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THE INTERSECTION OF FAMILY LAW AND ESTATES LAW: POST-MORTEM CLAIMS MADE BY MODERN DAY 'SPOUSES'

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1. Introduction

It is trite to say that our growing aging population is having a marked impact on the ways in which our estate laws are being developed and applied. This, combined with changes in the way families are being constituted – with remarriages, blended families, and "common law" relationships on the rise – estate and family laws are colliding in ways never before anticipated. The additional factor being that people are living longer than they used to, means estates and family law practitioners are likely to see a significant growth in cases involving competing post-mortem claims made by surviving spouses, former spouses, dependants, children, step-children, and other claimants against the estate of a deceased person.

The considerations within are important in today's rapidly changing society. The family construct is different today. It is more mobile, transient, international, communication and transportation barriers once apparent, are now non-existent, technological, scientific and medical advances all mean that today's family unit is simply different, complex, and often unique. External influences, often predatory in nature, once, more unlikely to have been brought to bear on the elderly, are now rife with opportunity. The incidence of cognitive impairment simply attributable to living a longer life means increased vulnerability in the confines of the family unit.

This is all to say that planning to protect property rights is imperative on so many competing levels. Litigation arising from these modern day family units is on the rise both in the family law and estates law arenas. The emotive nature of such disputes can be quite destructive and costly.

This monograph focuses on the legal avenues available to surviving spouses upon the death of a spouse or former spouse, in light of some significant changes arising out of recent case law on the subject.[1]

2. Recourse for Surviving Spouses under the Family Law Act

The *Family Law Act* (the "*FLA*"),[2] and in particular Parts I, III, and VI, provides surviving spouses and even former spouses with various means to access and, in some instances, equalize the assets of a deceased spouse's estate.

1. This paper builds upon two papers submitted for the Osgoode Professional Development's Conference on Advising the Elderly Client, 2011, and 2012 entitled "Remarriages and Common Law Arrangements: Estates Claims by Spouses".
2. R.S.O. 1990, c. F.3 ("*FLA*").

(1) Family Law Act Elections – Part I of the FLA

(a) Who Can Make the Election?

Surviving Married Spouses

When advice is sought from a surviving spouse about their entitlement upon the death of a spouse (or former spouse), the threshold question for counsel to ask is what type of "spouse" are they? For the purposes of Part I of the *FLA*, the definition of "spouse" is limited to the definition set out in s. 1(1) of the *FLA*; namely, persons who are either married to each other, or who have entered into a marriage that is voidable or void, in good faith. Thus, the question of what type of spouse the client is, is a critical one since "common law" spouses, as that term is colloquially used, are denied access to the rights and entitlements provided by the Family Property portion of the *FLA* (Part I), and are, therefore, prohibited from making a "*FLA* election". As such, common law spouses must look elsewhere for legal recourse as against the estate of their deceased partner, at least in Ontario, and at least for the time being. There are changes and developments on the horizon throughout Canada.

Notably, this is not the case in all Canadian provinces. Indeed, on November 24, 2011, B.C.'s Bill 16[3] received royal assent. The Bill radically replaces B.C.'s existing *Family Relations Act*,[4] an antiquated piece of legislation last updated in 1978. As a result, sweeping changes to B.C.'s family law are anticipated with the enactment of its new *Family Law Act*. Of the amendments, arguably the most radical and controversial reform will be the fact that common law spouses will now receive the same rights to property division as married spouses upon the breakdown of the relationship (subject to certain exceptions such as property gifted, inherited or owned prior to marriage). This is radically different from the law in other provinces, like Ontario, where only married spouses are entitled access to/reliance upon the family property/matrimonial property provisions of the *FLA*. This is also a drastic change to the law since the Supreme Court of Canada ruled in the B.C. case of *Nova Scotia (Attorney General) v. Walsh*[5] that common law spouses ought not to have the same property law rights as married spouses, a decision predicated on the presumed "choice" that common law spouses make to not marry and, therefore, not to participate in family law-

3. See <www.leg.bc.ca/39th4th/1st_read/gov16-1.htm>.
4. R.S.B.C. 1996, c. 128, available at <www.bclaws.ca/EPLibraries/bclaws_-new/document/ID/freeside/00_96128_01>.
5. *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 221 D.L.R. (4th) 1, 102 C.R.R. (2d) 1 (S.C.C.).

mandated property division upon marriage breakdown. It is unknown at this point whether similar legislative reform has set a precedent for other Canadian provinces, like Ontario.

Persons Designated on Behalf of Surviving Married Spouses

In addition to married spouses, a number of individuals are able to make a *FLA* Election. For instance, the Public Guardian and Trustee who acts as statutory guardian of property of a surviving spouse pursuant to a certificate issued under s. 63 of the *Mental Health Act*[6] would appear to have the necessary authority to make an election. A mentally incompetent surviving spouse's guardian of property appointed under s. 15(k) of the old *Mental Incompetency Act*[7] would also be able to make such an election.

Pursuant to the *Substitute Decisions Act, 1992*,[8] either a "statutory guardian of property" or a "court-appointed guardian of property" would have the authority to elect on behalf of a surviving spouse, subject to any restrictions imposed by the surviving spouse in the relevant empowering document or by court order. Precedent does also exist and stands for an Attorney, under a Continuing Power of Attorney for Property as an authorized person to make an election on behalf of an incapable grantor.[9]

Finally, if the surviving spouse is incapable of managing her property, the personal representative (modernly referred to as the "Estate Trustee") may exercise the election under the *FLA* on her behalf.

(b) FLA Elections – Electing in Favour of Equalization

One of the ways in which a surviving spouse can ensure adequate financial protection after the demise of their spouse is by making a "*Family Law Act* Election".

Essentially, a *Family Law Act* Election provides a surviving spouse with the right to file an election and to bring an application against the estate of their deceased spouse so as to elect in favour of equalization of the couples' net family property ("NFP") and forego their entitlement, if any, under the deceased's will and/or on intestacy.[10]

6. R.S.O. 1990, c. M.7.
7. R.S.O. 1990, c. M.9 (repealed).
8. S.O. 1992, c. 30.
9. *Anderson v. Anderson Estate* (1990), 71 D.L.R. (4th) 175, 38 E.T.R. 112, 1990 CarswellOnt 260 (Ont. H.C.J.); and *Conkwright Estate v. Maltby* (June 3, 1988), Doc. 1645/87, [1988] O.J. No. 686 (Ont. S.C.J. (Div. Ct.)).
10. *FLA,* s. 6(1).

The governing provisions warranting direct transcription, are ss. 5(2), 6(1), (2), (3), and (4), which provide as follows:

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

There are three key concepts that need to be considered when making a *FLA* Election: (i) NFP; (ii) equalization; and (iii) the valuation date.

The NFP of a spouse is essentially an individual's net worth, less any premarital deductions and after the following types of property are excluded pursuant to s. 4(2) of the *FLA*:[11]

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage. [Note that gifts given by the spouses to each other are not excluded.]
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.
3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.
4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the *Insurance Act*, that are payable on the death of the life insured.
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

11. *FLA*, s. 4(1).

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

7. Unadjusted pensionable earnings under the Canada Pension Plan.

It is important to note that, although title governs, a spouse is prohibited from deducting the value of the matrimonial home purchased before marriage from their NFP.[12] This means that the equalization payment owed to the spouse with the lesser NFP will be higher, if it includes the value of the house.

Importantly, in most estate cases, the spouses' NFP is calculated on the day before one of the spouses dies.[13] However, this is not always the case. If, for example, the spouses had separated prior to one of their deaths, the valuation date will be the date of separation, and not the date of death. If both spouses die simultaneously, neither spouse's estate will have a claim against the estate of the other, as there will be no surviving spouse. If both spouses die in circumstances rendering it uncertain which survived the other, neither of the spouse's respective estate trustees will be able to discharge the burden of establishing entitlement to an equalization claim.

Section 5(1) of the *FLA* addresses equalization. Equalization works as follows: the spouse with the greater NFP pays the other one-half of the difference between them. Equalization flows one way only, and that is in favour of the surviving spouse with the lesser NFP. Even if the surviving spouse has the larger NFP, the estate of a deceased spouse has no right of election in favour of equalization.

(c) The Effects of Electing

Pursuant to s. 6(1) and (2) of the *FLA*, upon the death of a spouse, a surviving spouse is entitled to make a choice between making an equalization claim, on the one hand, or taking under the will, if there is one, or, if there is not one, taking pursuant to the provincial intestacy laws set out in Part II of the *Succession Law Reform Act*[14] (the "*SLRA*"). A surviving spouse is not permitted to equalize in addition to taking under the will/pursuant to the intestacy laws if there is an intestacy, unless the will expressly permits them to do so.[15]

A surviving spouse must be fully advised about the impact of making a particular choice. The spouse should be advised that,

12. *FLA,* s. 4(1). The definition of NFP does not permit a deduction for the matrimonial home.
13. *FLA,* s. 4(1), definition "valuation date", para. 5.
14. R.S.O. 1990, c. S.26 ("*SLRA*").
15. *FLA,* s. 6(5).

should they elect in favour of taking under the will or, if there is no will, in accordance with the provincial intestacy laws, the spouse will also be entitled to receive the proceeds of any life insurance policies where named as a beneficiary as well as any death or survivorship benefits where named under the deceased's pension plan or similar plans. As well, the spouse should be advised that, in making that choice, they do not forfeit any rights of survivorship associated with property jointly owned by the spouses, property received by gift from the deceased spouse, or to which the spouse is entitled by way of resulting or constructive trust from the deceased spouse.[16]

The same is not necessarily true for a surviving spouse who elects in favour of equalization and, as noted above, as a result of amendments to the *FLA* and the interpretive case law, the value of certain assets may be deducted from the deceased's NFP, thus potentially decreasing the amount of an equalization payment from the estate. As well, the surviving spouse's equalization entitlements do not have priority over a gift by will made in accordance with a contract that the deceased spouse entered into in good faith and for valuable consideration, except to the extent that the value of the gift, in the court's opinion, exceeds the consideration given for it.[17]

Although choosing to elect in favour of an equalization claim does not forfeit any entitlement to dependant's support pursuant to Part V of the *SLRA*, an election does impact such a claim insofar as the merits of such claim will only be heard after the equalization claim is settled. Moreover, the election has priority over an order made against the estate under Part V of the *SLRA*, except an order in favour of a child of the deceased spouse.

(d) The Deadline and Governing Factors to Elect and Apply

A surviving spouse has six months from the date of death of the deceased spouse to file an election in the form prescribed by the regulations,[18] failing which the spouse will be deemed to take under the will, if there is one, or pursuant to the intestacy provisions of the *SLRA*, if there is not one, unless the court, on application, orders otherwise. If an application is needed to determine a surviving spouse's entitlement under s. 5(2) of *FLA*, the spouse must bring the application within this six-month deadline.[19]

16. *Bickley v. Bickley Estate* (1999), 29 E.T.R. (2d) 132, 91 A.C.W.S. (3d) 1080, 1999 CarswellOnt 3235 (Ont. S.C.J.).
17. *FLA*, s. 6(13).
18. *FLA*, s. 6(10).
19. *FLA*, s. 7(3)(c) (note that the six-month deadline to bring an application does not apply in situations where the spouses were already divorced, in which

In certain circumstances, the court will extend the time period to elect and apply pursuant to s. 2(8) of the *FLA*, if the court is satisfied that: (a) there are apparent grounds for relief; (b) relief is unavailable because of delay that has been incurred in good faith; and (c) no person will suffer substantial prejudice by reason of the delay. Extensions seem to be routinely ordered. It is prudent to obtain an extension where the assets of a deceased are not known, or disclosed, thereby preventing a spouse from the ability to assess or analyze the merits of an election. Often where there is threatened litigation, or in cases where there is no estate trustee appointed or willing to act, or even perhaps clear of conflict, discovering the assets and liabilities of an estate may be delayed.

In *Slaven v. Slaven Estate*,[20] the court granted an order in a motion brought by an elderly widow to extend the time to file her *FLA* application. Here, the widow had filed her election to take her entitlement under s. 6(1) within the six-month deadline. However, the widow had failed to bring her application within that same time period, a factor which the deceased's estate trustees (also his children) relied on to attempt to prohibit the widow from bringing her claim and to proceed with distributing the estate.

In reviewing the facts relevant to determining whether the widow met the criteria under s. 2(8) of the *FLA*, the court noted that the issue of the marriage contract signed by the parties was a live one, and one relevant to the *FLA* claim that the widow intended to make. As well, the court found that the delay in making the application had been incurred in good faith, with no ulterior motives. Not only had the deceased's estate trustees/children refused to show the widow the will, promising instead that she would be taken care of financially by them, but the time period lapsed while counsel to both parties were in the throes of trying to settle the matter and the delay was merely a "slip-up" in the timing of the filing of the application. The court was of the view no one would suffer substantial prejudice by reason of delay. Although it was not clear on reading the case what arguments were made on this issue by the deceased's children, the court simply noted that the children were aware of the wife's need for financial support and the fact that she filed an election. The court appears to have considered two additional factors; namely, that the order is a discretionary one; and, applying the case of *Curtner v. McNally*,[21]

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case the deadline is two years from the date of divorce. Likewise, if the spouses have separated, the deadline to elect is six years after the date of separation).

20. *Slaven v. Slaven Estate* (2011), 205 A.C.W.S. (3d) 1119, 2011 ONSC 3929, 2011 CarswellOnt 7973 (Ont. S.C.J. (Est. List)).

that an extension result is a construction that best serves the objectives of the *FLA*.

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

The importance of properly advising a surviving spouse of their rights pursuant to the *FLA* and the deadlines for exercising those rights cannot be underestimated. As demonstrated in the case of *Carrigan v. Quinn*,[22] failure to do so can make for harsh results, particularly in the context of a claim where the existence of multiple "spouses" comes to light.

The facts of *Carrigan v. Quinn* are instructive and a clear indication of the complicated family structures now prevalent in our society. Mrs. Carrigan and the deceased had been married since 1973 and had two children. In fact, Mr. Carrigan was still married to Mrs. Carrigan when he died. However, at the time he died, the deceased had been living in a conjugal relationship with another woman, Ms. Quinn. At the date of death Carrigan and Quinn lived in a condominium jointly owned by Mr. Carrigan and Mrs. Carrigan. Ms. Quinn was the woman with whom the deceased was living on the day he died. After his death, Mrs. Carrigan brought an action for a declaration that she was entitled to the deceased's death benefit, among other claims.

Pension plans can be quite complicated and have unexpected results. Each plan is different and the legislation is crucial to understanding the effects of a plan. Estate planning solicitors and family law lawyers cannot properly advise their clients on the effects of marital and estate planning without full consideration of the effects of such plans in light of the governing legislation. In reviewing the governing legislation, the court recited the relevant sections of the *Pension Benefits Act* key to its determination:

> *The Pension Benefits Act defines "spouse" in s. 1:*
>
> *"spouse" means either of two person who,*
>
> *(a) are married to each other, or*
>
> *(b) are not married to each other and are living together in a conjugal relationship,*
>
> *(i) continuously for a period of not less than three years,*
>
> . . . . .

21. *Curtner v. McNally* (2002), 33 R.F.L. (5th) 306, 118 A.C.W.S. (3d) 419, 2002 CarswellOnt 4125 (Ont. S.C.J.), at para. 29.
22. *Carrigan v. Quinn*, 2011 ONSC 585, 2011 CarswellOnt 774 (Ont. S.C.J.).

> 48(1) If a member or former member of a pension plan who is entitled under the pension plan to a deferred pension described in section 37 (entitlement to deferred pension) dies before commencement of payment of the deferred pension, the person who is the spouse of the member or former member on the date of death is entitled,
>
> (a) to receive a lump sum payment equal to the commuted value of the deferred pension; or
>
> (b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the deferred pension.
>
> Idem
>
> (2) If a member of a pension plan continues in employment after the normal retirement date under the pension plan and dies before commencement of payment of pension benefits referred to in section 37, the person who is the spouse of the member or former member on the date of death is entitled,
>
> (a) to receive a lump sum payment equal to the commuted value of the pension benefit; or
>
> (b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the pension benefit.
>
> Application of subs. (1, 1)
>
> (3) *Subsection (1) and (2) do not apply where the member or former member and his or her spouse are living separate and apart on the date of the death of the member or former member.* [Emphasis added.]

The court found that both women qualified as "spouses" pursuant to s. 1 of the *Pension Benefits Act,* yet, the court found that Mrs. Carrigan had been separated from the deceased since at least January 2000. The court made this finding in spite of the fact "Mr. and Mrs. Carrigan's separation was unusual".[23] As observed by the court:

> From their marriage date in 1973, Mr. and Mrs. Carrigan discussed and made various financial decisions together; they spent every Christmas day together at the former matrimonial home with their daughters and granddaughters; Mrs. Carrigan, who had worked as a hairdresser early in their marriage, continued to cut Mr. Carrigan's hair every month; the condominium was purchased in their joint names; and, according to Mrs. Carrigan, they continued to have sexual relations from time to time when he would visit the matrimonial home to which he always had a key and to which he was free to come at any time. For reasons that perhaps could have been explained by the accountant who prepared them, Mr. Carrigan continued to use the address of the matrimonial home as his address on his driver's licence, his annual income tax returns, and to identify himself as

23. *Supra*, at para. 39.

married with his spouse's name as Mrs. Carrigan. Mrs. Carrigan's returns also identified her as married to Mr. Carrigan . . .

According to the court, s. 48 of the *Pension Benefits Act* provides a complete code for distribution of death benefits which essentially provides that "if living separate and apart, a married spouse no longer qualifies for the benefit; if living together at the relevant time, a common law spouse of over three years is the eligible recipient".[24] As such, in the court's view, Ms. Quinn was the proper recipient of the deceased's pension.

The court made this finding in spite of the fact that "Mrs. Carrigan was the sole beneficiary of the residue of [the deceased's] estate, the sole beneficiary of all his life insurance policies and became the sole owner by right of survivorship of both the matrimonial home and condominium, the size of the estate was significantly diminished by the outstanding debts left by Mr. Carrigan, debts about which neither Mrs. Carrigan nor Ms. Quinn were aware", and that it "had always been Mrs. Carrigan's clear understanding from what Mr. Carrigan consistently told her that he intended that she would inherit everything he owned when he died".[25]

The court did highlight that the *Pension Benefits Act* does anticipate and address the rights of a former spouse to the employee's pension, but that such rights are conferred during the years of cohabitation and determined at marriage breakdown.[26] As stated by the court, s. 48(13) stipulates that an entitlement to a benefit is subject to any prior interest in the benefit set out in a domestic contract, or court order on marriage breakdown and that such an interest would take priority, after which the residue would determine the pre-retirement death benefit to which Ms. Quinn is entitled.[27] However, as Mrs. Carrigan did not obtain a domestic contract or court order prior to Mr. Carrigan's death, and nor had she elected to take an equalization payment, but had let the court extension lapse and was deemed pursuant to s. 6(11) of the *FLA*, to have taken under the will, there was no basis for her to gain access to the deceased's pension. The analysis undertaken by the court is instructive:[28]

Prior to Mr. Carrigan's death, Mrs. Carrigan could have settled the pension issue by obtaining a direct equalization payment in a domestic contract or court order. Mrs. Carrigan's and Mr. Carrigan's separation date was (at the latest) 2000; by 2006 Mrs. Carrigan was at the end of the six year period within which to bring a

24. *Ibid.,* at pars. 71.
25. *Ibid.,* at para. 9.
26. *Ibid.,* at para. 71.
27. *Ibid.*
28. *Ibid.,* at paras. 74-79.

claim for equalization as stipulated by section 7(3) of the *Family Law Act*. However, despite being outside of the limitation period, Mrs Carrigan could have applied to the court for an extension under section 2(8), and attempted to obtain an equalization claim. This she never did and the right expired on Mr. Carrigan's death.

Had she received an extension, Mrs. Carrigan could also have pursued the imposition of a "trust," a common method to attain a pension equalization. As a result of such a "trust" upon the employee, the employee is required to pay over a portion of the "pension payment directly to the spouse, once the employee retires under the pension plan and begins receiving the pension" (Kaplan, at p.307). This is referred to as an "if and when" approach which is linked to the life of the employee; if the employee dies prior to retirement the spouse will not receive any payment at all. For this reason such a trust is very risky unless paired with a designation of the spouse as a beneficiary of a life insurance policy of sufficient value to cover the total amount of the spouse's entitlement to the pension.

The reason to identify and protect the pension to which a spouse is entitled as a result of the marriage breakdown is because upon the death of the employee, the pension no longer exists; that is, the funds which would have been available to the spouse upon retirement never materializes, and, instead, a pre-retirement death benefit arises. This leads to the conclusion that there can be no finding of a resulting or constructive trust on a pension after the death of the employee, as there is no longer any "pot" of money to draw from, quite irrespective of the absolute inability to find either unjust enrichment or a corresponding deprivation at the case at bar.

Alternatively, upon marriage breakdown Mrs. Carrigan could have come to a settlement by splitting the pension at source. Another option still was "to divide and assign an employee's pension 'credits' to the former spouse, who will then receive a separate pension annuity from the plan attributable to those credits, or alternatively, be able to transfer an equivalent lump sum amount into a locked-in retirement savings vehicle" (Kaplan, at p.308). Both pension splitting and credit splitting are orders directed at the plan administrator and require their involvement. However, credit splitting creates a separately valued annuity from the plan. These are the types of settlements envisioned by the not yet proclaimed amendments to the Pension Benefits Act which enables an eligible spouse to apply for a transfer of a lump sum from the plan to another pension plan, to a prescribed retirement savings arrangement, or to leave the lump sum in the plan to the credit of the eligible spouse; these options are only available if the administrator agrees.

Pertinently, valuation of the pension, in accordance with the definition in section 4(1) of the *Family Law Act*, would be on the earliest of the date the spouses separate and there is no reasonable prospect that they will resume cohabitation, the date of divorce, the date the marriage is declared a nullity, the date an application is commenced which is subsequently granted, or the date before the date on which one of the spouses dies leaving the other spouse surviving. For

> Mrs. Carrigan, this means that the valuation of Mr. Carrigan's pension would be on the date of separation, not on the day before Mr. Carrigan's death. Thus, the value of the pension would have been calculated as of, at latest, 2000, and would have been significantly less than the pension at the date of death.
>
> Therefore, Mrs. Carrigan had options, but prior to Mr. Carrigan's death. There were available methods by which Mrs. Carrigan could have secured a right to a share of Mr. Carrigan's pension. *Most unfortunately for Mrs. Carrigan, she does not appear to have sought or received advice to this end, and instead relied upon Mr. Carrigan's assurances to her.* As the eligible spouse, Ms. Quinn is entitled to the pre-retirement death benefit. Upon Mr. Carrigan's death, any ability Mrs. Carrigan had to lay claim to the underlying pension was extinguished. [Emphasis added.]

The concluding and cautioning words of the court: "the anguish, to say nothing of the expense, this lawsuit has caused those closest to him could have been avoided had [the deceased] taken the advice he was given in 2006, or had Mrs. Carrigan acted to protect her own situation prior to 2006".[29]

(e) Restrictions on Administration and Estate Trustee Liability

Regardless of whether an election is made, an estate trustee is prohibited from distributing a deceased spouse's estate within six months from the date of death, unless the surviving spouse gives written consent to the distribution or the court authorizes the distribution.[30] Section 6(15) of the *FLA* potentially extends this period even further as it provides that an estate trustee is prohibited from distributing the estate if served with notice of an application which seeks an equalization claim,[31] until either the applicant gives written consent to the distribution; or the court authorizes the distribution.

An exception to the prohibition on distribution lies for reasonable advances for the support of dependants of a deceased spouse.[32] However, in the event that other distributions are made and the court later makes an equalization order against the estate, but, the undistributed portion of the estate is not sufficient to satisfy the order, the estate trustee will be personally liable to the surviving spouse for the amount that was distributed or the amount that is required to satisfy the order – whichever is found to be less.[33]

29. *Ibid.,* at para. 33.
30. *FLA,* s. 6(14).
31. *FLA,* s. 6(15).
32. *FLA,* s. 6(17).

Depending on the value of the assets of the estate, this could be a severe result for an estate trustee.

Importantly, filing an election, giving notice that an election has been filed, giving notice of an intention to file an election, or giving notice of an intention to commence an application does not constitute the requisite "notice of an application" required by s. 6(15) of the *FLA*.[34] Rather, when an election is filed it is imperative that the surviving spouse immediately commence an application for equalization of net family property and then immediately serve notice of the application on the trustee. Failure to do so may have a prejudicial impact on the surviving spouse, as was the case in *Paola v. Paola Estate*.[35]

In *Paola v. Paola Estate*, the court found that a letter written by the surviving spouse's solicitor which stated that his client was "in the process of filing an election pursuant to the *Family Law Act* of Ontario whereby [his] client will be electing to receive entitlement under the provisions of the said Act" was not sufficient notice of the surviving spouse's election.[36] In the court's view, the letter did nothing more "than state an intention to file an election, the inference being that an action or application for equalization of net family property will then be commenced following such election".[37] Consequently, the court held that the widow could not rely on the "[t]he shield afforded by subsection 6(15) of the *FLA*", since it was not raised until the notice of application was given to the trustee at a time after the trustee had distributed the assets of the estate. Thus, at the date of distribution, the estate trustee was not in breach of s. 6(15) of the *FLA*.

(f) Can an FLA Election be Revoked?

Section 6 of the *FLA* empowers the surviving spouse to elect in favour of equalization of NFP. While the statute does not expressly provide a right to revoke an election once made, according to the jurisprudence, the courts do retain a "residual jurisdiction" to authorize a revocation of an election in limited and restrictive circumstances and where the interests of justice require it.[38]

33. *FLA,* s. 6(19).
34. *Paola v. Paola Estate* (1997), 16 E.T.R. 142, 27 R.F.L. (4th) 418, 1997 CarswellOnt 520 (Ont. Ct. (Gen. Div.)), at para. 42.
35. *Supra.*
36. *Ibid.,* at para. 40.
37. *Ibid.,* at para. 41.
38. *Iasenza v. Iasenza Estate* (2007), 34 E.T.R. (3d) 123, 39 R.F.L. (6th) 452, 158 A.C.W.S. (3d) 686 (Ont. S.C.J.).

If an election is made and the surviving spouse later seeks to revoke it, the court, in exercising its discretion, will have regard to the following factors in making a determination:[39]

> (a) Was the election filed as a result of a material mistake of fact or law made in good faith?
>
> (b) Was there any responsibility or culpability on the part of effected parties in relation to the election?
>
> (c) Was the notice of intent to seek revocation of the election given in a timely way and, in particular, how long after the 6 month filing period was such notice given?
>
> (d) Has the estate been distributed or would interested parties otherwise be adversely effected by a revocation of the election?; and
>
> (e) Does the election result in an injustice to the surviving spouse in all of the circumstances?

(2) Spousal Support under Part III of the FLA: A Debt of the Estate

(a) Who is entitled to Spousal Support?

Part III of the *FLA* governs the support obligations owing to spouses from spouses (and of the estates of deceased spouses). Unlike Part I of the *FLA*, Part III bears an extended definition of spouse which specifically includes "common law spouses", and which is only applicable to this Part of the *FLA*. Section 29 provides the defining criteria:

> "spouse" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have cohabited,
>
> > (a) continuously for a period of not less than three years, or
> > (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

In order to qualify as a spouse therefore, the spouses must have cohabited continuously for at least three years. Alternatively, the unmarried cohabitating spouses must be the parents of a natural or adopted child, and the relationship must be one of some permanence.

The definition of "cohabit" is set out in s. 1(1) of the *FLA* and means "to live together in a conjugal relationship, whether within or outside marriage". The courts have essentially interpreted this to mean that the union between the unmarried cohabiting persons must

39. *Supra,* at para. 25.

be "marriage-like".[40] It would appear from the case law that the overarching criteria used to determine whether the spouses cohabited continuously in a marriage-like relationship is whether the relationship was a conjugal one. The courts have endorsed the following seven categories set out in *Molodowich v. Penttinen*[41] and confirmed in *Cammack v. Hill*[42] which are to be applied to determine whether a conjugal relationship existed for the requisite period:

1. whether the couple reside together and sleep under the same roof;
2. whether the couple share an intimate and sexual relationship and are loyal to each other;
3. whether the parties share services, such as housework;
4. whether the spouses participate in social/community activities together;
5. the social/community attitudes towards the spouses as a couple;
6. whether the spouses support each other, financially; and
7. whether the spouses have children and are mutually dedicated to their upbringing.

Whether the relationship was a conjugal one or not will be a question of fact in each case.

As is clear, for an unmarried cohabiting spouse to be entitled to spousal support, they must be able to demonstrate that their conjugal relationship existed for at least three years. Difficulty arises if the relationship was one that was "on again and off again" throughout the three-year period. In ascertaining whether the relationship was truly "off" either before or after the end of the requisite period, the courts will attempt to ascertain whether the parties, at some point in their union, exhibited a settled intention to live separate and apart.[43] As stated by the Court of Appeal in *Sanderson v. Russell*:[44]

> Without in any way attempting to be detailed or comprehensive, it could be said that such a relationship has come to an end *when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one*. While the physical separation of parties following "a fight" might, in some cases, appear to amount to an ending of cohabitation, the test should be realistic and flexible enough to recognize that a brief cooling-off period does not bring the relationship to an end. Such conduct

40. Simon R. Fodden, *Family Law* (Toronto: Irwin Law, 1999), at p. 56.
41. *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376, [1980] O.J. No. 1904 (Ont. Dist. Ct.).
42. *Cammack v. Hill* (2002), 63 O.R. (3d) 47, 119 A.C.W.S. (3d) 354, 2002 CarswellOnt 4403 (Ont. S.C.J.).
43. Fodden, *supra*, footnote 40, at p. 59.
44. *Sanderson v. Russell* (1979), 99 D.L.R. (3d) 713, 24 O.R. (2d) 429, 1979 CarswellOnt 381 (Ont. C.A.), at para. 8.

> does not convincingly demonstrate a settled state of mind that the relationship is at an end. [Emphasis added.]

Thus, the court will look beyond what it construes as a mere fight or "cooling off period" to ascertain whether there is both an *intention* to end cohabitation by one of the parties, and also certain *conduct*, or what essentially amounts to "no further significant acts of cohabitation".[45]

(b) Spousal Support: An Obligation that Survives Death, a Proper Debt of the Estate

Part III of the *FLA* features two critical definitions. Section 29 first defines "dependant", which is followed by the extended definition of spouse, as noted above. Dependant is defined as "a person to whom another has an obligation to provide support under this Part". The section immediately following, s. 30, sets out the spousal support obligation. It states that "[e]very spouse has an obligation to provide support . . . for the other spouse, in accordance with need, to the extent that he or she is capable of doing so". Since spouses are under a "legal obligation to support each other", they are "dependants", as that term is defined in s. 29. As such, relying on s. 33 of the *FLA*, a spouse/dependant may apply to the court for an order to receive spousal support. This may also give rise to a claim for dependant support, as set out more particularly below.

It is pursuant to s. 34 that a surviving/common law spouse may enforce a spousal support order after the death of their spouse and against the estate of their deceased spouse. Section 34(4) makes explicit the enduring nature of spousal support orders, stating: "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 s. 34(4) of the *FLA*, such that an estate trustee owes a fiduciary duty to the recipient of the support in the same way as owing a fiduciary duty to the beneficiaries and creditors of an estate, as evinced by the result in *Re Welin Estate*.[46]

Re Welin Estate 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 estate trustee of the estate on the basis of conflict of

45. Fodden, *supra*, footnote 40, at p. 60.
46. *Welin Estate (Re)* (2003), 124 A.C.W.S. (3d) 843, 2003 CarswellOnt 2869 (Ont. S.C.J.).

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 s. 34(4) of the *FLA*,[47] and as Spouse #2 had terminated the payments after death, the court found that Spouse #2 had failed to meet her estate trustee obligation to pay all of the debts of the estate.[48] According to the court, "[e]xecutors of an estate owe a fiduciary duty to the beneficiaries and creditors of the estate".[49] And, where a trustee is found to have acted in their own interest and not that of the estate, s. 37 of the *Trustee Act*[50] gives the court discretion to order their removal.[51] Consequently, the court ordered that Spouse #2 be removed as the executor/trustee of the deceased's estate.

The facts of *Re Welin Estate* are not atypical. In fact, it is quite common for separated spouses to appoint their new partners as executors and trustees of their estate. The message from the case, however, is that such spouses should tread carefully when administering a deceased spouse's estate, acknowledging existing, and, therefore, competing spousal support obligations, as well as other competing claims such as dependant support claims made under Part V of the *SLRA*. Failure to do so could result in breach of their fiduciary obligations for failing to act with an even hand or in the best interests of the other beneficiaries and could result in damages or, worse still, if legal proceedings are commenced, a cost award against the fiduciary, personally.

Notably, the implementation of Part III of the *FLA* and s. 34, in particular, ameliorated the situation that existed under the previous family law act regime, which had provided that an order for support was not binding on the estate of the payer spouse, unless the order specifically required it.[52]

Given the enduring nature of a spousal support order, the question then becomes: can a surviving spouse seek an increase in support and/

47. *Supra,* at para. 8.
48. In resolution of their divorce proceedings, Diana Welin and the deceased had entered into minutes of settlement, which were subsequently incorporated into a court order. The terms of the order provided that the deceased would pay spousal support to Diana Welin in the amount of $1,900 per month, indefinitely, and that she would be named as the sole beneficiary of the deceased's life insurance policies for so long as his obligation to provide her with support endured.
49. *Welin Estate, supra,* footnote 46, at para. 9.
50. R.S.O. 1990, c. T.23.
51. *Welin Estate, supra,* footnote 46, at para. 9.
52. Brian A. Schnurr, *Annotated Ontario Estates Statutes* (Toronto: Carswell, 2003) (looseleaf), at FLA-37; see also *Butler v. Butler Estate* (1990), 70 D.L.R. (4th) 571, 74 O.R. (2d) 645, 38 O.A.C. 293 (Ont. Div. Ct.).

or a final order for support *after* the death of their spouse? The answer to this is set out in s. 34(5), which provides that a periodic spousal support payment ordered pursuant s. 34(1)(a) may in fact be increased annually on the anniversary date of the order in accordance with the Consumer Price Index. The indexing factor is set out in s. 34(6). Often divorce judgments will provide for changes to support due to a material change in circumstances.

(3) Domestic Contracts Made Pursuant to Part IV of the FLA: Cohabitation, Separation and Marriage Contracts

Part IV of the *FLA* governs domestic contracts. According to the *FLA*, there are three types of domestic contracts: (i) cohabitation agreements;[52] (ii) marriage contracts;[54] and (iii) separation agreements.[55]

Cohabitation Agreements

Cohabitation agreements are utilized by unmarried partners who, at the time of execution, are either cohabiting or intend to cohabit. Cohabitation agreements generally deal with each partner's respective rights and obligations during cohabitation, on ceasing to cohabit, or on death.

Marriage Agreements

Marriage agreements or what are commonly referred to as "pre-nuptial contracts", are used by those persons that are legally married or intend to be.

Separation Agreements

Separation agreements are entered into by spouses who have decided to live separate and apart following a period of cohabitation.

For the most part, under the *FLA*, spouses are free to agree to whatever they wish about the rights and obligations that are to flow from their union – subject only to a few exceptions, such as contracts regarding the education, moral training or custody/access of children.[56] Indeed, domestic contracts may address property rights in the event of separation, divorce, or death, and may specifically opt out of equalization, or exclude certain assets from equalization, or provide for a different means of property division.[57] The same applies

53. *FLA*, s. 52.
54. *FLA*, s. 53.
55. *FLA*, s. 54.
56. *FLA*, s. 56(1).

to spousal support, which can be waived altogether, should the couple so decide.[58]

(a) Separation Agreements and Waivers of Rights

It is not uncommon, after the breakdown of a relationship, for former spouses to enter into a separation agreement, in an effort to settle various issues, including spousal support and the equalization and division of family property.

Separation agreements generally include mutual releases, which incorporate renunciations by the parties to all possible (present, future, contingent) claims in the other spouse's estate.[59] The separating spouses may even attempt to obtain a general waiver from their former spouse to any rights they may have in a pension plan or life insurance policy.[60] However, in these circumstances, attention must be had by drafting solicitors and the contracting parties to the specific legislation governing these types of plans and policies, since, again, in some cases, the rights and obligations bestowed under the governing legislation trump any attempt by the parties to contractually bar each other from access to the others' funds on death.

This was, essentially, the result in the Ontario Court of Appeal case of *Richardson Estate v. Mew*.[61] Here, the court found that the former spouse of the deceased was entitled to take the death benefit under the deceased's life insurance policy simply on the basis that the deceased had never changed the designation. This was so despite the fact that the former spouse and the deceased had entered into a separation agreement which contained a mutual release of claims to property. As well, the deceased had remarried, with the second spouse making some of the payments on the policy under the mistaken assumption that the policy named her as a beneficiary. The court's analysis and conclusion:[62]

> The jurisprudence drives one to the same conclusion. Cases such as *McLean v. Guillet* (1978), 22 O.R. (2d) 175 (Ont. Dist. Ct.), *Baker v. Hall* (1985), 59 A.R.

57. Martha McCarthy, "Family Law for Estates Lawyers", Blending Family Estate Planning, LSUC Continuing Professional Development (June 14, 2011), at p. 19.
58. *Supra,* at p. 19.
59. Corina Weigl, "Making Sure You Play with Your Best Hand", *All About Estates* (July 13, 2011).
60. *Supra.*
61. *Richardson Estate v. Mew* (2009), 310 D.L.R. (4th) 21, 96 O.R. (3d) 65, 73 C.C.L.I. (4th) 257 (Ont. C.A.).
62. *Supra,* at para. 55.

> 272 (Alta. C.A.), *Vail v. Vail Estate* (1988), 34 C.C.L.I. 261 (Ont. H.C.), *Gaudio Estate v. Gaudio* (2005), 16 R.F.L. (6th) 72 (Ont. S.C.J.), and *Conway v. Conway Estate* (2006), 25 R.F.L. (6th) 106 (Ont. S.C.J.), establish the following principles. A former spouse is entitled to proceeds of a life insurance policy if his or her designation as beneficiary has not changed. This result follows even where there is a separation agreement in which the parties exchange mutual releases and renounce all rights and claims in the other's estate. General expressions of the sort contained in releases do not deprive a beneficiary of rights under an insurance policy because loss of status as a beneficiary is accomplished only by compliance with the legislation. The general language used in waivers and releases does not amount to a declaration within the meaning of the *Insurance Act*.

A similar outcome is evinced by the recent case of *King v. King*.[63] In this case, Mr. King and his former wife executed a separation agreement that contained a general release regarding his pension, including his OMERS Pension Plan. Section 44 of the *Pension Benefits Act*[64] contains a mandatory provision which establishes a joint and survivor pension where a former member has a spouse on the date that the payment of the first installment of the pension is due. Mr. King was still married to his first wife when he received his first payment. As such, when he wrote to OMERS to attempt to appoint his new wife as the beneficiary of his OMERS plan, OMERS replied that the separation agreement was not sufficient evidence that his former wife had relinquished her right to the survivor benefit. OMERS continued that if the former wife completed the OMERS Form 156, it would be accepted as sufficient evidence of her relinquishment. The former wife, however, refused to sign the form and Mr. King brought this application.

The narrow issue in this case was whether a general pension release contained in Mr. King's separation agreement was sufficient to constitute a waiver of his former wife's entitlement to his OMERS survivor's pension.

The court held that, as the waiver in the separation agreement did not mirror the requisite OMERS form (which, at the time the agreement was executed, was a Form 3), Mr. King had failed to comply with the strict requirements of the statute and, consequently, the court refused to make a declaration that Mr. King's former wife had waived her entitlement to the survivor's pension via the separation agreement. As noted by the court, Mr. King "found

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63. *King v. King* (2010), 86 C.C.P.B. 206, 89 R.F.L. (6th) 361, 103 O.R. (3d) 156 (Ont. S.C.J.).
64. R.S.O. 1990, c. P.8.

himself in the unfortunate position of being caught in a trap for the unwary".[65]

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

(b) Setting Aside a Domestic Contract

Domestic contracts, like any other types of contracts, are subject to the normal principles of contractual interpretation.[66] Although, as a general rule, a valid, enforceable contract, will be upheld by the courts, in certain circumstances – whether by the governing legislation or the jurisprudence – the courts will intervene and override the contractual agreements made by spouses.[67]

Pursuant to s. 56(4) of the *FLA*, a surviving spouse may apply to the court to have a domestic contract or a provision in it set aside on any or all of the following grounds:

(a) One of the spouses failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
(b) One of the spouses did not understand the nature or consequences of the domestic contract; or
(c) Otherwise in accordance with the law of contract.

Section 56(4) has been interpreted by the Ontario Court of Appeal such that setting aside a domestic contract pursuant to it requires a

65. *Supra,* footnote 63, at para. 17.
66. Martha McCarthy and Heather Hansen, "Family Issues in Estate Litigation", in *Key Developments in Estates and Trusts Law in Ontario*, 2010 Edition, Melanie A. Yach ed. (Aurora: Canada Law Book, 2010), at p. 65.
67. *Supra.*

two-part judicial analysis: first, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged; and, second, once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.[68]

The intersection between domestic contracts and dependant's relief claims made pursuant to the provisions of the *SLRA* is discussed in greater detail below. The point to note here, however, is the fact that one of the factors considered by the court when a claim is advanced under Part V of the *SLRA* is "any agreement between the deceased and the dependant".[69] Thus, it goes without saying that, for an agreement to be considered by the court for the purposes of a dependant's support claim*, it must be valid.*

3. Recourse for Surviving Spouses under the Succession Law Reform Act

Unlike married spouses, common law spouses are limited in terms of claims available as against their deceased spouse's estate, prohibited as they are from making an equalization claim under the *FLA*. Thus, the only legal recourse available to them are the dependant's relief provisions of the *SLRA*, or certain common law/ equitable remedies, such as various trust principles or applications, resulting trust, constructive trust, unjust enrichment, *quantum meruit*, and promissory/proprietary estoppel, or a combination of each. Of course, these remedies are available to married spouses as well and, as such, the following sections will discuss some of the claims applicable to both married spouses and unmarried cohabitating spouses under the *SLRA*.

(1) Dependant Support Claims under the Succession Law Reform Act

Part V of the *SLRA* provides for the support of "dependants", in situations where a deceased spouse, prior to death, was providing support or was under a legal obligation to do so immediately prior to death,[70] but failed to make adequate provision for the proper support

68. *LeVan v. LeVan* (2008), 90 O.R. (3d) 1, 239 O.A.C. 1, 51 R.F.L. (6th) 237 (Ont. C.A.), leave to appeal refused [2008] 3 S.C.R. viii, 391 N.R. 391*n*, 2008 CarswellOnt 6207 (S.C.C.), at para. 51.
69. *SLRA*, s. 62(1)(m).
70. *SLRA*, s. 57.

of his/her dependant spouse on death. One of the governing provisions of Part V is s. 58(1) which provides:

> 58(1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

(a) Who is a Spouse for Purposes of the SLRA?

In order to qualify as a dependant for the purposes of making a claim, an applicant must establish that they are in fact a "dependant" of the deceased. Dependant is defined in s. 57 of Part V of the *SLRA* as, among others, "the spouse of the deceased . . . to whom the deceased was providing support or was under a *legal obligation to provide support immediately before his or her death*" (emphasis added).

The clear trend in the case law supports the conclusion that the legal obligation of spouses to support one another found in s. 30 of the *FLA,* suffices to satisfy the prerequisite of a "legal obligation to provide support" as provided for in s. 57 of the *SLRA*.[71] Indeed, this was the finding in the case of *Su v. Lam Estate*.[72]

Thus, if an applicant can prove that they were a "spouse" of the deceased pursuant to s. 57 of the *SLRA* (and thus s. 30 of the *FLA*), it is a foregone conclusion that that they will also be considered to be a dependant of the deceased's estate. Much hinges on whether the applicant can establish that they are in fact a spouse of the deceased. If the spouses are unable to do so, however, and this is a feat more challenging for unmarried spouses, no relief is available under the *SLRA*.

For a common law spouse to be considered a spouse under s. 57 of the *SLRA* and s. 1(1) of the *FLA*, they must be able to demonstrate that they have cohabited continuously for at least three years, or that they are in a relationship of some permanence, if the parent of a child. The courts have held that both Acts contain the same definitions of "cohabit".[73] The courts will have regard to the seminal case of *Molodowich v. Penttinen*,[74] where the court identified the seven broad factors to consider in assessing whether two persons have cohabited.

71. *Su v. Lam Estate* (2011), 198 A.C.W.S. (3d) 551, 2011 ONSC 1086, 2011 CarswellOnt 1030 (Ont. S.C.J.), at para. 9.
72. *Supra.*
73. *Ibid.,* at para. 12.
74. *Supra,* footnote 41, at para. 16.

Su v. Lam Estate involved a dependant's support claim brought in the context of competing claims made by the spouse and former spouse of the deceased, Ms. Lam.

Mr. Su brought an application for dependant's support, on the basis that he was the common law spouse of the deceased. Both Mr. Su and the deceased had been married and had children with their prior spouses, but were never officially divorced – a fact that the court found did not negate the existence of a common law conjugal relationship as between Mr. Su and the deceased for the purposes of either s. 57 of the *SLRA,* or s. 30 of the *FLA*. The deceased had prepared a will, pursuant to which she bequeathed any plan benefits to her former husband, and left the residue of her estate to her two adult children. Most of her real estate holdings also went to her former husband by way of survivorship. The entirety of the deceased's estate was valued at approximately $1,250,000. The deceased left nothing to Mr. Su.

The court applied the factors set out in *Molodowich* and was satisfied that Mr. Su and the deceased had maintained a conjugal relationship of a duration greater than three years. A very significant factor in the court's decision was that Mr. Su contributed materially to the physical and financial well being of the deceased. As such, the court found that the pair were spouses pursuant to s. 30 of the *FLA* and that the deceased was under a legal obligation to provide support to Mr. Su immediately before her death. As such, Mr. Su qualified as a dependant of Ms. Lam for the purposes of s. 57 of the *SLRA*. As the court did not have enough evidence before it regarding the value of the deceased's estate a further attendance was ordered.

In terms of whether the three-year period of cohabitation must immediately precede the death of the deceased spouse, the court in *Radziwilko v. Seef Estate*[75] held that such was not necessary. This holding was followed in *Romero v. Naglic Estate*,[76] an interesting case that provides clarification regarding the extended definition of "spouse" in s. 57 of the *SLRA*.

In *Romero v. Naglic Estate*, the court found that the surviving same-sex spouse qualified as a "spouse", despite a number of facts that would suggest otherwise. For instance, there was evidence that, in the year before the deceased death, the spouse's relationship with the deceased had purportedly ended; that the applicant had commenced an intimate relationship with a woman, allegedly

75. *Radziwilko v. Seef Estate* (2003), 169 O.A.C. 325, 1 E.T.R. (3d) 81, 2003 CarswellOnt 878 (Ont. S.C.J. (Div. Ct.)).

76. *Naglic Estate (Re)* (2009), 51 E.T.R. (3d) 180, 71 R.F.L. (6th) 168, *sub nom. Romero v. Naglic Estate*, 2009 CarswellOnt 3193 (Ont. S.C.J.).

without the deceased's knowledge until right before his death; that the spouse had purportedly made threats against the deceased, and that he had been accused of (although not convicted of) murdering the deceased. Despite this somewhat suspicious set of facts, the court decided that Mr. Romero was a spouse of the deceased. It relied exclusively on the principle enunciated in *Radziwilko v. Seef Estate*,[77] holding that the evidence disclosed a very credible claim by Mr. Romero that he cohabited with Mr. Naglic for not less than three years in a same-sex relationship, and, therefore, fell within the extended definition of "spouse" in s. 57 of the *SLRA*.

The case of *Blair v. Allair Estate*[78] is also quite interesting in that it involved a motion for interim support under the *SLRA* made by one of the deceased's two long-term common law partners. The court found that, on the evidence, both of the deceased's partners met the definition of "spouse" in the *SLRA*, and could establish claims for support. The court made this finding in spite of the fact that the other spouse, also the estate trustee appointed in the deceased's will, had maintained a relationship with another man for some time. Counsel for the estate trustee argued that since the relationships 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.[79]

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".[80] 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 spouse had overcome the evidentiary hurdle required to support a claim for support, having provided "credible evidence from which one could rationally conclude that the applicant could establish . . . (her) . . . claim for support", and awarded her $1,500 per month in support.[81]

77. *Supra,* footnote 75, at para. 15.
78. *Blair v. Allair Estate* (2011), 94 R.F.L. (6th) 346, 2011 CarswellOnt 263, 2011 ONSC 498 (Ont. S.C.J.).
79. *Supra*, at para. 16.
80. *Ibid.*

(b) Failure to Make Adequate Provision for Proper Support

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

In the case of *Perkovic v. McClyment*,[82] the common law spouse of the deceased was unsuccessful in an application under the *SLRA*. According to the applicant, he had cohabitated with the deceased for 14 years, had been financially supported by her, but she had failed to make adequate provision for his proper support. In her will, the deceased left her entire estate to her children and grandchildren, with the estate having a gross value of $538,999.82. The court referred to the seminal case of *Cummings v. Cummings*[83] and noted that when judging whether a deceased has made adequate provision for the proper support of her dependants, a court must examine "the claims of all dependants, whether based on need or on legal or moral or ethical obligations".[84] In reaching its conclusion that the surviving spouse had not established that he was a dependant of the deceased, or that he lacked the means to meet his financial needs, the court focused its attention on the fact that, by his own evidence, the surviving spouse had admitted that he had kept his financial affairs separate and apart from those of the deceased. For this reason, and reasons involving lack of credibility on his part, the court refused to make an application for support in his favour.

The case of *Middel v. Vanden Top Estate*[85] provides an interesting review of the principles upon which an award might be made under the *SLRA*. The issues in this case were whether the applicant (a former

81. *Ibid.*, at para. 19.
82. *Perkovic v. Marion Estate* (2008), 43 E.T.R. (3d) 124, 57 R.F.L. (6th) 57, *sub nom. Perkovic v. McClyment*, 2008 CarswellOnt 5931 (Ont. S.C.J.).
83. *Cummings v. Cummings* (2004), 235 D.L.R. (4th) 474, 69 O.R. (3d) 397, 2004 CarswellOnt 99 (Ont. C.A.), leave to appeal refused [2004] 2 S.C.R. v, 239 D.L.R. (4th) vi, 197 O.A.C. 400*n* (S.C.C.).
84. *Perkovic v. Marion Estate*, *supra*, footnote 82, at para. 7.
85. *Middel v. Vanden Top Estate* (2010), 87 R.F.L. (6th) 141, 2010 CarswellOnt 4169, 2010 ONSC 2951 (Ont. S.C.J.).

spouse) was a dependant of the deceased at the time of his death; whether the deceased made adequate provision for her; and, if not, what relief should be afforded to her. Interestingly, although the applicant and the deceased had been married for almost 15 years, before they separated in 1973 and divorced in 1975, the applicant never advanced a claim for spousal support, and no monthly support was ever paid by the deceased until 2003. At that time, the applicant learned that the deceased had cancer and wrote to him to express her regrets and remind him of a promise he had made to her in 1973 to pay her alimony and support. In response to the card, the deceased provided the applicant with $37,000 in cash between 2003 and 2008. The deceased also acquired a life lease in a retirement home for the applicant, and provided her with an annuity that would supply her with annual income of $9,120 for rest of her life. Importantly, before his death, the deceased told his executor that he had already made provision for the applicant.

When the deceased died, the applicant brought an application pursuant to s. 58(1) of the *SLRA* for support from the deceased's estate. The court noted that although the deceased had no legal obligation to provide support for the applicant immediately before his death, by supporting her in the manner he did, he opened the door to a claim under the *SLRA*. However, because the applicant had not established that the deceased had failed to make adequate provision for her proper support – the deceased had in fact provided her with shelter in a home of her choice and annual income that came very close to giving the applicant a balanced budget – the court found that to grant the applicant's application would frustrate the deceased's testamentary intentions and would be unfair to his beneficiaries, who would bear the brunt of any such award. In making its decision, the court carefully reviewed the 19 factors enumerated in s. 62 of the *SLRA*.[86]

86. Section 62 of the SLRA states as follows: "[i]n determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application, including,

(a) the dependant's current assets and means;
(b) the assets and means that the dependant is likely to have in the future;
(c) the dependant's capacity to contribute to his or her own support;
(d) the dependant's age and physical and mental health;
(e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living;
(f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
(g) the proximity and duration of the dependant's relationship with the deceased;

The thorough analysis performed by the court not only provides an excellent roadmap for counsel but it also provides insight on what evidence is expected by the court in order to meet the burden expected of an applicant when seeking support.[87]

(h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;
(i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;
(j) a contribution by the dependant to the realization of the deceased's career potential;
(k) whether the dependant has a legal obligation to provide support for another person;
(l) the circumstances of the deceased at the time of death;
(m) any agreement between the deceased and the dependant;
(n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;
(o) the claims that any other person may have as a dependant;
(p) if the dependant is a child,
(i) the child's aptitude for and reasonable prospects of obtaining an education, and
(ii) the child's need for a stable environment;
(q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;
(r) if the dependant is a spouse,
(i) a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship,
(ii) the length of time the spouses cohabited,
(iii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,
(iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,
(v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,
(vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,
(vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,
(viii) the desirability of the spouse remaining at home to care for a child; and
(s) any other legal right of the dependant to support, other than out of public money.

87. Philip Epstein and Lene Madsen, "Epstein and Madsen's This Week in Family Law", Fam. L. Nws. 2010-31.

(c) The Deadline to Bring a Claim

An order for dependant support is made by way of application to the court and may be made in circumstances where there is a will, intestacy, or, as noted, even where there has been a contractual agreement to waive support.[88]

Subject to the exception in s. 61(2) of the *SLRA*, an applicant has six months from the grant of letters probate of the will or of letters of administration to bring an application. Note that, in most circumstances, the phrase "grant of letters probate of the will" in s. 61(1) is the equivalent of issuing the Certificate of Appointment of an Estate Trustee With a Will as referred to in Rule 74.04.[89]

The underlying rationale for the six-month limitation period is twofold: first, it gives a potential claimant the opportunity to make a claim within a fixed period of time, before the estate can be distributed; and, second, upon the expiry of the limitation period it provides the trustee with the repose of knowing that all potential claims have been received, presupposing of course that probate is obtained.

The limitation period in s. 61(1) of the *SLRA* is not absolute. For instance, in a situation where an order for the Return of Certificate of Appointment is obtained pursuant to Rule 75.05(1) of the *Rules of Civil Procedure* (the "*Rules*"),[90] thus requiring that the Certificate be returned to the Registrar, as was the case in *Balanyk v. Balanyk Estate*,[91] the limitation period set out in s. 61(1) of the *SLRA* will be suspended until further order releasing the Certificate or otherwise appointing another estate trustee.[92]

As well, s. 61(2) provides that a court has discretion to allow an application to be made "at any time as to any portion of the estate remaining undistributed at the date of the application", if the court would consider it proper to do so.

Hence, in *Middel v. Vanden Top Estate*,[93] although the application for support was filed approximately five months after the limitation period had passed, relying on s. 61(2) of the *SLRA,* the court was

88. Corina S. Weigl and Jonathan F. Lancaster, "Contracting out of Dependant's Support Obligations", in *Key Developments in Estates and Trusts Law in Ontario,* 2010 Edition, Melanie A. Yach, ed. (Aurora: Canada Law Book, 2010), at p. 98.
89. *Balanyk v. Balanyk Estate* (2008), 38 E.T.R. (3d) 179, 165 A.C.W.S. (3d) 927, 2008 CarswellOnt 1353 (Ont. S.C.J.), at para. 14.
90. R.R.O. 1990, Reg. 194.
91. *Supra*, footnote 89.
92. *Ibid.,* at para. 25.
93. *Supra*, footnote 85.

satisfied that leave should be granted to permit the applicant to bring her claim. It appears that the applicant's failure to bring the application within the time period was based on the fact that she had not retained counsel until three months after the deadline had been surpassed.

(d) The Support Award

Pursuant to ss. 68 and 72 of the *SLRA* the court has wide discretion when making an award for support. Section 68 provides:

> 68(1) Subject to subsection (2), the incidence of any provision for support ordered shall fall rateably upon that part of the deceased's estate to which the jurisdiction of the court extends.
>
> (2) The court may order that the provision for support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to the court seems proper.

As these provisions make clear, a support order is not restricted to estate residue, after the deduction of specific bequests.

An award may be made in the form of periodic, lump sum payments, or a combination of both. The advantage of a lump sum payment is that the administration of the estate does not continue for the duration of the estate's obligation to provide such support.

Section 72 of the *SLRA* is an extremely powerful provision. It sets out the various ways in which certain *inter vivos* transactions can be clawed back into the estate for the purpose of satisfying a support award.[94]

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94. Section 72 provides as follows: 72(1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63 (2) (f),
    (a) gifts *mortis causa*;
    (b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;
    (c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors of those persons with any bank, savings office, credit union or trust corporation, and remaining on deposit at the date of the death of the deceased;
    (d) any disposition of property made by a deceased whereby property is

The court's powers under s. 72 are limited to the extent that where the deceased has entered into a contract, in good faith and for valuable consideration, to devise property and does so in his will, that property will be exempt from any support order, unless it can be demonstrated that the value of the property exceeded the consideration that was given for it. This is set out in s. 71.

(2) Section 44 of the Succession Law Reform Act and the Impact of Remarriage or Common Law Arrangements on Prior Wills

Section 44 of the *SLRA* provides that, where a deceased, who dies intestate, is survived by a spouse and not survived by "issue",[95] the spouse is entitled to *all* of the deceased's property absolutely.[96] Where a spouse dies intestate in respect of property having a net value of more than the "preferential share" and is survived by a spouse and issue, the spouse is entitled to the preferential share, absolutely. The preferential share is currently prescribed by regulation as $200,000.[97]

The recent case of *Scotia Mortgage Corp. v. Davidson Estate*[98] illustrates the way in which s. 44 is liable to produce a harsh and, as in this case, a seemingly unjust result in situations involving relatively small estates. Although it is unclear how old the deceased was at the time of his death, the case involved a situation where two years after the deceased's first wife died, he remarried, but only to pass away less than a year later and without leaving a will respecting his

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held at the date of his or her death by the deceased and another as joint tenants;

(e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof, but the provisions of this clause do not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;

(f.1) any amount payable on the death of the deceased under a policy of group insurance; and

(g) any amount payable under a designation of beneficiary under Part III.

95. Note that "issue" includes a descendant conceived before and born alive after the person's death (*SLRA*, s. 1(1)).
96. *SLRA*, s. 44.
97. *SLRA*, s. 45(5), and O. Reg. 54/95, s. 1.
98. *Scotia Mortgage Corp. v. Davidson Estate* (2009), 83 R.P.R. (4th) 247, 177 A.C.W.S. (3d) 576, 2009 CarswellOnt 2297 (Ont. S.C.J.).

testamentary intentions. The deceased had eight children from his first marriage, none of which stood to benefit upon his death due to the operation of s. 44 of the *SLRA*. As noted by Justice Quigley:[99]

> When a person dies intestate in respect of property that has a net value of not more than $200,000 (the preferential share) and is survived by a spouse and issue, the spouse is entitled to the property absolutely. Where a person dies intestate in respect of property and leaves a spouse and more than one child, the spouse is entitled to one third of the residue of the property after payment of the preferential share. The important point in this context, however, is that where the net value of the estate does not exceed $200,000, even if there are children who survive the spouse and who might otherwise be entitled to inherit, that is who might otherwise become "heir's" . . . there will be no property left for them to inherit and no residue for them to share in after the payment of the preferential share since the *Succession Law Reform Act* makes clear that that net value of less than $200,000 is all to be paid to the surviving spouse . . .

The case of *Re York Estate*,[100] provides another example of a situation where 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 stood to inherit the entirety of their parent's estate.

In *Re York Estate*, the deceased's first wife died in April of 1994, following which the deceased executed a will in May of 1994 (one month later). In that will, he left the residue of his estate to his children (they being from his first marriage), in equal shares. On July 28, 1995, however, the deceased re-married. He died a month later, on August 31, 1995. Although it was clear that the deceased's will was not made "in contemplation of marriage", it is not clear from the decision whether, at the time the deceased executed his will, he had even met his second wife, although this fact would not make a difference from a legal point of view. The deceased's estate was of moderate size, consisting of farm property, RRSPs, and investments totaling $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".[101]

Despite the short amount of 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

99. *Supra,* at para. 40.
100. *York Estate (Re)*, 1998 CarswellOnt 3947 (Ont. Gen. Div).
101. *Supra,* at para. 6.

out in s. 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 s. 45 resulted in any injustice, but the court's statement espouses how a straightforward application of the provision does not always bear a fair result:[102]

> 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 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.

4. Spousal Claims under Constructive and Resulting Trust Principles

As a result of the enactment of comprehensive matrimonial property legislation in the 1970s and 1980s, married spouses today have access to a range of property rights and entitlements upon the breakdown of the marital relationship. The same is not true for common law spouses, since, in most Canadian provinces, like Ontario, unmarried cohabitating spouses are denied access to the property law rights granted to married or separating spouses under the family law legislation. Consequently, the only vehicle for restitution for these types of spouses after the breakdown of a relationship or upon on death of a spouse is by reliance on common law and equitable remedies, with the main legal mechanisms being the resulting trust, constructive trust, and actions in unjust enrichment, and *quantum meruit*.

The resulting trust and constructive trust are different from express trusts. Express trusts arise by way of agreement between a settler/testator and trustee and, historically, have required perhaps slightly easier evidentiary thresholds to overcome. Conversely, the requirements for proving and determining both resulting and constructive trust remedies historically proved extremely

102. *Ibid.,* at para. 10.

complicated and hence it proved difficult for unmarried couples to succeed with such claims.

That said, in the recent seminal decision of *Kerr v. Baranow,*[103] the Supreme Court of Canada clarified the concept of resulting trust, particularly as it relates to the spousal context. And, most importantly of all, the court created a new judicial avenue for unmarried cohabiting spouses to obtain restitution in circumstances where unjust enrichment can be proven, thus making what was once nothing more than a legal mirage, into an equitable remedy with tangible proprietary and monetary consequences.[104]

(1) Resulting Trusts: Important New Developments

Over the past 30 or so years, the courts have struggled with the financial and property rights of spouses upon the breakdown of a marriage or domestic relationship, or the death of a spouse. In situations where the matrimonial property legislation did not enable the result required, heed has historically been had to various trust remedies.

In the early cases of the 1970s, relief was sought by way of the resulting trust. It was employed as a tool to recognize an interest in property that was the result of contributions to the acquisition of property, which were not reflected in the legal title. Added to this was the development of the purely Canadian invention of the "common intention" resulting trust, the premise of which was that a resulting trust could be judicially imposed in situations where it was shown that it was the "common intention" of the parties that the non-owner spouse receive an interest in the property.

However, doctrinal and practical problems with the common intention resulting trust soon emerged and it long proved to be an unsatisfactory legal solution to many domestic property disputes. This remained the case until now, when the Supreme Court of Canada clarified the law of the resulting trust in the case of *Kerr v. Baranow*.[105]

In *Kerr v. Baranow*, the Supreme Court radically altered the law with respect to the resulting trust. It held that although traditional resulting trust principles may continue to play a role in the resolution of property disputes between unmarried domestic partners, "the time has come to acknowledge that there is no continuing role of the common intention resulting trust".[106]

103. *Kerr v. Baranow*, [2011] 1 S.C.R. 269, 328 D.L.R. (4th) 577, 2011 CarswellBC 240 (S.C.C.).
104. Martha McCarthy, *supra*, footnote 57, at p. 12.
105. *Supra,* footnote 103.

In the court's view, the "common intention" resulting trust is doctrinally unsound. Not only did it evolve from a misreading of some imprecise language in early authorities from the House of Lords, but it is inconsistent with the underlying principles of resulting trust law.[107] Other significant problems identified by the court were the fact that the underlying principles of resulting trust law make it hard to accommodate situations in which the contribution made by the claimant was not in the form of property or closely linked to its acquisition since it cannot be said that in such instances the property "results back".[108] The final doctrinal problem identified by the court is the fact that the relevant time for ascertaining intention is the time of acquisition of the property. Thus, in the court's view, "it is hard to see how a resulting trust can arise from contributions made over time to the improvement of an existing asset, or contributions in kind over time for its maintenance".[109] On a practical level, the court opined that the notion of common intention may in fact be highly artificial, particularly in domestic cases,[110] in that, "[t]he search for common intention may easily become 'a mere vehicle or formula' for giving a share of an asset, divorced from any realistic assessment of the actual intention of the parties".

The implication for the resulting trust in the Canadian context, as a result of *Kerr v. Baranow*, is this: in domestic situations where there is either a gratuitous transfer of property from one spouse to the other or there is joint contribution by two partners to the acquisition of property, but the title to the property is held solely by one partner, a resulting trust may be imposed, but, in making such a determination, "it is the intention of the *grantor or contributor* alone that counts"[111] (emphasis added). As stated by the court:[112]

> The point of the resulting trust is that the claimant is asking for his or her own property back, or for the recognition of his or her proportionate interest in the asset which the other has acquired with that property . . . a resulting trust can arise only when one person has transferred assets to, or purchased assets for, another person and did not intend to make a gift of the property.

106. *Ibid.,* at para. 15.
107. *Ibid.,* at para. 25.
108. *Ibid.*
109. *Ibid.*
110. *Ibid.,* at para. 26.
111. *Ibid.,* at para. 18.
112. *Ibid.*, at para. 25, citing D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada,* 3rd ed. (Toronto: Carswell, 2005), at pp. 430-35.

Applied to the estates context, it is important to note that, provided the transferor had the requisite capacity to make the transfer, if, after they have passed away, title to the property is still held jointly with another, the estate trustee of the transferor will be obliged to seek a declaration that the transferee/defendant holds the property by way of resulting trust on behalf of the estate, such that the property can be included as an asset of the estate and administered.[113] If the trustee's claim is disputed by the transferee, it will then be incumbent upon the court to ascertain whether the property ought to result back to the estate, or whether a gift was intended to the recipient. If it is determined, however, that the transferor lacked capacity to make the transfer, the transfer can be set aside on the basis that it is void *ab initio*. In this situation, a court will proceed cautiously in making its determination as it will not have the benefit of the deceased's evidence.[114]

Notably, property is frequently conveyed jointly, often with a right of a survivorship for reasons such as avoiding creditors, probate fees, or certain taxes. The determination of "intention" is often the key in resolving jointly held property disputes.

(2) Unjust Enrichment and the Remedial Constructive Trust

As a result of the difficulties associated with the common intention resulting trust, the clear message received from the Supreme Court in *Kerr v. Baranow* is that the law of unjust enrichment, coupled with the remedial constructive, remains "the more flexible and appropriate lens through which to view property and financial disputes in domestic situations".[115] As stated by the court,[116] at the heart of the

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

114. *Supra,* at 18:40.20.10.

115. *Kerr v. Baranow, supra*, footnote 103, at par. 23. Here the court noted, with approval, that this was the approach enunciated in the leading case of *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 8 E.T.R. 143 (S.C.C.).

116. *Ibid.*, at para. 28: "as the development of the law since [*Becker v. Pettkus* (1980), 2 S.C.R. 834 (S.C.C.)] has shown, the principles of unjust enrichment, coupled with the possible remedy of a constructive trust, provide a much less artificial, more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships. There is no need for any artificial inquiry into common intent. Claims for compensation as well as for property interests may be addressed. Contributions of all kinds and made at all times may be justly considered. The equities of the particular case are considered transparently and according to principle, rather than masquerading behind often artificial

equitable remedy of unjust enrichment "lies the notion of restoring a benefit which justice does not permit one to retain".[117] In other words, equity will provide a remedy in a situation where something has been given by one party and received and retained by the other, without any juristic reason.[118]

Kerr v. Baranow has not changed the requirements for making an unjust enrichment claim, since the concept was applied in *Becker v. Pettkus*[119] and affirmed in *Peel (Regional Municipality) v. Canada*.[120] The law remains that, for a plaintiff to be successful in making such a claim, they must be able to establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. As well, precedent has consistently held, and has been affirmed in *Kerr v. Baranow*, 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'."[121]

With respect to the first element – the enrichment – the plaintiff must show that it gave something to the defendant which the defendant received and retained. It is not necessary that the benefit be retained permanently. However, it must be shown that the benefit enriched the defendant and that the benefit can be restored to the plaintiff *in specie* or by money. The benefit must be a tangible one.[122] It may be positive or negative; meaning: "the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake".[123]

In terms of the second element – deprivation – the plaintiff must show that it has suffered a deprivation. However, the plaintiff's loss will only be relevant to the extent that it can be shown that the defendant gained a benefit or has been enriched by that loss.[124]

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attempts to find common intent to support what the court thinks for unstated reasons is a just result."

117. *Ibid.*, at para. 31, citing *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 98 D.L.R. (4th) 140, 59 O.A.C. 81 (S.C.C.), at p. 788.

118. *Ibid.,* at para. 31.

119. *Pettkus v. Becker, supra,* footnote 115.

120. *Peel (Regional Municipality) v. Canada*, *supra*, footnote 117, at p. 788.

121. *Kerr v. Baranow, supra*, footnote 103, at para. 34, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621, [1993] 3 W.W.R. 337 (S.C.C.), at p. 997, *per* McLachlin J. (as she then was), and also p. 1023, *per* Cory J.

122. *Ibid.,* at para. 34, citing *Peel (Regional Municipality) v. Canada*, *supra*, footnote 117, at pp. 788 and 790; and *Garland v. Consumers' Gas Co*., [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385, 2004 SCC 25 (S.C.C.), at paras. 31 and 37.

123. *Ibid.*

The third element requires the plaintiff to demonstrate that there is no reason in law or justice which justifies the defendant's retention of the benefit conferred by the plaintiff – thus making the enrichment "unjust".[125] Although the courts resist a purely categorical approach to unjust enrichment claims, juristic reasons to deny recovery have historically included: the intention to make a gift, a contract, or a disposition of law.[126]

Finding an absence of juristic reason requires application of the two-step analysis, which was articulated by the Supreme Court in *Garland v. Consumers' Gas Co.*[127] Namely, the plaintiff must first show that no juristic reason from an established category exists to deny recovery, in which case a *prima facie* case will be demonstrated. If the case falls outside of one of the established categories, then the court will take into consideration the reasonable legitimate expectations of the parties and moral and public policy considerations, in order to assess whether recovery should be denied.[128]

It is at this stage that "due consideration of the autonomy of the parties, including factors such as 'the legitimate expectation of the parties, the right of parties to order their affairs by contract'"[129] will be considered.

When applying these principles to the domestic context, it has been conclusively held that, whether in common law, equity, or by statute, there is no duty on a spouse or domestic partner to perform work or services for the other.[130] As stated by the court in *Kerr v. Baranow*:[131]

> It follows, on a straightforward economic approach, that there is no reason to distinguish domestic services from other contributions (*Peter*, at pp. 991 and 993; *Sorochan,* at p. 46). They constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy (*Peter*, at p. 993). The

124. *Ibid.*
125. *Ibid.,* at para. 34.
126. *Ibid.,* at para. 41. The court noted that: "[t]he latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46*; Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.))."
127. *Supra,* footnote 122.
128. *Kerr v. Baranow, supra*, footnote 103, at paras. 43-44.
129. *Ibid.,* at para. 41.
130. *Ibid.,* at para. 42.
131. *Ibid.*

> unpaid provision of services (including domestic services) or labour may also constitute a deprivation because the full-time devotion of one's labour and earnings without compensation may readily be viewed as such. The Court rejected the view that such services could not found an unjust enrichment claim because they are performed out of "natural love and affection". (*Peter*, at pp. 989-95, per McLachlin J., and pp. 1012-16, per Cory J.).

As may be evident, the court in *Kerr v. Baranow* has not changed the criteria required to establish an unjust enrichment claim.

Nor, for that matter, did the Supreme Court alter the requirements for establishing a constructive trust claim, stating, instead, that "the law relating to when a proprietary remedy should be granted is well established and remains unchanged".[132]

Thus, the established law of constructive trust has been and remains that for a plaintiff to obtain such an award, it must be able to: (i) establish the three criteria for unjust enrichment, as identified above; (ii) demonstrate that a monetary award would be inappropriate or insufficient; and (iii) demonstrate that there is a link or causal connection between their contributions and the acquisition, preservation, maintenance or improvement of the disputed property.

With respect to the necessity of establishing a "link" between contribution and the property, the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust.[133] As noted by the Court in *Kerr v. Baranow*, "[i]ndirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property".[134]

Finally, the court will make an award that is proportionate to the claimant's contributions. Thus, if the contributions to the property are unequal, the interest in the property will be unequal.[135]

While *Kerr v. Baranow* did not alter the elements necessary to prove an unjust enrichment either, or to establish a claim for constructive trust, it did significantly contribute to determining criteria to apply to the question of how an award for unjust enrichment should be quantified. It did so by rejecting the widespread view that there are only two dichotomous choices of remedy available to satisfy an unjust enrichment claim: (i) a monetary award, calculated on a "value

132. *Ibid.,* at para. 58.
133. *Ibid.,* at para. 51.
134. *Ibid.*
135. *Ibid.,* at para. 53.

received" or fee-for-services basis (an approach employed in determining a remedy in *quantum meruit* claims); or (ii) a proprietary award, which generally takes the form of a remedial constructive trust, in situations where the claimant can show that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property.[136]

In the court's view, this remedial dichotomy would be appropriate only if the basis of all domestic unjust enrichment claims fit into only two categories – those where the enrichment consists of the provision of unpaid services; and, those where it consists of an unrecognized contribution to the acquisition, improvement, maintenance or preservation of specific property.[137] However, such a dichotomy neglects at least one other basis for determining an unjust enrichment claim, namely, cases where there is a "joint family venture" or, in other words, where the contributions of both parties over time have resulted in an accumulation of wealth.[138] In these situations, the unjust enrichment will occur when it is demonstrated that throughout the relationship the parties engaged in a joint family venture but, upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets. As stated by the court:[139]

> In such cases, the basis of the unjust enrichment is the retention of an inappropriately disproportionate amount of wealth by one party when the parties have been engaged in a joint family venture and there is a clear link between the claimant's contributions to the joint venture and the accumulation of wealth. Irrespective of the status of legal title to particular assets, the parties in those circumstances are realistically viewed as "creating wealth in a common enterprise that will assist in sustaining their relationship, their well-being and their family life" (McCamus, at p. 366). The wealth created during the period of cohabitation will be treated as the fruit of their domestic and financial relationship, though not necessarily by the parties in equal measure.

Although the court noted that determining whether a joint family venture exists is a question of fact in all cases, the court identified the following non-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

136. *Ibid.,* at para. 57.
137. *Ibid.,* at para. 57.
138. *Ibid.,* at para. 60.
139. *Ibid.,* at para. 81.

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.[140]

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

In determining the award, the court held that the remedy 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"[141] 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".[142] Rather, it should remain a broad and flexible one. As stated by the court:[143]

> Professor Fridman was right to say that "where a claim for unjust enrichment has been made out by the plaintiff, the court may award *whatever form of relief is most appropriate so as to ensure that the plaintiff obtains that to which he or she is entitled*, regardless of whether the situation would have been governed by common law or equitable doctrines or whether the case would formerly have been considered one for a personal or a proprietary remedy" (p. 398). [Emphasis added.]

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

This raises a number of questions. For example, what if, despite the considerable work and labour of the stay-at-home spouse, the income-earning spouse does not result in a proportionate increase in the couple's wealth, and, how is the former spouse's entitlement to be calculated in these circumstances? Is the former's entitlement to the

140. *Ibid.,* at paras. 89-100.
141. *Ibid.,* at para. 100.
142. *Ibid.,* at para. 102.
143. *Ibid.,* at para. 79.

existing joint family assets, which their efforts in the home have helped secure and maintain, negated? Or, will their compensation be limited to a fee-for-services calculation and, if so, does that not diminish the value of such work?

Although *Kerr v. Baranow* has clarified the law considerably with respect to quantification of an unjust enrichment remedy, the court's focus on the "accumulation of wealth" as a result of the joint family venture makes it difficult to predict how such questions will be dealt with when the principles of this case are applied in cases where greater wealth is not amassed during the course of a spousal relationship.

5. Claims for Quantum Meruit – A Claim for Services

In the normal case, a claimant seeking compensation for services rendered is able to rely on an express or implied promise of compensation or on a promise made by the deceased that the claimant will receive their compensation pursuant to the deceased's testamentary documents or by other means of remuneration.[144] In some situations, however, a claimant is unable to prove that a valid contract exists and/or they are unable to enforce upon an existing one. If, in these circumstances, unjust enrichment on the part of the deceased is found to exist, the court will calculate compensation in favour of the promisee on the basis of *quantum meruit*.[145]

The seminal case on *quantum meruit* is that of *Deglman v. Guaranty Trust Co. of Canada*.[146] In *Deglman*, the deceased had purportedly promised her nephew, who was living with her at one of her two homes while attending school, that if he would be good to her and do such services for her as she might from time to time request during her lifetime that she would make adequate provision for him in her will, and, in particular, that she would leave to him the house in which he was then residing. While staying with the deceased, the nephew did the chores around both houses which, except for an apartment used by his aunt, were occupied by tenants. It appears he also took his aunt about in her own or his automobile on trips to Montreal and elsewhere, and on pleasure drives, of doing odd jobs about the two houses, and of various accommodations such as errands and minor services for her personal needs. When his school term ended, the nephew returned to the home of his mother on another street. After

144. Jennifer J. Jenkins and H. Mark Scott, *supra*, footnote 113, at 18:60.10.
145. *Ibid.,* at 18:60.10.
146. *Deglman v. Guaranty Trust Co. of Canada*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785, 1954 CarswellOnt 140 (S.C.C.).

her death, the nephew learned that the deceased had not kept her promise and, as such, he brought an action for specific performance.

The court held that the nephew's right to recovery against the estate arose not from any enforceable contract made between him and his deceased aunt; but "an obligation imposed by law".[147] The court adopted the statement of Lord Wright in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*[148] when he said:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

Thus, as the estate had received the benefit of the promise made, the court ordered that payment ought to be made for the fair value of the services rendered by the nephew since, to do otherwise, would result in an unjust enrichment.

Practically speaking, in situations where services have been rendered on a property, a *quantum meruit* claim should properly be considered along with, or as an alternative to, a constructive trust claim. The reason for this is that, historically, even where a monetary award has been shown to be inadequate, courts have demonstrated a reluctance to award the proprietary remedy of constructive trust.[149] As such, relying on *quantum meruit*, a court is able to award monetary compensation as an alternative to an interest in a particular property, in situations where, for example, the relationship was of short duration, assets did not survive, or the services were not sufficient to justify a connection to the property.[150]

While the courts may be more receptive to awarding monetary compensation, instead of an interest in property, a court will not award compensation unless the three-part test for a finding of unjust enrichment, as set out by the Supreme Court of Canada in the case of

147. *Supra,* at para. 17.
148. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, [1942] UKHL 4 (H.L.), at p. 61.
149. Jennifer J. Jenkins and H. Mark Scott, *supra,* footnote 113, at 18:60.20, citing *Smithson v. Bock Estate*, [1999] 1 W.W.R. 243, 62 Alta. L.R. (3d) 137, 217 A.R. 50 (Alta. Q.B.).
150. *Ibid.*, at 18:60.20, citing *Grant v. Moore* (1993), 50 E.T.R. 12, 48 R.F.L. (3d) 345, 40 A.C.W.S. (3d) 1191 (B.C.S.C.), and *Shepherd v. Sonnenberg* (1994), 2 R.F.L. (4th) 67, 45 A.C.W.S. (3d) 477 (B.C.S.C.).

Pettkus v. Becker,[151] and as confirmed by the Court in *Kerr v. Baranow*, has been satisfied on the evidence adduced. Namely, a claimant must be able to demonstrate: (i) an enrichment enjoyed by the defendant; (ii) a corresponding deprivation suffered by the plaintiff; and (iii) an absence of juristic reason for the enrichment.

Again, with respect to the third criteria, a court will generally examine the reasonable expectations of the parties, together with moral and public policy considerations, in order to assess whether recovery should be denied, or whether the claimant ought to be reimbursed for the benefit that was provided to the estate.[152]

In the estates context, this raises the issue of the requirement of corroborative evidence imposed on the claimant pursuant to s. 13 of the Ontario *Evidence Act*.[153] As, in cases of this nature, the surviving spouse will usually be the party with the most evidence, and the deceased, the most important witness, is not available to provide evidence, much of the court's analysis will come down to the credibility of the surviving spouse.[154]

Applied to the spousal context, the courts have attributed value to the spousal-type services rendered by one spouse to another during the course of a relationship and, as such, have found such services compensable in law.[155] In some cases, the payment for household expenses will constitute a compensable benefit.[156] In other cases, the delivery of labour and services to or for the benefit of the deceased may be found to be a benefit.[157] Finally, while in some cases the deceased will have suffered a net loss because they provided the claimant with more benefits than received from the claimant – although still having some benefit from the claimant – the courts will

151. *Pettkus v. Becker*, *supra*, footnote 115.
152. Brian A. Schnurr, *Estate Litigation*, 2nd ed. (Toronto: Carswell 1994), 25 – Unjust Enrichment, Constructive Trust and Quantum Meruit Claims in Estates, 25.4 – Quantum Meruit Awards.
153. R.S.O. 1990, c. E.23. Section 13 states: "In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."
154. *Wright Estate v. Johnston* (2011), 199 A.C.W.S. (3d) 329, 2011 CarswellOnt 960, 2011 ONSC 830 (Ont. S.C.J.), at para. 122.
155. *Supra*, at para. 198.
156. *Ibid.,* at par. 198, citing *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1, [1986] 5 W.W.R. 289 (S.C.C.), at pp. 43-45; *Garland v. Consumers' Gas Co.*, *supra*, footnote 122. However, courts have determined that non-economic considerations belong at the juristic reason stage.
157. *Ibid.*

be loath to view services as a "set-off or balancing of mutual contributions or enrichments", at least at the initial stage.[158]

In the case of *Wright Estate v. Johnston*,[159] the court noted, it is more likely than not that a court will find a claimant has suffered a deprivation if the deceased has received a benefit, so long as the claimant can establish a causal link between the two. Applied to marriage-like relationships, the court made this analysis:

> . . . the full-time devotion of one's labour and earnings without compensation or with less than complete remuneration can be viewed as a deprivation . . . Where the benefits received by the Defendant are unpaid household or domestic services, the deprivation is the fact that those services were uncompensated. The precise quantum of the deprivation is not the focus; that is left for the assessment phase. The identification and definition of the detriment corresponding to the enrichment is essential to this stage.

In *Albadi v. Greenzveig Estate*,[160] the plaintiff, an esthetician who was 41 years of age at the time of the hearing, had worked at a Toronto spa, where she met the deceased. The deceased was 77 years of age when he died of a heart attack. He was a Holocaust survivor who had no family and lived in a "run-down apartment".[161] His estate was worth approximately two million dollars.

For about 10 years prior to the deceased's death, the plaintiff supplemented her earnings by providing services to the deceased, including esthetic services from her home and housekeeping services every Sunday, for which she was paid $100 in cash. When the deceased retired, about two to three years before his death, the plaintiff began to provide services to him two evenings a week, after she finished work. She was paid $60 cash for each evening. On those days, the deceased would pick her up from her work and, in some cases he would treat her to dinners, shopping, or a movie.

The plaintiff and the deceased eventually became quite close, speaking on the phone several times a day. The deceased began taking the plaintiff on trips, including trips to the Caribbean, a cruise to Alaska, an expensive cruise to Russia and the Scandinavian countries, to name but a few. The deceased paid for all of the trips, which the plaintiff admitted to enjoying very much. A romantic relationship did not ensue. The plaintiff bought a home with her boyfriend in 2003.

158. *Ibid.,* at para. 200, citing *Garland v. Consumers' Gas Co*., *supra*, footnote 122, at para. 31.
159. *Supra*, footnote 154.
160. *Albadi v. Greenzveig Estate*, 2011 CarswellOnt 5146, 2011 ONSC 3640 (Ont. S.C.J.).
161. *Supra,* at para. 3.

Although the plaintiff alleged that the deceased had promised to leave her his car and "some money" in his will and that he wanted to make some changes to his will, he died before doing so. Observing that the plaintiff conceded that, pursuant to s. 4 of the *Statute of Frauds*[162] she had no claim against the deceased, based on his oral representations to her. In applying the three-part test for unjust enrichment, the court held that even assuming the deceased enjoyed the enrichment conferred by the plaintiff, both by virtue of the services performed, and paid for, as well as her companionship outside of the hours she was paid for, "the plaintiff did not in [the court's] view suffer a corresponding deprivation".[163] First, the court found that she was paid for the housekeeping services and companionship she provided on a weekly basis. As well, not only was it found that she enjoyed the expensive holidays paid for by the deceased, but, in fact, the plaintiff appeared to have been enriched by the trips; not deprived. Hence, the court dismissed the plaintiff's *quantum meruit* claim, holding that, "[t]o the extent that the plaintiff might be seen as having conferred a benefit on the [deceased] through the frequent phone calls in later years, there is no corresponding deprivation and, in the context of the relationship and the benefits received by the plaintiff, they are not sufficient to entitle her to compensation".[164]

In terms of quantification, the scope of the claim has expanded over time, and the measure of a *quantum meruit* award is flexible. As noted by the court in *Kerr v. Baranow*: "it might be assessed, for example, by the cost to the plaintiff of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient".[165]

6. Spousal Claims for Proprietary Estoppel

An additional claim that is available to surviving spouses is that of proprietary estoppel. Essentially, proprietary estoppel is geared to protect an individual who has relied, to his or her detriment, on the action (or inaction) of a property owner that resulted in the belief that he/she would be the true owner of certain property to such an extent that it would be unjust to permit the owner to later turn around and assert his title.[166]

162. R.S.O. 1990, c. S.19.
163. *Albadi, supra,* footnote 160, at para. 13.
164. *Ibid.*
165. *Kerr v. Baranow, supra*, footnote 103, at para. 74, citing P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990) (loose-leaf), vol. 1 at §4:200.30.

The law of proprietary estoppel is well settled and was clarified and confirmed in the recent Ontario Court of Appeal case of *Schwark Estate v. Cutting*.[167] Therein, the Ontario Court of Appeal held that the elements necessary to establish proprietary estoppel are: (i) encouragement of the plaintiffs by the defendant land owner; (ii) detrimental reliance by the plaintiffs to the knowledge of the defendant owner; and (iii) the defendant owner must later seek to take "unconscionable" advantage of the plaintiff by reneging on an earlier promise.[168]

In order to establish unconscionability, the Court of Appeal opined that a plaintiff must meet the five-part test set out by Fry J. in the case of *Wilmott v. Barber*,[169] and adopted by the English Court of Appeal in the seminal case on proprietary estoppel: *Crabb v. Arun District Council*.[170] Fry J.'s five-part test is summarized as follows: (i) the plaintiff must have made a mistake as to his legal rights; (ii) the plaintiff must have expended some money or must have done some act on the faith of his mistaken belief; (iii) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff, since the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights; (iv) the defendant must know of the plaintiff's mistaken belief of his rights; and (v) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

The facts in *Schwark Estate v. Cutting* date back to the 1920s, when the appellants registered a plan of subdivision on the shores of Lake Erie. The respondents were the owners of lakeview cottage lots located atop a bank overlooking the lake, but without direct access to it. Interposed between the respondents' lots and the lake were water lots owned by the appellant with the boundaries thereof demarcated by "no trespassing" signs. Eventually, the bank began to erode causing the respondents to construct a berm at its base. In response, the appellants threatened to sue. Later, however, the appellants gave permission to the respondents to use the water lots for passage to the beach in exchange for use of the respondents' stairs. However, in the

166. *Mohawks of the Bay of Quinte v. Brant* (2008), 166 A.C.W.S. (3d) 204, 2008 CarswellOnt 1753 (Ont. S.C.J.), at para. 101.
167. *Schwark Estate v. Cutting* (2010), 316 D.L.R. (4th) 105, 53 E.T.R. (3d) 163, 2010 CarswellOnt 350 (Ont. C.A.).
168. *Supra,* at para. 16.
169. *Wilmott v. Barber* (1880), 15 Ch. D. 96 (Ch. Div.), affd in part 17 Ch. D. 772 (C.A.).
170. *Crabb v. Arun District Council*, [1976] 1 Ch. 183.

fall of 1998, the appellants deliberately obstructed the path aligning their lots with barrels and brush, thus drawing a final line in the sand.

The Court of Appeal was firm in applying the requirements for proprietary estoppel. The court found that there was no evidence that the appellants had made any false inducements and, in fact, the respondents knew they had no legal right to use the water lots. Nor was there any evidence that the respondents had acted to their detriment, since no money had been expended on the rubble used to construct the berm. The court was clear that simple reliance on another's indulgence is insufficient to lead to an estoppel, stating, "mere acquiescence or being a good neighbor is not enough to establish a claim in proprietary estoppel".[171]

Schwark Estate v. Cutting, although not an estates case *per se*, is important in that, on the one hand, it serves as a reminder that proprietary estoppel, when deployed correctly, provides another means for the estate litigator to level equity's scales in favour of those surviving spouses who have suffered injustice from hollow promises.

As an example, where a surviving spouse is able to put forth sufficient corroborative evidence of a claim for proprietary estoppel, the courts may ignore the provisions of a deceased's will and award damages to the spouse in a manner commensurate with what would reasonably have been expected in respect of the assets of the estate.[172] In these circumstances, "a court will not insist on strict adherence to legal rights of a party where it would be inequitable for that party to do so having regard to the dealings which have taken place between the parties".[173]

Importantly, however, the Court of Appeal makes clear that the test is not an easy one and the facts must truly "raise an equity" or, to quote the court, "give rise to an estoppel". Thus, the estate practitioner must be sure that the three criteria – (i) encouragement by the defendant, (ii) detrimental reliance by the plaintiff to the knowledge of the defendant, and (iii) an attempt by the defendant to take unconscionable advantage of the plaintiff by reneging on an earlier promise – are met in asserting a claim in proprietary estoppel on behalf of his or her client.

Examples of expenditure or "detriment" are situations where "the claimant has spent money on improving the property, done repairs,

171. *Schwark Estate v. Cutting, supra,* footnote 167, at para. 33.
172. Ian M. Hull and Suzana Popovic-Montag, "Proprietary Estoppel – Consider it a Claim Against the Assets of an Estate", LSUC 10th Annual Estates and Trust Summit (November 18, 2010), at p. 5-2.
173. Ian Hull, "Proprietary Estoppel — An Innovative Claim Against the Assets of the Estate" (2003), at 8-10.

contributed to mortgage payments", and may also consist of cases where the claimant foregoes his or her job to take care of the deceased. Although the doctrine of proprietary estoppel has traditionally concerned rights over land, it has been relied upon to assert claims to other forms of property, such as a farm business or the family home.

Although *obiter*, *Schwark Estate v. Cutting* also stands for the principle that where a person makes a binding contract that they will not insist on the strict legal position or their strict legal rights, a court of equity will hold them to their promise. However, this raises the question of what is to happen in a scenario where one spouse argues that she did not bargain harder in her marriage contract because the deceased had promised to take care of her in his will.[174] Arguably, this is one scenario that "raises an equity" and may perhaps be sufficient to support a proprietary estoppel claim.

The law of proprietary estoppel was applied in the more recent Ontario case of *Spadafora v. Gabriele*.[175]

The facts of *Spadafora v. Gabriele* are as follows. In 2004, Guiseppina Gabriele (the "Deceased") and her husband convinced the Deceased's mother, Mariannina Pulla ("Mariannina"), to live with them. At the time, Mariannina was living in her own home. However, the Deceased and her husband promised Mariannina that if she moved in with them, she could live with them in their new home until she died. Relying on this promise, Mariannina gave her daughter and son-in-law her home, which was later sold, and moved with the couple into their newly purchased home located at 246 Sylvadene Parkway (the "House").

As it turned out, the Deceased's husband and then the Deceased predeceased Mariannina. However, on the day before her death, on January 8, 2009, the Deceased transferred the House to her three children Mary Spadafora ("Mary"), Frank Gabriele ("Frank") and Tony Gabriele ("Tony") as tenants-in-common.

Following their mother's death, Mary, Frank and Tony agreed that Frank and Tony would purchase Mary's interest in the House. However, the agreement fell apart, and, as a result, Mary brought an application seeking, among other things, an order for the sale of the House and the equal division of the proceeds between the siblings. At the time of the application, Mariannina still resided in the House.

In support of the relief sought, Mary argued that she had a *prima facie* right to partition or sale of the land pursuant to s. 2 of the

174. All credit for this question goes to Clare Burns, Weir Foulds LLP (Estate Planning Council Meeting, February 2, 2010).

175. *Spadafora v. Gabriele* (2011), 210 A.C.W.S. (3d) 800, 2011 CarswellOnt 14702, 2011 ONSC 6686 (Ont. S.C.J.).

Partition Act.[176] Citing the case of *Akman v. Burshtein*,[177] she further argued that the only basis upon which a court could refuse to grant such a partition or sale order would be where there has been malicious, vexatious or oppressive conduct on the part of the party seeking the partition or sale.

The court noted that, pursuant to s. 3(1) of the *Partition Act*, Mary would only be entitled to partition the property if she were entitled to immediate possession of it. The issue facing the court then was whether Mariannina's residency in the House, pursuant to the agreement reached between Mariannina and her daughter and son-in-law, restricted Mary's right to immediate possession of the House and thus her entitlement to partition and sale under the *Partition Act*.[178]

The court ultimately was of the view that the doctrine of proprietary estoppel applied to protect Mariannina's residency in the property, and restricted Mary's right to immediate possession of it. In making its determination, the court cited the Ontario Court of Appeal case of *Depew v. Wilkes*[179] as authority for the court's equitable jurisdiction to employ the doctrine of proprietary estoppel in cases where the assertion of strict legal rights would be unconscionable.[180] It then reiterated the essential elements of proprietary estoppel as set out in the case of *Eberts v. Carleton Condominium Corp. No. 396*:[181]

> (i) An equity arises where:
>
> (a) the owner of land (O) induces, encourages or allows the claimant (C)

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176. R.S.O. 1990, c. P.4.

177. *Akman v. Burshtein* (2009), 176 A.C.W.S. (3d) 464, [2009] O.J. No. 1499 (Ont. S.C.J.).

178. *Spadafora v. Gabriele, supra,* footnote 175, at para. 16.

179. *Depew v. Wilkes* (2000), 216 D.L.R. (4th) 487, 60 O.R. (3d) 499, 162 O.A.C. 23 (Ont. C.A.).

180. As noted by the court in *Spadafora v. Gabriele*, *supra*, footnote 175, in *Depew v. Wilkes*, *supra,* the Court of Appeal considered whether proprietary estoppel was established with respect to easements. Although the Court of Appeal declined to apply the doctrine of proprietary estoppel in that case, it cited Megarry and Wade's *The Law of Real Property*, 6th ed. (London: Sweet & Maxwell, 2000), at p. 727 as follows: "Proprietary estoppel, which is also sometimes referred to as 'estoppel by acquiescence' or 'estoppel by encouragement,' is a means by which property rights may be affected or created. The term describes the equitable jurisdiction by which a court may interfere in cases where the assertion of strict legal rights is found to be unconscionable."

181. *Eberts v. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317, 36 R.P.R. (3d) 104, [2000] O.J. No. 3773 (Ont. C.A.), leave to appeal refused 153 O.A.C. 195*n*, 171 N.R. 200*n* (S.C.C.).

> to believe that he has or will enjoy some right or benefit over O's property;
> (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and
> (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.
>
> . . . .
>
> and
>
> (iv) The relief which the court may give may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O to either grant or convey to C some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.

Applying the criteria to the facts before it, the court found that Mariannina 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 (and not the deaths of the deceased and her husband).[182] This belief, the court noted, was initiated by the deceased and her husband and continued by their children. Mary, Frank and Tony had, as noted by the court, been given a House "that bore the burden of their parents' promise to their grandmother".[183] It was a promise they were fully aware of and, in fact, they too had honoured, having permitted Mariannina to reside in the house for several years after their mother's death. According to the court, Mariannina had relied on this agreement to her detriment, and she had sold her own home.

On the issue of whether an order permitting the partition and sale of the property would have an unconscionable result, the court cited *Anger & Honsberger Law of Real Property* as follows:[184]

> An equity will arise where the court decides it would be unconscionable to allow the owner to take advantage of the claimant by denying them the right or benefit that they expected to receive. The unconscionablility relates to the consequences of the conduct, not to the act of permitting the representee to assume they could act as they did . . .

In the court's view, to permit the sale and effectively evict Mariannina against her will would be unconscionable, in the circumstances of this case.[185] As such, the court refused to grant the order as requested by Mary.

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182. *Spadafora v. Gabriele*, *supra*, footnote 175, at para. 20.
183. *Ibid.,* at para. 23.
184. A.W. La Forest, ed., *Anger & Honsberger Law of Real Property,* 3rd ed. (Aurora: Canada Law Book, 2006), at para. 28:10.20.
185. *Supra.*

The remedy of proprietary estoppel is indeed a potentially powerful tool that can be used to reclaim a proprietary interest in certain property after death in instances where such an interest has not been reflected in a will. Estate litigators must be aware of this potential avenue of legal recourse and the case of *Spadafora v. Gabriele* when advising clients, and drafting pleadings involving common law remedies.

7. Conclusion

The *FLA* provides a comprehensive regime that provides protection for the property rights and obligations of married spouses as between them, on the breakdown of their relationship, or the death of a spouse. In the estates context where contractual obligations are breached arising out of the estate, surviving spouses, including umarried spouses, and/or dependants may seek to enforce on their legal rights as against their deceased spouse's estate pursuant to the *FLA* and the *SLRA*, or, if access to the provincial legislation is denied or provides an inadequate remedy, a variety of other equitable claims can be made pursuant to common law and principles of equity.

As a result of an increase in blended families, remarriages, and other types of spousal relationships and the changes in the characteristics of the family unit over the last few decades, and the rapidly aging population, estate litigators are seeing a correlative increase in the number of such claims being brought against estates not just by spouses of a deceased person, but by their combined children, extended family and other dependants as well. Moreover, the recent amendments made to the legislation governing the revocation of wills on marriage in Alberta and British Columbia, and landmark decisions such as *Kerr v. Baranow* are indicative of our changing demographics which are having a radical impact on the way in which our estates laws and family laws intersect.

It is so crucial that estates lawyers and family law lawyers, as well as other planning professionals advising on wealth management and succession planning be aware of the intersection of factors applicable to effective planning. It is only through this awareness that the application of effective, competent planning can be usefully employed so as to protect rights and prevent unnecessary litigation and family break-down.

Historical societal norms no longer apply to our rapidly changing family unit. This requires an adjustment in our approach to making all of these competing puzzle pieces fit into a workable plan.

Advising modern families, and the elderly in the context of planning for the future, requires a high degree of skill and professionalism as well as knowledge of resource-based tools and services. Often it requires engaging different skill sets, for example accountants, financial planners, investment advisors, insurance consultants, mediators, social workers, corporate counsel, and this all in addition to family and estates solicitors. This monograph is but a snapshot of some of the issues prevalent in our changing family and elder demographics – it does not touch on for example planning issues involving genetics, mental illness, guardianship capacity, and elder abuse. However, such other issues are also extremely relevant to planning in the family and estates context and so too, in protecting and preserving the rights and claims available to spouses.