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Spousal Claims against Estates and Other Claims Arising out of Remarriages

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Spousal Claims against Estates and Other Claims Arising out of Remarriages

by Kimberly A. Whaley¹

I. INTRODUCTORY COMMENTS

The high rate of separation and divorce, the increasing prevalence of unmarried cohabiting partners, and the recognition of the equality of same-sex partnerships have made it necessary for practitioners to be more aware of the issues that arise out of remarriages and common-law partnerships.

This is a distinctly modern development. The volume of cases involving blended, complex or fractured families, where a spouse has remarried or entered into a new common-law relationship and may have children from multiple relationships, has exploded over the last several decades in the changing cultural climate following the liberalization of matrimonial laws. As the population ages, it is ever more important to consider these relationships from the perspective of estate planning and litigation.

Disputes that arise in remarriage and re-partnership can often be foreseen, and there is often both the motivation and the opportunity to plan and avoid disputes. To seize that opportunity, however, the estates planner must navigate a significant amount of litigation that has emerged from the complex web of competing interests in these new complex relationships.

¹ Kimberly A. Whaley, Principal, Whaley Estate Litigation, excerpted from papers originally prepared for the Osgoode Professional Development Conference, Advising the Elderly, 2011, 2012, 2013, updated as of September 2013 with the acknowledged assistance of Benjamin A. Arkin, Associate, Whaley Estate Litigation, and from "Spousal Claims Against Estates and Other Claims Arising Out of Remarriages and Common Law Arrangements: Estates Claims by Spouses," prepared for the LSUC Estates and Trusts Summit Nov 14, 2012, updated and edited with the grateful assistance of Matt Smith, Law Student, Osgoode Hall Law School, York University. Also note publication, The Advocates Quarterly, Volume 40, Number 1, June 2012. "The Intersection of Family Law and Estates Law: Post-Mortem Claims Made by Modern Day 'Spouses'".

This paper, then, considers a sampling of cases from the point of view of both the deceased and the estate-planning lawyer. Were claims foreseeable and, if not, why not? If claims were foreseeable and litigation ensued despite planning, what was the cause?

We begin this paper with an overview of the legal basis for claims by surviving spouses against estates. These claims include:

- inheritance upon intestacy;
- *Family Law Act* elections for an equalization of net family property;
- the enforcement of spousal support orders;
- the enforcement of domestic contracts;
- dependant's support claims pursuant to the *Succession Law Reform Act* ("SLRA");
- unjust enrichment and its legal and equitable remedies, including equitable compensation, constructive trust, resulting trust, unjust enrichment, and *quantum meruit*;
- proprietary estoppel; and
- other claims regarding the ownership of property, including jointly ownerships.

After a discussion of these often-employed claims, we then review some recent cases in which these claims have been utilized in estate disputes, and we reflect on some of the steps that could have – or should not have – been taken before death hardened the battle lines.

This paper is not exhaustive in its approach or content. The subject matter is broad, and so we merely touch on some of the many developing situations across Canada, paying particular attention to the specific challenges that we confront with remarriage and re-partnership.

The rise of remarriage: Statistics

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

Before the passage of the *Divorce Act*, 1968, obtaining a divorce was difficult. In Ontario, the primary grounds for divorce were adultery, cruelty or abandonment. The *Divorce Act*, 1968, somewhat liberalized the grounds for a divorce. Still, a complete, no-fault divorce, based on one year of separation and without a trial, was not available until the passage of the *Divorce Act*, 1985. A common-law partner was not entitled to make a claim for dependant's support in Ontario until 1977.² Because divorce was uncommon, so too was remarriage and, as a result, support claims by new partners/spouses were rare.

It has only been 45 years since the *Divorce Act*, 1968, and 28 years since the *Divorce Act*, 1985, came into force. A Canadian who is 79 years old today – just under the current average lifespan in Canada – would have been approximately 34 years old at the advent of the initial wave of liberalized divorce. The same Canadian would have been 51 years old when the path to divorce was broadened in 1985. In other words, people dying at an average old age in 2013 were already, or were approaching, middle age when these rights arose; they have had less time in their lives to develop the legal obligations arising out of re-partnership than a person who came of age in this regime.

Canadians who reached the age of majority in the era of common-law dependants' support legislation are 54 years old or younger in 2013. Those who reached the age of majority in the era of no-fault divorce are approximately 45 years old and younger in 2013. This younger cohort will be the first group of Canadians who have, for their entire

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

adult lives, had the opportunity to develop a web of competing spousal claims. This generation will reach their average lifespan in about 25 to 35 years. It therefore seems likely that, even if the growth of remarriage and re-partnership were to stabilize in the very near future, the legal system should expect a continued influx of spousal disputes as death catches up with the social arrangements that this generation has adopted in life. And recent data suggests that the numbers have in fact not yet stabilized. The growth in the number of complex families continues. The 2011 Census on families, households, and marital status data shows that people are choosing family structures that create more complicated personal and legal relationships:³

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

These trends demonstrate an increase in competing family interests. It is also noteworthy that, according to 2006 survey, common-law spouses are much less likely than married spouses to consult a lawyer following the breakdown of a relationship. While 58.2% of separating spouses and 76.0% of divorcing spouses sought advice, only 25.3% of separating common-law spouses did the same.⁴

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

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

The high rate of separation and divorce, increasing prevalence of unmarried cohabiting partners, recognition of the equality of same-sex partnerships, and the relatively modern availability of divorce and common-law spousal claims make it essential for advisors to continue to increase their awareness of the issues that arise out of remarriages and common-law partnerships.

II. CLAIMS BY SPOUSES AGAINST ESTATES

Marriage is a rite of passage that carries with it intense personal, familial and societal significance. Most people marry, and many marry more than once. It is a ritual that is familiar, comforting and celebratory. However, in addition to the emotional, familial and cultural importance of marriage, marriage also brings with it significant legal and property implications. The act of marriage not only alters an individual's personal life, but also one's financial life.

The next few sections that follow set out some of the basic legal and financial rights and obligations that arise out of marriage, marriage-like relationships, and the death of a spouse.

Revocation of wills on marriage and inheritance upon intestacy

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

⁵ [1975] 1 SCR 423, 1973 CanLII 193.

⁶ Professor A. H. Oosterhoff, "Predatory Marriages", Law Society of Upper Canada, 14th Annual Estates and Trust Summit at p. 29.

An intestacy can create a windfall situation for a surviving spouse. In Ontario, where a married person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.⁷ 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.⁸ The preferential share is currently prescribed by regulation as \$200,000.⁹ The remaining one-third to one-half of the residue will also be paid to the spouse according to the formula set out in the *SLRA*.¹⁰

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

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

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

⁷ *Succession Law Reform Act*, RSO 1990, c S.26, s. 44.

⁸ *Ibid.* s. 46.

⁹ O Reg 54/95.

¹⁰ *SLRA*, s. 46

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

interdependent relationship.¹² British Columbia's forthcoming *Wills, Estates and Succession Act*, which will come into force March 31, 2014, also provides that a Will is not presumed to be revoked by marriage or a change in common-law or marriage-like relationships.

New Brunswick has a unique approach that could be described as a hybrid between revocation on marriage and non-revocation on marriage. As in most other provinces, a will made before marriage is revoked on marriage,¹³ subject to certain exceptions.¹⁴ However, unlike in other provinces, a person who would have received a gift in the revoked Will can apply to court to receive that gift, and the court may give effect to all or part of the gift.¹⁵ The power is discretionary, and the court is directed to consider whether putting the gift into effect would be an undue detriment to a person receiving on an intestacy.¹⁶ There will be no undue detriment to the person receiving on intestacy if that person receives what they would have received under the revoked Will.¹⁷

Division of matrimonial property upon separation

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

¹² SA 2010 c. W-12.2.

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

¹⁴ *Ibid.*, s. 16

¹⁵ *Ibid.*, s. 15.1(3)

¹⁶ *Ibid.*, s. 15.1(4)

¹⁷ *Ibid.*, s. 15.1(5)

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

¹⁹ *Ibid.* s. 4(1) and (2).

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

The British Columbia *Family Law Act*,²⁰ which replaced the previous *Family Relations Act*, came fully into force in March 18, 2013.²¹ This new legislation abandons the division of family assets and moves to an equalization regime similar to that in Ontario. The British Columbia *Family Law Act* also extends the same rights for property division to common-law spouses as to married spouses. In that respect, it joins Saskatchewan and Manitoba as the only other common-law provinces to do this.²²

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

It will be interesting to see some of the litigation arising out of the new legislation in BC and, in particular, the division of assets acquired during the relationship, assets owned before the relationship, and the interaction of trust holdings. Given that throughout the provinces our courts have often historically had great difficulty identifying a marriage-like relationship, new legislation in British Columbia may bring with it more litigation. Our more recent case law has determined that many people in relationships, whether married or not married, may indeed qualify as spouses of sort, even where they do not

²⁰ *Family Law Act*, SBC 2011, c 25.

²¹ B.C. Reg. 131/2012.

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

²³ SBC 2009, c 13

live in the same house or even the same country. Likewise, case law has demonstrated that courts have found a spousal relationship where there has been no children, and no sexual relations. Often courts determine a spousal relationship on the evidence of intention of the parties.

Ontario still has no statutory regime for property division between common-law spouses.²⁴ In light of *Vanasse v. Seguin*; *Kerr v. Baranow*, however, in which the Supreme Court of Canada affirmed the right of common-law spouses who are engaged in “joint family ventures” to share in the wealth accumulated by both spouses during the relationship, statutory common-law property division may eventually arrive in Ontario too.²⁵

Division of matrimonial property after death

In Ontario, within six months of the death of a married spouse, the surviving spouse is entitled, pursuant to subsections 6(1) and (2) of the *Family Law Act*, to make a choice between either making an equalization claim of net family property, as described above, or taking under the Will (if there is one) or under provincial intestacy laws (if there is not) as set out in Part II of the *SLRA*.²⁶

If a spouse elects in favour of taking under the Will or by intestacy, the spouse will also be entitled to receive the proceeds of any life insurance policies (where named as a beneficiary), death or survivorship benefits (where named under the deceased’s pension plans or similar plans), and any property held in joint tenancy by right of survivorship.²⁷ The same is not necessarily true for a surviving spouse who elects in favour of equalization: the value of these benefits may be deducted from the deceased’s NFP, thus potentially decreasing the amount of an equalization payment from the estate

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

²⁵ 2011 SCC 10, [2011] 1 SCR 269.

²⁶ R.S.O. 1990, c. S.26.

²⁷ *Bickley v. Bickley Estate* (1999), 1999 CarswellOnt 3235 (S.C.J.).

so that the surviving spouse does not gain an unjustified windfall.²⁸

Two fairly recent Ontario cases, *Weatherdon-Oliver v. Oliver Estate* and *Laframboise v. Laframboise*, have considered the converse issue: whether life insurance or pension death benefit proceeds that are payable to the estate should be included in the deceased's NFP so that the estate does not gain an unjustified windfall. In both cases, the surviving spouses argued that if each, as surviving spouses, were credited with the amount of the life insurance proceeds or pre-retirement death benefits so that each did not receive an unjust windfall, should not the same kind of credit be applied against the estate where the estate is the beneficiary of these payments?²⁹

The court in both cases declined to follow this reasoning. The valuation date is defined in section 4 of the *Family Law Act* as the date before the day of death. Since the life insurance proceeds and pension death benefits only materialize at the time of death, they are not included in the deceased's NFP, which is calculated a day earlier. Mitigating this, the court in *Laframboise* noted that while the pension death benefit that was payable to the estate would not be shared with the surviving spouse, the pension itself may have had a value as an asset on the valuation date that could be included in the deceased's NFP.³⁰

Family Law Act elections pose special practical challenges. The limitation period for making an election is 6 months after the date of death. In order to make the election, the surviving spouse needs to know the relative values of the benefits that he or she will receive under the Will versus the value of the equalization payment as calculated pursuant to sections 5 and 6 of the *Family Law Act*. Given that executors are expected to have their "executor's year" to call in the assets of the estate and pay debts, and that the necessary disclosure to the surviving spouse includes not only the identity and value

²⁸ FLA ss. 6(6) and 6(7).

²⁹ *Laframboise v. Laframboise*, 2012 CarswellOnt 9719, 2012 CarswellOnt 9719, 2012 ONSC 4508, [2013] W.D.F.L. 150, [2013] W.D.F.L. 177, [2013] W.D.F.L. 189, [2013] W.D.F.L. 344, 219 A.C.W.S. (3d) 892 (S.C.J.); *Weatherdon-Oliver v. Oliver Estate*, 2010 CarswellOnt 6800, 2010 ONSC 5031, [2011] W.D.F.L. 737, [2011] W.D.F.L. 730, [2011] W.D.F.L. 672, [2011] W.D.F.L. 808 (S.C.J.).

³⁰ *Laframboise*, *ibid.*, at para. 21.

of the assets of the estate of the deceased but also a *Family Law Act* disclosure of valuation date assets, marriage date assets, liabilities, and excluded property, it is not surprising that issues have arisen regarding extensions to the deadline to make or revoke an election.³¹ Even after the election is made to receive an equalization of property, the surviving spouse must still bring an actual application, in addition to filing the election, for equalization. Given the likely delay in resolving all these issues, the surviving spouse may need an advance on the equalization payment on an interim basis. It is now clear that, in addition to other interim orders such as interim dependant's support and interim distributions to beneficiaries, there is also a right to claim an advance on an equalization payment from an estate if:

- (i) there is a reasonable requirement for the funds;
- (ii) there is little doubt that the person making the request will receive an equalization payment of at least that amount; and
- (iii) it is just in the circumstances.³²

In British Columbia, unlike in Ontario, a division of property between spouses cannot be triggered by the death of a spouse.³³ The legislature may have seen fit to leave out matrimonial property division rights for surviving spouses because the British Columbia Supreme Court already has a broad discretion to reallocate a deceased's estate under the *Wills Variation Act* in the event that a deceased spouse does not make adequate provision for the surviving spouse.³⁴

Alberta recently recognized the need for legislative change in order to give surviving spouses the right to claim a division of matrimonial property instead of taking the gifts left by the deceased spouse in a will or on intestacy. Alberta conducted an amendment of its wills, estates and succession laws by combining the former *Wills Act*, *Intestate*

³¹ *Iasenza v. Iasenza Estate*, 2007 CarswellOnt 4025, 2007 CarswellOnt 4025, [2007] W.D.F.L. 3501, 34 E.T.R. (3d) 123, 39 R.F.L. (6th) 452 (S.C.J.).

³² *Skrobacky v. Frymer*, 2012 CarswellOnt 9335, 2012 ONSC 4277, 218 A.C.W.S. (3d) 717, [2012] W.D.F.L. 5786 (S.C.J.).

³³ Bill 18, s. 81; *Family Law Act*, SBC 2011, c 25.

³⁴ RSBC 1996, c 490.

*Succession Act, Survivorship Act, Dependents Relief Act, and section 47 of the Trustee Act into the Wills and Succession Act.*³⁵ This relatively new legislation also included proposed revisions to the *Matrimonial Property Act* to implement a regime for the division of matrimonial property following the death of a spouse upon the application of the surviving spouse.³⁶ These final proposed changes to the *Matrimonial Property Act*, however, may not be proclaimed any time soon. After consultation with estate and family law practitioners in the province last year, the Alberta Attorney General's website now says: "*Section 117 will not be proclaimed in force at this time. Further research will be conducted to explore some of the issues raised in the consultation process.*"³⁷

Enforcement of spousal support orders

Pursuant to section 34 of the *SLRA* in Ontario, a surviving spouse, whether common-law or married, may enforce a spousal support order against the estate of a deceased spouse.³⁸ Subsection 34(4) is explicit on this point: "*An order for support binds the estate of the person having the support obligation unless the order provides otherwise.*" Indeed, the courts have held that support payments owed by a deceased spouse constitute a debt of the estate pursuant to subsection 34(4) of the Ontario *Family Law Act*, such that estate trustees owe a fiduciary duty to the recipient of the support in the same way they owe a fiduciary duty to the beneficiaries and creditors of an estate.³⁹

Enforcement of domestic agreements

Another potential source of rights for a separating or surviving spouse is a domestic agreement. In Ontario, Part IV of the *Family Law Act* governs domestic contracts:

³⁵ SA 2010, c W-12.2.

³⁶ *Ibid.*, s. 117.

³⁷ Alberta Justice and Solicitor General, "Matrimonial Property on Death Consultation Report," http://justice.alberta.ca/programs_services/wills/Publications/MatrimonialPropertyDivisionDeath-whatweheard.aspx Accessed: August 14, 2013.

³⁸ RSO 1990, c S.26.

³⁹ *Re Welin Estate*, 2003 CarswellOnt 2869 (Ont. S.C.J.).

cohabitation agreements, marriage contracts, and separation agreements.⁴⁰ The parties to such agreement have reasonably wide latitude to agree about the division of property and spousal support.

A domestic contract may be filed with the court under Section 35 of the *FLA* and the spousal support provisions in it can be enforced as if they were a court order. Therefore, a surviving spouse can enforce a spousal support provision in a domestic contract in the same way as a support order.

Estates practitioners should be mindful of the extensive law governing the enforceability of domestic contracts, which may not be enforceable if such contain prohibited provisions,⁴¹ if a party failed to make full and final financial disclosure,⁴² and/or if the agreement is unconscionable.⁴³

Dependant's support

Part V of the Ontario *SLRA* provides for the support of dependants in situations where a deceased person, prior to death, was providing support, or was under a legal obligation to do so, immediately before death but failed to make adequate provision for the proper support of his/her dependant on death.⁴⁴ In such circumstances, the court is empowered to make an order, interim or permanent, as it considers adequate, to be made out of the estate of the deceased.⁴⁵

In the case of a surviving spouse, the spouse needs to prove that he or she was indeed a spouse, that the deceased had a legal obligation to provide support or was providing support immediately before death, and that the deceased failed to make adequate

⁴⁰ *FLA*, ss. 52-54.

⁴¹ *FLA*, ss. 52(2) and 56(1).

⁴² *FLA*, s. 56(4). See also *LeVan v. LeVan* (2008), 90 OR (3d) 1; 51 RFL (6th) 237; 239 OAC 1, application for leave refused in 2008 CanLII 54724 (SCC).

⁴³ *FLA*, s. 56(4). See e.g. *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 SCR 303 and *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 SCR 550.

⁴⁴ *SLRA*, s. 57.

⁴⁵ *Ibid.*, s. 58(1).

support. If successful in establishing that he or she is a dependant, the court will then consider an extensive list of factors in s. 62 of the *SLRA* in determining the amount and duration of support.

Part V of the *SLRA* is a powerful tool. At first blush, it may seem to provide a remedy akin to spousal support, which is guided by, if not limited to, the payor's means and the recipient's needs. However, the Ontario Court of Appeal has clarified that in determining claims for dependant's support under the *SLRA* the court must consider not just the applicant's bare needs, or legal claims, but also the applicant's moral or ethical claims.⁴⁶ Arguably, the moral claim has become a legal claim.⁴⁷

This expands the court's discretion to make a dependant's support order to resemble, if not mirror, the broader jurisdiction of British Columbia courts under the *Wills Variation Act*.⁴⁸ Section 2 of the British Columbia *Wills Variation Act* provides that:

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

Even with the recent expansive reading of the *SLRA* by the Ontario courts, the British

⁴⁶ *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. Cummings Estate, Re) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).

⁴⁷ *Tataryn v. Tataryn*, [1994] 2 SCR 807; *Cummings v Cummings*, 2003 CanLII 64218 (On SC) – 2003-02-21. For an application of this particular moral claim in a situation of complex estate planning, see *Morassut v. Jaczynski Estate*, 2013 ONSC 2856; *Morassut v. Jaczynski Estate*, 2013 ONSC 2856: A successful business owner, was diagnosed with breast cancer and she decided to revise her estates plans in the last few months of her life. Two new Wills were produced. The first Will moved many of her assets to holding companies and left the residue of the estate to a family Trust created by the second Will. Her common-law spouse, was not provided for in either new Will, but the estate agreed to give him a \$1,000,000 lump-sum payment. Her previous Will, nullified by her subsequent planning, had provided for her common law spouse a \$1,000,000 payment. The estate argued that this single payment was adequate in itself and that he should not qualify for further dependant support under the *SLRA*. Following *Tataryn v. Tataryn*, however, the court found that the testatrix had “both a legal and moral obligation to continue to support him after her death.” He was awarded sole ownership of a property that he and the testatrix had built together; a yearly sum for the rest of his life; and a smaller payment every five years so that he could buy a new automobile

⁴⁸ *Wills Variation Act*, RSC 1996, c 490.

Columbia provision has a potentially broader application. The applicant in British Columbia can be any spouse or child. The applicant need not prove that he or she was a dependant of the deceased.⁴⁹ The definition of spouse includes both married and common-law spouses.⁵⁰ Although there is no definition of child, the provision has been held to apply to independent adult children.⁵¹ There is no need to show either a legal obligation to support the person or that the deceased was actually supporting the person immediately before death.

On the other hand, Part V of the Ontario *SLRA* may arguably be a more powerful tool than the British Columbia *Wills Variation Act* in at least one important respect: In Ontario, the dependant can reach various assets of the deceased that do not form part of the estate. Certain *inter vivos* transactions can be clawed back into the estate for the purpose of satisfying a support award, including gifts *mortis causa*; property held jointly that passed to another person by right of survivorship; the proceeds of RRSPs and like instruments that pass to designated beneficiaries; property that the deceased settled on/in trust; the proceeds of any life insurance policy owned by the deceased; and others.⁵² Such a power does not exist in British Columbia, where *Wills Variation Act* claims can only be satisfied by the assets of the estate and can therefore be defeated by the deceased's *inter vivos* transfers.⁵³ That said, British Columbia claimants may resort to equitable claims or rely on the *Fraudulent Conveyance Act*⁵⁴ to bring assets back into the estate, but these kinds of claims can result in difficult trials.⁵⁵

⁴⁹ *Ibid.*, s. 2.

⁵⁰ *Ibid.*, s. 1.

⁵¹ *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807 at 14.

⁵² *SLRA*, s. 72.

⁵³ *Hossay v. Newman*, 1998 CarswellBC 1734; 22 E.T.R. (2d) 150, 5 C.B.R. (4th) 198

⁵⁴ RSBC 1996, c 163.

⁵⁵ See *Mawdsley v. Meshen*, [2012] 5 W.W.R. 1, 2012 CarswellBC 442, 2012 BCCA 91, 211 A.C.W.S. (3d) 877, [2012] B.C.W.L.D. 2187, [2012] B.C.W.L.D. 2188, [2012] B.C.W.L.D. 2212, [2012] B.C.W.L.D. 2213, [2012] B.C.W.L.D. 2214, [2012] B.C.W.L.D. 2215, [2012] B.C.W.L.D. 2216, [2012] B.C.W.L.D. 2217, [2012] B.C.W.L.D. 2224, [2012] B.C.W.L.D. 2279, [2012] B.C.W.L.D. 2310, [2012] B.C.W.L.D. 2357, [2012] W.D.F.L. 1803, [2012] W.D.F.L. 1836, [2012] W.D.F.L. 1875, 74 E.T.R. (3d) 198, 28 B.C.L.R. (5th) 12 (B.C. C.A.) affirming 2010 CarswellBC 2078, 2010 BCSC 1099, [2010] B.C.W.L.D. 7868, [2010] B.C.W.L.D. 7877, [2010] B.C.W.L.D. 7879, [2010] B.C.W.L.D. 7882, [2010] B.C.W.L.D. 7883, [2010] B.C.W.L.D. 7884, [2010] B.C.W.L.D. 7886, [2010] B.C.W.L.D. 7902, [2010] B.C.W.L.D. 8020, [2010] W.D.F.L. 4845, [2010] W.D.F.L. 4904, [2010] W.D.F.L. 4961, 59 E.T.R. (3d) 51 (B.C. S.C.)

Unjust enrichment claims

In the seminal decision of *Kerr v. Baranow; Vanasse v. Seguin*,⁵⁶ the Supreme Court of Canada reviewed the law of unjust enrichment and expanded the remedies available to unmarried cohabiting spouses.⁵⁷

The basic elements of an unjust enrichment claim have remained more or less unchanged since *Becker v. Pettkus*.⁵⁸ For a plaintiff to be successful in making such a claim, he/she must be able to establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. As well, it has been consistently held in the case law, and has been affirmed in *Kerr v. Baranow; Vanasse v. Seguin*, that “the courts ‘should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.’”⁵⁹

Two of the available remedies for unjust enrichment remain unchanged by the Court: the remedial constructive trust and a monetary remedy in *quantum meruit* (sometimes referred to as “value received” or “fee-for-service”).⁶⁰ The constructive trust (proprietary) remedy is available where a monetary award would be inappropriate or insufficient and there is a link or causal connection between their contributions and the acquisition, preservation, maintenance, or improvement of the disputed property. The *quantum meruit* remedy is typically available where the unjust enrichment constituted the provision of unpaid services, but it tends to be the least valuable remedy.

⁵⁶ *Kerr v. Baranow*, 2011 CarswellBC 240 (S.C.C.). A further judgment in this matter issued on *Kerr v. Baranow*, 2012, BCSC 1222 (CanLII) 2012-08-15

⁵⁷ See Martha McCarthy, “Family Law for Estates Lawyers,” LSUC CPD, Blended Family Estate Planning, June 14, 2011, at 12.

⁵⁸ (1980), 2 S.C.R. 834.

⁵⁹ *Kerr v. Baranow*, *supra*, note 56 at para. 34, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 997 per McLachlin J. (as she then was) and also 1023 per Cory J.

⁶⁰ *Ibid.* at para. 58.

The major development in *Kerr v. Baranow*; *Vanasse v. Seguin* was the endorsement of a third remedy: a monetary remedy for “value survived.” Where the spouses were engaged in a “joint family venture” and, upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets, the Court will reapportion the wealth between the parties. The Court identified the following non-exhaustive list of factors to assist in making a determination: (i) the mutual effort of the parties and whether they worked collaboratively towards common goals; (ii) economic integration of the couples’ finances; (iii) actual intent or choice of the parties to not have their economic lives intertwined, whether such is expressed or inferred; and (iv) whether the parties have given priority to the family or there is detrimental reliance on the relationship, by one or both of the parties, for the sake of the family.⁶¹

Once a spouse has proven the existence of a joint family venture, the Court will determine the award, which is not restricted to a fee-for-services approach. Rather, where it can be shown that the joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth, the remedy “should be calculated on the basis of the share of those assets proportionate to the claimant’s contributions,”⁶² 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.”⁶³ Rather, it should remain a broad and flexible approach.

The important point for estates litigators is that the law of unjust enrichment is equally applicable to a surviving spouse against the estate of a deceased spouse as it is to a living spouse.⁶⁴ There is a wealth of case law applying *Kerr v. Baranow*; *Vanasse v. Seguin*, and the cases are very much driven by the unique facts of each. The difficulty for the surviving spouse and his or her lawyer will be in proving the existence of a joint family venture without the evidence of the deceased spouse. There is the strategic and practical challenge of deciding which claim or combination of claims to bring on behalf

⁶¹ *Ibid.* at paras. 89-100.

⁶² *Ibid.* at para. 100.

⁶³ *Ibid.* at para. 102.

⁶⁴ *Hillier Estate v. McLean*, 2011 CarswellNfld 207 at para. 20.

of a surviving spouse, including dependant's support, unjust enrichment, and other equitable claims.

Proprietary estoppel

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

In *Schwark v. Cutting* in 2010, the Ontario Court of Appeal confirmed the well-settled test for proprietary estoppel:⁶⁵

(i) An equity arises where:

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

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

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

[...]

(iv) The relief which the court may give may be either negative, in the form of an order restraining the owner from asserting his legal rights, or positive, by ordering the owner to either grant or convey to the claimant some estate, right or interest in or over his land, to pay the claimant appropriate compensation, or to act in some other way.⁶⁶

⁶⁵ *Schwark v. Cutting*, 2010 ONCA 61 at para. 34 citing *Eberts v. Carleton Condominium No. 396 et al.*, [2000] O.J. No. 3773 (Ont. C.A.) at para. 23.

⁶⁶ *Ibid.* at para. 23.

Since *Schwark v. Cutting*, proprietary estoppel has been argued successfully in Ontario in at least three family disputes. In *Spadafora v. Gabriele*,⁶⁷ for example, an older woman moved in with her adult daughter and son-in-law and conveyed her own home to them in 2004. The adult daughter and son-in-law had promised the older grandmother that she could live in the house until she died. As it turned out, the adult daughter and son-in-law died before the older grandmother.

On the day before the adult daughter's death in 2009, she transferred the house to her three children as tenants-in-common. A dispute between these children resulted in one of them bringing an application for partition and sale of the house. The Court noted that, pursuant to the *Partition Act*, partition would only be available if the person applying for it was entitled to immediate possession of the property. The issue was whether the grandmother's continued residence in the house gave her the right to possession and therefore prevented the *Partition Act* applicant's right to immediate possession.⁶⁸

The Court found that the grandmother had been induced or encouraged to believe that she would enjoy the right, or at least the benefit, of residing in the house until her death.⁶⁹ This belief, the Court noted, was initiated by the daughter and son-in-law and continued by their children. The children had been given a house "that bore the burden of their parents' promise to their grandmother."⁷⁰ It was a promise they were fully aware of and, in fact, they too had honoured, having permitted their grandmother to reside there for several years after their mother's death. The grandmother had relied on this agreement to her detriment by conveying away her own home. In the Court's view, to permit the sale and effectively evict the grandmother against her will would be unconscionable.⁷¹ As such, the Court refused to grant the order for partition and sale.

⁶⁷ 2011 CarswellOnt 14702 (Ont. S.C.J.).

⁶⁸ *Ibid.* at para. 16.

⁶⁹ *Ibid.* at para. 20.

⁷⁰ *Ibid.* at para. 23.

⁷¹ *Ibid.*

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

Challenges to joint title

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

In the recent case of *Hansen v. Hansen Estate*, the Ontario Court of Appeal clarified the law with respect to the severance of joint tenancies.⁷² In particular, the court clarified the third of the “three rules” of when a joint tenancy will be severed. The first rule provides that a joint tenancy can be severed by a unilateral act affecting title, such as selling or encumbering the interest. The second rule provides that the parties may explicitly agree to sever the joint title. Both of these rules can be used effectively for planning purposes.

The third rule provides that a joint tenancy will be severed by something less than an explicit act of severance. Specifically, joint title will be severed by “any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.”⁷³ The Court held that this rule operates in equity.⁷⁴ It is meant to prevent the title passing by way of survivorship when to do so would cause an injustice. This rule does not require a specific act or any explicit agreement. What the party asserting severance must prove is that the co-owners have all acted as though their respective shares in the property were no longer an indivisible, unified whole.⁷⁵

⁷² *Hansen Estate v. Hansen*, 2012 CarswellOnt 2051, 2012 ONCA 112, [2012] W.D.F.L. 1985, [2012] O.J. No. 780, 109 O.R. (3d) 241, 16 R.P.R. (5th) 1, 212 A.C.W.S. (3d) 854, 288 O.A.C. 116, 347 D.L.R. (4th) 491, 75 E.T.R. (3d) 19, 9 R.F.L. (7th) 251.

⁷³ *Ibid.* at para. 34.

⁷⁴ *Ibid.* at para. 35.

⁷⁵ *Ibid.* at para. 39.

III. A REVIEW OF ESTATE DISPUTES ARISING OUT OF REMARRIAGES AND COMMON-LAW RELATIONSHIPS

Intestate succession and unjust enrichment – Ontario: *Re York Estate*⁷⁶

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

The deceased's first wife died in April of 1994. Only one month later, the deceased executed a new Will leaving the residue of his estate to his children in equal shares. Just over a year later, the deceased remarried. One month after that, he died.

It is not clear whether the deceased already had marriage in mind when he made his new Will, that is, whether he intended to get married and still leave his estate to his children. In any event, this was not a Will made "in contemplation of marriage," and was therefore revoked by the marriage. The deceased's estate was of moderate size, consisting of farm property, RRSPs, and investments totalling \$476,574. The evidence was clear that the substantial amount of money the deceased amassed during his lifetime "was due to his extremely frugal lifestyle and the fact that he did all repairs necessary on his farm property, and that the children ran the significant operation of the farm to allow [the deceased] to continue with a full-time job."⁷⁷

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

The Court ordered the farm to be transferred to the surviving spouse as part of her

⁷⁶ *York Estate, Re*, 1998 CarswellOnt 3947 (Ont. Gen. Div.).

⁷⁷ *Ibid.* at par. 6.

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

*"The evidence before me is that [the deceased] and his six children, when he was married to [his first wife], lived for almost 30 years on this farm property on 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."*⁷⁸

Notably, in the end, the children were granted \$10,000 each in *quantum meruit* for their work on the farm when growing up.⁷⁹

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

⁷⁸ *Ibid.* at para. 10.

⁷⁹ *Ibid.* at paras. 37-38.

reporting letter that he would need a new Will if and when he remarries. Unless there is a change to the laws of intestate succession and/or the rule that a Will is revoked by marriage, as in Alberta, British Columbia, and New Brunswick, these cases will surely keep coming up.

Intestate succession – New Brunswick: *Stanley Mutual Insurance Co. v. Shepherd*⁸⁰

Even where the deceased intends his entire estate to pass to his wife of 28 years and has no reasonable expectation of claims against his estate, an intestacy can cause serious problems. In *Stanley*, the deceased died intestate. He had children from a previous relationship, but he had no contact with these children and in fact did not even know where they were located or if they were alive. The widow disclosed these facts to the court, which held that she must take extraordinary steps to locate the children and give them an opportunity to be heard.

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

Intestate succession – Saskatchewan: *Cronan v. Cronan Estate*⁸¹

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

The main issue was whether the deceased’s second spouse fell within the definition of “spouse” for purposes of the Saskatchewan *Intestate Succession Act*, *Pension Benefits Act*, and *Dependants’ Relief Act*, each of which has a different definition of “spouse.” The first defines spouse as a person who is legally married or cohabiting with the

⁸⁰ 2011 NBQB 57, 2011 CarswellNB 88, 97 C.C.L.I. (4th) 64, 369 N.B.R. (2d) 181, 952 A.P.R. 181, (N.B. Q.B.).

⁸¹ 2010 CarswellSask 259 (Sask. Q.B.).

deceased spouse continuously for no less than two years and has so cohabited within the last two years. The second defines spouse as a person married to the member or cohabiting with the member for at least a year prior to the relevant time. The third defines spouse as a person who lived continuously for not less than two years with the deceased or in a relationship of some permanence if they are parent of a child.

In this case, the deceased died intestate. He committed suicide after a lifelong battle with depression. He had been married and had three children with his first wife. He divorced and was then married to his second wife, with whom he had two children. He then divorced his second wife. The evidence, however, was that he resumed a common-law relationship with his second wife after the divorce.

The case turned on the facts, following the framework set out in the Ontario decision in *Molodowich v. Penttinen*,⁸² the leading case on determining whether two individuals are cohabiting in a conjugal relationship. The second wife's evidence was that they lived together, shared a bedroom, raised their children together, held themselves out to the community as a couple, and that several periods of separation between them were brief and always reconciled. The children of the deceased's first marriage gave evidence, which was accepted, that during these periods of separation the deceased would often return to his first wife, including even briefly entering into an engagement with her. They argued that this amounted to an intention on the part of the deceased not to continue cohabitation in a conjugal relationship with the second wife.

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

As a case about a person who died intestate, having never had a will, this is obviously a case about the failure to plan. It is also a case involving a person afflicted with

⁸² 1980 CarswellOnt 274, 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

depression and prone to an unstable lifestyle. He had maintained relationships with two former spouses and children of the first spouse. If he had planned, it seems likely that he would have chosen to benefit his children from each, to some extent.

Enforcement of a separation agreement - Ontario: *Re Welin Estate*⁸³

This case involved a dispute over the failure of the estate trustee, who was the spouse of the deceased at the time of death, to make spousal support payments to his former spouse pursuant to a separation agreement. This case involved a motion brought by one of the adult sons of the deceased (also a residual beneficiary of the deceased's estate) to remove the deceased's second surviving spouse (Spouse #2), Barbara Welin, as the executor/trustee of the estate on the basis of conflict of interest. As the monthly support payments owed to the deceased's first surviving spouse (Spouse #1), Diana Welin, constituted a debt against the estate pursuant to subsection 34(4) of the *FLA*,⁸⁴ and as Spouse #2 had terminated the payments after death, the Court found that Spouse #2 had failed to meet her trustee obligation to pay all of the debts of the estate. According to the Court, "[e]xecutors of an estate owe a fiduciary duty to the beneficiaries and creditors of the estate."⁸⁵ And, where a trustee is found to have acted in their own interest and not that of the estate, section 37 of the *Trustee Act*⁸⁶ gives the Court discretion to order their removal.⁸⁷ Consequently, the Court ordered that Spouse #2 be removed as the executor/trustee of the deceased's estate.

This case represents a typical, yet avoidable, problem in planning. It is quite common for separated spouses to appoint their new partners as executors and trustees of their estate. The testator was well aware of the adversity in the interests and, probably, dispositions of his current and former spouses. While the testator may hope that the current spouse will tread carefully when administering his estate and respect competing

⁸³ *Re Welin Estate*, 2003 CarswellOnt 2869 (Ont. S.C.J.).

⁸⁴ *Ibid.* at para. 8.

⁸⁵ *Ibid.* at para. 9.

⁸⁶ *Trustee Act*, R.S.O. 1990, c. T.23.

⁸⁷ *Supra* note 83, at para. 9.

spousal support obligations, it may be better to avoid appointing the spouse altogether. This would protect not only the former spouse and the estate, but also the executor spouse, who could be exposed to personal liability for defeating the interests of creditors of the estate.

Dependant's support – Ontario: *Sorkos v. Sorkos Estate*⁸⁸

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

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

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

The result of the case is somewhat inexplicable. The applicant had claimed a monthly shortfall of about \$1,100. The court reduced a specific bequest to her from \$250,000 to \$150,000 and then ordered the estate trustees to purchase an annuity to pay her

⁸⁸ *Sorkos v. Sorkos Estate*, 2012 CarswellOnt 6835, 2012 CarswellOnt 6835, 2012 ONSC 3196, 216 A.C.W.S. (3d) 1054 (S.C.J.).

\$3,000 per month with the reversionary interest, if any, being paid to the deceased's estate.

Dependant's support – Ontario: *Lukic v. Zaban*⁸⁹

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

In this application for interim dependant's support, which was somewhat unusually heard by a Master, the deceased was a successful businessman and widower. He and his late wife, who died in 2002, had four children together. In 2005, he was disabled in a serious car accident. Two years later, he met the applicant in a grocery store. They apparently struck up a friendship, which resulted in the deceased financing the applicant's business. However, the applicant's home and business were in Gatineau, Quebec, while the deceased lived in Picton, Ontario. The applicant eventually moved her business to Picton. She maintained an apartment for some time, but lived in the deceased's home for about 10 months. The deceased bought the applicant a car and let her use his credit cards.

The main question in the case was whether the applicant satisfied the definition of "spouse," which was a threshold question for any order of support. The definition of "spouse" in the *SLRA* includes persons who have cohabited continuously in a conjugal relationship for a period of not less than three years. To determine whether the applicant was a spouse, Master MacLeod applied the factors in *Molodowich v. Pentinnen*: "In simplest terms the characteristics of a conjugal relationship include 'shared shelter, sexual and personal behaviour, services, social activities, economic

⁸⁹ *Lukic v. Zaban*, 2012 CarswellOnt 14165, 2012 ONSC 6078 (Master).

support and children, as well as the societal perception of the couple.’ These elements may be present in varying degrees and not all need be present for the relationship to be found to be conjugal.”

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

Interestingly, the applicant was successful in obtaining an order for the interim preservation of the vehicle that the deceased had given her to drive but that his estate trustees had repossessed from the applicant. The court held that there was a strong *prima facie* claim that it had been a gift.

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

Dependant’s support – Ontario: *Kalman v. Pick*⁹⁰

The 75-year-old applicant sought, inter alia, dependant’s support from the estate of her common-law partner of 23 years. The respondent estate trustees were the deceased’s

⁹⁰ *Kalman v. Pick et al.*, 2013 ONSC 304 (“*Kalman*”).

children of his first relationship, and the primary beneficiaries of his estate valued at \$1.8 million. The applicant had been completely financially dependant on the deceased for all of their living, leisure, and entertainment expenses. They travelled frequently and held season tickets to various cultural events.

The respondents conceded that the applicant was entitled to relief under Part V of the *SLRA*, but no agreement could be reached as to the quantum. They had also agreed to cover the applicant's monthly condo fees but could not agree to increase that amount to meet her living expenses.

After a year of costly negotiations, the parties made their first appearance before Justice Chapnik. On consent, the applicant received a monthly payment of "interim interim support," a non-dissipation order in respect of the Estate, and a return date in three months' time.

The only issue before Justice C. Brown on that January 2012 return date was the Applicant's request that the estate provide her with a lump-sum interim support payment to cover her legal fees and disbursements. This type of funding order has not previously been reported as granted in *SLRA* claims.

The Applicant submitted that she could not meet her monthly living expenses, despite her monthly interim support on top of her fixed monthly income. She submitted that she had depleted her modest savings, had to obtain a line of credit, and was incurring ongoing legal fees, all in the pursuit of her claim which the respondents agreed had *prima facie* merit.

Justice Brown accepted the applicant's evidence of financial need and legal fees incurred and observed that, in the absence of adequate interim support, "...the

Applicant's ability to pursue her meritorious claim would be prejudiced or would depend on the generosity of her counsel."⁹¹

In ordering the estate to pay the applicant a lump-sum interim support of \$60,000 for her legal costs and disbursements and expert's retainer, Justice Brown cited the provision of such funding orders in matrimonial, commercial, and constitutional matters and applied the SCC's criteria for such exercises of equitable jurisdiction as to costs.⁹² Justice Brown also relied on interim costs awards granted in the context of estates and trusts matters.⁹³

The costs of the application have yet to be reported.

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

Dependant's support – Ontario: *Matthews v. Matthews*⁹⁴

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

The only asset of the estate was the matrimonial home, which had a value of about \$330,000. The husband left this home in his Will to his daughters. He had also designated his daughters as the beneficiaries of a \$1 million insurance policy. Pursuant

⁹¹ *Kalman*, *supra* note 90, para. 11

⁹² *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371, 2003 SCC 71.

⁹³ *Kraus v. Valentini Estate*, 1993 CarswellOnt 2128, 1993 OJ No 3276 (Ont Gen Div); *Zhao v Ismail Estate (trustee of)*, 2006 CarswellOnt 8411, 29 ETR (3d) 315; *Perkovic v Marion Estate*, 2008 CarswellOnt 5931 (SCJ).

⁹⁴ 2012 ONSC 933.

to s. 72(1) of the *SLRA*, the court found that the proceeds of the policy were chargeable to satisfy an award of support for the wife.

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

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

As long as a matrimonial dispute remains unresolved – whether because of incomplete negotiations, ongoing court proceedings, or because the parties simply walked away from their relationship without dealing with the legal and financial implications – a dispute after the death of one spouse is extremely likely if the spouses have children from previous relationships. The combination of factors in this case was especially volatile: the husband made no provision for his wife and the spouses were engaged in an ongoing litigious dispute. It is not clear that even the best planning advice would have prevented this dispute from continuing after his death.

Dependant’s support – Ontario: *Blair v. Allair Estate*⁹⁵

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

⁹⁵ *Blair v. Allair Estate*, 2011 CarswellOnt 263 (Ont. S.C.J.).

that, on the evidence, both of the deceased's partners met the definition of "spouse" in the *SLRA* and could establish claims for support.

Counsel for the estate trustee, being the other spouse, argued that since the relationships that the deceased had with both women were virtually the same, the Court should not make any finding of entitlement to support on the interim motion because it would preclude the second spouse/estate trustee from claiming support or claiming that she was in fact the spouse of the deceased. It was also suggested that a ruling in favour of the applicant would be tantamount to finding that the deceased was in a "bigamous" relationship.⁹⁶ The Court rejected this argument, stating that it failed to see "how ordering support for a dependant would preclude the right to support by another dependant even if it is tantamount to a finding that both of the 'dependants' were 'spouses' and thus the deceased was living in a 'bigamous' relationship." The Court further noted that the relationship was not "bigamous," as neither of the spouses were legally married to the deceased.

In the result, the Court found that the moving-party spouse had overcome the evidentiary hurdle required to advance a claim for support, having provided "credible evidence from which one could rationally conclude that the applicant could establish...(her)...claim for support," and awarded her \$1,500 per month in support.⁹⁷

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

⁹⁶ *Ibid.* at para. 16.

⁹⁷ *Ibid.* at para. 19.

Severance of joint title – Ontario: *Hansen v. Hansen Estate*⁹⁸

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

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

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

The situation in *Hansen* represents a potential missed opportunity to plan. Family lawyers in the circumstances of the separating spouses in *Hansen* in addition to advising that a Will be done, may want to consider advising their separated clients on

⁹⁸ *Hansen*, *supra* note 72.

entering into interim agreements to sever title to some or all jointly held property or register transfer of the property jointly to the parties as tenants in common. It is also worth considering whether parties to marriage contracts and cohabitation agreements might want to include a provision automatically severing title upon breakdown of the relationship. However, despite the fact that this case could be said to have arisen out of the deceased's failure to plan, the helpful reasons may have the effect of reducing future confusion and disputes over severance of joint title when spouses separate. The facts of this case are typical of a separation, and it is possible that severance based on the "third rule," severance of joint title by a mutual course of conduct, will be the naturally expected outcome when parties initiate negotiations to divide their property after a separation, especially if they specifically address the disposition of a jointly held matrimonial home.

Severance of joint title – Ontario: *Su v. Lam*⁹⁹

Despite *Hansen*, it would be a mistake to see the severance of jointly held property as the automatic result of the breakdown of the relationship. The court has recently said that the mere fact of a separation is insufficient to establish severance.¹⁰⁰ The totality of the evidence must be assessed. Indeed, on the totality of evidence in *Su v. Lam*, a case decided after *Hansen*, it was found that former spouses had not intended to sever their joint tenancy in certain pieces of rental real estate.¹⁰¹

In this case, the deceased owned the properties with her husband, from whom she was separated but not divorced. She had a common-law spouse at the date of death who made a claim for dependant's support. He claimed that the joint tenancies in these properties were severed so that her one-half interest fell into her estate. (The properties could not be clawed back into the estate under s. 72(1) of the *SLRA* because of the expiry of the six-month limitation period.)

⁹⁹ *Su v. Lam*, 2012 ONSC 2023, 2012 CarswellOnt 3975 (Ont. S.C.J.).

¹⁰⁰ *Jurevicius v. Jurevicius*, 2011 ONSC 696 (Ont. S.C.J.)

¹⁰¹ *Su v. Lam*, supra note 99.

After reviewing the principles in *Hansen*, the Court reviewed the evidence. The deceased and her husband had separated and stopped living together. The deceased had initiated an application for divorce and prepared a separation agreement, although her husband did not sign it. She had taken over the financial obligations for the properties alone and collected the rents alone. On the sale of one property during her lifetime, she shared some of the proceeds with the husband. There were two facts inconsistent with the mutual intention to treat the joint tenancy as severed that the judge seems to have placed a good deal of weight on. First, the deceased's health steadily declined over years, so that her death was not unexpected, and yet she never took steps to sever the tenancy. Second, there was no evidence that the parties entered into negotiations over the division of property, which distinguished it from cases that were otherwise quite similar.

Joint tenancy has been described to be a useful estate-planning tool in avoiding the administrative hassle and estate administration taxes associated with probate, but it is difficult to suggest, in light of the difficulties, that joint tenancy is a good or effective means of planning. Indeed, an extraordinary amount of litigation arises respecting jointly held assets and survivorship rights perhaps planning for probate, as opposed to around probate is the best approach. This is an area riddled with disputes about whether joint title was severed by a mutual course of conduct. It is important to remember that severance of joint title under the third rule requires a *mutual* course of conduct. Therefore, if only one of the joint owners maintains that the property is held in joint tenancy, the property will remain so until the other owner carries out a unilateral act of severance on title. When a property is to be held in joint tenancy, particularly in complex family situations, it is worth considering whether the joint owner carrying out the estate plan should sign a written acknowledgement that the property is to be held in joint tenancy.¹⁰²

¹⁰² See *Pickard v. Pickard Estate*, 2013 BCSC 1091, *Sawdon Estate v. Watch Tower Bible & Tract Society of Canada*, 2012 ONSC 4042, and *Sawchuk Estate v. Evans*, 2012 MBQB 82 for cases involving other jointly held assets.

Pension benefits – Ontario: *Carrigan v. Quinn* and *Vladescu v. CTV Globe Media Inc.*

Both of these cases deal with a dispute over surviving spouses' entitlement to pension death benefits.

***Carrigan v. Quinn*¹⁰³**

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

Background Facts:

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

The trial judge held that while both Mrs. Carrigan and Ms. Quinn met the statutory definition of spouse under section 48 of the *Pension Benefits Act*, there could only be one spouse for the purposes of the act. As Ms. Quinn was living with Mr. Carrigan at the time of his death, the trial judge held that Ms. Quinn was the spouse who was entitled to his death benefit. The trial judge also rejected Mrs. Carrigan's second argument that she and her two daughters were entitled to the death benefit because they were the

¹⁰³ *Carrigan v. Quinn*, 2012 CarswellOnt 13522, 2012 ONCA 736, 112 O.R. (3d) 161, 220 A.C.W.S. (3d) 632; application for leave to appeal pending 2012 CarswellOnt 16775 (S.C.C. Dec 14, 2012).

designated beneficiaries. The court held that they would only have received the benefit as beneficiaries when there is no eligible spouse. Mrs. Carrigan appealed.

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

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

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

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

The Supreme Court of Canada has recently denied leave to appeal, so this case now creates new law which provides that a common-law spouse's entitlement to a pension member's death benefit will be denied whenever that member has a previous legally married spouse who the member was separated from but never divorced. This decision will result in more death benefits (in these kinds of circumstances) going to the person or persons designated as beneficiaries rather than to spouses.

Vladescu v. CTV Globe Media Inc.¹⁰⁴

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

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

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

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

¹⁰⁴ 2012 CarswellOnt 9252 (Ont. S.C.J.).

The Court held that the separation agreement was insufficiently clear to assign the pre-retirement death benefit to the former wife. Specifically, the paragraph of the separation agreement that required the husband to enter into a domestic contract with a subsequent spouse suggested that he had not assigned 100% of his interest away. The Court said that the subsequent spouse would have some right to the pension benefit if she did not give such release. This outcome was supported by the fact that the *PBSA* favours the interests of spouses who are cohabiting at the date of death.

Notably, the Court of Appeal recently upheld the lower court decision of *Vladescu*.¹⁰⁵

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

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

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

¹⁰⁵ *Vladescu v. CTV Globe Media Inc.*, 2013 ONCA 448, 2013 CarswellOnt 8683.

agreement.

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

Beneficiary designations – Ontario: *Petch v. Kuivila*¹⁰⁶

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

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

The Court held that an insurance declaration made in a will in accordance with s. 171(1) of the *Insurance Act*, R.S.O. 1990, Chapter I.8¹⁰⁷, is effective as of the date it is made.

¹⁰⁶ 2012 CarswellOnt 13859 (S.C.J.)

¹⁰⁷ *Ontario Insurance Act*, R.S.O. 1990, Chapter 1.8

At the moment the Will is signed, the declaration permanently revokes any previous beneficiary designations. If the Will is later revoked by marriage, its declaration of beneficiary designation is also revoked. However, this does not change the fact that the declaration was valid and effective as of the time the Will was signed. Therefore, the result is that the deceased was left without any beneficiary designation at all and the insurance proceeds fell into his estate, as his wife had argued.

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

Beneficiary designations – Ontario: *Littlechild Estate v. Littlechild*¹⁰⁸

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

The issue was whether the RRSP designation clause in the Will was effective in changing the designated beneficiary of the London Life investment. Specifically, the

¹⁰⁸ 2011 CarswellOnt 15283 (Ont. S.C.J.)

question was whether the London Life investment was an insurance policy governed by the *Insurance Act* or an RRSP governed by Part III of the *SLRA*.

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

In this case, the testator took steps to put in place an appropriate estate plan and, assuming that the court properly interpreted his intentions, the plan was successfully implemented after death. However, this came at the price of litigation. This case serves as a reminder that expectant beneficiaries in complex families may use any perceived weakness to their own advantage. It pays to be extremely diligent when identifying the kind of assets that the client holds and ensuring that the Will appropriately deals of them.¹⁰⁹ Unfortunately, there does not seem to have been any mention of the deceased's solicitor's state of knowledge of the investment at issue.

Beneficiary designations – Alberta: *Perry v. Perry*¹¹⁰

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

The deceased had entered into a separation agreement with his wife that included a provision that he pay spousal support and obtain a policy of life insurance with the wife

¹⁰⁹ For another recent example of an ambiguous provision that resulted in a dispute in a complex family, see *Dice v. Dice Estate*, 2012 CarswellOnt 8608, 2012 ONCA 468, 111 O.R. (3d) 407, 217 A.C.W.S. (3d) 748, 293 O.A.C. 190, 78 E.T.R. (3d) 105.

¹¹⁰ *Perry v. Perry (Estate)*, 2009 ABQB 687 (CanLII)

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

The Court considered three different grounds on which the courts have redirected the proceeds of a life insurance policy to a person other than the designated beneficiary: 1) the deceased may have revoked the beneficiary designation by taking the steps set out in the applicable insurance legislation; 2) the Court may rectify the beneficiary designation if there is clear evidence that it does not reflect the true intention of the insured; and 3) the Court may impress the insurance proceeds with a trust to give effect to an agreement or for other reasons.

In this case, none of the grounds were applicable. Although there were some general statements that the deceased wanted to change the beneficiary designation, these were not "clear and express" declarations to revoke the designation and identify the particular policy in question, both of which were necessary under the applicable section of the *Insurance Act*.¹¹¹ Rectification was impossible because there was no evidence that the deceased formed a clear intention to change the beneficiary designation or that there was a clerical error in carrying out the intention. The proceeds were not impressed with a remedial trust because there was no agreement and no unjust enrichment: the releases in the separation agreement were too general to waive a right to the life insurance proceeds and the beneficiary designation itself was a juristic reason for the enrichment.

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

¹¹¹ R.S.A. 2000, c. I-5, s. 259.

Proprietary estoppel – Ontario: *Cowderoy v. Sorkos Estate*¹¹²

Gus Sorkos – the husband in *Sorkos v. Sorkos Estate, supra* – had no children of his own. He considered his first spouse’s grandchildren to be his own and they considered him to be their grandfather. He promised them that if they worked to maintain his farm and cottage, whenever and however he asked, that he would leave these properties to them in his will. The evidence showed that the grandchildren carried out their end of the bargain: they were available whenever asked and carried out extensive work on the farm and cottage over the course of many years. They had also helped Gus with his business ventures. The Court found, for example, that one of the grandchildren had put in over 2000 hours of unpaid work to help Gus with one of his businesses.

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

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

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

From a planning perspective, individuals who have made these kinds of promises may

¹¹² 2012 CarswellOnt 6857 (Ont. S.C.J.).

think that they still have the discretion about whether to make good on them. When making a Will, they may not think to disclose the circumstances to their lawyer. Perhaps the simple question: “have you already told anyone that they can expect to get something from you when you die?” might elicit an answer that the estate planner could probe. This will be an interesting area of law to watch develop in Ontario.¹¹³

Proprietary estoppel – Ontario: *Clarke v. Johnson*¹¹⁴

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

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

The court held that Mr. Clarke was successful on the basis of both unjust enrichment and proprietary estoppel. With respect to unjust enrichment, Mr. Clarke was instrumental in constructing the cottage and paid its expenses for twenty years. This enriched the wife’s family and, if he were forbidden from accessing the cottage, would amount to a corresponding deprivation to him, especially since he reasonably expected the use of it until he died. The court rejected the wife’s family’s defence that there was no deprivation because they advanced the funds for the original construction. First, the

¹¹³ For a relevant BC case, see *Sabey v. Von Hopffgarten Estate*, 2013 BCSC 642.

¹¹⁴ 2012 ONSC 4320 (S.C.J.)

loan to Mr. Clarke had been forgiven, so there was no actionable debt to recover it. Second, the original construction price is far exceeded by the value of the whole property at the date of trial. There was no juristic reason for the deprivation.

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

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

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

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

would revert to the wife's family.

IV. PROFESSIONAL PRACTICE AND NEGLIGENCE

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

- It is important to consider the complete family relationships history and dynamics when naming estate trustees, if possible avoiding the appointment of a new spouses or children of a former relationship where there will be a temptation for the estate trustee to not act neutrally.
- It is necessary to identify all people who may make a claim under the applicable dependant's support legislation and to advise the client on the adequacy of the provision in a proposed will and disposition of other assets based on the most up-to-date trends in the cases. This includes determining if the client had any former common-law spouses, especially relationships that ended without the involvement of lawyers.
- It is necessary to find out whether the client has induced anyone to detrimentally rely on his or her promise to give an interest in property.
- An estate-planning lawyer should determine what legislation might be operative upon death and whether the deceased and his or her partners are spouses for purposes of the different definitions of "spouse" in family law, succession law, pension, tax, banking, and other legislation. At common-law, a person is not limited to having only one spouse at a time.
- It is important for separated spouses to obtain a divorce, especially where the spouse has a pension governed by the *Pension Benefits Act*, or plan around this

issue. Also consider which legislation applies provincial, or federal.

- The existence and status of children is not always obvious. A child estranged for many years may not be mentioned. There might be doubt about whether a child or their issue are biologically related or adopted, which could cause unexpected results or litigation over the issue. Special care should be taken to identify all intended beneficiaries by name rather than class as far as possible and to probe the existence and lineage of children and other issue.
- It is important to obtain copies of all domestic agreements, including cohabitation agreements, marriage contracts (pre-nuptial and post-nuptial agreements), and separation agreements. It is equally crucial to get copies of any support orders, support variation orders, and support termination orders, including orders to secure support with life insurance or other vehicles.
- It is necessary to identify all insurance policies, RRSPs and other similar vehicles with beneficiary designations. It is not always sufficient to revoke and make new beneficiary designation in a Will because the revocation may be ineffective where a designation was made irrevocable.
- In jurisdictions where a surviving spouse can make a claim for a division of matrimonial property from the deceased spouse's estate, the estate planner might need to roughly calculate the potential outcome of a property division between the spouses, including an assessment of the various exclusions, marriage date deductions, and identification of difficult valuation issues (e.g. interests in private businesses) to determine if the estate plan will be sidetracked by a spouse's election.
- Family lawyers have a major role to play in estate planning. Their separating clients may have outdated Wills, property held in joint tenancy that should be

severed, and non-traditional assets (RRSPs, insurance policies, pensions) that need special care to ensure they fall into the right hands on death. Their pre-nuptial clients may, among other arrangements of their affairs on death, consider whether to make any provision for severing joint title or confirming the right of survivorship in property held in joint tenancy on death.

- It is important to consider, if the client is in a common-law relationship, whether the client and his or her spouse are engaged in a joint family venture with the potential for an unjust enrichment claim, or other equitable claim, against the estate.
- Time if of the essence, gauging urgency in death bed circumstances.¹¹⁵

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

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

- **Undue Influence Checklist**
http://whaleyestatelitigation.com/resources/WEL_Undue_Influence_Checklist_Sask_2013.pdf
- **Duties of an Attorney Under Power of Attorney For Property**
http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_POA_Property.pdf

¹¹⁵ *Morassut v. Jaczynski Estate*, 2013 ONSC 2856

- **Duties of an Attorney Under Power of Attorney for Personal Care**
http://whaleyestatelitigation.com/resources/WEL_CapacityCheckist_POA_PersonalCare.pdf
- **Capacity Checklist Re: Estate Planning Context**
http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf
- **Summary of Capacity Criteria**
http://whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf
- **Attorney/Guardian /Client Memorandum Re: Personal Care**
http://whaleyestatelitigation.com/resources/WEL_AttorneyGuardianClientMemo_PersonalCare.pdf
- **Attorney/Guardian/Client Memorandum Re: Property**
http://whaleyestatelitigation.com/resources/WEL_AttorneyGuardianClientMemo_Property.pdf

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

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