

**UNTIL DEATH DO US PART?  
ESTATE CLAIMS ARISING OUT OF  
(RE) PARTNERSHIPS:  
*A CROSS-PROVINCIAL PERSPECTIVE***

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## TABLE OF CONTENTS

<b>I. INTRODUCTORY COMMENTS</b> .....	4
Overview: The rise of re-partnership: Statistics .....	5
<b>II. AVAILABLE SPOUSAL CLAIMS: AN OVERVIEW</b> .....	7
Revocation of Wills on marriage and inheritance upon intestacy .....	8
Division of property upon separation and death .....	10
What is a spouse? .....	11
Division of property after death .....	12
Enforcement of spousal support orders .....	15
Enforcement of domestic agreements .....	16
Dependant’s support .....	18
Unjust enrichment and other equitable remedies .....	20
The Joint Family Venture Analysis now also applies to Married Spouses .....	23
Matrimonial Home- Post-Separation .....	23
<i>Martin v. Sansome</i> .....	26
Proprietary estoppel .....	27
Challenges to joint title .....	29
Predatory Marriages .....	29
<b>III. A REVIEW OF NOTABLE ESTATE DECISIONS ARISING OUT OF (RE)</b>	
<b>PARTNERSHIPS</b> .....	30
Intestate succession and unjust enrichment – Ontario: <i>Re York Estate</i> .....	30
Intestate succession – New Brunswick: <i>Stanley Mutual Insurance Co. v. Shepherd</i> .....	32
Intestate succession – Saskatchewan: <i>Cronan v. Cronan Estate</i> .....	33
Revocation of a will on marriage – Alberta – <i>Fuchs v. Fuchs</i> .....	34
Enforcement of a separation agreement - Ontario: <i>Re Welin Estate</i> .....	36
Enforcement of domestic agreement – Yukon – <i>MacNeil v. Hedmann</i> .....	37
Pre-Marital Agreements and survivorship rights on Death – Ontario: <i>Caron v Rowe</i> .....	38
Dependant’s support – Definition of spouse – Ontario: <i>Lalonde v. Moore</i> .....	40
Dependant’s support – Ontario: <i>Sorkos v. Sorkos Estate</i> .....	41
Dependant’s support – Ontario: <i>Lukic v. Zaban</i> .....	42
Dependant’s support – Ontario: <i>Kalman v. Pick</i> .....	44
Dependant’s support – Ontario: <i>Matthews v. Matthews</i> .....	46
Dependant’s support – Ontario: <i>Blair v. Allair Estate(Cooke)</i> .....	47
Dependant’s support – PEI – <i>MacDonald Estate</i> .....	48
Dependant’s support – Alberta – <i>Malkhassian Estate (Re)</i> .....	50
Dependant’s support – British Columbia – <i>Griese v. Syret</i> .....	52
Severance of joint title – Ontario: <i>Hansen v. Hansen Estate</i> .....	53
Severance of joint title – Ontario: <i>Su v. Lam</i> .....	55
Severance of joint title – Newfoundland and Labrador – <i>Chafe v. Hunter et al</i> .....	55
Joint Title – Ontario – <i>Jones v. Jones</i> .....	56
Joint Bank Accounts – British Columbia – <i>Pickard v. Knudsen</i> .....	57
Joint Bank Accounts – Ontario: <i>Sawdon Estate</i> .....	58
Joint Bank Accounts – Ontario – <i>Lowe Estate v. Lowe</i> .....	61

Joint Bank Accounts – Manitoba: <i>Sawchuk Estate v. Evans et al</i> .....	63
Pension benefits – Ontario: <i>Carrigan v. Quinn, Vladescu v. CTV Globe Media Inc., and Stanton v. Coughlin &amp; Associates Limited</i> .....	66
<i>Carrigan v. Quinn</i> .....	66
Pensions – Ontario:.....	68
<i>Vladescu v. CTV Globe Media Inc.</i> .....	68
Pensions – Ontario:.....	70
Stanton v. Coughlin & Associates Limited .....	70
Pension Benefits – Nova Scotia:.....	73
<i>MacEachen v. Minnikin</i> .....	73
Beneficiary designations – Ontario: <i>Petch v. Kuivila</i> .....	74
Beneficiary designations – Ontario: <i>Littlechild Estate v. Littlechild</i> .....	75
Beneficiary designations – Alberta: <i>Perry v. Perry</i> .....	76
Beneficiary Designation – Saskatchewan: .....	77
<i>Love v. Love</i> .....	77
Beneficiary Designation – British Columbia: .....	79
<i>Wilson v. Wysoki</i> .....	79
Proprietary estoppel – Ontario: .....	80
<i>Cowderoy v. Sorkos Estate</i> .....	80
Proprietary estoppel – Ontario: <i>Clarke v. Johnson</i> .....	82
Proprietary Estoppel – British Columbia - <i>Scholz v Scholz</i> .....	84
Predatory Marriage – Ontario .....	88
<i>Juzumas v Baron</i> .....	88
Predatory Marriage – British Columbia - <i>Ross-Scott v. Potvin</i> .....	94
<b>IV. CHECKLIST:</b> .....	97

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by Kimberly A. Whaley<sup>1</sup>

**I. INTRODUCTORY COMMENTS**

Our high rate of separation and divorce; increasing prevalence of unmarried, cohabiting partners, particularly amongst older adults; recognition in the equality of same-sex partnerships/unions, in addition to common law developments giving rise to what constitute spousal, and ‘spousal-like’ relationships have resulted in an increase in legal disputes arising out of such relationships. As an adjunct to such unions, children, step-children, adopted children, genetically procured children, add to the complexity associated with estate and succession planning.

These societal issues are a distinctly modern development. The volume of court decisions involving blended, complex or fractured family units, where a spouse has remarried or entered into a new common-law relationship, with children from multiple relationships, has exploded over the last several decades in the changing cultural climate following the liberalization of matrimonial laws. As the population ages rapidly, it is ever more important to consider these relationships from the perspective of effective estate planning and litigation prevention.

This paper, then, considers a sampling of provincial decisions from the perspective of both the deceased and the estate-planning lawyer as a means of identifying lessons learned from post-mortem litigation.

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<sup>1</sup> Kimberly A. Whaley, Principal, Whaley Estate Litigation, 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 grateful assistance of Matt Smith, Law Student, Osgoode Hall Law School, York University. 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’*”.

There are many types of disputes arising after death where complex, fractured family units existed, for example, issues arising from:

- Intestate succession;
- *Family Law Act* Elections;
- the enforcement of spousal support orders and domestic contracts;
- dependant's support claims (*Succession Law Reform Act*);
- unjust enrichment and its legal and equitable remedies, including equitable compensation, constructive trust, resulting trust, unjust enrichment, and *quantum meruit*;
- proprietary estoppel;
- pensions, legislation and planning initiatives;
- predatory marriages; and
- other disputes regarding the ownership of property, including jointly held property.

This paper is by no means exhaustive in its approach or content. The subject matter is broad, and a mere overview of some of the many developing patterns across Canada are considered while paying particular attention to the specific challenges arising out of re-partnership.

### **Overview: The rise of re-partnership: Statistics**

Competing spousal claims were comparatively rare as recently as the late 1960's, likely because divorce was less common and re-partnership outside of marriage did not necessarily result in new legal rights, particularly property rights, for new partners.

Before the passage of the *Divorce Act*, 1968, obtaining a divorce was difficult. In Ontario, the primary grounds for divorce were adultery, cruelty or abandonment. The *Divorce Act*, 1968, somewhat liberalized the grounds for divorce. Still, a complete, no-

fault divorce, based on one year of separation and without a trial, was not available until the passage of the *Divorce Act, 1985*.

Similarly, a common-law partner was not entitled to make a claim for dependant's support in Ontario until 1977.<sup>2</sup> Because divorce was uncommon, so too was remarriage and, as a result, support claims by new partners/spouses were relatively rare.

It has only been 46 years since the *Divorce Act, 1968*, and 29 years since the *Divorce Act, 1985*, came into force. A Canadian who is 79 years old today – just under the current average lifespan in Canada – would have been approximately 34 years old at the advent of the initial wave of liberalized divorce. The same Canadian would have been 51 years old when the path to divorce was broadened in 1985. In other words, people dying at an average old age this past year were already, or were approaching, middle age when these rights arose; they have had less time in their lives to develop the legal obligations arising out of re-partnership than a person who coming of age under this regime.

Canadians who reached the age of majority in the era of common-law dependants' support legislation are 55 years old or younger in 2014. Those who reached the age of majority in the era of no-fault divorce are approximately 45 years old and younger in 2014. This younger cohort will be the first group of Canadians who have, for their entire adult lives, had the opportunity to develop a web of competing spousal claims. This generation will reach their average lifespan in about 25 to 35 years. It therefore seems likely that, even if the growth of remarriage and re-partnership were to stabilize in the very near future, the legal system should expect a continued influx of spousal disputes as death catches up with the social arrangements that this generation has adopted in life. Recent statistical data suggests that the numbers have in fact not yet stabilized. Growth in the number of complex families continues. The 2011 Census on families,

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<sup>2</sup> *Succession Law Reform Act, 1977*, S.O. 1977, c. 40, which replaced the prior *Dependants' Relief Act*, R.S.O. 1970, c. 126. Also see *Butt, Re*, 1986 CarswellOnt 655, 22 E.T.R. 120, 53 O.R. (2d) 297 at para. 21.

households, and marital status data shows that people are choosing family structures that create more complicated personal and legal relationships:<sup>3</sup>

- Between 2006 and 2011, the number of common-law couples rose 13.9% to nearly 3 million couples. This was more than four times the increase for married couples, which was only 3.1%;
- Same-sex couples account for 64,575 families in Canada, an increase of 42.4% from 2006. 43,560 of these couples are in common-law relationships;
- Of the 3,684,675 Canadian couples with children, 12.6% of them, or 464,269 families, are stepfamilies with one or more children not biologically related to one of the parents;
- 41% of stepfamilies are “complex” stepfamilies, where there is at least one child of both parents as well as at least one child of one parent only; and
- Married couples declined from 91.6% of all families in 1961 to 67.0% in 2011.

These trends demonstrate an increase in competing family interests. Notably, common-law spouses are much less likely than married spouses to consult a lawyer following the breakdown of a relationship. While 58.2% of separating spouses and 76.0% of divorcing spouses sought advice, only 25.3% of separating common-law spouses did the same.<sup>4</sup>

It is important for professional advisors to be aware of, and to stay current on the legal consequences arising out of these complex family structures.

## **II. AVAILABLE SPOUSAL CLAIMS: AN OVERVIEW**

Marriage is a rite of passage that carries with it intense personal, familial and societal significance. Most people marry, and many marry more than once. It is a societal ritual

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<sup>3</sup> Statistics Canada, Portrait of Families and Living Arrangements in Canada, 2011 Census, <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>, accessed August 20, 2013.

<sup>4</sup> Statistics Canada, *General Social Survey - Cycle 20: Family Transitions Survey 89-625-XWE - Navigating Family Transitions: Evidence from the General Social Survey*. <http://www.statcan.gc.ca/pub/89-625-x/2007002/t/4055015-eng.htm>. Accessed August 20, 2013.

that is familiar, comforting and celebratory. However, in addition to the emotional, familial, societal and cultural importance of marriage, it too brings with it significant legal and property entitlements. The act of marriage not only alters an individual's personal life, but significantly impacts one's financial life.

### **Revocation of Wills on marriage and inheritance upon intestacy**

Historically, there were very few financial and legal protections for a separated spouse. The concept of a division of matrimonial property only took hold popularly after Justice Laskin's dissent in the Supreme Court of Canada decision *Murdoch v. Murdoch*,<sup>5</sup> which was quickly followed by property division legislation in all provinces. Similarly, there were historically few rights that a surviving spouse could assert against the estate of a deceased person. The main protection was the common-law rule that marriage revoked a Will.<sup>6</sup> This allowed a surviving spouse to inherit on an intestacy as long as the other spouse did not make a new Will.

### **Ontario**

An intestacy can create a windfall situation for a surviving spouse. In Ontario, where a married person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.<sup>7</sup> 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.<sup>8</sup> The preferential share is currently prescribed by regulation as \$200,000.<sup>9</sup> The remaining one-third to one-half of the residue will also be paid to the spouse according to the formula set out in the *SLRA*.<sup>10</sup>

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<sup>5</sup> [1975] 1 SCR 423, 1973 CanLII 193.

<sup>6</sup> 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

<sup>7</sup> *Succession Law Reform Act*, RSO 1990, c S.26, s. 44.

<sup>8</sup> *Ibid.* s. 46.

<sup>9</sup> O Reg 54/95.

<sup>10</sup> *SLRA*, s. 46



The common-law rule that a Will is revoked by marriage has been codified in many provinces. For example, section 15 of the *SLRA* in Ontario provides that a prior Will is revoked upon the valid marriage of the testator. Section 16 sets out exceptions, the most commonly applicable of which is that the Will is not revoked by marriage if it contains a declaration that it was made in contemplation of marriage.

The rules of intestacy are strict in Ontario. The case of *Scotia Mortgage Corp. v. Davidson Estate*<sup>11</sup> illustrates just how intestacy can produce a harsh and, as in this case, seemingly unjust result in situations involving relatively small estates. The deceased remarried two years after his first wife died, but then passed away less than a year later without leaving a Will. The deceased had eight children from his first marriage. The estate was worth less than \$200,000, so the new wife received all of it as her preferential share, and the children received nothing. The court was powerless to avoid this result in the face of clear statutory language.

### **Alberta**

Not all provinces share this approach. Section 23(2) of the *Alberta Wills and Succession Act*, which came into force on February 1, 2012, provides that no Will or part of a Will is revoked by the marriage of the testator, or the testator's entering into an adult interdependent relationship.<sup>12</sup>

### **British Columbia**

British Columbia's *Wills, Estates and Succession Act*, which came into force March 31, 2014, also provides that a Will is not presumed to be revoked by marriage or a change in common-law or marriage-like relationships.

### **New Brunswick**

New Brunswick has a unique approach that could be described as a hybrid between revocation on marriage and non-revocation on marriage. As in most other provinces, a

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<sup>11</sup> *Scotia Mortgage Corp. v. Davidson Estate*, 2009 CarswellOnt 2297 (Ont. S.C.J.).

<sup>12</sup> SA 2010 c. W-12.2.

will made before marriage is revoked on marriage,<sup>13</sup> subject to certain exceptions.<sup>14</sup> However, unlike in other provinces, a person who would have received a gift in the revoked Will can apply to court to receive that gift, and the court may give effect to all or part of the gift.<sup>15</sup> The power is discretionary, and the court is directed to consider whether putting the gift into effect would be an undue detriment to a person receiving on an intestacy.<sup>16</sup> There will be no undue detriment to the person receiving on intestacy if that person receives what they would have received under the revoked Will.<sup>17</sup>

## **Division of property upon separation and death**

### **Provincial Consideration**

In most Canadian common-law jurisdictions, married spouses are entitled to a division of property following separation. In Ontario, spouses may apply for an equalization of net family property (“NFP”).<sup>18</sup> A spouse’s NFP is their net worth on the date of separation less their net worth on the date of marriage, excluding gifts and inheritances received during the marriage, life insurance proceeds received during the marriage, and personal injury settlement funds received during the marriage.<sup>19</sup> The amount of the equalization payment is calculated as follows: the spouse with the greater NFP pays the spouse with the lesser NFP one-half of the difference.

British Columbia and Nova Scotia have different regimes for dividing property between spouses.

The British Columbia *Family Law Act*,<sup>20</sup> which replaced the previous *Family Relations*

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<sup>13</sup> *Wills Act*, RSNB 1973, c W-9, s. 15(2)

<sup>14</sup> *Ibid.*, s. 16

<sup>15</sup> *Ibid.*, s. 15.1(3)

<sup>16</sup> *Ibid.*, s. 15.1(4)

<sup>17</sup> *Ibid.*, s. 15.1(5)

<sup>18</sup> *Family Law Act*, RSO 1990, c F.3 [FLA], s. 5(1).

<sup>19</sup> *Supra* note 18, s. 4(1) and (2).

<sup>20</sup> *Family Law Act*, SBC 2011, c 25.

*Act*, came fully into force in March 18, 2013.<sup>21</sup> This new legislation abandons the division of family assets and moves to an equalization regime similar to that in Ontario.

The British Columbia *Family Law Act* also extends the same rights for property division to common-law spouses as to married spouses.

In that respect, it joins Saskatchewan and Manitoba as the only other common-law provinces to do this.<sup>22</sup>

British Columbia's new *Wills, Estates, and Succession Act* ("WESA")<sup>23</sup> also finds no meaningful distinctions between married and unmarried spouses. This particular piece of legislation is interesting in this context because its changes attempt to recognize or anticipate claims arising from modern blended or complex families. The spousal share on intestacy, for example, which was set in B.C. at \$300,000, is reduced to \$150,000 when all the children of the deceased are not also children of the surviving spouse. This reduction seeks to ensure that some assets will be available for the non-common children. The *WESA* also directly addresses situations where more than one spouse might fit its definitions.

### **What is a spouse?**

It will be interesting to see some of the litigation arising out of the new legislation in certain provinces and, in particular in BC, regarding the division of assets acquired during the relationship, assets owned before the relationship, and the interaction of trust holdings.

Given that throughout the provinces our courts have often historically had great difficulty identifying a marriage-like relationship, new legislation may well bring with it more

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<sup>21</sup> B.C. Reg. 131/2012.

<sup>22</sup> *Matrimonial Property Act*, SS 1997, c. F-6.3, as am. by S.S. 2001, c.51, s. 8 in force on July 6, 2001; *Family Property Act*, C.C.S.M. c. F25, s. 13 as am. by S.M. 2002, c. 4813, in force on June 30, 2004.

<sup>23</sup> SBC 2009, c 13

litigation. More recent case law has determined that many people in relationships, whether married or not married, may indeed qualify as spouses of sort, even where they do not live in the same house or even the same country. Likewise, case law has demonstrated that courts have even found spousal relationships where there has been no children, and no sexual relations. Often courts determine a spousal/spousal-like relationship on the evidence of intention of the parties.

Ontario still has no statutory regime for property division between common-law spouses.<sup>24</sup> In light of *Vanasse v. Seguin*; *Kerr v. Baranow*,<sup>25</sup> however, in which the Supreme Court of Canada affirmed the right of common-law spouses who are engaged in “joint family ventures” to share in the wealth accumulated by both spouses during the relationship, statutory common-law property division may too, eventually arrive in Ontario.<sup>26</sup> The decision of *Barrett v Barrett*<sup>27</sup> now makes *Kerr v. Baranow* relevant to married spouse as well as common law spouses.

## **Division of property after death**

### **Ontario**

In Ontario, within six months of the death of a married spouse, the surviving spouse is entitled, pursuant to subsections 6(1) and (2) of the *Family Law Act*, to make a choice between either filing an election and making an equalization application for a division of net family property, as described above, or taking under the Will (if there is one) or under provincial intestacy laws (if there is not) as set out in Part II of the *SLRA*.<sup>28</sup>

If a spouse elects in favour of taking under the Will or by intestacy, the spouse will also be entitled to receive the proceeds of any life insurance policies (where named as a beneficiary), death or survivorship benefits (where named under the deceased’s

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<sup>24</sup> *Family Law Act*, SBC 2011, c 25; *Matrimonial Property Act*, SS 1997, c. F-6.3, as am. by S.S. 2001, c.51, s. 8 in force on July 6, 2001; *Family Property Act*, C.C.S.M. c. F25, s. 13 as am. by S.M. 2002, c. 4813, in force on June 30, 2004.

<sup>25</sup> *Kerr v. Baranow*, 2011 SCC 10.

<sup>26</sup> 2011 SCC 10, [2011] 1 SCR 269.

<sup>27</sup> *Barrett v Barrett*, 2014 CarswellOnt 1379

<sup>28</sup> R.S.O. 1990, c. S.26.

pension plans or similar plans), and any property held in joint tenancy by right of survivorship.<sup>29</sup> The same is not necessarily true for a surviving spouse who elects in favour of equalization: the value of these benefits may be deducted from the deceased's NFP, thus potentially decreasing the amount of an equalization payment from the estate so that the surviving spouse does not gain an unjustified windfall.<sup>30</sup>

Two fairly recent Ontario cases, *Weatherdon-Oliver v. Oliver Estate* and *Laframboise v. Laframboise*, have considered the converse issue: whether life insurance or pension death benefit proceeds payable to the estate should be included in the deceased's NFP so that the estate does not gain an unjustified windfall. In both cases, the surviving spouses argued that if each, as surviving spouses, were credited with the amount of the life insurance proceeds or pre-retirement death benefits so that each did not receive an unjust windfall, should not the same kind of credit be applied against the estate where the estate is the beneficiary of these payments?<sup>31</sup>

The court in both cases declined to follow this reasoning. The valuation date is defined in section 4 of the *Family Law Act* as the date before the day of death. Since the life insurance proceeds and pension death benefits only materialize at the time of death, they are not included in the deceased's NFP, which is calculated a day earlier. Mitigating this, the court in *Laframboise* noted that while the pension death benefit payable to the estate would not be shared with the surviving spouse, the pension itself may have had a value as an asset on the valuation date that could be included in the deceased's NFP.<sup>32</sup>

*Family Law Act* elections pose special practical challenges. The limitation period for making an election is 6 months after the date of death. In order to make the election, the

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<sup>29</sup> *Bickley v. Bickley Estate* (1999), 1999 CarswellOnt 3235 (S.C.J.).

<sup>30</sup> FLA ss. 6(6) and 6(7).

<sup>31</sup> *Laframboise v. Laframboise*, 2012 CarswellOnt 9719, 2012 CarswellOnt 9719, 2012 ONSC 4508, [2013] W.D.F.L. 150, [2013] W.D.F.L. 177, [2013] W.D.F.L. 189, [2013] W.D.F.L. 344, 219 A.C.W.S. (3d) 892 (S.C.J.); *Weatherdon-Oliver v. Oliver Estate*, 2010 CarswellOnt 6800, 2010 ONSC 5031, [2011] W.D.F.L. 737, [2011] W.D.F.L. 730, [2011] W.D.F.L. 672, [2011] W.D.F.L. 808 (S.C.J.).

<sup>32</sup> *Laframboise, ibid.*, at para. 21.

surviving spouse needs to know the relative values of the benefits to be received under the Will, versus the value of the equalization payment as calculated pursuant to sections 5 and 6 of the *Family Law Act*. Given that executors are expected to have their “executor’s year” to call in the assets of the estate and pay debts, and that the necessary disclosure to the surviving spouse includes not only the identity and value of the assets of the estate of the deceased, but also a *Family Law Act* disclosure of valuation date assets, marriage date assets, liabilities, and excluded property, it is not surprising that issues have arisen regarding extensions to the deadline to make or revoke an election.<sup>33</sup> Even after the election is made to receive an equalization of property, the surviving spouse must still bring an application for equalization. Given the likely delay in resolving such issues, the surviving spouse may request interim payment. It is now clear that, in addition to other interim orders such as interim dependant’s support and interim distributions to beneficiaries, there is also a right to claim an advance on an equalization payment from an estate if:

- (i) there is a reasonable requirement for the funds;
- (ii) there is little doubt that the person making the request will receive an equalization payment of at least that amount; and
- (iii) it is just in the circumstances.<sup>34</sup>

### **British Columbia**

In British Columbia, unlike in Ontario, a division of property between spouses cannot be triggered by the death of a spouse.<sup>35</sup> The legislature may have seen fit to leave out matrimonial property division rights for surviving spouses because the British Columbia Supreme Court already has a broad discretion to reallocate a deceased’s estate under the *Wills Variation Act* in the event that a deceased spouse does not make adequate provision for the surviving spouse.<sup>36</sup>

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<sup>33</sup> *Iasenza v. Iasenza Estate*, 2007 CarswellOnt 4025, 2007 CarswellOnt 4025, [2007] W.D.F.L. 3501, 34 E.T.R. (3d) 123, 39 R.F.L. (6th) 452 (S.C.J.).

<sup>34</sup> *Skrobacky v. Frymer*, 2012 CarswellOnt 9335, 2012 ONSC 4277, 218 A.C.W.S. (3d) 717, [2012] W.D.F.L. 5786 (S.C.J.).

<sup>35</sup> Bill 18, s. 81; *Family Law Act*, SBC 2011, c 25.

<sup>36</sup> RSBC 1996, c 490.

## **Alberta**

Alberta recently recognized the need for legislative change in order to give surviving spouses the right to claim a division of matrimonial property instead of taking the gifts left by the deceased spouse in a Will or on intestacy. Alberta amended its Wills, estates and succession laws by combining the former *Wills Act*, *Intestate Succession Act*, *Survivorship Act*, *Dependants Relief Act*, and section 47 of the *Trustee Act* into the *Wills and Succession Act*.<sup>37</sup> This still new legislation also included proposed revisions to the *Matrimonial Property Act* to implement a regime for the division of matrimonial property following the death of a spouse upon the application of the surviving spouse.<sup>38</sup> These final proposed changes to the *Matrimonial Property Act*, however, may not be proclaimed any time soon. After consultation with estate and family law practitioners in the province last year, the Alberta Attorney General's website now says: "*Section 117 will not be proclaimed in force at this time. Further research will be conducted to explore some of the issues raised in the consultation process.*"<sup>39</sup>

## **Enforcement of spousal support orders**

### **Ontario**

Pursuant to section 34 of the *SLRA* in Ontario, a surviving spouse, whether common-law or married, may enforce a spousal support order against the estate of a deceased spouse.<sup>40</sup> Subsection 34(4) is explicit on this point: "*An order for support binds the estate of the person having the support obligation unless the order provides otherwise.*" Indeed, the courts have held that support payments owed by a deceased spouse constitute a debt of the estate pursuant to subsection 34(4) of the Ontario *Family Law Act*, such that estate trustees owe a fiduciary duty to the recipient of the support in the same way they owe a fiduciary duty to the beneficiaries and creditors of an estate.<sup>41</sup>

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<sup>37</sup> SA 2010, c W-12.2.

<sup>38</sup> *Ibid.*, s. 117.

<sup>39</sup> Alberta Justice and Solicitor General, "Matrimonial Property on Death Consultation Report,"

[http://justice.alberta.ca/programs\\_services/wills/Publications/MatrimonialPropertyDivisionDeath-whatweheard.aspx](http://justice.alberta.ca/programs_services/wills/Publications/MatrimonialPropertyDivisionDeath-whatweheard.aspx) Accessed: July 17, 2014.

<sup>40</sup> RSO 1990, c S.26.

<sup>41</sup> *Re Welin Estate*, 2003 CarswellOnt 2869 (Ont. S.C.J.).

## Enforcement of domestic agreements

Another potential source of rights for a separating or surviving spouse is a domestic agreement. In Ontario, Part IV of the *Family Law Act* governs domestic contracts: cohabitation agreements, marriage contracts, and separation agreements.<sup>42</sup> Similar legislation exists throughout Canada.<sup>43</sup> The parties to such agreements have reasonably wide latitude to agree about the division of property and spousal support.

A domestic contract may be filed with the court under Section 35 of the Ontario *FLA* and the spousal support provisions can be enforced accordingly. As such, a surviving spouse can enforce a spousal support provision in a domestic contract in the same way as a support order.

Estates practitioners should be mindful of the extensive law governing the enforceability of domestic contracts, which may be set aside if such contain prohibited provisions;<sup>44</sup> if a party failed to make full and frank financial disclosure;<sup>45</sup> and/or if the agreement is unconscionable.<sup>46</sup>

In Ontario, the fairly recent case of *McCain v. McCain*<sup>47</sup> is instructive. It concerns a wealthy businessman, Wallace McCain, 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 told them that they would be disinherited. Accordingly, his son Michael presented his wife of 16 years (at the time) with a marriage contract. The contract was

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<sup>42</sup> *FLA*, ss. 52-54.

<sup>43</sup> See Alberta's *Family Law Act*, SA 2003, c F-4.5 and *Matrimonial Property Act*, R.S.A. 2000, C M-8, British Columbia's *Family Law Act*, SBC 2011, c 25 and *Family Relations Act*, R.S.B.C. 1996, c.128, Saskatchewan's *The Family Property Act*, SS 1997, c F-6.3 s.38, Manitoba's *Family Property Act*, CCSM c F-25, New Brunswick's *Marital Property Act*, SNB 2012 c 107, Nova Scotia's *Maintenance Enforcement Act*, SNS 1994-95, c 6 and *Matrimonial Property Act*, RSNA 1989, c 275, Prince Edward Island's *Family Law Act*, RSPEI 1988, c F-2.1, Newfoundland's *Family Law Act*, RSNL 1990, c F-2, Yukon's *Family Property and Support Act*, RSY 2002 c83, Northwest Territories *Family Law Act*, SNWT 1997, c 18.

<sup>44</sup> *FLA*, ss. 52(2) and 56(1).

<sup>45</sup> *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).

<sup>46</sup> *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.

<sup>47</sup> *McCain v. McCain*, 2012 ONSC 7344.



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".<sup>48</sup>

Justice Greer reviewed and applied the relevant case law, including the two part test in *Miglin v. Miglin*.<sup>49</sup> 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 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:

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<sup>48</sup> *McCain v. McCain*, 2012 ONSC 7344 at para. 20.

<sup>49</sup> *Miglin v. Miglin*, [2003] SCC 24.

*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.”<sup>50</sup>*

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.<sup>51</sup>

## **Dependant's support**

### **Ontario**

In Ontario, Part V of the *SLRA* provides for the support of dependants in situations where a deceased person, prior to death, was providing support, or was under a legal obligation to do so, immediately before death but failed to make adequate provision for the proper support of his/her dependant on death.<sup>52</sup> In such circumstances, the court is empowered to make an order, interim or permanent, as it considers adequate, to be made out of the estate of the deceased.<sup>53</sup>

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.

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<sup>50</sup> *McCain v. McCain*, 2012 ONSC 7344 at paras. 87-88.

<sup>51</sup> *McCain v. McCain*, 2012 ONSC 7344 at para. 108.

<sup>52</sup> *SLRA*, s. 57.

<sup>53</sup> *Ibid.*, s. 58(1).

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.<sup>54</sup> Arguably, the moral claim has become a legal claim.<sup>55</sup>

This expands the court's jurisdiction to make a dependant's support order to resemble, if not mirror, the broader jurisdiction of British Columbia courts under the *Wills Variation Act*.<sup>56</sup> Section 2 of the British Columbia *Wills Variation Act* provides that:

*"Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children."*

Even with fairly recent developments affecting *SLRA* claims in the Ontario court, the British Columbia provision has a potentially broader application. The applicant in British Columbia can be any spouse or child. The applicant need not prove that he or she was a dependant of the deceased.<sup>57</sup> The definition of spouse includes both married and common-law spouses.<sup>58</sup> Although there is no definition of child, the provision has been

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<sup>54</sup> *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.).

<sup>55</sup> *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; *Morassut v. Jaczynski Estate*, 2013 ONSC 2856: 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

<sup>56</sup> *Wills Variation Act*, RSBC 1996, c 490.

<sup>57</sup> *Ibid.*, s. 2.

<sup>58</sup> *Ibid.*, s. 1.

held to apply to independent adult children.<sup>59</sup> There is no need to show either a legal obligation to support the person or that the deceased was actually supporting the person immediately before death.

On the other hand, Part V of the Ontario *SLRA* may arguably be a more powerful tool than the British Columbia *Wills Variation Act* in at least one important respect: 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.<sup>60</sup> Such a power does not exist in British Columbia, where *Wills Variation Act* claims can only be satisfied by the assets of the estate and can therefore be defeated by the deceased's *inter vivos* transfers.<sup>61</sup> That said, British Columbia and Ontario claimants alike may resort to equitable claims or rely on the *Fraudulent Conveyance Act*<sup>62</sup> to bring assets back into the estate, but these kinds of claims can result in difficult trials.<sup>63</sup>

### **Unjust enrichment and other equitable remedies**

In the seminal decision of *Kerr v. Baranow; Vanasse v. Seguin*,<sup>64</sup> the Supreme Court of Canada reviewed the law of unjust enrichment and expanded the remedies available to

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<sup>59</sup> *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807 at 14.

<sup>60</sup> *SLRA*, s. 72.

<sup>61</sup> *Hossay v. Newman*, 1998 CarswellBC 1734; 22 E.T.R. (2d) 150, 5 C.B.R. (4th) 198

<sup>62</sup> RSB 1996, c 163.

<sup>63</sup> 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.)

<sup>64</sup> *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.). A further judgment in this matter issued on *Kerr v. Baranow*, 2012, BCSC 1222 (CanLII) 2012-08-15

unmarried cohabiting spouses.<sup>65</sup>

The basic elements of an unjust enrichment claim have remained more or less unchanged since *Becker v. Pettkus*.<sup>66</sup> For a plaintiff to be successful in such a claim, he/she 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.’”<sup>67</sup>

Two of the available remedies for unjust enrichment remain unchanged by the Court: the remedial constructive trust and a monetary remedy in *quantum meruit* (sometimes referred to as “value received” or “fee-for-service”).<sup>68</sup> The constructive trust (proprietary) remedy is available where a monetary award would be inappropriate or insufficient and there is a link or causal connection between their contributions and the acquisition, preservation, maintenance, or improvement of the disputed property. The *quantum meruit* remedy is typically available where the unjust enrichment constituted the provision of unpaid services, but it tends to be the least valuable remedy.

### **Joint Family Venture**

The major development in *Kerr v. Baranow*; *Vanasse v. Seguin* was the endorsement of a third remedy: a monetary remedy for “value survived.” Where the spouses were engaged in a “joint family venture” and, upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets, the Court will reapportion the wealth between the parties. The Court identified the following non-

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<sup>65</sup> See Martha McCarthy, “Family Law for Estates Lawyers,” LSUC CPD, Blended Family Estate Planning, June 14, 2011, at 12.

<sup>66</sup> (1980), 2 S.C.R. 834.

<sup>67</sup> *Kerr v. Baranow*, *supra*, note 64 at para. 34, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 997 per McLachlin J. (as she then was) and also 1023 per Cory J.

<sup>68</sup> *Ibid.* at para. 58.

exhaustive list of factors to assist in making a determination: (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.<sup>69</sup>

Once a spouse has proven the existence of a joint family venture, the Court will determine the award, which is not restricted to a fee-for-services approach. Rather, where it can be shown that the joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth, the remedy "should be calculated on the basis of the share of those assets proportionate to the claimant's contributions,"<sup>70</sup> taking into consideration the respective contributions of the parties. The Court was clear that this calculation should not result in a "minute examination of the give and take of daily life."<sup>71</sup> Rather, it should remain a broad and flexible approach.

The important point for estates litigators is that the law of unjust enrichment is equally applicable to a surviving spouse against the estate of a deceased spouse as it is to a living spouse.<sup>72</sup> There is a wealth of case law applying *Kerr v. Baranow*; *Vanasse v. Seguin*, and the cases are very much driven by the unique facts of each. The difficulty for the surviving spouse and his or her lawyer will be in proving the existence of a joint family venture without the evidence of the deceased spouse. There is the strategic and practical challenge of deciding which claim or combination of claims to bring on behalf of a surviving spouse, including dependant's support, unjust enrichment, and other equitable claims.

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<sup>69</sup> *Supra* note 65, at paras. 89-100.

<sup>70</sup> *Ibid.* at para. 100.

<sup>71</sup> *Ibid.* at para. 102.

<sup>72</sup> *Hillier Estate v. McLean*, 2011 CarswellNfld 207 at para. 20.

## **The Joint Family Venture Analysis now also applies to Married Spouses**

Very recently the Ontario Superior Court of Justice released a family law decision dealing with the issue of who benefited from the increase in value of the matrimonial home from the date of separation to the date of trial. The Court applied the principles set out in *Kerr v. Baranow*.<sup>73</sup>

***Barrett v. Barrett***<sup>74</sup> involves divorce proceedings between a wife and husband who separated in 2008 after 33 years of marriage.

A trial was held in the divorce proceedings in January 2014. According to both parties' evidence, the matrimonial home was in the wife's name alone in order to protect it from the husband's creditors from his business ventures.

Post separation the wife maintained the home and paid all expenses including the mortgage and home equity line of credit payments. On two occasions, post-separation, the wife arranged for refinancing of the home, resulting in \$30,000 in total being paid to the wife. While there was no written evidence of these re-financings, the husband testified that he had to sign documents to permit the transactions. He was not a debtor, nor a guarantor for these secured debts.

At issue also, was the gift of \$100,000 received by the wife from her mother. \$50,000 of the gift was deposited into an account in her name alone with the other \$50,000 deposited into a joint account between the wife and her husband. On the same day as the deposit, \$50,000 was removed from the joint account by the husband to pay business expenses. The husband signed a promissory note in favour of his wife for the \$50,000.00.

### **Matrimonial Home- Post-Separation**

At trial, the husband argued that he had an interest in the increase in the value of the house post separation. He argued that under the principles set out in *Kerr v. Baranow*, the wife was unjustly enriched to his detriment, in that he contributed to the home post

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<sup>73</sup> [2011] 1 S.C.R. 269.

<sup>74</sup> 2014 ONSC 857.

separation by signing papers allowing the wife to refinance the home. The wife argued that under the *Family Law Act*, since the home was her asset, any increase in the value post separation is her asset alone. She was only required to account for the increase in value from the date she first took ownership until the date of separation.

Justice Trimble started the legal analysis by enunciating the three step analysis for unjust enrichment: did the wife receive a benefit to which the husband suffered a corresponding detriment for which there is no juridical reason? Trimble J., observed that since *Kerr*, the courts have looked at the issue of the division of unevenly accumulated wealth through the analysis of what is referred to as a “joint family venture”. In other words, where the contribution of each party is to a common enterprise that assisted in sustaining the parties’ relationship, albeit not necessarily in equal measure. That the effort of both parties is seen as a joint family venture and the wealth created is part of the fruit of the union and should be divided according to the relative contribution.<sup>75</sup> Trimble J. observed that the actual intentions of the parties must be given considerable weight. While *Kerr* applies to situations where spouses are not married, Trimble J. held that “it applies equally to the unequal accumulation of wealth in a marriage, to the extent that the *Family Law Act* does not apply – i.e., to the unequal accumulation of wealth post separation.”<sup>76</sup>

The Court found that the proper approach (following *Kerr v. Baranow*) to deal with the issue of whether or not the husband had any interest in the matrimonial home post-separation is “not one of constructive trust, but rather one of unjust enrichment and the remedy, if any, a monetary one.”<sup>77</sup> Justice Trimble went on to find that:

Whether I use the three step approach (benefit, corresponding detriment and no juridical reason to deprive) or the joint family venture analysis [per *Kerr*], I come to the same conclusion. On all the evidence I find that the husband has no interest, and intended to keep no interest in the family home post separation, and

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<sup>75</sup> [2014] ONSC 857 at para. 17.

<sup>76</sup> [2014] ONSC 857 at para. 20.

<sup>77</sup> [2014] ONSC 857 at para. 48.



therefore, the wife was not unjustly enriched. The onus to establish that the wife was unjustly enriched is with the husband. He fails to discharge this onus.<sup>78</sup>

The Court concluded firstly that there was no doubt that the wife received a benefit from having the home in her name and as a title holder, yet, she alone enjoyed the increased value of the home since separation. Secondly, the husband did not suffer a corresponding detriment by signing off on the refinancing of \$30,000.00. There was no evidence that he “gave something up” as he claimed. Thirdly, there was a juristic reason for allowing the benefit to stay with the wife. Both parties intended that the home would be in the wife’s name to protect it from creditors. There was no intention for the husband to maintain any ownership (legal, equitable or beneficial) in the house.<sup>79</sup>

Under the joint family venture multi-factorial analysis, Trimble J., found that it was the specific intention that the home would be outside the joint family venture, while all other assets were intended to fall within the joint family venture.<sup>80</sup>

Trimble J., went on to ask, should this conclusion be wrong, and the husband was entitled to monetary compensation, how much was owed? The money award should bear some relationship to the contribution he made to the house post-separation. The husband argued that the \$30,000 in equity which was removed from the house with his consent was used on upkeep of the house; therefore he contributed to the house post-separation. The court found that if he had found for the husband on the unjust enrichment question, “on the slimmest of evidence. . .I would have awarded [the husband] 10% of the net increased value of the home post separation.”<sup>81</sup>

### **The \$100,000 Gift**

Another issue determined by the Court was the gift from the wife’s mother to the wife of \$100,000 and whether or not it should be excluded from the Net Family Property (“NFP”) calculation. The court held that the onus was on the wife to prove that she

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<sup>78</sup> [2014] ONSC 857 at para. 48.

<sup>79</sup> [2014] ONSC 857 at paras. 50-51.

<sup>80</sup> [2014] ONSC 857 at para. 52.

<sup>81</sup> [2014] OSNC 857 at para. 54.

segregated the gift and that there was sufficient evidence to trace the money to its ultimate resting place. The Court held that the wife met this onus. The promissory note was sufficient evidence to show that the \$50,000.00 was traceable directly to the husband for business purposes. Just because the \$50,000 passed through the joint account first was not enough to make it “co-mingled” money. The joint account was merely a conduit. Therefore the \$50,000 was excluded from the NFP.

### ***Martin v. Sansome***

The recent Ontario Court of Appeal case of ***Martin v. Sansome***<sup>82</sup> looked at the interplay between an unjust enrichment claim and equalization under the *Family Law Act* between married spouses. The husband was involved in some bad business ventures which put him in bankruptcy. His parents offered to sell him the family farm. The day before the farm deal was to close the husband told his wife that her name would not be on the property and asked her to sign a domestic contract relinquishing her rights to the farm and home.

Later, after 10 years of marriage (and 10 previous years of common law cohabitation) they sought a divorce. At trial, the wife sought to set aside the domestic contract and sought a constructive trust interest in the farm as remedy for her unjust enrichment claim.

Applying *Kerr v. Baranow*, the trial judge set aside the domestic contract and awarded the wife a one half interest in the farm under constructive trust.

However, the Ontario Court of Appeal disagreed, and set aside the wife’s one-half interest in the farm. The Court determined that the proper process was to determine ownership first, and when there is a claim for constructive trust, the applicant must prove that an ownership interest is more appropriate than monetary damages (which the applicant did not do in this case). On the facts of this case the Court concluded that a monetary payment under the FLA’s equalization scheme would adequately compensate the applicant.

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<sup>82</sup> 2014 ONCA 14.

## Proprietary estoppel

Proprietary estoppel is an increasingly used tool to remedy and to protect a person who detrimentally relied on a property owner's promises, actions, or inaction that caused the person to believe that he or she was the true owner of the property and where it would be unjust to permit the owner to later turn around and assert title.

In *Schwark v. Cutting* in 2010, the Ontario Court of Appeal confirmed the well-settled test for proprietary estoppel:<sup>83</sup>

(i) An equity arises where:

(a) the owner of land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the owner's property;

(b) in reliance upon this belief, the claimant acts to his detriment to the knowledge of the owner; and

(c) the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.

[...]

(iv) The relief which the court may give may be either negative, in the form of an order restraining the owner from asserting his legal rights, or positive, by ordering the owner to either grant or convey to the claimant some estate, right or interest in or over his land, to pay the claimant appropriate compensation, or to act in some other way.<sup>84</sup>

Since *Schwark v. Cutting*, proprietary estoppel has been argued successfully in Ontario in at least three family disputes. In *Spadafora v. Gabriele*,<sup>85</sup> for example, an older woman moved in with her adult daughter and son-in-law and conveyed her own home

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<sup>83</sup> *Schwark v. Cutting*, 2010 ONCA 61 at para. 34 citing *Eberts v. Carleton Condominium No. 396 et al.*, [2000] O.J. No. 3773 (Ont. C.A.) at para. 23.

<sup>84</sup> *Ibid.* at para. 23.

<sup>85</sup> 2011 CarswellOnt 14702 (Ont. S.C.J.).

to them in 2004. The adult daughter and son-in-law had promised the older grandmother that she could live in the house until she died. As it turned out, the adult daughter and son-in-law died before the older grandmother.

On the day before the adult daughter's death in 2009, she transferred the house to her three children as tenants-in-common. A dispute between these children resulted in one of them bringing an application for partition and sale of the house. The Court noted that, pursuant to the *Partition Act*, partition would only be available if the person applying for it was entitled to immediate possession of the property. The issue was whether the grandmother's continued residence in the house gave her the right to possession and therefore prevented the *Partition Act* applicant's right to immediate possession.<sup>86</sup>

The Court found that the grandmother had been induced or encouraged to believe that she would enjoy the right, or at least the benefit, of residing in the house until her death.<sup>87</sup> This belief, the Court noted, was initiated by the daughter and son-in-law and continued by their children. The children had been given a house "that bore the burden of their parents' promise to their grandmother."<sup>88</sup> It was a promise they were fully aware of and, in fact, they too had honoured, having permitted their grandmother to reside there for several years after their mother's death. The grandmother had relied on this agreement to her detriment by conveying away her own home. In the Court's view, to permit the sale and effectively evict the grandmother against her will would be unconscionable.<sup>89</sup> As such, the Court refused to grant the order for partition and sale.

As can be seen, the remedy of proprietary estoppel is potentially a powerful tool that can be used to reclaim a proprietary interest in certain property after death in instances where such an interest has not reflected in a will. Estate litigants should be aware of this potential avenue of legal recourse and plead it in appropriate cases. More recent decisions are addressed below.

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<sup>86</sup> *Supra* note 73, at para. 16.

<sup>87</sup> *Ibid.* at para. 20.

<sup>88</sup> *Ibid.* at para. 23.

<sup>89</sup> *Ibid.*

## Challenges to joint title

Spouse/partners may find themselves defending challenges to property passing to them by right of survivorship. In remarriage and re-partnership scenarios, expectant heirs often have an incentive to try to prevent the deceased's portion of a jointly held asset from passing by right of survivorship to the surviving spouse.

In the recent case of *Hansen v. Hansen Estate*, the Ontario Court of Appeal clarified the law with respect to the severance of joint tenancies.<sup>90</sup> In particular, the court clarified the third of the “three rules” of when a joint tenancy will be severed. The first rule provides that a joint tenancy can be severed by a unilateral act affecting title, such as selling or encumbering the interest. The second rule provides that the parties may explicitly agree to sever the joint title. Both of these rules can be used effectively for planning purposes.

The third rule provides that a joint tenancy will be severed by something less than an explicit act of severance. Specifically, joint title will be severed by “any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.”<sup>91</sup> The Court held that this rule operates in equity.<sup>92</sup> It is meant to prevent the title passing by way of survivorship when to do so would cause an injustice. This rule does not require a specific act or any explicit agreement. What the party asserting severance must prove is that the co-owners have all acted as though their respective shares in the property were no longer an indivisible, unified whole.<sup>93</sup>

## Predatory Marriages

Civil marriages are solemnized with increasing frequency under circumstances where one party to the marriage is incapable of understanding, appreciating, and formulating a choice to marry—perhaps because they are afflicted with one of the many ailments of

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<sup>90</sup> *Hansen Estate v. Hansen*, 2012 CarswellOnt 2051, 2012 ONCA 112, [2012] W.D.F.L. 1985, [2012] O.J. No. 780, 109 O.R. (3d) 241, 16 R.P.R. (5th) 1, 212 A.C.W.S. (3d) 854, 288 O.A.C. 116, 347 D.L.R. (4th) 491, 75 E.T.R. (3d) 19, 9 R.F.L. (7th) 251.

<sup>91</sup> *Ibid.* at para. 34.

<sup>92</sup> *Ibid.* at para. 35.

<sup>93</sup> *Ibid.* at para. 39.

older adults such as dementia, incapacity, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and capability.

Unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the 'predatory marriage'. This is not a term that is in common use. However, given that marriage brings with it a wide range of property and financial entitlements, it does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.

The problem with predatory marriages is that they are not easily challenged. The current standard for determining requisite "capacity to marry" is anything but a rigorous one. Currently, in Canadian law, in order to enter into a marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage. No party is required to understand all of the consequences of marriage and does not require a high degree of intelligence. This means that capacity is likely found, even in the most obvious cases of exploitation, and, consequently, that predatory and exploitative marriages are more likely to withstand challenge.

### **III. A REVIEW OF NOTABLE ESTATE DECISIONS ARISING OUT OF (RE) PARTNERSHIPS**

#### **Intestate succession and unjust enrichment – Ontario: *Re York Estate*<sup>94</sup>**

The case of *Re York Estate* provides an example of a situation in which a remarriage that takes place not long before the death of the testator works a significant disadvantage to the children of the deceased who, but for the remarriage, would have

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<sup>94</sup> *York Estate, Re*, 1998 CarswellOnt 3947 (Ont. Gen. Div).

stood to inherit the entirety of their parent's estate.

The deceased's first wife died and one month later, the deceased executed a new Will leaving the residue of his estate to his children in equal shares. Just over a year later, the deceased remarried. One month after that, he died.

It is not clear whether the deceased already had marriage in mind when he made his new Will, that is, whether he intended to get married and still leave his estate to his children. In any event, this was not a Will made "in contemplation of marriage," and was therefore revoked by the marriage. The deceased's estate was of moderate size, consisting of farm property, RRSPs, and investments totalling \$476,574. The evidence was clear that the substantial amount of money the deceased amassed during his lifetime "was due to his extremely frugal lifestyle and the fact that he did all repairs necessary on his farm property, and that the children ran the significant operation of the farm to allow [the deceased] to continue with a full-time job."<sup>95</sup>

Despite the short time that the deceased and his second wife were married, the Court disagreed with the proposal that it had discretion to deviate from the distribution formula for intestacy as set out in section 45 of the *SLRA* as to the \$200,000 preferential share.

The Court ordered the farm to be transferred to the surviving spouse as part of her distributive/preferential share, deducting half the costs of repairing it on the basis that the repairs would significantly benefit the wife as the ultimate owner of the property. A number of other items were deemed to be received by the wife as part of her distributive share. The Court did not comment on whether the application of section 45 resulted in any injustice, but the Court's statement at paragraph 10 exposes how a straightforward application of the provision does not always bear a fair result:

*"The evidence before me is that [the deceased] and his six children, when he was married to [his first wife], lived for almost 30 years on this farm property on*

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<sup>95</sup> *Ibid.* at par. 6.

*Bleeks Road. The children are, needless to say, very emotionally attached to the farm and the property, because that is where they were brought up and they spent many hours working on the farm. It is clearly evident from three of the children who testified before me, [...] that this whole issue of the circumstances they find themselves in now with their father's second wife is difficult for them, and every effort at trying to resolve the property issues between them and [his second wife] have failed.*<sup>96</sup>

Notably, in the end, the children were granted \$10,000 each in *quantum meruit* for their work on the farm when growing up.<sup>97</sup>

This litigation resulted despite the perfectly clear effect of the rules of intestate succession under Part III of the *SLRA*. One has to wonder at the tenacity of the children's quixotic mission to bring their unlikely application to trial. Estate litigators are well aware of the strong emotional forces that drive family litigation, even against long odds. This case seemingly represents a failure to plan, whether by making a new Will to benefit the children or to confirm that the deceased wished to actually benefit his new wife almost exclusively. However, the lawyer who may have advised the deceased on his Will shortly after his first wife died may have had no opportunity to assist this client in dealing with the consequences of the new marriage except to remind the client in his reporting letter that he would need a new Will if and when he remarries.

Unless there is a change to the laws of intestate succession and/or the rule that a Will is revoked by marriage, as recently seen in Alberta, British Columbia, and New Brunswick, these cases will surely continue.

### **Intestate succession – New Brunswick: *Stanley Mutual Insurance Co. v. Shepherd***<sup>98</sup>

Even where the deceased intends his entire estate to pass to his wife of 28 years and

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<sup>96</sup> *Ibid.* at para. 10.

<sup>97</sup> *Ibid.* at paras. 37-38.

<sup>98</sup> 2011 NBQB 57, 2011 CarswellNB 88, 97 C.C.L.I. (4th) 64, 369 N.B.R. (2d) 181, 952 A.P.R. 181, (N.B. Q.B.).



has no reasonable expectation of claims against his estate, an intestacy can cause serious problems. In *Stanley*, the deceased died intestate. He had children from a previous relationship, but he had no contact with these children and in fact did not even know where they were located or if they were alive. The widow disclosed these facts to the court, which held that she must take extraordinary steps to locate the children and give them an opportunity to be heard.

The estate-planning lesson in this case must be a reminder that simple families on the surface may in fact be complex families on closer inspection.

### **Intestate succession – Saskatchewan: *Cronan v. Cronan Estate*<sup>99</sup>**

The reasons for judgment in this Saskatchewan case begin with the sentence: “*The only thing more peculiar than modern relationships are the laws which attempt to define them.*”

The main issue was whether the deceased’s second spouse fell within the definition of “spouse” for purposes of the Saskatchewan *Intestate Succession Act*, *Pension Benefits Act*, and *Dependants’ Relief Act*, each of which has a different definition of “spouse.” The first defines spouse as a person who is legally married or cohabiting with the deceased spouse continuously for no less than two years and has so cohabited within the last two years. The second defines spouse as a person married to the member or cohabiting with the member for at least a year prior to the relevant time. The third defines spouse as a person who lived continuously for not less than two years with the deceased or in a relationship of some permanence if they are parent of a child.

In this case, the deceased died intestate. He committed suicide after a lifelong battle with depression. He had been married and had three children with his first wife. He divorced and was then married to his second wife, with whom he had two children. He

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<sup>99</sup> 2010 CarswellSask 259 (Sask. Q.B.).

then divorced his second wife. The evidence, however, was that he resumed a common-law relationship with his second wife after the divorce.

In determining the relationship, the court, following the framework set out in the Ontario decision in *Molodowich v. Penttinen*,<sup>100</sup> the leading case on determining whether two individuals are cohabiting in a conjugal relationship. The second wife's evidence was that they lived together, shared a bedroom, raised their children together, held themselves out to the community as a couple, and that several periods of separation between them were brief and always reconciled. The children of the deceased's first marriage gave evidence, which was accepted, that during these periods of separation the deceased would often return to his first wife, including even briefly entering into an engagement with her. They argued that this amounted to an intention on the part of the deceased not to continue cohabitation in a conjugal relationship with the second wife.

The Court found that the second wife met the definition of the spouse under all of the statutes. As a result, the entire value of the small estate went to the second wife, and the children from the first marriage received nothing.

As a case about a person who died intestate, having never had a will, this is obviously a case about the failure to plan. It is also a case involving a person afflicted with depression and prone to an unstable lifestyle. He had maintained relationships with two former spouses and children of the first spouse. If he had planned, it seems likely that he would have chosen to benefit his children from each, to some extent.

### **Revocation of a will on marriage – Alberta – *Fuchs v. Fuchs***

The Alberta Court of Queen's Bench declared that a Will executed on June 22, 1999 was a valid will drafted in contemplation of a marriage which took place on April 20, 2001 notwithstanding that the Will failed to expressly indicate that it was made in

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<sup>100</sup> 1980 CarswellOnt 274, 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

contemplation of marriage.<sup>101</sup> The Court focused on the evidence of the testator's true intentions at the time he executed the Will.

The deceased had advertised for a wife in a German newspaper in 1998. He began correspondence with Ms. Lippka and when she visited Canada that same year he proposed. The deceased was not able to marry at the time, as his divorce from his previous spouse was not finalized. On June 22, 1999 the deceased executed his Will, his divorce was granted on January 20, 2000, and the parties married on April 20, 2001. The deceased's will appointed "my friend, Barbara Lippka" as executor and directed that the residue, after paying debts, was to be transferred "to my friend, Barbara Lippka, if she survives me." There was no declaration that it was in contemplation of marriage and no evidence was provided by the solicitor who drafted the will.

The deceased died on February 8, 2012, notably just 7 days after the new Alberta *Wills and Succession Act* (the New Act) came into effect. Section 8 of the New Act states that the previous legislation, the *Wills Act*, R.S.A. 2000, c. W-12 (the Old Act) applies if the Will was *executed* during the time of the Old Act. However, Section 8 of the New Act also states that certain sections of the New Act applied if the testator *died* after the New Act came into force. One of those sections provided that:

a "will must be interpreted in a manner that gives effect to the intent of the testator" and that a Court may rectify a will "that does not reflect the testator's intentions because of. . .a misunderstanding of, or failure to give effect to, the testator's instructions by the person who prepared the will."

If it was found that the Will was revoked and the deceased was intestate the wife would be entitled to only 50 percent of the Estate under the legislation instead of the entirety of the residue of his estate as set out in his Will.<sup>102</sup>

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<sup>101</sup> 2013 ABQB 78.

<sup>102</sup> *Fuchs v. Fuchs* 2013 ABQB 78 at para. 37.

Justice Rooke observed that while there was no independent evidence with respect to the intention of the deceased, it was clear that: the deceased and Ms. Lippka were living together at the time he executed his Will, he could not call her his “spouse” because he was still married, and that the word “friend” was an accurate and logical description. Justice Rooke also concluded that the Will was clearly made in contemplation of marriage based on the “clear and convincing evidence” in Ms. Lippka’s affidavit. The lack of a declaration saying so was impliedly due to the misunderstanding or error of his lawyer. There was no mention in the case as to why the lawyer did not provide evidence in this matter, although Justice Rooke stated that it would have been “useful”. The Will was declared valid and the wife inherited under the Will:

The will of the Deceased of June 23, 1999 was clearly made in the contemplation of marriage but it does not contain a declaration saying so impliedly due to the misunderstanding or error of his lawyer. Having regard to the provisions of the New Act and the ability to consider, by extrinsic evidence, the circumstances surrounding the execution of the will and all of the other circumstances, it is clear that it was made in contemplation of marriage, and the requirements of s.39(1) of the New Act regarding why that intention was not expressed in the will have been satisfied. In the result, under the provisions of the New Act, that requires the Court to give effect to the intention of the testator, and, notwithstanding the provisions of s.17 of the Old Act, s.39 is invoked to rectify the will to provide specifically (as indicated (supra)) that it is in contemplation of marriage. Thus, Mrs. Fuchs, his spouse, inherits under the Deceased’s will.<sup>103</sup>

### **Enforcement of a separation agreement - Ontario: *Re Welin Estate***<sup>104</sup>

This case involved a dispute over the failure of the estate trustee, who was the spouse of the deceased at the time of death, to make spousal support payments to his former spouse pursuant to a separation agreement. This case involved a motion brought by one of the adult sons of the deceased (also a residual beneficiary of the deceased’s estate) to remove the deceased’s second surviving spouse (Spouse #2), Barbara Welin, as the executor/trustee of the estate on the basis of conflict of interest. As the monthly support payments owed to the deceased’s first surviving spouse (Spouse #1), Diana Welin, constituted a debt against the estate pursuant to subsection 34(4) of the *FLA*,<sup>105</sup>

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<sup>103</sup> 2013 ABQB 78 at para. 35.

<sup>104</sup> *Re Welin Estate*, 2003 CarswellOnt 2869 (Ont. S.C.J.).

<sup>105</sup> *Ibid.* at para. 8.

and as Spouse #2 had terminated the payments after death, the Court found that Spouse #2 had failed to meet her trustee obligation to pay all of the debts of the estate. According to the Court, “[e]xecutors of an estate owe a fiduciary duty to the beneficiaries and creditors of the estate.”<sup>106</sup> And, where a trustee is found to have acted in their own interest and not that of the estate, section 37 of the *Trustee Act*<sup>107</sup> gives the Court discretion to order their removal.<sup>108</sup> Consequently, the Court ordered that Spouse #2 be removed as the executor/trustee of the deceased’s estate.

This case represents a typical, yet avoidable, problem in planning. It is quite common for separated spouses to appoint their new partners as executors and trustees of their estate. The testator was well aware of the adversity in the interests and, probably, dispositions of his current and former spouses. While the testator may hope that the current spouse will tread carefully when administering his estate and respect competing spousal support obligations, it may be better to avoid appointing the spouse altogether. This would protect not only the former spouse and the estate, but also the executor spouse, who could be exposed to personal liability for defeating the interests of creditors of the estate.

### **Enforcement of domestic agreement – Yukon – *MacNeil v. Hedmann***

See also the recent case *MacNeil v. Hedmann*<sup>109</sup> where the Yukon Supreme Court found that an agreement executed between a husband and a wife purporting to revoke a marriage contract had no legal effect, based on the husband’s undue influence upon the wife to execute the agreement and the wife’s lack of opportunity to obtain independent legal advice. The husband presented the wife with the revocation agreement “out of the blue” and told her she had to sign it or he would not pay her back certain monies that he owed her. The wife’s two sons from a previous marriage acted as

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<sup>106</sup> *Ibid.* at para. 9.

<sup>107</sup> *Trustee Act*, R.S.O. 1990, c. T.23.

<sup>108</sup> *Supra* note 89, at para. 9.

<sup>109</sup> 2014 YKSC 16.

witnesses to the agreement, however both admitted they were high on marijuana at the time. The original marriage contract was declared valid and enforced. This case provides a good overview of the enforcement of domestic contracts in Yukon.

**Pre-Marital Agreements and survivorship rights on Death – Ontario: *Caron v Rowe*<sup>110</sup>**

In *Caron v Rowe*<sup>111</sup>, A. Caron (the “Applicant”) brought an Application for Directions with respect to the appointment of an Estate Trustee Without a Will of the Estate of P. Rowe (the “Deceased”), her deceased husband, seeking a declaration that as surviving spouse, she is the sole beneficiary of the entirety of the Estate.

The Deceased signed a Will dated May 9, 2009, leaving the entirety of his estate to his parents. Four months later, the Applicant and the Deceased entered into a Pre-Marital Agreement and subsequently married on September 4, 2009. The Deceased died 2 years later, on November 12, 2011.

The Applicant applied to be appointed as the Estate Trustee Without a Will. The Respondents were the Deceased’s mother and brothers, who filed a Notice of Objection to her appointment as the Estate Trustee Without a Will.

Subsequently, on February 23, 2012, the Applicant filed an election under the *Family Law Act*, to receive her net family property entitlement as a spouse and asked for a declaration under Part II of the *SLRA* as the sole intestate heir of the Estate.

The Applicant asserted that the May 2009 Will was revoked upon marriage pursuant to section 16 of the *SLRA*.

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<sup>110</sup> *Caron v Rowe* 2013 CarswellOnt 1259, 2013 ONSC 863, [2013] W.D.F.L. 1771, 225 A.C.W.S. (3) 490, 86 E.T.R. (3d) 243,26 R.F.L. (7th) 399

<sup>111</sup> *Ibid*

The parties agreed that the Pre-Marital Agreement became a marriage agreement upon marriage.

The Respondents asserted that the Applicant had no claim to the Deceased's home as she waived the right to make any claim to the home in the Pre-Marital Agreement, and as such that part of the Estate falls to the surviving parent.

The judge disposing of the matter found that the Pre-Marital Agreement was a binding contract and relied on *Stern v Sheps Estate*<sup>112</sup> standing for the proposition that parties can contract themselves out of the benefits of otherwise governing legislation as long as they are clearly aware of their respective rights. As such, the Applicant was entitled to contract out of the benefits that would fall pursuant to section 44 of the *SLRA*. The Respondents assert this is what transpired.

It was the Respondents' position that the Applicant, by entering into the Pre-Marital Agreement which provided for the home remaining in Paul's estate, was not entitled to the home because she had contracted out of her rights under the *Succession Law Reform Act*.

The Applicant's contended that she did not specifically waive her rights under the *SLRA*.<sup>113</sup>

The court stated that both *Saylor* and *Cairns* support the finding that Ms. Caron was not relinquishing her rights as a spouse under the *SLRA* in the Pre-Marital Agreement<sup>114</sup>. The court found that while Ms. Caron had a right to contract out of her entitlement under the *SLRA*, it was not satisfied that she did so and as such appointed the Applicant as the Estate Trustee Without a Will, and declared that as the surviving spouse she was the sole beneficiary of the entirety of the Estate.

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<sup>112</sup> *Stern v Sheps Estate*, [1968] S.C.J. No. 64 (S.C.C.)

<sup>113</sup> *Re, Saylor*, [1983] O.J. No. 3252 (Ont. H.C.); and the case of *Cairns v Cairns*, [1990] O.J. No. 377 (Ont. H.C.).

<sup>114</sup> *Caron v Rowe*, 2013 ONSC 863, para 26

## **Dependant's support – Definition of spouse – Ontario: *Lalonde v. Moore*<sup>115</sup>**

This case involved a dispute between the common-law partner of the deceased, Ms. Lalonde, and the deceased's children from a previous marriage over whether or not Ms. Lalonde met the definition of "spouse" under the *SLRA* and therefore was entitled to dependant's support.

"Spouse" as defined in the *SLRA*, includes "two persons who, [. . .] are not married to each other and have cohabited...continuously for a period of not less than three years".<sup>116</sup> Under the *SLRA*, "cohabit" means "to live together in a conjugal relationship, whether within or outside marriage".<sup>117</sup>

According to Ms. Lalonde, she commenced co-habiting with the deceased as of May 30, 2009 and continued to co-habit with him until his death in August, 2012. Ms. Lalonde met the deceased in 2006 when she was living in Montreal and the deceased was living in Ontario. They would see each other weekly or bi-weekly. In May of 2009 Ms. Lalonde cancelled the lease on her apartment in Montreal and moved all of her belongings to the deceased's home. She also applied for an Ontario driver's license.

The deceased's children, the respondents, argued that Ms. Lalonde had not cohabited with their father in a conjugal relationship for the required three years. They claimed that Ms. Lalonde did not cohabit with the deceased until October or November of 2010. The children argued that when Ms. Lalonde moved her belongings in May of 2009 that she was simply storing her furniture with their father. They also relied on cellphone, telephone and facsimile records to argue that Ms. Lalonde was actually living and working in Montreal until late 2010 and not with their father.

Justice Linhares de Sousa concluded that based on the evidence, and on the balance of probabilities, that Ms. Lalonde had cohabited continuously with the deceased from

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<sup>115</sup> *Lalonde v. Moore* 2013 ONSC 739

<sup>116</sup> *Lalonde v. Moore* 2013 ONSC 739 at paras. 1,10 and 11.

<sup>117</sup> *Lalonde v. Moore*, 2013 ONSC 739 at para. 11.



May or June of 2009 until his death in 2012 and therefore was a “spouse” under the *SLRA* and entitled to dependant support.

The Court relied on the fact that she moved all of her belongings to Ontario, terminated her Montreal lease, applied for an Ontario driver’s licence, terminated her employment in Montreal, changed her bank account address to Ontario, and that she shared expenses with the deceased. However, the most persuasive evidence for the Court was a document sent to the Canada Revenue Agency:

Unfortunately, the deceased is not able to shed light on the question before the Court. However, there is one document in which the deceased, along with Ms. Lalonde made an official declaration as to how long Ms. Lalonde and he cohabited. This was . . .the document dated September 12, 2011 sent to the Canada Revenue Agency, declaring that he and Ms. Lalonde had been living “*as a common law couple since July 2009*” . . .I find this document, along with all the other evidence . . . , very persuasive in coming to my decision that the cohabitation commenced in the months of May or June of 2009. Firstly, it is the only evidence that comes from the deceased. Secondly, it is consistent with much of the other evidence concerning Ms. Lalonde’s history of the relationship. . .]

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Therefore, evidence that can be directly linked to the deceased and his or her intention or confirmation of the cohabitation may be persuasive for the Court.

### **Dependant’s support – Ontario: *Sorkos v. Sorkos Estate*<sup>119</sup>**

The deceased’s previous spouse of almost 40 years died in 2001. After his first spouse died, he reconnected with the applicant, who was a childhood friend from Greece where they both grew up. They married in 2002. The deceased husband died with over \$2.3 million in assets, leaving the applicant financial assets of over \$500,000, a vehicle, the contents of his home, and the right to occupy his home for six months after his death. The residue of his estate was left to his siblings.

The widow claimed dependant’s support. By virtue of the marriage, she was a spouse

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<sup>118</sup> *Lalonde v. Moore*, 2013 ONSC 739 at paras. 75-76.

<sup>119</sup> *Sorkos v. Sorkos Estate*, 2012 CarswellOnt 6835, 2012 CarswellOnt 6835, 2012 ONSC 3196, 216 A.C.W.S. (3d) 1054 (S.C.J.).

for the purposes of the *SLRA*. The deceased had been supporting her, so she was a dependant within the meaning of the *SLRA*. The court identified the principles to be applied to determine whether the deceased had made adequate provision for support. Specifically, the dependant's moral claims must be considered and the need for support should be assessed over the course of the dependant's anticipated lifetime.

The court found that the applicant was 69 years old, spoke little English, and could not work due to medical reasons. She had left her family and friends in Greece to marry the applicant and take care of him in his then already compromised health. The applicant was the deceased's only dependant and her needs trumped the residuary beneficiaries.

The result of the case is somewhat inexplicable. The applicant had claimed a monthly shortfall of about \$1,100. The court reduced a specific bequest to her from \$250,000 to \$150,000 and then ordered the estate trustees to purchase an annuity to pay her \$3,000 per month with the reversionary interest, if any, being paid to the deceased's estate.

### **Dependant's support – Ontario: *Lukic v. Zaban*<sup>120</sup>**

This was a motion for interim support and turned mainly on whether the applicant was a spouse of the deceased. In the re-partnerships of older people, relationships may not be as formalized and publicly acknowledged as relationships among younger people. Therefore, the question sometimes arises about whether the relationship was one between spouses, roommates, or friends.

In this application for interim dependant's support, which was somewhat unusually heard by a Master, the deceased was a successful businessman and widower. He and his late wife, who died in 2002, had four children together. In 2005, he was disabled in a serious car accident. Two years later, he met the applicant in a grocery store. They

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<sup>120</sup> *Lukic v. Zaban*, 2012 CarswellOnt 14165, 2012 ONSC 6078 (Master).

apparently struck up a friendship, which resulted in the deceased financing the applicant's business. However, the applicant's home and business were in Gatineau, Quebec, while the deceased lived in Picton, Ontario. The applicant eventually moved her business to Picton. She maintained an apartment for some time, but lived in the deceased's home for about 10 months. The deceased bought the applicant a car and let her use his credit cards.

The main question in the case was whether the applicant satisfied the definition of "spouse," which was a threshold question for any order of support. The definition of "spouse" in the *SLRA* includes persons who have cohabited continuously in a conjugal relationship for a period of not less than three years. To determine whether the applicant was a spouse, Master MacLeod applied the factors in *Molodowich v. Pentinnen*: "In simplest terms the characteristics of a conjugal relationship include 'shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple.' These elements may be present in varying degrees and not all need be present for the relationship to be found to be conjugal."

Although the relationship lasted for over three years, the court was not convinced that the parties had cohabited in a conjugal relationship for that time. Several facts contributed to this finding. The deceased's capacity and ability to care for himself was in steady decline, making him dependent on caregivers. His neighbours, friends, children and personal care workers were not aware of any intimate relationship. There was no evidence of a sexual or romantic relationship. The court found that there were some indicators of a close relationship, including the provision of financial support and a short term sharing of shelter, but that the evidence as a whole was equivocal, uncorroborated, and highly contested. There was therefore no *prima facie* claim for interim dependants' support.

Interestingly, the applicant was successful in obtaining an order for the interim

preservation of the vehicle that the deceased had given her to drive but that his estate trustees had repossessed from the applicant. The court held that there was a strong *prima facie* claim that it had been a gift.

This case may highlight the desirability of taking active steps in the course of estate planning to clarify the status of a relationship, either with the potential claimant or with the world at large. By fostering a secretive and dependant relationship, the deceased assured his estate trustees and beneficiaries difficulty in administering the estate.

In the costs decision released in this matter,<sup>121</sup> the defendant beneficiaries argued that the motion was largely unsuccessful and wanted costs awarded against the applicant. The court however concluded that the applicant should have modest costs of \$6,000, proportionate to the relief granted. The Court opined that the estate was “implacably hostile” to the applicant and that the exploration of the applicant’s claims that took place “in the context of the motion [was] not irrelevant to the action itself and need not be wasted.”<sup>122</sup>

### **Dependant’s support – Ontario: *Kalman v. Pick***<sup>123</sup>

The 75-year-old applicant sought, inter alia, dependant’s support from the estate of her common-law partner of 23 years. The respondent estate trustees were the deceased’s children of his first relationship, and the primary beneficiaries of his estate valued at \$1.8 million. The applicant had been completely financially dependant on the deceased.

On consent, at an interim motion, the applicant received a monthly payment of “interim interim support,” a non-dissipation order in respect of the Estate, and a return date in three months’ time.

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<sup>121</sup> *Lukic v. Zaban*, 2013 ONSC 93.

<sup>122</sup> *Lukic v. Zaban*, 2013 ONSC 93 at paras. 6-7.

<sup>123</sup> *Kalman v. Pick et al.*, 2013 ONSC 304 (“*Kalman*”).

The only issue before Justice C. Brown on that January 2013 return date was the Applicant's request that the estate provide her with a lump-sum interim support payment to cover her legal fees and disbursements. This type of funding order has not previously been reported as granted in *SLRA* claims.

Justice Brown accepted the applicant's evidence of financial need and legal fees incurred and observed that, in the absence of adequate interim support, "...the Applicant's ability to pursue her meritorious claim would be prejudiced or would depend on the generosity of her counsel."<sup>124</sup>

In ordering the estate to pay the applicant a lump-sum interim support of \$60,000 for her legal costs and disbursements and expert's retainer, Justice Brown cited the provision of such funding orders in matrimonial, commercial, and constitutional matters and applied the SCC's criteria for such exercises of equitable jurisdiction as to costs.<sup>125</sup> Justice Brown also relied on interim costs awards granted in the context of estates and trusts matters.<sup>126</sup>

Recently, Justice McEwen ordered a further interim support payment in the amount of \$25,000 on a without prejudice basis.<sup>127</sup> The matter is set down for trial.

This case represents a much needed precedent in providing a means for dependants to fund a viable claim against an estate where having met the statutory test under the legislation – the *SLRA* – and the dependant has not been provided adequate or proper support by the deceased person. Often in such a case the dependant is prejudiced in prosecuting a meritorious claim due to unaffordability.

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<sup>124</sup> *Kalman*, *supra* note 102, para. 11

<sup>125</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371, 2003 SCC 71.

<sup>126</sup> *Kraus v. Valentini Estate*, 1993 CarswellOnt 2128, 1993 OJ No 3276 (Ont Gen Div); *Zhao v Ismail Estate (trustee of)*, 2006 CarswellOnt 8411, 29 ETR (3d) 315; *Perkovic v Marion Estate*, 2008 CarswellOnt 5931 (SCJ).

<sup>127</sup> 2014 ONSC 2362.

## **Dependant's support – Ontario: *Matthews v. Matthews*<sup>128</sup>**

In this case, the husband died in the middle of ongoing matrimonial proceedings. The wife had made claims for an equalization of net family property, child support, spousal support, and other relief. The wife continued her application after her spouse's death as a dependant's support claim under the *SLRA*.

The only asset of the estate was the matrimonial home, which had a value of about \$330,000. The husband left this home in his Will to his daughters. He had also designated his daughters as the beneficiaries of a \$1 million insurance policy. Pursuant to s. 72(1) of the *SLRA*, the court found that the proceeds of the policy were chargeable to satisfy an award of support for the wife.

The main dispute in this case was over the quantification of the support award. The wife argued that the Spousal Support Advisory Guidelines ("SSAG") lump sum support calculation was applicable, which would have resulted in a payment of about \$770,000.

The court disagreed with this approach since the SSAG depends on income sharing, and the estate was no longer an income-earning entity and the provisions did not properly apply where there was a deceased person. Instead, the Court reviewed the support provisions and factors under s. 62 of the *SLRA* and determined that a reasonable support award would be in the amount of about \$430,000. This would ensure that the daughters, who the husband had intended to benefit, would still receive a benefit.

As long as a matrimonial dispute remains unresolved – whether because of incomplete negotiations, ongoing court proceedings, or because the parties simply walked away from their relationship without dealing with the legal and financial implications – a dispute after the death of one spouse is extremely likely if the spouses have children

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<sup>128</sup> 2012 ONSC 933.

from previous relationships. The combination of factors in this case was especially volatile: the husband made no provision for his wife and the spouses were engaged in an ongoing litigious dispute. It is not clear that even the best planning advice would have prevented this dispute from continuing after his death.

**Dependant's support – Ontario: *Blair v. Allair Estate(Cooke)*<sup>129</sup>**

The case involved a motion for interim support under the *SLRA* made by one of the deceased's two long-term partners in an unconventional relationship. 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.

Counsel for the estate trustee, being the other spouse, argued that since the relationships that the deceased had with both women were virtually the same, the Court should not make any finding of entitlement to support on the interim motion because it would preclude the second spouse/estate trustee from claiming support or claiming that she was in fact the spouse of the deceased. It was also suggested that a ruling in favour of the applicant would be tantamount to finding that the deceased was in a "bigamous" relationship.<sup>130</sup> The Court rejected this argument, stating that it failed to see "how ordering support for a dependant would preclude the right to support by another dependant even if it is tantamount to a finding that both of the 'dependants' were 'spouses' and thus the deceased was living in a 'bigamous' relationship." The Court further noted that the relationship was not "bigamous," as neither of the spouses were legally married to the deceased.

In the result, the Court found that the moving-party spouse had overcome the evidentiary hurdle required to advance a claim for support, having provided "credible evidence from which one could rationally conclude that the applicant could

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<sup>129</sup> *Blair v. Allair Estate*, 2011 CarswellOnt 263 (Ont. S.C.J.), 2011 ONSC 498.

<sup>130</sup> *Ibid.* at para. 16.

establish...(her)...claim for support," and awarded her \$1,500 per month in support.<sup>131</sup>

It is not clear from the reasons whether the deceased left a Will. Assuming that the deceased did leave a Will and did not make adequate provision for support of the claimant spouse in the Will, the estate-planning lesson in this case seems to be that one must carefully explore the client's relationships. If the deceased in this case had simply been asked if he were married to, living with, or supporting someone, he might not have identified one or the other of the partners that the court found on this interim motion that he maintained households with.

### **Dependant's support – PEI – *MacDonald Estate***

When deciding on the quantity for adequate provision for a surviving spouse in *MacDonald Estate*,<sup>132</sup> the Prince Edward Island Supreme Court turned to the intentions of the parties and an un-kept promise by the deceased to provide the applicant with the proceeds of a life insurance policy of \$100,000.00.

This case dealt with relief sought by a surviving spouse pursuant to the *Dependents of a Deceased Person Relief Act*, R.S.P.E.I. 1988, Cap. D-7.

The applicant, Ms. MacDonald, and the deceased were married in 1999 when the applicant was 59 years old and the deceased was 60. It was the second marriage for both and both were retired. The couple resided in a home owned by the husband, with the husband paying all household and living expenses including utilities, mortgage payments, property taxes, home and car insurance etc. but excluding groceries, which was the wife's responsibility. The couple entered into a marriage contract setting out the terms of the husband's payment of household expenses and, among other things, required each party to make certain provisions for the other in their Wills. The marriage contract, however, was revoked in 2009 when the husband wanted to "divorce-proof" his daughter's inheritance when her marriage failed. At the time of revocation the

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<sup>131</sup> *Ibid.* at para. 19.

<sup>132</sup> 2014 PESC 7.



husband told the applicant that instead of providing for her in his Will, she would be named the beneficiary of a life insurance policy in the sum of \$100,000.00. However, there was no evidence of any such policy.

The husband died on October 8, 2012. His Will, which he executed on June 4, 2009 provided the following for his wife: any vehicle owned by the husband at his death, a life interest in the residence and cottage and the residue of his estate, other than personal and household effects.

According to the executrix of the estate (the daughter) the residue of the estate “had no value because of debts owed by the estate”. Furthermore, the only car owned by the deceased was worth \$28,900.00 but there was a debt against it for \$29,029.00. (The first question posed to the court was whether the Estate was obliged to pay the loan owing against the vehicle. The Court found that it was.<sup>133</sup>)

The wife continued to live in the residence after her husband’s death but shortly found she was unable physically and financially to maintain the residence and moved to a rental apartment. She expected her entire savings to be depleted in 3-6 years depending on her ability to reduce expenses.

The Estate acknowledged that the wife was a dependant, but argued that the Will provided adequate support for the wife. The Court disagreed and concluded that the testator had failed to provide adequately for his dependant widow. The Court looked to the “intentions of the parties” when deciding to award a lump sum of \$100,000.00, in addition to paying out the car loan discussed above. It was undisputed that the deceased had told his wife he would leave her with proceeds of \$100,000 from a life insurance policy, which failed to materialize. In order for the Estate to have funds to

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<sup>133</sup> *MacDonald Estate*, 2014 PESC 7, at paras. 24-31.

make the payments, the Court ordered that the two properties owned by the Estate be sold.

In making its order the Court had the following useful observations about dependant support claims:

Assessing the testator's moral obligations involves consideration of society's reasonable expectations and contemporary standards. In the past two or three decades, second marriages have become commonplace. Often older adults are entering new relationships in which they maintain their financial independence. They frequently make arrangements for the bulk of their property to pass on their death to their children from their first relationship. That is a natural and completely understandable desire. However, the relationship of marriage, whether common law or otherwise, imposes new primary obligations which must be addressed in priority to other worthy, but still secondary, objectives. Society reasonably expects that a dependant person from a primary relationship, subject to the capacity of the estate, be supported to a reasonable extent from the available assets of the estate".<sup>134</sup>

### **Dependant's support – Alberta – *Malkhassian Estate (Re)***

This case<sup>135</sup> examined s.72(b) of the *Wills and Succession Act*, SA2010, c W-12.2 (the *WSA*)(which replaced the *Dependant's Relief Act* RSA 2000 c D-10.5 and the *Intestate Succession Act*, RSA 2000, c I-10, among other statutes, on February 1, 2012) and examined whether or not the intestate deceased "stood in the place of a parent to his granddaughter" and if the granddaughter was a dependant.

This was the first time this section of the legislation was judicially considered.

The facts of this case are becoming more commonplace as many adult children move home to live with their parents.

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<sup>134</sup> *MacDonald Estate* 2014 PESC 7 at para. 49.

<sup>135</sup> 2014 ABQB 353.

The deceased was a father to two daughters. He was separated but not divorced from his children's mother, the respondent in the proceedings. One daughter, Larissa, became pregnant in early 2010 and shortly thereafter moved in with her father and continued to live with him after the birth of her daughter, "E", until he passed away when "E" was 16 months old.

The daughter submitted an unsworn statement to the Court stating that her father supported her during her pregnancy and after the birth of "E" by letting her live with him, buying groceries and toiletries and being a secondary caregiver to "E" when she went back to work. The respondent mother testified that the daughter lived independently of her parents for her entire adult life and that the daughter was only living with the deceased temporarily until she got back on her feet. Both parties admitted that the daughter, at various times, worked 2-3 part time jobs to support herself and her child.

The only issue before the Court on this motion was "whether the deceased stood in the position of a parent" to the grandchild, as issues relating to the distribution of the Estate or the grandchild's maintenance and support were not properly raised before the Court.

Part 5 of the *WSA* deals with family maintenance and support and provides that "family member" includes "a grandchild of the deceased" who is under 18 years of age and "in respect of whom the deceased stood in the place of a parent at the time of the deceased's death". Under s. 72(b)(vi) and 73(2) of the *WSA* the deceased grandparent stood in the place of a parent to the grandchild if:

1. the deceased demonstrated a settled intention to treat the grandchild as his own;
2. the grandchild's primary home was with the deceased from her birth for at least two years immediately before the deceased's death; and
3. the deceased provided the primary financial support for the grandchild.

Justice Pentelchuk dismissed the application on the following findings:

**The evidence suggests that the deceased benevolently provided emotional support, childcare and some degree of financial support to his daughter and granddaughter following her birth.** The evidence falls well short of establishing that the deceased had a settled intention to treat [the granddaughter] as his own daughter, or that the deceased provided primary financial support. . .In my view, s. 72(b)(vi) was not intended to capture all of those familial relationships where three generations live together for some period of time. Something more must be shown. . . **A grandparent should be free to provide this type of assistance for the benefit of a child and grandchild without it affecting the ultimate disposition of his or her estate.**<sup>136</sup> [emphasis added]

### **Dependant's support – British Columbia – *Griese v. Syret***

This case<sup>137</sup> demonstrates how estate disputes can arise from a reluctance to openly refer to, or recognize, a relationship later in life as more than “friends” when it has the hallmarks of a loving, caring and supportive “spousal” relationship.

In *Griese*, a 54 year old widow, Ms. Jacques, commenced a common law relationship in 1980 and stayed in that relationship for 30 years, until her death in 2010. The deceased's Will, which was executed in July 1995, left her “dining room suite” to her “friend” the plaintiff/common law spouse, Mr. Griese. She left the remainder of her estate which consisted of her half of the couple's principal residence (held as tenants in common) to her nephew who she raised as a son. The plaintiff/spouse sought to vary the Will and brought an unjust enrichment claim based on his contributions to the residence.

The plaintiff/spouse argued that he was entitled to a significant portion of the deceased's estate and that his moral and legal claims ought to be recognized over and above the nephew/son's claim. Interestingly, he also made the assertion that the

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<sup>136</sup> 2014 ABQB 353 at paras. 49-50.

<sup>137</sup> 2013 BCSC 1601.

deceased's Will was "based on a lie" as the deceased "misrepresented the nature of their relationship by referring to him as a friend".<sup>138</sup> The nephew countered this argument by saying that this was not a lie, the spouse was her "friend" and she honestly represented that they were not married.

Justice Arnold-Bailey conducted an extensive review of the relevant and leading case law and the evidence (including that the spouses kept their finances separate, the nephew was an independent financially secure adult, the spouse provided significant comfort and care to the deceased etc.) and concluded that a dining-room set was not adequate provision for a spouse of over 30 years.

Justice Arnold-Bailey assessed the deceased's legal obligation to have been "modest spousal support" but that her moral obligation "was significant".<sup>139</sup> Justice Arnold-Bailey also balanced this with the deceased's moral obligation to her nephew/son. Justice Arnold-Bailey noted that had the deceased died intestate the nephew would not have qualified as "issue" under the *Estate Administrations Act* and the spouse would have inherited the entire Estate. Justice Arnold-Bailey ordered that the plaintiff/spouse receive a lump sum payment of \$150,000 (of the approximate \$375,000.00 Estate), with the remainder to go to the nephew and ordered the Estate to "equal amounts of the costs of each party".<sup>140</sup>

### **Severance of joint title – Ontario: *Hansen v. Hansen Estate***<sup>141</sup>

In *Hansen*, the husband's daughters from a previous marriage claimed that title to the matrimonial home, which was held by the husband and wife jointly, was severed as a result of their mutual conduct following their separation. The Court agreed. The following mutual conduct supported this finding:

- the wife moved out of the home;

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<sup>138</sup> 2013 BCSC 1601 at para.52.

<sup>139</sup> 2013 BCSC 1601 at paras.72-72.

<sup>140</sup> *Griese v. Syret* 2013 BCSC 1601 at para.80.

<sup>141</sup> *Hansen v. Hansen*, 2012 ONCA 112.

- the husband took over payment of the expenses and put the bills in his own name;
- the parties retained their own lawyers and agreed that they would exchange financial disclosure in order to carry out a division of their property;
- the wife proposed that the husband buy out her interest in the home or else it would need to be sold, and the husband took no issue with this proposal;
- the parties agreed that a quick resolution was in order;
- the husband made a new will naming his children rather than his wife as beneficiaries, and the home was his only significant asset; and
- the husband and wife closed joint bank accounts and opened new bank accounts in their own names.

A claim for severance of a joint tenancy is most likely to arise in complex family situations. Where spouses in a “simple” family separate, the passage of title by survivorship to the other spouse would often not work an injustice. Assuming that both parents have positive relationships with their children, the property may eventually pass to the children.

The situation in *Hansen* represents a potential missed opportunity to plan. Family lawyers in the circumstances of the separating spouses in *Hansen* in addition to advising that a Will be done, may want to consider advising their separated clients on entering into interim agreements to sever title to some or all jointly held property or register transfer of the property jointly to the parties as tenants in common.

It is also worth considering whether parties to marriage contracts and cohabitation agreements might want to include a provision automatically severing title upon breakdown of the relationship. However, despite the fact that this case could be said to have arisen out of the deceased’s failure to plan, the helpful reasons may have the effect of reducing future confusion and disputes over severance of joint title when spouses separate. The facts of this case are typical of a separation, and it is possible

that severance based on the “third rule,” severance of joint title by a mutual course of conduct, will be the naturally expected outcome when parties initiate negotiations to divide their property after a separation, especially if they specifically address the disposition of a jointly held matrimonial home.

**Severance of joint title – Ontario: *Su v. Lam***<sup>142</sup>

Despite *Hansen*, it would be a mistake to see the severance of jointly held property as the automatic result of the breakdown of the relationship. The court has recently said that the mere fact of a separation is insufficient to establish severance.<sup>143</sup> The totality of the evidence must be assessed. Indeed, on the totality of evidence in *Su v. Lam*, a case decided after *Hansen*, it was found that former spouses had not intended to sever their joint tenancy in certain pieces of rental real estate.<sup>144</sup>

**Severance of joint title – Newfoundland and Labrador – *Chafe v. Hunter et al***<sup>145</sup>

In this case, the Court found that a joint tenancy was severed between three individuals and converted to tenants in common by their actions to fence off portions of their land which “destroy[ed] the unity of possession”.

The Crown granted land to a father and two sons. All three died intestate. In 2010 the son of one of the deceased owners sold the land to a third party for \$150,000.00. The daughter of another deceased owner claimed that she had an interest in the property as her father had died intestate and sought an order declaring her interest in the land and an accounting of the monies received for the sale of the land.

Ultimately the Court allowed the application and found that the three deceased took the land as joint tenants but that they converted their ownership to a tenancy in common, thus any interest they had in the property passed to their estates when they died

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<sup>142</sup> *Su v. Lam*, 2012 ONSC 2023, 2012 CarswellOnt 3975 (Ont. S.C.J.).

<sup>143</sup> *Jurevicius v. Jurevicius*, 2011 ONSC 696 (Ont. S.C.J.)

<sup>144</sup> *Su v. Lam*, supra note 142.

<sup>145</sup> 2013 NLTD(G) 67

intestate. The Court found that the deceased engaged in a “course of dealing” from which it inferred that they treated their ownership as a tenancy in common: the parties subdivided the land, occupied distinct portions of the land by building houses, fencing them in, cultivating gardens and harvesting hay from them. This “destroyed the unity of possession”. The Court provided a helpful overview of the law that applies in Newfoundland to the creation and severance of joint tenancies.

### **Joint Title – Ontario – *Jones v. Jones***

The case of *Jones v. Jones*<sup>146</sup> is a notable one in which an older adult added her daughter as a joint tenant on the title to her property with the intention of the daughter holding it in trust for her benefit as she progressed into her old age. She did this even though the daughter paid nothing towards the purchase price. The daughter moved into her mother’s house shortly after it was purchased and her boyfriend moved in after a few years. Eventually the mother asked both of them to leave and they refused.

While the self-represented daughter agreed during the trial to a vesting order placing all legal and beneficial ownership of the house into the name of the mother alone and agreed to vacate the property, Justice Quigley stated he would have granted the relief in any event as the evidence supported a finding of resulting or constructive trust in favour of the mother (relying on *Kerr v. Baranow*, *Peter v. Beblow* and *Pecore v. Pecore*). Justice Quigley went on to consider the mother’s claims for repayment of significant amounts of money given to the daughter in the form of loans and advances, money taken from a joint line of credit without authorization, and imputed back rent for 10 years. Justice Quigley reviewed years of evidence in this regard and ordered that the daughter repay a total of just over \$43,000.00 to her mother. This case acts as a warning to parents who see joint tenancy as a form of protecting their interests in old age. Parents must be sure of the character and trustworthiness of their off-spring, otherwise more cases similar to this one will be before the courts.

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<sup>146</sup> *Jones v. Jones* 2014 ONSC 787.



## **Joint Bank Accounts – British Columbia – *Pickard v. Knudsen*<sup>147</sup>**

One of the issues in the British Columbia case of *Pickard v. Knudsen*<sup>148</sup> was a dispute over jointly held bank accounts between the deceased and her children and whether the “right of survivorship” applied to those accounts. The deceased had two bank accounts: one joint with her adult son and one joint with her adult daughter. The son acknowledged that the funds in the bank account he held jointly with his mother should form part of the estate. He testified that he used the account from time to time to pay for expenses for his mother. The daughter, on the other hand, claimed that she should have the benefit of the balance of the joint account she had with her mother as it was a gift to her.

Referring to *Pecore v. Pecore*, the Court confirmed that there is a presumption of a resulting trust for joint accounts held between parents and adult children. A surviving joint account holder must prove on the balance of probabilities that the transferor intended to gift the assets in the joint account to the survivor. Absent such proof, the assets form part of the estate.<sup>149</sup>

The daughter argued that as she was not aware that her name was on the account with her mother and because her mother never mentioned it to her, then it must have been meant as a gift. Justice Savage did not accept the daughter’s evidence that she did not know about the account, and in any event found this to be insufficient evidence to rebut the presumption and establish a gift.

This case provides insight into what may or may not be acceptable evidence to rebut the presumption set out in *Pecore* and that simply not knowing about the joint account is not enough to prove the money was a gift.

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<sup>147</sup> *Pickard v. Knudsen*, 2013 BCSC 1091.

<sup>148</sup> *Pickard v. Knudsen*, 2013 BCSC 1091.

<sup>149</sup> *Pickard v. Knudsen*, 2013 BCSC 1091 at para.67.

## **Joint Bank Accounts – Ontario: *Sawdon Estate*<sup>150</sup>**

In the Ontario case of *Sawdon Estate*, the deceased had seven bank accounts at various financial institutions that were jointly held, with a right of survivorship, with two of his five children. The funds in the accounts totalled just over \$1 million. The father had some history and understanding of joint accounts when his wife passed away, and according to his lawyer, understood that when he transferred the bank accounts into “joint accounts with a right of survivorship” the funds would “be accessible to his two sons immediately upon his death”.<sup>151</sup> At the same time he made the accounts joint, the deceased executed a new Will which divided his estate into five parts, for each of his five children and their issue. Should one of his children die without issue, that particular child’s share would go to the charity, Watch Tower Bible and Tract Society of Canada (the “Watch Tower”).

The deceased, despite understanding the “right of survivorship” of joint accounts, advised his sons that upon his death they were to divide the money in the joint accounts equally amongst their siblings. The sons agreed to and understood this request.

Subsequently the deceased revised his Will, whereby the Watch Tower would receive certain shares of his corporation “Sawdon Holdings” and the residue of his estate. Upon his death, his sons argued that the joint accounts were “gifted” to them and passed outside of his estate. The Watch Tower argued that the gift failed because the deceased did not gift the “beneficial interest” in the joint bank accounts and therefore the funds in the accounts formed part of the residue of the estate.

Justice Ricchetti applied *Pecore* and found that the sons successfully rebutted the presumption of resulting trust. The direct evidence showed that the deceased understood how joint accounts operated and specifically wanted the funds to pass to his

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<sup>150</sup> *Sawdon Estate*, 2012 ONSC 4042.

<sup>151</sup> *Sawdon Estate*, 2012 ONSC 4042 at para. 23.

children outside of his estate. His Honour also relied on the bank documents setting out that the accounts were subject to the right of survivorship, the tax treatment of the funds, and that there was no evidence of any reservation of interest by the deceased. The gift of the joint bank accounts was not a testamentary disposition as the gift was intended to be and was effective immediately upon opening of the joint bank accounts.

His Honour also went on to find that there was no intention by the deceased to retain a “beneficial” interest in the joint accounts as suggested by the Watch Tower. The beneficial interest in the joint bank accounts was transferred to all of the deceased’s children. The deceased had no intention to reserve any beneficial interest for himself.

Ricchetti J., found the bank documents to be clear on their face and that the deceased’s sons had control and use of the funds if they wanted. Ricchetti J., also opined that another way to approach the deceased’s actions was that he made a gift of the legal and beneficial interest in the joint bank accounts to the two sons subject to them holding those monies upon receipt in trust for their siblings. In other words, that the sons were bare trustees for their siblings, when and if they received any monies from the joint bank accounts.<sup>152</sup>

### **Appeal Decision**

The Watch Tower appealed and the Court of Appeal just recently released its decision.<sup>153</sup> Justice Gillese, with Justices Hoy and Strathy agreeing, upheld the trial judge’s conclusion that all of the children were beneficially entitled to the funds in the bank accounts. However, Justice Gillese, on behalf of the Court, arrived at that conclusion using a different legal analysis.

Her Honour found that when the father transferred the bank accounts into joint names with his two sons he created a trust, and legal title vested immediately upon transfer. The sons became legal owners on the understanding that they were to divide the funds in the accounts equally amongst all of the children upon their father’s death. Therefore,

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<sup>152</sup> *Sawdon Estate*, 2012 ONSC 4042 at paras. 80-83.

<sup>153</sup> *Sawdon Estate v. Sawdon*, 2014 ONCA 101.

Gillese J. held that “in legal terms, when the [b]ank [a]ccounts were opened [the father] made an immediate *inter vivos* gift of the beneficial right of survivorship to the [c]hildren. Thus, from the time that the [b]ank [a]ccounts were opened, those holding the legal title to the [b]ank [a]ccounts *held the beneficial right of survivorship in trust* for the [c]hildren in equal shares.”[emphasis added]<sup>154</sup>

Her Honour explained that this analysis differed from the trial judge’s in two significant respects.

Firstly, Her Honour disagreed with the trial judge’s suggestion that all of the children were beneficially entitled to *the contents* of the bank accounts from the time the accounts were opened. Instead, Gillese J. found that the children were entitled to the beneficial *right of survivorship* from the time the bank accounts were opened. There is a significant difference in these two findings, Gillese J. explained:

The question of beneficial entitlement on [the father’s] death is a question of who owns the right of survivorship, whereas the question of beneficial ownership generally would encompass the period from the time that the [b]ank [a]ccounts were opened. . . [O]n the trial judge’s findings of fact, [the father’s] intention and instructions related only to the former, namely, beneficial entitlement upon death.<sup>155</sup>

Secondly, Gillese J.’s legal analysis differed from the trial judge’s in that the trial judge also founded the children’s entitlement on the alternative bases of gift or trust. The trial judge found that, alternatively, the father made a “gift” of the legal and beneficial interest to his two sons but they were to hold whatever funds they received from the bank accounts in trust for their siblings. Gillese J. held that “one cannot find that a gift of the beneficial right of survivorship has been made and, at the same time find that the recipient held it in trust for others. When the legal title holder of property is obliged to hold the property for the benefit of another, a trust has been created.”<sup>156</sup> Basically, once the trial judge found that the two sons were obliged to hold the beneficial right of

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154 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 67.

155 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 69.

156 Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 70.

survivorship for all of the children in equal shares he found that a trust had been created, and therefore a gift analysis was no longer available.

Although Her Honour used a different legal analysis, Justice Gillese stated:

I hasten to reiterate that the legal analysis I offer in no way detracts from the correctness of the trial judge's conclusion that on [the father's] death, the [c]hildren became entitled to the monies in the [b]ank [a]ccounts in equal shares. In my view, that conclusion is not only correct in light of the trial judge's findings, it is inescapable.<sup>157</sup>

On appeal, the Watch Tower also attempted to argue that the father had created a "secret trust" when he asked his two sons to distribute the funds equally to all of his children upon his death. The Watch Tower argued that the secret trust failed for lack of certainty of objects and the funds in the bank accounts must revert back to the estate, or the beneficiaries of the secret trust are the beneficiaries of the father's Will.

Gillese J. held that as this was a new issue raised first on appeal, Her Honour "would decline to entertain it" and that "in any event, without deciding the matter, it seems to me that the secret trusts argument is doomed to fail. Even if the secret trusts doctrine could apply to a situation such as this, . . . there can be no problem with the certainty of objects requirement because, on the findings of the trial judge, the objects of the 'secret trust' are indisputably the children."<sup>158</sup>

### **Joint Bank Accounts – Ontario – *Lowe Estate v. Lowe***

Justice Reid introduced this dispute<sup>159</sup> over a joint bank account by commenting that the funds in the bank account were "not large, and arguably not nearly enough to justify the time and expense of this litigation. However, as is often the case in estate litigation, the court process is the means by which a dysfunctional family has chosen to wage battle, and proportionality is a casualty of the early skirmishes."<sup>160</sup>

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<sup>157</sup> Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 72.

<sup>158</sup> Sawdon Estate v. Sawdon, 2014 ONCA 101 at para. 76.

<sup>159</sup> 2014 ONSC 2436

<sup>160</sup> *Lowe Estate v. Lowe* 2014 ONSC 2436 at para. 1

In his Will, the deceased appointed his wife as the sole executor and trustee, with his son as the alternate. The debts of his estate were to be paid and the wife was the residual beneficiary, with the residue to be divided equally between his two children should the wife predecease him.

In 2008 after being diagnosed with pancreatic cancer, the deceased separated from his spouse and became estranged from his son. He relocated to Ontario and lived with his sister. He became close with his nephew. They visited regularly. In 2009 the deceased made his bank account joint with a right of survivorship with his nephew. At the same time, the deceased advised the nephew that upon his death he wanted a portion of the money in the joint account to be distributed to his *alma mater* university and to his granddaughter, with the rest to go to his son, and signed a note to this effect. The deceased stated that he did not trust his son to carry out these instructions and expressed that it was his understanding that the funds did not form part of his estate. Upon his uncle's death, the nephew made the payments out of the joint account as requested, but held the payment to the son while the litigation was ongoing. The son argued that the joint account formed part of the Estate and all funds should have been distributed according to the will.

Justice Reid used the analysis in *Sawdon Estate* above, to conclude that in effect:

Lawton Lowe set up a trust with [his nephew] as the trustee when he added [his nephew] as legal title holder to the joint bank account. Lawton Lowe's granddaughter, *alma mater* and son Garry were the beneficiaries. Ultimately, the combination of the banking documents, the written instructions, the prior use of joint banking for estate planning purposes, the confirmation that [the nephew] would see that 'everything is paid', and the lack of direct reliable evidence that the funds were to be treated as estate funds leads me to conclude that the respondent's onus to rebut the presumption of resulting trust has been met.<sup>161</sup>

A unique aspect of the joint account case, as noted by the Court, was the respondent nephew's total lack of personal benefit, as he agreed he was to receive no money from

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<sup>161</sup> *Lowe Estate v. Lowe*, 2014 ONSC 2436 at paras.37-38.

the account. Justice Reid found that this also supported the evidence rebutting the presumption of resulting trust.

**Joint Bank Accounts – Manitoba: *Sawchuk Estate v. Evans et al***

In the Manitoba case of *Sawchuk Estate v. Evans et al*, at the time of her death, the deceased had all of her assets in joint bank accounts or joint investments with the youngest of her two adult daughters. After the mother died intestate, the youngest daughter claimed all of the joint accounts and investments through right of survivorship and advised her sister that their mother had left her nothing. The eldest daughter brought an application seeking a declaration that the assets held in the joint accounts were held on a resulting trust in favour of the mother's estate and were to be distributed pursuant to Manitoba's *The Intestate Succession Act*, C.C.S.M. c. 185.

Dewar J., reviewed the evidence presented, including testimony from the sisters, bank and investment documents, and testimony from the mother's various caregivers. It was evident that the youngest daughter spent more time with the mother, caring for her, and assisting her after her stroke, and eventually lived with her mother.

Dewar J. concluded that the mother was dependent upon her youngest daughter to a degree and questioned whether the mother could have been unduly influenced to make her accounts joint. His Honour relied on the Supreme Court of Canada case of *Goodman Estate v. Geffen*<sup>162</sup> and opined that "where there is a case that raises the spectre of a relationship in which the donee has the opportunity to influence the donor" then a presumption of undue influence arises.<sup>163</sup> Then, Dewar J. observed, the onus is on the donee to rebut this presumption of undue influence. If that onus is not overcome, the gift automatically fails even without specifically addressing the presumption as articulated in *Pecore* that any joint accounts made between a parent and adult child are held in a resulting trust for the parent's estate. If the presumption of undue influence is overcome, however, "then the court must also address the onus as articulated in

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<sup>162</sup> [1991] S.C.R. 353.

<sup>163</sup> *Sawchuk Estate v. Evans et al.*, 2012 MBQB 82 at paras. 29 and 34.

Pecore”.<sup>164</sup>

Having determined the existence of a dependant relationship between the deceased and her youngest daughter, Dewar J., concluded that it was necessary to consider whether the presumption of undue influence had been rebutted. His Honour concluded that the youngest daughter could not rebut this presumption nor could she rebut the presumption that the joint accounts were held in a resulting trust as per *Pecore*. His Honour based his conclusion on the following evidence:

- the lack of the mother’s signature on some bank documents;
- the fact that the youngest daughter would sometimes sign her mother’s name on bank documents;
- the dependency of the mother on the youngest daughter for her care;
- the ill feelings the youngest daughter had against the eldest daughter;
- the fact that the youngest daughter was not financially well off; and
- the history of equal treatment by the parents towards both of their daughters.

Dewar J. also observed that:

*I recognize that family members oftentimes deal informally with each other on monetary matters. However, I am of the view that where it is alleged that an elderly and partially disabled parent makes what amounts to a disposition of her estate and favours the child upon whom she is at least partially dependant to the exclusion of other children and especially where historically, equal treatment was exercised by the deceased, the court should require some rigour to the evidence which is adduced to try and rebut the presumption of undue influence as well as the presumption articulated in *Pecore*. Evidence from the donee and people close to the donee does not carry great weight in my opinion. It should be reviewed with suspicion.*<sup>165</sup>

Ultimately the Court concluded that all of the monies held in the joint accounts were held on a resulting trust and were to be repaid to the estate of the mother for distribution according to *The Intestate Succession Act*, subject to any other distribution which the

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<sup>164</sup> *Sawchuk Estate v. Evans et al.*, 2012 MBQB 82 at para. 34.

<sup>165</sup> *Sawchuk Estate v. Evans et al.*, 2012 MBQB 82 at para. 52.



parties might agree amongst themselves.

Interestingly it appears that Dewar J. would have liked to have compensated the youngest daughter for the time and energy she spent assisting her mother, however felt that he could not make such a ruling. His Honour stated that he did “not believe that the law permits [him] to reduce the amount of repayment to compensate [the youngest daughter] for the care that she provided. Nothing stops the estate, however, with the consent of both beneficiaries, to vary the distribution prescribed by *The Intestate Succession Act* to take account of [the youngest daughter’s] care of her mother.”<sup>166</sup>

### **Cautionary Planning Tips**

Joint tenancy has been described to be a useful estate-planning tool in avoiding the administrative hassle and estate administration taxes associated with probate, but it is difficult to suggest, in light of the difficulties, that joint tenancy is a good or effective means of planning. Indeed, an extraordinary amount of litigation arises respecting jointly held assets and survivorship rights perhaps planning for probate, as opposed to around probate is the best approach. This is an area riddled with disputes about whether joint title was severed by a mutual course of conduct. It is important to remember that severance of joint title under the third rule requires a *mutual* course of conduct. Therefore, if only one of the joint owners maintains that the property is held in joint tenancy, the property will remain so until the other owner carries out a unilateral act of severance on title. When a property is to be held in joint tenancy, particularly in complex family situations, it is worth considering whether the joint owner carrying out the estate plan should sign a written acknowledgement that the property is to be held in joint tenancy.

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<sup>166</sup> *Sawchuk Estate v. Evans et al*, 2012 MBQB 82 at para. 57

**Pension benefits – Ontario: *Carrigan v. Quinn*, *Vladescu v. CTV Globe Media Inc.*, and *Stanton v. Coughlin & Associates Limited***

These cases deal with disputes over entitlement to pension death benefits.

***Carrigan v. Quinn*<sup>167</sup>**

This Ontario Court of Appeal decision will have an impact on who may be entitled to pension death benefits under the *Pension Benefits Act*. The Court was asked to address the following question: who receives the pension death benefit when the member of a pension plan dies and is survived by both a common-law spouse and a legally married spouse from whom he was separated but who was also designated as a beneficiary of his pension plan?

**Background Facts:**

Melodee and Ronald Carrigan were married in 1973 until his death in 2008. In 2002, Mr. Carrigan had designated Mrs. Carrigan and their daughters as the beneficiaries of the death benefit of his pension plan. The Carrigans separated in January 2000 when Mr. Carrigan began living with the respondent Jennifer Quinn. Mr. Carrigan continued to live with Ms. Quinn until his death.

The trial judge held that while both Mrs. Carrigan and Ms. Quinn met the statutory definition of spouse under section 48 of the *Pension Benefits Act*, there could only be one spouse for the purposes of the act. As Ms. Quinn was living with Mr. Carrigan at the time of his death, the trial judge held that Ms. Quinn was the spouse who was entitled to his death benefit. The trial judge also rejected Mrs. Carrigan's second argument that she and her two daughters were entitled to the death benefit because they were the designated beneficiaries. The court held that they would only have received the benefit as beneficiaries when there is no eligible spouse. Mrs. Carrigan appealed.

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<sup>167</sup> *Carrigan v. Quinn*, 2012 CarswellOnt 13522, 2012 ONCA 736, 112 O.R. (3d) 161, 220 A.C.W.S. (3d) 632; application for leave to appeal denied 2013 CanLII 15563.

The Court of Appeal allowed the appeal in a two-one decision written by Justice Juriensz (Justice Epstein concurred and Justice LaForme dissented). In reaching its decision, the Court completed a statutory interpretation of section 48 of the *Pension Benefits Act*, which provides that a “spouse” of a member of a pension plan on the date of death is entitled to the pension death benefit. However, section 48(3) provides that no payment will be made “where the member or former member and his or her spouse are living separate and apart on the date of death.”

The Court held that, assuming that both Mrs. Carrigan and Ms. Quinn met the statutory definition of “spouse,” s. 48(3) would apply in these circumstances since Mrs. Carrigan was “living separate and apart” from Mr. Carrigan at the date of death. Once s. 48(3) was triggered, s.48(1), which entitles a “spouse” to the death benefit, did not apply, full stop.

If s.48(1) was rendered inapplicable, Ms. Quinn would not be entitled to the death benefit, even though she was also a “spouse” as defined in the *Pension Benefits Act* and was not living “separate and apart” from Mr. Carrigan. The Court then went on to find that, as there was no spousal entitlement, Mr. Carrigan’s designated beneficiaries, Mrs. Carrigan and his daughters, were entitled to the death benefit under s.48(6) of the *Pension Benefits Act*.

In his dissenting reasons, however, Justice LaForme held that the Act does not stop a person from effectively having two spouses with equal rights of entitlement to the death benefit. He also held that the Act clearly favours whichever spouse (whether married or common-law) was living with the pension-holder on the date of death. He would have dismissed the appeal.

The Supreme Court of Canada has recently denied leave to appeal, so this case now creates new law which provides that a common-law spouse’s entitlement to a pension member’s death benefit will be denied whenever that member has a previous legally

married spouse who the member was separated from but never divorced. This decision will result in more death benefits (in these kinds of circumstances) going to the person or persons designated as beneficiaries rather than to spouses.

### **Pensions – Ontario:**

#### ***Vladescu v. CTV Globe Media Inc.***<sup>168</sup>

In *Vladescu*, the deceased was a member of a pension governed by the federal *Pension Benefits Standards Act* (“*PBSA*”). He entered into a separation agreement in 2003 in which it was acknowledged that the wife would continue to be the sole and exclusive person entitled to his pre-retirement death benefit until his death, and that he would not do anything to change this. Specifically, the husband was required to attempt to negotiate a domestic contract or release with any future spouse in order to recognize the wife’s rights under the separation agreement.

After determining that the *PBSA* allows for an assignment of a pre-retirement death benefit, the issue was whether the wording of the separation agreement successfully effected an assignment.

Section 24(4) of the *PBSA* provides that,

*“a member or former member of a pension plan may assign all or part of their pension benefit, pension benefit credit or other benefit under the plan to their spouse, former spouse, common-law partner or former common-law partner, effective as of divorce, annulment, separation, or breakdown of the common-law partnership, as the case may be...”*

The Court held that the separation agreement was insufficiently clear to assign the pre-retirement death benefit to the former wife. Specifically, the paragraph of the separation agreement that required the husband to enter into a domestic contract with a

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<sup>168</sup> 2012 CarswellOnt 9252 (Ont. S.C.J.), aff’d 2013 ONCA 488, leave to appeal to SCC denied 2014 CarswellOnt 459.

subsequent spouse suggested that he had not assigned 100% of his interest away. The Court said that the subsequent spouse would have some right to the pension benefit if she did not give such release. This outcome was supported by the fact that the *PBSA* favours the interests of spouses who are cohabiting at the date of death.

Notably, the Court of Appeal upheld the lower court decision of *Vladescu* and the Supreme Court of Canada recently denied leave to appeal.<sup>169</sup>

The Court found against the two arguments put forth by the former wife: that the separation agreement assigned the deceased's pre-retirement death benefit to her, and that, alternately, the separation agreement constituted an equitable assignment. The Court of Appeal agreed with the lower court that the separation agreement was insufficiently clear and therefore did not assign the benefit to the former wife. The Court also found that, despite the inclusion of an irrevocable direction as a schedule to the separation agreement authorizing the pension plan to pay all survivor benefits to the former wife, the documents failed to show that the deceased intended to assign the benefit.

Interestingly, the Court of Appeal stated that if the deceased had not remarried the separation agreement along with the irrevocable direction, worded as they were, would have sufficed to render the first wife a beneficiary to the benefit in question.

Both decisions appear harsh in that the deceased's intentions and/or public policy were thwarted. In *Carrigan*, the deceased would have wanted to benefit his new spouse and the public policy of the *Pension Benefit Act* favours spouses with automatic benefits. In *Vladescu*, the deceased entered into a separation agreement that explicitly gave his former spouse his pre-retirement death benefit as part of a negotiated agreement.

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<sup>169</sup> *Vladescu v. CTV Globe Media Inc.*, 2013 ONCA 448, 2013 CarswellOnt 8683, leave to appeal to SCC denied 2014 CarswellOnt 459

What could the family lawyers and estate planners have done to protect their clients? In *Carrigan*, the husband or parties could have sought a divorce. Where married spouses separate, the divorce is no mere formality. It has a real, practical effect on the way that the deceased's pension benefits and other assets will be distributed. A separation agreement may arguably, go some distance towards avoiding these problems, but the lesson from *Vladescu* is that where a separation agreement deals with the assignment, waiver, or other reorganization of statutory rights and instruments (federal and provincial pensions, RRSPs, life insurance, etc.), it must be drafted with deliberate and exacting care to ensure that they meet with the specific requirements of the legislation and interpretive case law.

#### **Pensions – Ontario:**

##### ***Stanton v. Coughlin & Associates Limited*<sup>170</sup>**

In this more recent case of *Stanton v. Coughlin & Associates*, the Court struck a claim by a spouse of a pension member seeking survivor benefits, for disclosing no reasonable cause of action.

The plaintiff and the deceased were married in 1974 and separated in 2000. They entered into a separation agreement in 2004 but like the facts in *Carrigan*, never divorced. The separation agreement provided that neither would be entitled to share or receive benefits of any kind from any pension plan of the other, except that the survivor may receive survivor benefits if a deceased has not remarried nor designated another beneficiary.

The deceased was a member of a pension plan administered by Coughlin & Associates. Under the plan, the deceased had designated the plaintiff as the beneficiary of his pre-retirement pension benefits up until his retirement in 2006. He had not designated a beneficiary for his post-retirement benefits.

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<sup>170</sup> 2013 ONSC 7294.

In April of 2006 the Public Guardian and Trustee (“PGT”) was appointed as the deceased’s guardian of property pursuant to the *Substitute Decisions Act 1992*, S.O. 1992 c. 30 (“*SDA*”). On behalf of the deceased they submitted a retirement package to Coughlin & Associates stating that the plaintiff was a “former spouse” of the deceased as he had terminated his relationship with the plaintiff “due to legal separation”.<sup>171</sup> As part of the retirement package the PGT opted for a single life annuity with a ten year guarantee period which terminated on the death of the member. The deceased died in 2011 without having remarried.

In her Statement of Claim the plaintiff sought an order declaring that she was entitled to a survivor’s pension for life. She alleged that the PGT incorrectly identified her as a “former” spouse when in fact she was still the deceased’s spouse. She also alleged that the PGT should not have elected a single life annuity which in effect changed the beneficiary designation, which the plaintiff claimed the PGT could not do. The plaintiff also alleged that since the deceased had not remarried nor changed his beneficiary designation she was entitled to survivor benefits.

The defendants, Coughlin & Associates and the PGT, brought a motion to have the plaintiff’s Statement of Claim struck for disclosing no reasonable cause of action. They relied on section 44(4) of the *Pension Benefits Act*, R.S.O. 1990 c.P. 8 (“*PBA*”) to argue that a claim that the plaintiff was an eligible spouse could not succeed. Sections 44(1) and (4) of the PBA state:

44(1) Every pension paid under a Pension Plan to a retired member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension.

44(4) Subsection (1) to (3.1) do not apply, . . . (b) in respect of a retired member who is living separate and apart from his or her spouse on the date that payment of the first instalment of the pension is due.

Mackinnon J. reviewed the case of *Carrigan* and concluded that “to have a statutory

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<sup>171</sup> *Stanton v. Coughlin & Associates Limited*, 2013 ONSC 7294 at para. 5.

entitlement to a mandatory joint and survivor pension, the employee must have a spouse at the time of retirement, the spouses must not be separated on the date the first instalment of the pension is due and the spouse must survive the employee.”<sup>172</sup>

The Court held that the plaintiff and the deceased were living separate and apart at the relevant time and accordingly section 44(1) was inapplicable to the plaintiff. His Honour went on to conclude that this left the PGT with the ability to choose the annuity it believed to be best for the deceased, as the PGT only owed a duty to the deceased and was authorized to do anything on the deceased’s behalf in respect of his property that he could have done himself, if capable, except make a will.<sup>173</sup> The PGT did not owe any private law duty of care to the plaintiff as alleged in the Statement of Claim. The Court also concluded that the PGT had not changed a beneficiary designation but had selected a single life annuity. As there was no designated beneficiary the present value remaining was payable to the deceased’s estate.

Ultimately the Statement of Claim was struck as disclosing no cause of action; however, the Court granted leave to the plaintiff to deliver a fresh Statement of Claim against Coughlin & Associates only, within 20 days. His Honour granted this leave based on the plaintiff’s oral argument that under the terms of the Pension Plan at the applicable time, the definition of spouse was such that the requirement was mandatory to provide a joint and survivor annuity where the member and his or her spouse were living separate and apart on the member’s date of retirement. The plaintiff also argued that the plan administrator, Coughlin & Associates owed a duty of care to members’ spouses. As neither of these arguments were “adequately developed before the court” Mackinnon J. granted leave to deliver the fresh Statement of Claim developing these allegations more fully, subject to the ability of Coughlin to plead a limitation defence.<sup>174</sup>

As this is a recent case there are no further reported decisions in this matter. It will be

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<sup>172</sup> *Stanton v. Coughlin & Associates Limited*, 2013 ONSC 7294 at para. 16.

<sup>173</sup> *Stanton v. Coughlin & Associates Limited*, 2013 ONSC 7294 at para. 17.

<sup>174</sup> *Stanton v. Coughlin & Associates Limited*, 2013 ONSC 7294 at paras. 21-23.



interesting to see if the newly drafted Statement of Claim will stand and whether the plaintiff will be successful with her arguments, especially whether or not a pension administrator owes a duty of care to members' spouses.

### **Pension Benefits – Nova Scotia:**

#### ***MacEachen v. Minnikin***<sup>175</sup>

This case from Nova Scotia examines a dispute between the second and third wives of the deceased over the enforcement of a clause in a separation agreement that the deceased executed with his second wife dealing with the deceased's pension from Canada Post Corporation.

After the deceased died, the second wife, Paula, received his pension benefit and the third wife, Frances, brought a claim arguing that she was the rightful beneficiary. Frances argued that the separation agreement between the deceased and Paula, required Paula to "execute any and all documents in order to release herself as a beneficiary of the [pension] of which [the deceased] was a member, to allow instead the new wife of [the deceased] to become the beneficiary." As Frances was not a party to the separation agreement, or the divorce, she brought a claim rooted in unjust enrichment seeking a remedy of constructive trust over the pension funds.

The Court found that the deceased had taken steps to change the beneficiary designation on his *insurance policy* but did not take any steps to change the beneficiary designation on his *pension*. The Court concluded that "he made no request to Ms. Minniken (the second wife) that she execute the documents referred to in Clause 17 of the Separation Agreement". The deceased was left in control of who would be designated as beneficiary of his pension once he remarried, despite the wording in the separation agreement. Changing the designation involved taking concrete steps. He did

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<sup>175</sup> 2014 NSSC 47

not take those steps.<sup>176</sup>

The Court dismissed the unjust enrichment claim brought by the third wife against the second wife as there was “no enrichment” (the third wife did not give anything to the second wife), “no corresponding deprivation” (there was no deprivation brought by the actions or inactions of the second wife) and there was juristic reason for the second wife to retain the benefit (she was the validly designated beneficiary).

### **Beneficiary designations – Ontario: *Petch v. Kuivila***<sup>177</sup>

The testator’s Will included a declaration making the woman he would later marry a beneficiary of his life insurance policy. However, their later marriage revoked the Will and, as a result, the life insurance beneficiary designation in her favour. A dispute arose between her and the deceased’s sister, who was the previous designated beneficiary on file with the insurance company.

The court was asked to decide as follows: a) whether the beneficiary designation reverted to the one filed with the insurance company; or b) whether there was no valid beneficiary designation having the effect of the insurance proceeds falling into the deceased’s estate.

The Court held that an insurance declaration made in a will in accordance with s. 171(1) of the *Insurance Act*, R.S.O. 1990, Chapter I.8<sup>178</sup>, is effective as of the date it is made. At the moment the Will is signed, the declaration permanently revokes any previous beneficiary designations. If the Will is later revoked by marriage, its declaration of beneficiary designation is also revoked. However, this does not change the fact that the declaration was valid and effective as of the time the Will was signed. Therefore, the result is that the deceased was left without any beneficiary designation at all and the insurance proceeds fell into his estate, as his wife had argued.

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<sup>176</sup> 2014 NSSC 47 at para. 35.

<sup>177</sup> 2012 CarswellOnt 13859 (S.C.J.)

<sup>178</sup> *Ontario Insurance Act, R.S.O. 1990, Chapter 1.8*

The backdrop of this case and the choice of the wife's strategy are interesting. The wife could have elected under section 16(b) of the *SLRA* to take under the Will. That section provides that, where a Will is revoked by marriage, the married spouse can revive it by filing an election within one year of death. Had the wife done this, she would have received one-half of the life insurance proceeds (the deceased had named his son from a previous relationship as co-beneficiary with her in his will). By not so electing and by treating the Will as revoked, the wife successfully had 100% of the insurance proceeds become an asset of the estate, which presumably benefited her in her inheritance upon intestacy (the court did not discuss the assets of the estate). This was a risky yet arguably effective strategy.

**Beneficiary designations – Ontario: *Littlechild Estate v. Littlechild*<sup>179</sup>**

The deceased wrote his partner, with whom he had a tumultuous relationship, out of his Will and named his sons as his beneficiaries instead. At the same time, he designated his sons as the beneficiaries of a London Life segregated fund. However, mere days before he died by his own hand, he made a new Will naming his partner as his sole beneficiary. The Will contained a clause changing the designated beneficiary of any RRSPs he owed to his partner.

The issue was whether the RRSP designation clause in the Will was effective in changing the designated beneficiary of the London Life investment. Specifically, the question was whether the London Life investment was an insurance policy governed by the *Insurance Act* or an RRSP governed by Part III of the *SLRA*.

The evidence was that the London Life investment was a segregated fund, which was a policy of life insurance contingent on the death of the deceased, but was also set up as a deferred annuity and structured as an RRSP. Therefore, the investment was more properly characterized as an RRSP, with the result that the RRSP designation clause in the will was effective. The court examined evidence of the intention of the deceased and

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<sup>179</sup> 2011 CarswellOnt 15283 (Ont. S.C.J.)

confirmed that he had in fact intended the partner to receive the proceeds of the London Life investment.

In this case, the testator took steps to put in place an appropriate estate plan and, assuming that the court properly interpreted his intentions, the plan was successfully implemented after death. However, this came at the price of litigation. This case serves as a reminder that expectant beneficiaries in complex families may use any perceived weakness to their own advantage. It pays to be extremely diligent when identifying the kind of assets that the client holds and ensuring that the Will appropriately deals of them.<sup>180</sup> Unfortunately, there does not seem to have been any mention of the deceased's solicitor's state of knowledge of the investment at issue.

### **Beneficiary designations – Alberta: *Perry v. Perry*<sup>181</sup>**

This Alberta case is just one instance of the common but harsh effect on a surviving subsequent spouse where a deceased who paid support secured by a life insurance policy fails to change the designated beneficiary once the spousal support terminates.

The deceased had entered into a separation agreement with his wife that included a provision that he pay spousal support and obtain a policy of life insurance with the wife designated as irrevocable beneficiary. The husband obtained an order terminating spousal support, although the order was silent about life insurance. He never changed the policy's beneficiary designation, but he continued to pay the premiums. The deceased remarried and some years later died intestate without having changed the beneficiary designation. His surviving spouse claimed that the \$144,000 life insurance proceeds should be paid to the estate.

The Court considered three different grounds on which the courts have redirected the proceeds of a life insurance policy to a person other than the designated beneficiary: 1)

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<sup>180</sup> For another recent example of an ambiguous provision that resulted in a dispute in a complex family, see *Dice v. Dice Estate*, 2012 CarswellOnt 8608, 2012 ONCA 468, 111 O.R. (3d) 407, 217 A.C.W.S. (3d) 748, 293 O.A.C. 190, 78 E.T.R. (3d) 105.

<sup>181</sup> *Perry v. Perry (Estate)*, 2009 ABQB 687 (CanLII)

the deceased may have revoked the beneficiary designation by taking the steps set out in the applicable insurance legislation; 2) the Court may rectify the beneficiary designation if there is clear evidence that it does not reflect the true intention of the insured; and 3) the Court may impress the insurance proceeds with a trust to give effect to an agreement or for other reasons.

In this case, none of the grounds were applicable. Although there were some general statements that the deceased wanted to change the beneficiary designation, these were not “clear and express” declarations to revoke the designation and identify the particular policy in question, both of which were necessary under the applicable section of the *Insurance Act*.<sup>182</sup> Rectification was impossible because there was no evidence that the deceased formed a clear intention to change the beneficiary designation or that there was a clerical error in carrying out the intention. The proceeds were not impressed with a remedial trust because there was no agreement and no unjust enrichment: the releases in the separation agreement were too general to waive a right to the life insurance proceeds and the beneficiary designation itself was a juristic reason for the enrichment.

In the result, the former spouse received a windfall and the surviving spouse was left empty-handed.

### **Beneficiary Designation – Saskatchewan:**

#### ***Love v. Love***<sup>183</sup>

The Saskatchewan Court of Appeal, in *Love v. Love* used equity and the doctrine of rectification to give effect to the true intentions of a deceased who improperly filled out a beneficiary change form.

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<sup>182</sup> R.S.A. 2000, c. I-5, s. 259.

<sup>183</sup> *Love v. Love*, 2013 SKCA 31

The deceased married in 1976 and had four children with his wife. He was insured through his employment under a group insurance policy, with his wife as the beneficiary. The deceased and his wife divorced in 2006 and entered into a separation agreement, which purported to deal with all spousal support claims and property division issues. The agreement did not directly deal with the deceased's insurance policy but stipulated that the wife surrendered all claims she may have against the deceased's pension.

Following his divorce the deceased sent an email to his employer's human resources manager stating that "*due to his divorce*" he "*would like to change the beneficiary on [his] pension etc. (from [his] former wife to [his] son)*". The deceased filled out some portions of a group coverage change form but not all. While the section to change the beneficiary designation was left blank the deceased wrote "*From Love, Lori M. (his wife) to Love, Thomas (his son)*" under the section to be completed if the beneficiary had a legal name change. He did not sign the form. After he died in 2009, the partially completed unsigned form was found in his employee file at work.

Following the deceased's death, both the wife and the son submitted a claim report, each stating they were the beneficiary of the life insurance proceeds

### **The Queen's Bench Decision**

The Chambers Judge found that the wife had originally been properly designated as the beneficiary, the change of beneficiary form did not effect a change in beneficiary, the separation agreement did not change the beneficiary, the doctrine of unjust enrichment did not assist the son and the doctrine of rectification had no application.<sup>184</sup>

### **Appeal**

On appeal the Court reversed the trial judge's reason by finding that the doctrine of rectification was applicable (dismissing the rest of the grounds of appeal). The son argued that, in light of the error made by his father in completing the change form, the

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<sup>184</sup> 2011 SKQB 176.

form should be amended to give effect to his father’s intention to designate his son as his beneficiary. By relying on equity and the doctrine of rectification the Court of Appeal agreed. The Court observed that “there can be absolutely no doubt” that the deceased intended to change his beneficiary designation to his son: he thought he was filling out the form correctly, it was clear he was trying to advise that he was changing the beneficiary from his wife to his son, and he submitted the form to his work. The Court found that “he took all of the steps which, from his perspective, were necessary to give it full legal effect”. The Court also noted that both the deceased’s employer and insurance company accepted the change form as valid for the purposes of changing his coverage to “single coverage” and removing his wife as a dependant.

The Court dealt with the lack of signature issue by finding that the handwriting on the form was authenticated as the deceased’s and both his employer and the insurance company were prepared to act on it notwithstanding that it was not signed. The Court ordered that the change form be amended to indicate that the beneficiary was the son and all insurance proceeds under the policy, along with accrued interest, were payable to the son.

### **Beneficiary Designation – British Columbia:**

#### ***Wilson v. Wysoki***<sup>185</sup>

A case with similar facts but a different outcome is the case of *Wilson v. Wysoki*. In this case, the deceased committed suicide shortly after settling his divorce proceeding. The settlement was documented by a final order which dismissed any and all claims the wife had to any pension or pension benefits of the husband. After the husband’s death the wife discovered that she was still the named beneficiary for her ex-husband’s pension benefits and claimed entitlement to the proceeds. The executor of the estate sought a

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<sup>185</sup> 2014 BCSC 675.

declaration that the wife was unjustly enriched and that she held the funds in trust for the estate.

The wife testified that she had seen her ex-husband on three separate occasions after the divorce settlement and each time warned him to change his beneficiary designation. On the third occasion she testified that he said words to the effect “It’s all done, I’m happy with it” and he put his hands up to indicate he did not want to talk about it anymore. The evidence showed he did attend his employer’s office and signed a “Benefit Application and Change” form and changed the beneficiary from his ex-wife to his friend (and executor), but that form only related to the benefits available to him from his employer and not the union pension. The executor argued that the failure to change the pension beneficiary was an oversight and that the deceased’s true intention was that the executor should be entitled to those benefits, not his ex-wife. The deceased had removed his ex-wife as beneficiary under his employer benefits and his will specifically excluded his wife. Furthermore, the executor’s evidence showed that the deceased felt “bitter and angry” toward his ex-wife and “dreaded” seeing her.

Justice Bracken concluded that there was no unjust enrichment in this case:

*Whether or not Mr. Wilson intended to make a change to the beneficiary under his pension, he did not do so prior to his death. The defendant remained the validly designated beneficiary and thus took the benefit by disposition of law. Following the analysis as set out in Kerr, that is the end of the matter. Although perhaps an unfortunate outcome, the plaintiff has failed to prove that the enrichment is “unjust” as defined in law. Therefore, the plaintiff’s claim must be dismissed.*<sup>186</sup>

### **Proprietary estoppel – Ontario:**

#### ***Cowderoy v. Sorkos Estate***<sup>187</sup>

Gus Sorkos – the husband in *Sorkos v. Sorkos Estate, supra* – had no children of his

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<sup>186</sup> 2014 BCSC 675 at para.44.

<sup>187</sup> 2012 CarswellOnt 6857 (Ont. S.C.J.), 2012 ONSC 1921.



own. He considered his first spouse's grandchildren to be his own and they considered him to be their grandfather. He promised them that if they worked to maintain his farm and cottage, whenever and however he asked, that he would leave these properties to them in his will. The evidence showed that the grandchildren carried out their end of the bargain: they were available whenever asked and carried out extensive work on the farm and cottage over the course of many years. They had also helped Gus with his business ventures. The Court found, for example, that one of the grandchildren had put in over 2000 hours of unpaid work to help Gus with one of his businesses.

In 2001, Gus's wife, the grandmother of the grandchildren, died. In 2002, Gus remarried a woman he had known in his youth in Greece. His will had previously left the bulk of his estate to the grandchildren. However, after he remarried, he reduced the bequests to the grandchildren to token legacies.

Gus made representations and the grandchildren relied on them in ordering their lives to their detriment. Having received the benefit of his promises, the withdrawal of the benefit was considered by the court to be unconscionable. *Quantum meruit* would not adequately compensate the grandchildren. They were entitled to the farm and cottage properties on the basis of proprietary estoppel.

The lessons from this case are simple to state and difficult to apply. Simply put, people will be held to their promises to make testamentary gifts, at least with respect to land (although compare gifts *mortis causa* per statute), if the promises induce detrimental reliance and the promised gifts are unconscionably withdrawn.

From a planning perspective, individuals who have made these kinds of promises may think that they still have the discretion about whether to make good on them. When making a Will, they may not think to disclose the circumstances to their lawyer. Perhaps the simple question: "have you already told anyone that they can expect to get something from you when you die?" might elicit an answer that the estate planner could

probe. This will be an interesting area of law to watch develop in Ontario.<sup>188</sup>

**Proprietary estoppel – Ontario: *Clarke v. Johnson***<sup>189</sup>

Although this case did not involve an estate dispute, it is another excellent example of the power of the equitable claim of proprietary estoppel in claims arising out of the breakdown of marriages.

In this case, Mr. Clarke and his wife built a cottage on an island owned by the wife's family. The wife's family advanced some of the funds to build the structure and eventually forgave the loan. The marriage came to an end in 1991 and the wife stopped using the cottage. Mr. Clarke, often with the children from their marriage, continued to use the cottage with the wife's family's permission. On an ongoing basis, Mr. Clarke paid for all of the maintenance and improvements to the property. Twenty years later, a dispute arose and the wife's family issued a trespass notice to Mr. Clarke. He sued on the basis of proprietary estoppel and/or unjust enrichment and sought the continued occupation of the property.

The court held that Mr. Clarke was successful on the basis of both unjust enrichment and proprietary estoppel. With respect to unjust enrichment, Mr. Clarke was instrumental in constructing the cottage and paid its expenses for twenty years. This enriched the wife's family and, if he were forbidden from accessing the cottage, would amount to a corresponding deprivation to him, especially since he reasonably expected the use of it until he died. The court rejected the wife's family's defence that there was no deprivation because they advanced the funds for the original construction. First, the loan to Mr. Clarke had been forgiven, so there was no actionable debt to recover it. Second, the original construction price is far exceeded by the value of the whole property at the date of trial. There was no juristic reason for the deprivation.

The court then relied on the three-part test for proprietary estoppel that the Ontario

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<sup>188</sup> For a notable and recent BC case, see *Sabey v. Von Hopffgarten Estate*, 2013 BCSC 642.

<sup>189</sup> 2012 ONSC 4320 (S.C.J.)

Court of Appeal set out in *Schwark Estate v. Cutting*.<sup>190</sup> The court found that the wife's family induced, encouraged or allowed Mr. Clarke to believe that he would enjoy the right to the property until he died. Mr. Clarke relied on this belief when he made significant contributions to the maintenance and improvement of the property. It would be unconscionable to allow the wife's family vacant possession, which would give her the right to use it herself or rent it out.

This case will be especially helpful to parties who claim an interest in recreational property because of this rather romantic observation in the reasons:

*The attachment between a person and his or her camp is unique and not easily described. Over time there comes to be an emotional attachment borne of the surrounding beauty, the investment of sweat equity, and the memories of times spent with family and friends. When one has been allowed to develop that attachment over the course of decades, and has directed personal and financial resources to the property in the reasonable belief that it would continue, it is unconscionable to deny that benefit.*

The court crafted an interesting remedy. It found that a monetary remedy would be inadequate given the link between the Mr. Clarke's contribution and the property itself. It awarded Mr. Clarke a constructive trust over the property. However, this took the form of a personal licence to occupy the property for life on condition that it be kept in a state of good repair, that he pay all taxes and costs, and that he not materially alter the nature or quality of the property. After his death or the breach of the conditions, the property would revert to the wife's family.

Recently, the Ontario Court of Appeal dismissed an appeal of this matter and upheld the trial judge's finding of proprietary estoppel and unjust enrichment.<sup>191</sup> Justice Pepall, writing on behalf of the court, provided a helpful summary of the historical and modern approaches to proprietary estoppel.<sup>192</sup> In commenting on the trial judge's remedy,

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<sup>190</sup> 2010 ONCA 61

<sup>191</sup> *Clarke v. Johnson*, 2014 ONCA 237

<sup>192</sup> *Clarke v. Johnson*, 2014 ONCA 237 at paras. 40-53

Justice Pepall had this to say:

He was mindful of the context of the case that unfolded before him over the course of a three-day trial and strove to accommodate the parties' expectations. His choice of remedy represented the minimum equity to do justice in the circumstances. The respondent would not be entitled to the rights of an owner including the right to devolve the camp as part of his estate. Rather, consistent with expectations, he could regulate use during his lifetime or until he could no longer attend at the camp.<sup>193</sup>

### **Proprietary Estoppel – British Columbia - *Scholz v Scholz*<sup>194</sup>**

In the BC decision of *Scholz v. Scholz*,<sup>195</sup> the British Columbia Court of Appeal issued a unanimous decision upholding the decision of the British Columbia Supreme Court.<sup>196</sup> Madam Justice Neilson, writing for the court, on issues of constructive trust, resulting trust and of particular note, proprietary estoppel.

In 2001, the appellant, Ruth Scholz (“Mrs. Scholz”) had built a coach house on the property of her son, Michael Scholz (“Michael”) and daughter in law, Carolyn Scholz (“Carolyn”). Michael and Carolyn had bought the property in 1998, and then built their own house on that land in 2001. As Mrs. Scholz was, at that time, recovering from hip surgery and requiring additional help, Carolyn and Michael invited her to build a coach house that she could live in on their property. Mrs. Scholz paid approximately \$94,000.00 to build the home and lived there until 2011. To help Mrs. Scholz, Carolyn and Michael arranged and paid for nannies who provided meals and household support to Mrs. Scholz.

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<sup>193</sup> *Clarke v. Johnson* 2014 ONCA 237 at para. 81

<sup>194</sup> *Scholz v Scholz*, 2013 CarswellBC 1956, BC Court of Appeal , 2013

<sup>195</sup> 2013 BCCA 309 (CanLII) <http://canlii.ca/en/bc/bcca/doc/2013/2013bcca309/2013bcca309.html>

<sup>196</sup> 2012 BCSC 1172

<http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc1172/2012bcsc1172.html?searchUrlHash=AAAAAQAGc2Nob2x6AAAAAAE>

In 2007, Michael and Carolyn bought another property where they planned to build a home. They initially planned to build a self-contained unit in that home for Mrs. Scholz, but those plans fell apart. In 2011, Michael and Carolyn listed their home (with the coach house) for sale. They accepted an offer of approximately \$3,000,000.00. Arrangements were made for Mrs. Scholz to move into an apartment and Carolyn and Michael moved Mrs. Scholz's belongings to the apartment – albeit without her knowledge and while she was on vacation with her daughter.

Mrs. Scholz asked Carolyn and Michael for a share of the proceeds of sale of the house, in light of the fact that she had expended funds to build the coach house. Michael and Carolyn refused and Mrs. Scholz brought an action against them and filed a certificate of pending litigation on the property, on the basis that there had been an oral agreement that Mrs. Scholz would obtain an interest in the coach house and the land on which it was built. Mrs. Scholz also claimed resulting trust and constructive trust.

At trial, the judge dismissed Mrs. Scholz's claims of resulting trust, constructive trust and proprietary estoppel.

On the issue of resulting trust, Justice Saunders found that the components of a resulting trust were not found in the case. He found that Mrs. Scholz had not made a contribution to the purchase price of the property itself, nor was there any agreement between the parties that Mrs. Scholz was to receive an ownership interest in the land. Rather, Justice Saunders, held that the evidence showed that Mrs. Scholz had intended her son and daughter in law to hold the value of the coach house in trust for her as it depreciated through the years she lived there.

As for constructive trust and unjust enrichment, Mr. Justice Saunders could find no evidence that there had been an "enrichment" or increase in the value of the property due to the presence of the coach house.

On the issue of proprietary estoppel, the trial judge held that there was nothing in the evidence to support a finding that Mrs. Scholz could have reasonably expected to share in the profit of the prospective sale of the property.

Still, despite determining that there was no recourse to these equitable remedies, Justice Saunders turned to the decision of Lord Denning in *Hardwick v. Johnson*<sup>197</sup> and found that the facts supported a finding that there was a family relationship with an implicit legal agreement. That agreement would see Mrs. Scholz receive a “fair measure of compensation upon termination of her occupation of the Coach House. The most reasonable mechanism, and one which I find appropriate to impute to the parties, is that the value of the Coach House would be viewed by them as depreciating at a fixed rate on a declining balance, from year to year....”<sup>198</sup> Justice Saunders set the appropriate rate of depreciation at 10%, which would see Mrs. Scholz receiving from her initial input of \$94,000.00, approximately \$36,756.00.

Mrs. Scholz appealed the decision of Justice Saunders.

In reviewing Justice Saunders’s decision, the Court of Appeal noted that the rulings on resulting trust, constructive trust and proprietary estoppel were findings of fact such that they attracted a high degree of deference. Neilson J.A. considered whether there were errors in Justice Saunders’s findings such that they could be overturned.

Neilson J.A. found no error on the issue of resulting trust in that there was no evidence that Mrs. Scholz had transferred property to Michael and Catherine, had not contributed to the purchase price of their property and had not intended to acquire an ownership interest in the house. As for the claim of constructive trust, Justice Neilson held that there was no error in Justice Saunders’s ruling, on the basis that “there was no evidence the respondents had been unjustly enriched by the presence of the coach

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197 [1978] 2 All E.R. 935, [1978] 1 W.L.R. 683 (C.A.)

198 At paragraph 33

house on their property...”<sup>199</sup>

On the proprietary estoppel claim, Neilson J.A. found again there was no error on Justice Saunders’s part. Justice Neilson made reference to the British Columbia Court of Appeal’s decision in *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*<sup>200</sup> Neilson J.A. summarizes a three-part test respecting proprietary estoppel from that case as follows:

..First, did the respondents as the owners of the legal right to the property do something to encourage the appellant to believe they did not intent to rely on their right? Second, has the appellant acted to her detriment because of that? Third, would it be unconscionable for the respondents to go back on the assumption they have allowed the appellant to make?<sup>201</sup>

On her review of the facts and the test, Neilson J.A. notes that the trial judge held that the case did not support a finding that there was a reasonable expectation that Mrs. Scholz would share in the profits from the sale of the property in the future.

Furthermore, Justice Neilson concluded that Mrs. Scholz benefited from the living arrangement (by not paying for rent or utilities, and by receiving other support from the couple) such that any claim of detrimental reliance could not be made out. Neilson J.A. also noted that any claim that Mrs. Scholz would have made other living arrangements if she had known she was not to receive a share of the future sale price, was not supported by evidence on the record. And so, the Court of Appeal upheld the trial judge’s finding that proprietary estoppel does not apply in this case.

The Court of Appeal was then asked to consider whether the rate of 10% depreciation was in error. Justice Neilson held that the characterization of a “legal relationship on a family relationship” was appropriate and that the decision was a proper exercise of judicial discretion in the interest of fairness. The Court of Appeal therefore deferred to

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<sup>199</sup> At paragraph 27

<sup>200</sup> 2003 BCCA.197 (CanLII) [hereinafter *Tretheway*]

<http://www.canlii.org/en/bc/bcca/doc/2003/2003bcca197/2003bcca197.html?searchUrlHash=AAAAQAQdHJldGhld2V5IGR5a2luZwAAAAAB>

<sup>201</sup> At paragraph 31; cite to paragraphs 64 to 73 of *Tretheway*

the trial judge on this count as well, and declined to alter the rate of depreciation. As a result, Mrs. Scholz was unsuccessful in claiming constructive trust, resulting trust or proprietary estoppel in respect of the coach house she built and paid for on her son's property. The trial judge, however, did reach out to find a remedy for Mrs. Scholz, by relying on its discretion, and the reasoning of Lord Denning in *Hardwick v. Johnson* to find that legal duties flowed from the family's relationship. While the outcome was short of what Mrs. Scholz originally sought, the court was able to find at least a partial remedy which was ultimately upheld by the Court of Appeal.

### **Predatory Marriage – Ontario**

#### ***Juzumas v Baron***<sup>202</sup>

A “predatory marriage” case worth reviewing in detail is the case of *Juzumas v. Baron*. The facts of this case have all the hallmarks of a predatory marriage: Mr. Juzumas is an older adult who comes into contact with an individual who, under the guise of “caretaking”, takes steps to fulfill more of the latter part of that verb. The result: an older person is left in a more vulnerable position than that in which they were found.

Mr. Juzumas, was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbor described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years. Once a “lovely and cheerful” gentleman, the plaintiff was later described as being downcast and “downtrodden” after the defendant infiltrated the plaintiff's life.

The defendant “befriended” the respondent in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff's initial reluctance. The defendant was aware that the plaintiff lived in fear that he would be forced to move away from his home into a facility. She offered to provide him with services to ensure

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<sup>202</sup> 2012 ONSC 7220.



that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other reason related to his money or property. She promised to live in the home after they were married and to take better care of him. Most importantly, she undertook not to send him to a nursing home as he so feared. The plaintiff agreed.

The defendant testified that the plaintiff had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest. Justice Lang found otherwise.

The defendant, who had been married approximately 6-8 times (she could not remember the exact number), had previous "caretaking" experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable.

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff's house (\$600,000) or the possibility of a marriage contract. Interestingly, the lawyer did not meet with the plaintiff without the defendant being present.

After the wedding ceremony, which took place at the defendant's apartment, she dropped him off at a subway stop so that he would take public transit home alone. The

defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant's promise that she would provide better care to the plaintiff if they married, the plaintiff's tenant and neighbor, who were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "abusive', 'controlling' and 'domineering'".

With the help of a plan devised over the course of the defendant's consultation with the lawyer who had drafted the plaintiff's Will made in contemplation of marriage, the defendant's son drafted an agreement which transferred the plaintiff's home to himself. The "agreement" acknowledged that the plaintiff did not want to be admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.

The plaintiff, the defendant and her son attended the lawyer's office in order to sign the agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that overall his evidence indicated that it had not been explained to the client with sufficient discussion, or understanding the consequences of the transfer of property and moreover, that he was in the court's words "virtually eviscerating the Will he had executed only one month earlier..."; that he did not meet with the plaintiff alone; and only met with the parties for a brief time. Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. In fact, it seems the lawyer was under the impression that the defendant, and not the plaintiff, was the vulnerable party.

The lawyer's notes indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction. In addition, Justice Lang found that the plaintiff had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on testimonial evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff.

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "wife" would appear. The lawyer explained to the plaintiff that the transfer could not be reversed because it was "in the computer."

In considering the transfer of property, Justice Lang applied and cited McCamus' Law of Contracts, which outlines a "cluster of remedies" that may be used "where a stronger party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement." Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: "if any of these doctrines applies, the weaker party has the option of rescinding the agreement."

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an

exercise of independent free-will, which can be demonstrated by evidence of independent legal advice or some other opportunity given to the vulnerable party which allows him or her to provide “a fully-informed and considered consent to the proposed transaction.”

As for the doctrine of unconscionability, Justice Lang stated that the doctrine “gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power.” The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

The defendant also made a claim of quantum meruit for services rendered. Justice Lang denied this claim as before the marriage the defendant undertook the care without an expectation or promise of remuneration and no remuneration was warranted. While Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff for care post-marriage, and that the plaintiff had agreed to do so, Justice Lang denied the defendant’s claim. Justice Lang relied on the equitable principle that restitutionary relief allows a court to “refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable.” In considering this principle, Justice Lang found that the defendant had “unclean hands” and that “the magnitude of her reprehensible behaviour is such that it taints the entire relationship.” Substantial costs were awarded in favour of the older adult plaintiff.

This case provides helpful guidance in the use of both contract law and equity to remedy the wrongs associated with predatory marriages. Also of note in this case, it is not a family member or acquaintance who brought the case before a court after the vulnerable adult’s assets had already been depleted, but rather, the older adult himself who, with the help of his neighbor, was able to seek justice and reverse some of the defendant’s wrongdoing. This case also demonstrates the usefulness of presenting the testimony of an older adult when it is possible and appropriate.

## **New York State**

Other jurisdictions have seen an increase in these predatory marriage cases as well. The New York case of *In the Matter of Berk*<sup>203</sup> looked at whether a spouse has a right to his or her elected statutory share of a deceased spouse's estate even if the marriage was the result of fraud, undue influence or the incapacity of one of the parties.

The facts are very similar to that of Juzumas, where a caretaker convinced a vulnerable older adult, who was dependant upon her, to marry her. The caretaker (who was abusive and domineering) kept the marriage a secret from the older adult's children (from a previous marriage) until the older adult died and she brought an application seeking her elected share of his estate, as she was left nothing in his will. A motion court granted her summary judgment motion declaring that as she was a spouse she was entitled to her elected share as a "right". The Court of Appeal however found that the summary judgment motion should not have been granted as there was a triable issue: "did the caregiver forfeit her statutory right of election?":

In opposing the petitioner's motion for summary judgment on the petition, the decedent's sons tendered evidence from which a trier of fact could properly determine that the petitioner, 'knowing that a mentally incapacitated person [was] incapable of consenting to a marriage, deliberately [took] unfair advantage of the incapacity by marrying that person for the purpose of obtaining pecuniary benefits that become available by virtue of being that person's spouse, at the expense of that person's intended beneficiaries.' (*Campbell v. Thomas* A.D. 3d 897 N.Y.S. 2d 460) Should the trier of fact so determine, equity will intervene to prevent the petitioner from becoming unjustly enriched from her wrong doing as a court cannot allow itself to become an instrument of wrongdoing."

This case, and the similar case of *Campbell v. Thomas*<sup>204</sup> which the New York Court released concurrently, raise the possibility of other remedies for predatory marriages in Canada, including possibly the defence of *ex turpi causa non oritur actio* (no right of action arises from a base cause). This maxim acts as a defence to bar a plaintiff's claim where the plaintiff seeks to profit from acts that are "anti-social" [*Hardy v. Motor*

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<sup>203</sup> 2008 NY Slip Op 28247 [20 Misc 3d 691]

<sup>204</sup> *Campbell v. Thomas* A.D. 3d 897 N.Y.S. 2d 460

*Insurer's Bureau* (1964) 2 All E.R. 742]; or “illegal, wrongful or of culpable immorality” [*Hall v. Hebert* 1993 2 S.C.R. 159] in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. Arguably, the unscrupulous, should not be entitled to financial gain arising from the “anti-social” or “immoral” act of a predatory marriage.

### **Predatory Marriage – British Columbia - *Ross-Scott v. Potvin***

*Ross-Scott v. Potvin*<sup>205</sup> illustrates the difficulties of attacking the validity of a marriage after the death of the vulnerable adult. The only surviving relatives of the deceased, Mr. Groves, sought an order annulling Mr. Groves’s marriage on grounds of undue influence or, in the alternative, lack of capacity. They also argued that various inter vivos transfers and testamentary instruments were invalid on the same grounds. Justice Armstrong applied the common law standard for capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability.

Mr. Groves was a 77 year-old retired civil engineer when he married the Respondent, Ms. Potvin, who was then 56 years old. They were neighbors. Mr. Groves was reclusive and did not socialize; he met Ms. Potvin in 2006 when he delivered a piece of her mail that he had received by mistake. They married in November of 2009. Mr. Groves died a year later, in November of 2010.

The applicants are his niece and nephew, and his only living relatives. They lived abroad and had not seen the deceased for 25 years.

In 2007, shortly after he had met Ms. Potvin, Mr. Groves instructed a solicitor to prepare a will which named one of the applicants, Nigel Scott-Ross, as the executor and trustee of his estate. The proposed will split the estate equally between Nigel and his sister and co-applicant. Mr. Groves contacted that solicitor 4 months later and said that he wanted to leave the will for about six months.

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<sup>205</sup> 2014 BCSC 435

In June of 2008, Mr. Groves contacted a new solicitor, instructed the new solicitor to prepare a new will and executed the will in the same month. The will included provisions that granted his car, space heater, and rugs to Ms. Potvin, and divided the rest of his estate between the applicants and two charities.

Four months later, in October of 2008, Mr. Groves retained his third solicitor, Mr. Holland, and executed another will which named Ms. Potvin as his executor and trustee, and divided the estate between the applicants, Ms. Potvin, and one charity. In July of 2009, Mr. Groves executed yet another will that divided his estate in two equal shares; one share for Ms. Potvin and one for the applicants.

By September of 2009, Mr. Groves's health problems, which had first presented themselves to his doctor in 2007, had grown more serious.

In November of 2009, Mr. Groves and Ms. Potvin were married. They made no announcements or public notice, and they took no pictures. Mr. Groves then put his car in Ms. Potvin's name, converted his bank accounts to joint accounts with her, and gave her \$6,000 to assist her with her mortgage.

When Mr. Holland learned of the marriage a few months later, he called Mr. Groves and informed him of the impact of the marriage on Mr. Groves's will. Mr. Groves executed a new will that gave the applicants \$10,000 each and left the rest of his estate to Ms. Potvin.

Mr. Groves died in November of 2010.

Justice Armstrong's analysis of the capacity to marry relies primarily on the case of *A.B. v C.D.*, 2009 BCCA 200, and in particular, the importance of autonomy therein. The medical evidence established that Mr. Groves suffered from cognitive impairments, anxiety, depression, and moments of delusional thinking. Mr. Groves's family doctor asserted that Mr. Groves was incapable of "managing himself" in November of 2009. Nevertheless, Justice Armstrong found that these conditions, diagnoses, and limitations

did not evidence an inability on Mr. Groves's part to make an informed decision to marry Ms. Potvin. His Honour provides the following observation:

A person may be incapable of writing a cheque or making a deposit to a bank account and thus be described as being incapable of managing their financial affairs. Similarly, temporal delusions, depression, or anxiety may impact a person's ability to make other life decisions. But these factors do not necessarily impact a person's ability to consciously consider the importance of a marriage contract. Nor do they necessarily impact formation of an intention to marry, a decision to marry, or the ability to proceed through a marriage ceremony.

Mr. Holland, as well as Mr. Groves's accountant, financial advisor and marriage commissioner all gave evidence affirming that Mr. Groves was aware of the nature of the marriage. Of particular assistance was Mr. Holland's evidence; Mr. Holland was concerned about the appearance of elder abuse and he questioned Mr. Groves in detail about his relationship with Ms. Potvin a few weeks prior to the marriage. Mr. Groves was consistent in his assertions that he wanted to marry.

With respect to undue influence, the applicants relied on *Feng v. Sung Estate*, 2003 CanLII 2420 (ONSC). The evidence established that Mr. Groves was afraid of being admitted into care and believed that he could avoid that end by marrying Ms. Potvin, who would assist him with asserting his autonomy and maintaining his comfort and care at home. His family doctor asserted that Mr. Groves was susceptible to persuasion in 2009.

Regardless, Justice Armstrong found that there was no direct evidence that Ms. Potvin's influence over Mr. Groves supplanted his decision making power on the issue of his decision to marry. His Honour found that Ms. Potvin may have encouraged Mr. Groves in this regard, but there was no evidence that she exerted influence or force to compel him to do so. His Honour explains his holding as follows:

I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must provide the defendant's actual influence deprived Mr. Groves of the free



will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.

Justice Armstrong also dismissed the claims that Mr. Grover's testamentary dispositions and inter vivos transfers were invalid by reason of undue influence. His Honour applied *Hyrniak v. Maudlin*, 2014 SCC 7 and concluded that a summary trial, with a record of affidavit evidence and cross-examination transcripts, was a suitable forum for the disposition of the claim. The action was dismissed with costs to Ms. Potvin.

#### **IV. CHECKLIST:**

Although this is not by any means intended to be an exhaustive list, the following checklist incorporates certain conclusions that can be drawn from the law evolving out of litigation involving re-marriages, re-partnerships, common-law relationships and complex families:

- It is important to consider the complete family dynamics relationship and history when naming estate trustees, if possible avoiding the appointment of a new spouses or children of a former relationship where there will be a temptation for the estate trustee to not act neutrally.
- It is necessary to identify all people who may make a claim under the applicable dependant's support legislation and to advise the client on the adequacy of the provision in a proposed will and disposition of other assets based on the most up-to-date trends in the cases. This includes determining if the client had any former common-law spouses, especially relationships that ended without the involvement of lawyers.
- It is necessary to find out whether the client has induced anyone to detrimentally rely on his or her promise to give an interest in property.

- An estate-planning lawyer ought to determine what legislation might be operative upon death and whether the deceased and his or her partners are spouses for purposes of the different definitions of “spouse” in family law, succession law, pension, tax, banking, and other legislation. At common-law, a person is not limited to having only one spouse at a time.
- It is important for separated spouses to obtain a divorce, especially where the spouse has a pension governed by the *Pension Benefits Act*, or plan around this issue. Also consider which legislation applies provincial, or federal.
- The existence and status of children is not always obvious. A child estranged for many years may not be mentioned. There might be doubt about whether a child or their issue are biologically related or adopted, which could cause unexpected results or litigation over the issue. Special care ought to be taken to identify all intended beneficiaries by name rather than class as far as possible and to probe the existence and lineage of children and other issue.
- It is important to obtain copies of all domestic agreements, including cohabitation agreements, marriage contracts (pre-nuptial and post-nuptial agreements), and separation agreements. It is equally crucial to get copies of any support orders, support variation orders, and support termination orders, including orders to secure support with life insurance or other vehicles.
- It is important to identify all insurance policies, RRSPs and other similar vehicles with beneficiary designations. It is not always sufficient to revoke and make new beneficiary designation in a Will because the revocation may be ineffective where a designation was made irrevocable.
- In jurisdictions where a surviving spouse can make a claim for a division of matrimonial property from the deceased spouse’s estate, the estate planner

might need to roughly calculate the potential outcome of a property division between the spouses, including an assessment of the various exclusions, marriage date deductions, and identification of difficult valuation issues (e.g. interests in private businesses) to determine if the estate plan will be sidetracked by a spouse's election.

- Family lawyers have a major role to play in estate planning. Their separating clients may have outdated Wills, property held in joint tenancy that should be severed, and non-traditional assets (RRSPs, insurance policies, pensions) that need special care to ensure they fall into the right hands on death. Their pre-nuptial clients may, among other arrangements of their affairs on death, consider whether to make any provision for severing joint title or confirming the right of survivorship in property held in joint tenancy on death.
- It is important to consider, if the client is in a common-law relationship, whether the client and his or her spouse are engaged in a joint family venture with the potential for an unjust enrichment claim, or other equitable claim, against the estate.
- Time is of the essence, gauging urgency in death bed circumstances.<sup>206</sup>

Finally, for further writings on this topic, please see our WHALEY ESTATE LITIGATION publication/blog site: <http://whaleyestatelitigation.com/blog/published-papers-and-books/>, and “*The Intersection of Family Law and Estates Law: Post-Mortem Claims Made by Modern Day ‘Spouses’*”, Kimberly A. Whaley, *The Advocates Quarterly*, Volume 40. Number 1, June 2012.

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<sup>206</sup> *Morassut v. Jaczynski Estate*, 2013 ONSC 2856

Links to further resources which may be of assistance, are contained on our website:

- **Undue Influence Checklist**  
[http://whaleyestatelitigation.com/resources/WEL\\_Undue\\_Influence\\_Checklist\\_Sask\\_2013.pdf](http://whaleyestatelitigation.com/resources/WEL_Undue_Influence_Checklist_Sask_2013.pdf)
- **Duties of an Attorney Under Power of Attorney For Property**  
[http://whaleyestatelitigation.com/resources/WEL\\_CapacityChecklist\\_POA\\_Property.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_POA_Property.pdf)
- **Duties of an Attorney Under Power of Attorney for Personal Care**  
[http://whaleyestatelitigation.com/resources/WEL\\_CapacityCheckist\\_POA\\_PersonalCare.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf)
- **Capacity Checklist Re: Estate Planning Context**  
[http://whaleyestatelitigation.com/resources/WEL\\_CapacityChecklist\\_EstatePlanningContext.pdf](http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf)
- **Summary of Capacity Criteria**  
[http://whaleyestatelitigation.com/resources/WEL\\_SummaryofCapacityCriteria.pdf](http://whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf)
- **Attorney/Guardian /Client Memorandum Re: Personal Care**  
[http://whaleyestatelitigation.com/resources/WEL\\_AttorneyGuardianClientMemo\\_PersonalCare.pdf](http://whaleyestatelitigation.com/resources/WEL_AttorneyGuardianClientMemo_PersonalCare.pdf)
- **Attorney/Guardian/Client Memorandum Re: Property**  
[http://whaleyestatelitigation.com/resources/WEL\\_AttorneyGuardianClientMemo\\_Property.pdf](http://whaleyestatelitigation.com/resources/WEL_AttorneyGuardianClientMemo_Property.pdf)

*This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*

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