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Estate Litigation in Complex, Blended and Extended Families in an Era of Social and Demographic Change*

Solo and Small Firm Conference
Law Society of Upper Canada
May 23-24, 2013

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***** *This paper is an updated version of papers that have been previously presented by Kimberly Whaley for LSUC, Estates and Trusts Summit, November 2012.*

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INTRODUCTION

The family fight following a death is not a modern development. Historical case reports and recent ones alike, are rife with examples of squabbles between parents and children, brothers and sisters, aunts and uncles, nieces, nephews and cousins who have looked to the legal system to resolve their differences.

The distinctly modern development is the volume of cases involving blended, complex or fractured families ("complex families"). These are cases where a spouse has remarried or entered into a new common law relationship, where partners have children from multiple relationships – or both – and a dispute arises between different factions of the complex family that are connected to each other only through the deceased.

An interesting distinction can be drawn between the internecine disputes of families related by blood, on the one hand, and the disputes that arise in complex families, on the other. By default, blood-related families have well-aligned interests. The disputes in these more traditional families tend to arise through personal grievance or bad conduct. In these cases, the dispute arises because of a surprise in the Will or a breakdown of relationships after the death. If the dispute was not a surprise, it is often attributable in some way to the deceased, or an expectant heir spoiling for a fight.

By contrast, in complex families, the conflict after death is rarely a late-breaking surprise. In complex families, the competing claims arise more automatically and from the outset of the complex relationship. There need be no spark of personal conflict to set parties against each other.

Therefore, a unique and important feature of complex families is that the potential disputes can often be foreseen. In complex families, there often is opportunity to plan in such a way so as to avoid disputes. Despite this opportunity, there is a significant amount of litigation involving complex families.

A focus of this paper is to consider a sprinkling of cases from the point of view of the deceased and the estate planning lawyer: Were the potential claims foreseeable and, if not, why not? If the potential 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 and children against estates. Spousal 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), claims and remedies in law and equity, including: unjust enrichment; constructive trust; trust; resulting trust; quantum meruit; and attendant remedies in law and equity, and proprietary estoppel. Children's claims against estates include inheritance upon intestacy, dependant's support claims pursuant to the SLRA, claims regarding the ownership of property, and other claims.

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

Finally, we discuss some professional responsibility aspects of estate planning in complex relationships, which touch on the risks associated with joint retainers, privilege and confidentiality, and conflicts of interest.

Notably, this paper is not exhaustive in its approach and its content. The subject matter is broad and therefore we merely touch on some of the many developing situations and challenges that we confront as a result of claims by spouses and children, arising from remarriage and re-partnership.

The rise of the complex family

Competing claims in complex families – especially spousal claims – were comparatively rare as recently as the late 1960s, likely because divorce was historically less common and re-partnership outside of marriage did not necessarily result in new legal rights, particularly property rights, arising between the 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 full, no-fault divorce, based on one year of separation, without a trial was not available until the passage of the *Divorce Act, 1985*. Furthermore, a common law partner was not entitled to make a claim for dependant's support in Ontario until 1977.[1] Because divorce was uncommon, so too, was remarriage, and therefore subsequent support claims by new partners/spouses.

It has only been 44 years since the *Divorce Act,* 1968, and 27 years since the *Divorce Act, 1985,* came into force. A Canadian who is 78 years old today – just under the current average lifespan in Canada – would have been 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 2012 were already, or were approaching middle age when these rights arose; they have had a more limited time to develop legal obligations arising out of the establishment of complex families, especially spousal claims, than a person who came of age into this regime.

People who reached the age of majority in the era of common law dependants' support

[1] *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.

legislation are approximately 53 years old and younger in 2012. Those who reached the age of majority in the era of no-fault divorce are approximately 44 years old and younger in 2012. These people have had, for their entire adult lives, the opportunity to develop a web of competing spousal claims. This generation will reach their average lifespan in about 25 to 35 years. It seems likely that, even if the demographics of complex families stabilize in the near future, the legal system can expect a continued influx of family disputes for a longer period of time as death catches up to the social arrangements that this generation has adopted in life.

This is not the only factor suggesting the continued growth of estate litigation in complex families. Recent data suggests that the demographics have not yet stabilized and growth in the number of complex families continues. The 2011 Census data on families, households and marital status data shows that people are choosing family structures that are prone to more complicated personal and legal relationships:[2]

- 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.

[2] Statistics Canada, Families and Households Highlight Tables, 2011 Census, *http://www.statcan.gc.ca/pub/89-625-x/2007002/t/4055015-eng.htm*, accessed November 1, 2012.

These trends demonstrate an increase in competing family interests. It is also noteworthy that common law spouses were much less likely than married spouses to use 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.[3]

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 necessary for practitioners to continue to increase their awareness of the issues that arise out of remarriages and common-law partnerships.

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 sections that follow set out the basic legal and financial rights and obligations that arise out of marriage, marriage-like relationships, and the death of a spouse. The discussion focusses on Ontario, but also references and compares a sampling of developments in other provinces.

[3] 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 June 27, 2012.

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*,[4] 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.[5] This allowed a surviving spouse to inherit on an intestacy as long as the other spouse did not make a new will.

An intestacy can create a windfall 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.[6] 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.[7] The preferential share is currently prescribed by regulation as $200,000.00.[8] 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*.[9]

The common law rule that a will was overridden on 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.

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[4] [1975] 1 SCR 423, 1973 CanLII 193.
[5] Professor A. H. Oosterhoff, "Predatory Marriages", Law Society of Upper Canada, 14th Annual Estates and Trust Summit at p. 29.
[6] *Succession Law Reform Act*, RSO 1990, c S.26, s. 44.
[7] *Ibid.* s. 46.
[8] O. Reg 54/95.
[9] *SLRA*, s. 46.

Not all provinces share this approach. Section 23(2) of the Alberta *Wills and Succession Act*, which came into force on February 1, 2012, provides that no Will, or part of a Will is revoked by the marriage of the testator or the testator's entering into an adult interdependent relationship.[10]

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,[11] subject to certain exceptions.[12] However, a person who would have received a gift in the invalid will can apply to court to receive the gift, and the court may give effect to all or part of the gift.[13] 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.[14] 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.[15]

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").[16] 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.[17] 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.

[10] SA 2010 c. W-12.2.
[11] *Wills Act*, RSNB 1973, c W-9, s. 15(2)
[12] *Ibid.,* s. 16
[13] *Ibid.,* s. 15.1(3)
[14] *Ibid.,* s. 15.1(4)
[15] *Ibid.,* s. 15.1(5)
[16] *Family Law Act*, RSO 1990, c F.3 [*FLA*], s. 5(1).
[17] *Ibid.* s. 4(1) and (2).

British Columbia and Nova Scotia, notably, have different regimes for dividing property between spouses. Under the British Columbia *Family Relations Act,* "family assets", which include property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose, are divided equally. [18] "Business assets" are excluded from being family assets, although the determination of what assets are family assets or business assets can be arbitrary.[19] Under the Nova Scotia *Matrimonial Property Act*, "matrimonial assets", which include a matrimonial home and all of both spouses' assets other than gifts, inheritances, insurance proceeds, settlement funds, business assets and personal effects, are divided equally.[20] Both regimes give the court a wide discretion to divide family property unequally in the interest of fairness.[21]

The British Columbia *Family Law Act*,[22] which replaces the existing *Family Relations Act*, an antiquated piece of legislation last updated in 1978, is expected to come fully into force on March 18, 2013.[23] 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.[24]

The legislation therefore goes further than in Ontario and the rest of the common law provinces. In light of *Vanasse v. Seguin; Kerr v. Baranow*, in which the Supreme Court of Canada affirmed the right of common law spouses who are engaged in "joint family

[18] RSBC 1996, c 128, s. 58.
[19] *Ibid.* s. 59.
[20] *Matrimonial Property Act*, RSNS 1989, c 275, s. 12(1)
[21] RSBC 1996, c 128, s. 58; s. 65, Nova Scotia s. 13
[22] *Family Law Act*, SBC 2011, c 25.
[23] B.C. Reg. 131/2012.
[24] *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.

ventures" to share in the wealth accumulated by the other spouse, statutory common law property division may be on the way in other provinces as well.[25]

Division of matrimonial property after death

In Ontario, within six months of the death of a married spouse, the surviving spouse can elect to either take under the Will of the deceased or in intestacy, as the case may be, or to receive an equalization of net family property under the *Family Law Act* as described above.[26]

Pursuant to subsections 6(1) and (2) of the *Family Law Act*, upon the death of a spouse, a surviving spouse is entitled to make a choice between making an equalization claim, on the one hand, or either taking under the will, if there is one, or, if there is not one, taking pursuant to the provincial intestacy laws set out in Part II of the SLRA.[27]

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.[28] The same is not necessarily true for a surviving spouse who elects in favour of equalization: the value of these benefits assets may be deducted from the deceased's NFP, thus potentially decreasing the amount of an equalization payment from the estate.[29]

In British Columbia, unlike in Ontario, a division of property between spouses cannot be triggered by the death of a spouse.[30] This is the state of the law under the current

[25] 2011 SCC 10, [2011] 1 SCR 269.
[26] *FLA*, s. 6.
[27] R.S.O. 1990, c. S.26.
[28] *Bickley v. Bickley Estate* (1999), 1999 CarswellOnt 3235 (S.C.J.).
[29] FLA ss. 6(6) and 6(7).
[30] Bill 18, s. 81; *Family Law Act,* SBC 2011, c 25.

Family Relations Act and, curiously, will remain so under the new *Family Law Act*. Although this is only speculation, 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.[31]

In contrast to British Columbia, Alberta has recently recognized the need for legislative change 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 recently conducted an amendment of its wills, estates and succession laws by combining the former *Wills Act, Intestate Succession Act, Survivorship Act, Dependants Relief Act* and section 47 of the *Trustee Act* into the *Wills and Succession Act*.[32] The new legislation came into force on February 1, 2012. The legislation also includes 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.[33] However, these changes have not yet come into force. A note on the Alberta Attorney General's website says that, *"Further discussion with estate practitioners will take place in the upcoming months to discuss how best to transition to this new law. Discussions will focus on what should happen to a surviving spouse's inheritance if they make a claim for matrimonial property on death."*[34]

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

[31] RSBC 1996, c 490.
[32] SA 2010, c W-12.2.
[33] *Ibid.,* s. 116.
[34] Alberta Justice and Solicitor General, "New Wills and Succession Act: What has changed", http://justice.alberta.ca/programs_services/wills/Common_Questions/WhatHasChanged.aspx/DispForm.aspx?ID=4. Accessed: June 27, 2012.

spouse.[35] 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.[36]

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, which consist of cohabitation agreements, marriage contracts, and separation agreements.[37] The parties 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 discussed above for a support order.

Estates practitioners should be mindful of the extensive law on the enforceability of domestic contracts, which may not be enforceable if they contain prohibited provisions,[38] a party failed to make full financial disclosure,[39] or if they are unconscionable.[40]

[35] RSO 1990, c S.26.
[36] *Re Welin Estate*, 2003 CarswellOnt 2869 (S.C.J.).
[37] *FLA*, ss. 52-54.
[38] *FLA*, ss. 52(2) and 56(1).
[39] *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).
[40] *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.

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.[41] In those circumstances, the court is empowered to make an order for such provision as it considers adequate be made out of the estate of the deceased.[42]

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 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 his or her legal claims but also his or her moral or ethical claims.[43] 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*.[44]

[41] *SLRA*, s. 57.
[42] *Ibid.*, s. 58(1).
[43] 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.).
[44] *Wills Variation Act*, RSBC 1996, c 490. See also *Cummings v. Cummings* (2004), 69 OR (3d) 397; 235 DLR (4th) 474; 181 OAC 98 (ONCA) and *Tataryn v. Tataryn Estate,* 1994 CanLII 51 (SCC); 116 DLR (4th) 193; [1994] 7 WWR 609; 93 BCLR (2d) 145.

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 expansive reading of the *SLRA* by the Ontario courts, the British Columbia provision has a potentially broader application. The applicant in British Columbia can be any spouse or child. The applicant need not prove that he or she was a dependant of the deceased.[45] The definition of spouse includes both married and common law spouses.[46] Although there is no definition of child, the provision has been held to apply to independent adult children.[47] 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, the Part V of the Ontario *SLRA* may 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 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 trust, the proceeds of any life insurance policy owned by the deceased, and others.[48] 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*

[45] *Wills Variation Act*, *ibid*., s. 2.
[46] *Ibid.*, s. 1.
[47] *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807 at 14.

transfers.[49] That said, British Columbia claimants may resort to equitable claims or rely on the *Fraudlent Conveyance Act*[50] to bring assets back into the estate, but these kind of claims can result in difficult trials.[51]

Unjust enrichment claims

In the recent seminal decision of *Kerr v. Baranow; Vanasse v. Seguin,*[52] the Supreme Court of Canada reviewed the law of unjust enrichment and expanded the remedies available to unmarried cohabiting spouses.[53] These remedies are available to a surviving spouse against the estate of a deceased spouse and form an important new tool in the estate lawyer's toolbox.

The basic elements of an unjust enrichment claim have remained more or less unchanged since *Becker v. Pettkus.*[54] For a plaintiff to be successful in making a claim, they must be able to establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. As well, it has been consistently held in the case law and has been affirmed in *Kerr v. Baranow; Vanasse v. Seguin*, that, "the courts 'should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances

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[48] *SLRA*, s. 72.
[49] *Hossay v. Newman*, 1998 CarswellBC 1734; 22 E.T.R. (2d) 150, 5 C.B.R. (4th) 198
[50] RSBC 1996, c 163.
[51] 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.)
[52] *Kerr v. Baranow,* 2011 CarswellBC 240 (S.C.C.).
[53] See Martha McCarthy, "Family Law for Estates Lawyers," LSUC CPD, Blended Family Estate Planning, June 14, 2011, at 12.
[54] (1980), 2 S.C.R. 834.

that can arise in such cases'."[55]

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").[56] 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.

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.[57]

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

[55] *Kerr v. Baranow, supra,* note 52 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.
[56] *Ibid.* at para. 58.

the basis of the share of those assets proportionate to the claimant's contributions"[58] 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."[59] Rather, it should remain a broad and flexible one.

This is an important and potentially difficult new area of work for estates practitioners and their clients, who may be in the position of trying to ascertain the existence of a joint family venture by examining the very detailed and personal factors without the assistance of the deceased spouse. Furthermore, there is the strategic and practical challenge of deciding which claim or combination of claims to bring on behalf of a surviving spouse, including dependant's support, unjust enrichment and other equitable claims.

Proprietary estoppel

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

In 2010, the Ontario Court of Appeal confirmed the well-settled test for proprietary estoppel, which had been expressed by the same court years earlier:[60]

> (i) An equity arises where:
>
> (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;

[57] *Ibid.* at paras. 89-100.
[58] *Ibid.* at para. 100.
[59] *Ibid.* at para. 102.

> (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and
>
> (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.
> […]
>
> (iv) The relief which the court may give may be either negative, in the form of an order restraining O from asserting his legal rights, or positive, by ordering O to either grant or convey to C some estate, right or interest in or over his land, to pay C appropriate compensation, or to act in some other way.[61]

The rule has recently been argued successfully in Ontario in the context of at least two family disputes, one of which occurred in a complex family and will be discussed below in *Spadafora v. Gabriele*.[62] In 2004, an older woman moved in with her adult daughter and son-in-law and conveyed her own home to them. They had promised her that she could live there until she died. As it turned out, the daughter and son-in-law died before the mother.

On the day before the daughter's death in 2009, the daughter 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 prevented the *Partition Act* applicant's right to immediate possession.[63]

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[60] *Schwark v. Cutting*, 2010 ONCA 61 at para. 34 citing *Eberts v. Carleton Condominium No. 396 et al.,* [2000] O.J. No. 3773 (C.A.) at para. 23.
[61] *Ibid.* at para. 23.
[62] 2011 CarswellOnt 14702 (S.C.J.).
[63] *Ibid.* at para. 16.

The Court found that the older woman 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.[64] 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."[65] 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.[66] As such, the Court refused to grant the order for partition and sale.

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

CLAIMS BY CHILDREN AGAINST ESTATES

Common children's claims against estates include inheritance upon intestacy, dependant's support claims pursuant to the SLRA, claims regarding the ownership of property, and also claims based in unjust enrichment and other legal and equitable claims.

Inheritance upon intestacy

As discussed above, a married spouse of a person who dies intestate is entitled to receive his or her preferential share of the estate. If the estate is worth more than the

[64] *Ibid.* at para. 20.
[65] *Ibid.* at para. 23.
[66] *Ibid*.

preferential share, then the remainder of the assets of the estate will be distributed pursuant to the formula set out in the SLRA. If the deceased had only one child, then the surviving spouse and the child will share the residue equally.[67] Where there is more than one child, the surviving spouse will receive one-third of the residue and the children will share the rest in equal shares.[68] If a child predeceases the intestate but leaves issue, his or her issue will receive that child's share in equal shares.[69]

The rules of intestacy are strict. The recent case of *Scotia Mortgage Corp. v. Davidson Estate*[70] illustrates the way in which the rules of intestacy are liable to produce a harsh and, as in this case, seemingly unjust results in situations involving relatively small estates. Two years after the deceased's first wife died, he remarried only to pass away less than a year later and 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 none. The court was powerless to avoid this result in the face of clear statutory language.

Dependant's support

A child who is a dependant of the deceased can make a claim under Part V of the SLRA for dependant's support. The claim is enabled by section 58(1), which is the same provision that enables claims by spouses.

A claim by a child differs is some respects from a claim by a spouse. The first distinction is in the definition of who qualifies as a "dependant". The second distinction is in the applicable factors that the court will consider when determining the amount and duration of support.

[67] SLRA, s. 46.
[68] SLRA, s. 47(1)
[69] SLRA, s. 47(2).
[70] *Scotia Mortgage Corp. v. Davidson Estate*, 2009 CarswellOnt 2297 (S.C.J.).

A "dependant" includes a child of the deceased to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.[71] A minor child is automatically a dependant of the deceased because the deceased would have been under a legal obligation to provide support for the minor before he or she died as a result of the support obligations set out in the *Family Law Act*.[72] Adult children have held to be dependants, including a child over the age of majority who is attending a full time post-graduate studies program,[73] an adult child who will suffer from a disability throughout adulthood,[74] and an adult stepchild in a full-time undergraduate program whom the deceased had a settled intention to treat as his own child,[75] which are all arguably consistent with a legal obligation to provide support under the *Family Law Act*.

Adult children to whom the deceased owed no legal duty to support may also be dependants. Under the *Wills Variation Act* in British Columbia, an adult child does not need to prove that he or she was a dependant of the deceased. In Ontario, however, the adult child whom the deceased did not have a legal obligation to support must pass a threshold question: was the deceased providing support to him or her immediately before death? While the deceased's "moral obligation" to a dependant has been a factor in determining the quantum of support since the decision of the Ontario Court of Appeal in *Cummings*, the existence of a moral obligation has no bearing on whether an adult child qualifies as a dependent within the meaning of s. 57.[76] If there is no legal obligation to provide support, the sole question is whether the deceased was actually providing support immediately before death. The meaning of "support" in this context

[71] SLRA, s. 57.
[72] FLA, s. 31.
[73] *Sheffiel-Lambros v. Sheffiel*, 2005 CarswellOnt 704, 137 A.C.W.S. (3d) 579, [2005] W.D.F.L. 1355, [2005] W.D.F.L. 1429, [2005] O.J. No. 697 (S.C.J.).
[74] *Cummings v. Cummings*, 235 D.L.R. (4th) 474, 181 O.A.C. 98, 2004 CarswellOnt 99, 69 O.R. (3d) 397, [2004] W.D.F.L. 131, [2004] O.J. No. 90, 5 E.T.R. (3d) 97 (Ont. C.A.).
[75] *Mihaescu v. Zodian Estate*, 2009 CarswellOnt 3010, [2009] W.D.F.L. 3370, [2009] O.J. No. 2169, 49 E.T.R. (3d) 8 (Ont. S.C.J.).
[76] *Coull v. Edgcumbe*, 2000 CarswellOnt 1897 (S.C.J.) at para. 16.

means that the deceased was providing more than "nominal gestures", which might include food, sustenance, rent-free accommodations, and also non-essentials and luxuries, including possibly moral support.[77] Unsurprisingly, there are many fewer reported claims in Ontario than in British Columbia by adult children to whom the deceased did not have a legal obligation to provide support.[78]

The other distinction between spouses and children involves the factors that the court will consider in setting the quantum and duration of support. If the dependant is a child, the court will consider the child's reasonable aptitude and prospects for education, his or her need for a stable environment, and, if the child is over the age of 16, whether he or she has withdrawn from parental control.[79] The court will not consider a list of other factors only applicable to spouses.[80]

Challenges to joint title

Although not a claim advanced only by children, in complex family situations, children of a deceased person often have an incentive to try to prevent 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.[81] 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

[77] *Trenton, Re*, 1987 CarswellOnt 646 (Surr. Ct.), aff'd by [1988] O.J. No. 2919 (Div. Ct.).
[78] See for example *Re Trenton*, *ibid.*, where the adult child was an alcoholic and abusive of the deceased, but the deceased provided him free accommodation in an apartment he owned, and *Balanyk v. Balanyk Estate*, 2008 CarswellOnt 1353, where the adult child was a nurse and lived with and cared for the deceased up until her death.
[79] SLRA, ss. 62(1)(p) and (q).
[80] SLRA, s. 62(1)(p).
[81] *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.

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."[82] The Court held that this rule operates in equity.[83] 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.[84] The facts of this case are set out in the discussion of caselaw below.

THWARTED ESTATE PLANS OR NO PLANS AT ALL:

REVIEW OF RECENT EXAMPLES OF ESTATE DISPUTES ARISING IN COMPLEX FAMILIES AND THEIR LESSONS FOR ESTATE PLANNING

Intestate succession and unjust enrichment – Ontario: *Re York Estate*[85]

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

The deceased's first wife died in April of 1994. Only one month later, he executed a new

[82] *Ibid*. at para. 34.
[83] *Ibid*. at para. 35.
[84] *Ibid*. at para. 39.

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 totaling $476,574.00. 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.[86]

Despite the short amount of time that the deceased and his second wife were married, the Court disagreed with the proposal that it had discretion to deviate from the distribution formula for intestacy as set out in section 45 of the *SLRA* as to the $200,000 preferential share. The Court ordered the farm to be transferred to the surviving spouse as part of her distributive/preferential share, deducting half the costs of repairing it on the basis that the repairs would significantly benefit the wife as the ultimate owner of the property. A number of other items were deemed to be received by the wife as part of her distributive share. The Court did not comment on whether the application of section 45 resulted in any injustice, but the Court's statement at paragraph 10 exposes how a straightforward application of the provision does not always bear a fair result:

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

[85] *York Estate, Re*, 1998 CarswellOnt 3947 (Gen. Div).
[86] *Ibid.* at par. 6.

> 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.[87]

The children were granted $10,000 each in *quantum meruit* for their work on the farm when growing up.[88]

This litigation resulted despite the perfectly clear effect of the rules of intestate succession in 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. Obviously, this case 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 had no opportunity to assist this client in dealing with the consequences of the new marriage except to remind the client in his reporting letter that he will 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, such as in Alberta and New Brunswick, these cases will surely keep coming up.

Intestate succession – New Brunswick: *Stanley Mutual Insurance Co. v. Shepherd*[89]

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

[87] *Ibid.* at para. 10.
[88] *Ibid.* at paras. 37-38.
[89] 2011 NBQB 57, 2011 CarswellNB 88, 97 C.C.L.I. (4th) 64, 369 N.B.R. (2d) 181, 952 A.P.R. 181, (N.B. Q.B.).

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

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

Intestate succession – Saskatchewan: *Cronan v. Cronan Estate*[90]

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 *Dependant's Relief Act*, each of which has a different definition of "spouse". The first defines spouse as a person who is legally married or cohabiting with the deceased spouse continuously for no less than two years and had 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 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 divorced

[90] 2010 CarswellSask 259 (Q.B.).

his second wife, but the evidence 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*,[91] the leading case on determining whether two individuals are cohabiting in a conjugal relationship. The second wife's evidence was that they lived together, shared a bedroom, raised their children together, held themselves out to the community as a couple, and that several periods of separation between them were brief and always reconciled. The children of the deceased's first marriage gave evidence, which was accepted, that during these periods of separation, the deceased would often return to his first wife, including even briefly entering into an engagement with her. They argued that this amounted to an intention on the part of the deceased not to continue cohabitation in a conjugal relationship with the second wife.

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

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

Enforcement of a separation agreement - Ontario: *Re Welin Estate*[92]

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

[91] 1980 CarswellOnt 274, 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).
[92] *Re Welin Estate*, 2003 CarswellOnt 2869 (S.C.J.).

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,[93] 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."[94] 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*[95] gives the Court discretion to order their removal.[96] Consequently, the Court ordered that Spouse #2 be removed as the executor/trustee of the deceased's estate.

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

[93] *Ibid.* at para. 8.
[94] *Ibid.* at para. 9.
[95] *Trustee Act*, R.S.O. 1990, c. T.23.
[96] *Supra* note 92, at para. 9.

Dependant's support – Ontario: *Matthews v. Matthews*[97]

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 as a dependant's support claim under the SLRA.

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

The main dispute in this case was over the quantification of the support award. The wife argued that the Spousal Support Advisory Guidelines 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 depend on income-sharing and the estate was no longer an income-earning entity. Instead, the Court reviewed the factors in 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.

This case illustrates the unavoidable adversity of the complex family. As long as a matrimonial dispute remains unresolved – whether because of incomplete negotiations, ongoing court proceedings, or because the parties simple 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

[97] 2012 ONSC 933.

litigious dispute. It is not clear that even the best planning advice would have prevented the dispute from continuing after his death.

Dependant's support – Ontario: *Blair v. Allair Estate*[98]

The case involved a motion for interim support under the *SLRA* made by one of the deceased's two long-term partners in an unconventional relationship. The Court found that, on the evidence, both of the deceased's partners met the definition of 'spouse' in the *SLRA*, and could establish claims for support.

Counsel for the estate trustee, being the other spouse, argued that since the relationships 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.[99] 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 spouse had overcome the evidentiary hurdle required to support a claim for support, having provided "credible evidence from which one could rationally conclude that the applicant could establish...(her)...claim for

[98] *Blair v. Allair Estate*, 2011 CarswellOnt 263 (S.C.J.), 2011 ONSC 498.

[99] *Ibid.* at para. 16.

support," and awarded her $1,500.00 per month in support.[100]

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.

Severance of joint title - Ontario: *Hansen v. Hansen Estate*[101]

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 of Appeal 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

[100] *Ibid.* at para. 19.
[101] *Hansen, supra* note 81.

- 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 would eventually pass to the children anyways.

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

Severance of joint title – Ontario: *Su v. Lam*[102]

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

[102] *Su v. Lam*, 2012 ONSC 2023, 2012 CarswellOnt 3975 (S.C.J.).

that the mere fact of a separation is insufficient to establish severance.[103] 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.[104]

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 were not able to be clawed back into the estate under s. 72(1) of the SLRA because of the expiry of the six-month limitation period).

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 can be a useful estate planning tool in avoiding the administrative hassle and estate administration taxes associated with probate. However, it is also an area riddled with the kind of disputes over whether joint title was severed by a mutual course

[103] *Jurevicius v. Jurevicius*, 2011 ONSC 696.
[104] *Su v. Lam*, supra note 102.

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, then it will remain so unless the other owner carries out a unilateral act of severance on title. It is worth considering whether, in complex family situations, if a property is to be held in joint tenancy, the joint owner carrying out the estate plan should sign a written acknowledgement that the property is to be held in joint tenancy.

Severance of joint title – Ontario: *Ramnarine v. Ragoo*[105]

In this case, it was the mother of the deceased who was claiming that joint title to a matrimonial home had been severed. The deceased and his surviving common law spouse had cohabited for about nine years. The deceased and common law spouse owned their home in joint tenancy. The deceased's mother, who was the estate trustee without a will, claimed that she held beneficial title to a one-half interest in the deceased's home. The deceased and his mother had entered into a written agreement to the effect that he was holding his interest in the home in trust for his mother. However, he did not disclose this agreement to his spouse or register it on title. The house was registered in joint title when it was purchased. Furthermore, the deceased and the spouse dealt with the property as if it were held in joint title as between them; for example, they obtained additional mortgage financing on the entire undivided interest in the property. The court held in detailed reasons that the joint tenancy was not severed by the agreement between the deceased and his mother. The surviving spouse was entitled to complete title by right of survivorship.

If the mother advanced the funds to purchase the property to her son, then it would seem reasonable for her to obtain an agreement that she would have an interest in the property. However, this case shows that a deed of trust or other agreement between

[105] 2011 ONSC 4441, 71 E.T.R. (3d) 47, 2011 CarswellOnt 7001, Seppi J. (S.C.J.).

just one of the joint owners may not be sufficient to sever title. This case does not apply the "three rules" as described in *Hansen*, but it seems clear that none of them were satisfied in this case: there was no unilateral act directly on title; there was no explicit agreement between the joint owners; and there was no mutual course of conduct because only one party was behaving as if title were severed, and only some of the time.

Pension benefits – Ontario: *Carrigan v. Carrigan Estate*[106] and *Vladescu v. CTV Globe Media Inc.*[107]

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

In *Carrigan*, a recent Ontario Court of Appeal decision, a member of a pension plan governed by the *Pension Benefits Act* died. He was separated from his wife, whom he never divorced, and had been living in a common law relationship with another woman, Ms. Quinn, at the date of his death. Ms. Quinn claimed that she was entitled to the deceased's death benefit.

Under the *Pension Benefits Act,* a spouse is entitled to the member's pension death benefit. If there is no spouse, then the member's designated beneficiaries will receive it instead. However, section 48(3) provides that no payment of benefits 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 both the wife and Ms. Quinn met the definition of spouse. However, the separation of the deceased and a spouse – any spouse – triggered this section and denied any benefit to a spouse. The benefit was therefore to be paid to the designated beneficiaries, which were to the deceased's wife and children.

[106] 2012 ONCA 736.
[107] 2012 CarswellOnt 9252 (S.C.J.).

Justice LaForme dissented in the majority's decision. He held that the *Pension Benefits Act* does not prevent a person from having two spouses; instead, it favours whichever spouse the deceased was cohabiting with at the date of death. This dissent seems to be consistent with the reasoning in *Cronan*, where the Court held that the definition and application of "spouse" is variable depending on the legislative scheme.

On March 28, 2013 the Supreme Court of Canada denied leave to appeal in *Carrigan*. This denial of leave means that the Ontario Court of Appeal's interpretation of section 48(3) will stand. Many within the profession were hoping for further clarification from Canada's top court and now are left in the dark and are unsure what the future may hold with respect to the application of this section.

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 the husband's 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 he might have to recognize the wife's rights under the separation agreement.

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

Section 24(4) of the PBSA provides that,

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

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

Both of these cases seem to have harsh results in that the deceased's intentions and/or public policy was 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 separation agreement that explicitly gave his former spouse his pre-retirement death benefit as part of a negotiated agreement. It will be interesting to see if these cases are further appealed.

What could the family lawyers and estate planners have done to protect their clients? In *Carrigan*, the husband could have sought a divorce. Where married spouses separate, the divorce is more than just a formality to take care of before getting married again. It has a real, practical effect on the way that the deceased's pension benefits and other assets will be distributed. Now that the Ontario Court of Appeal's interpretation will stand, plan members may want to review their personal situation and review their options, such as getting a divorce, if they are in the same situation as Mr. Carrigan. A separation agreement can go a long way 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 caselaw.

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 owned 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 questions 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 intentions 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

[108] 2011 ONSC 7695.

appropriately.[109] Unfortunately, there does not seem to have been any evidence of about whether the deceased's solicitor was aware of the investment at issue.

Littlechild was relied on in the case of *Cunningham v. Quadrus Charitable Foundation*,[110] where a very similar dispute was adjudicated. In *Cunningham* a charity had been designated as the beneficiary of a London Life investment, however, the testator had included a clause in her will leaving any insurance policy to her nephew. The charity brought an application for rectification of the will to remove the insurance clause or for a declaration that the London Life investment did not fall under the insurance clause. The Court, reviewed *Littlechild* and relevant legislation and held that the London Life investment was indeed captured by the insurance clause in the will and dismissed the charity's application.

Beneficiary designations – Alberta: *Perry v. Perry*[111]

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

[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] 2012 ONSC 5836.
[111] *Perry v. Perry (Estate),* 2009 ABQB 687 (CanLII)

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" declaration to revoke the designation and identifying the particular policy in question, which were necessary under the applicable section of the *Insurance Act*.[112] Rectification was impossible because there was no evidence that the deceased formed a clear intention to change the beneficiary designation nor any clerical error in carrying out the intention. The proceeds were not impressed with a remedial trust because there was no agreement nor any 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 got a windfall and the surviving spouse was left empty-handed.

Proprietary Estoppel – Ontario: *Cowderoy v. Sorkos Estate*[113]

Gus Sorkos had no children of his own. He was married later in his life to a woman with

[112] R.S.A. 2000, c. I-5, s. 259.
[113] 2012 CarswellOnt 6857 (S.C.J.).

two grandchildren. He eventually considered her grandchildren to be his own and they considered him 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, he 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 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*), if the promises induce detrimental reliance and the promised gifts are unconscionably withdrawn. These cases are as likely to come up in complex cases as elsewhere; for example, it is easy to imagine a stepparent inducing a stepchild by promise of a testamentary gift or threat of differential treatment in the Will. It is also easy to imagine this claim being used in complex family situation without merit, on the basis of alleged promises.

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

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

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

Although this case did not involve an estate dispute per se, it is another excellent example of the power of the equitable claim of proprietary estoppel in estate 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

[114] 2012 ONSC 4320

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 license 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.

Children – Ontario: *Collis v. Ward*[115]

The deceased died intestate. His sister applied for a certificate of appointment of estate trustee without a will and took the position that the deceased's mother was the sole heir. A man who held himself out as the deceased's son was named as a respondent.

The deceased's family argued that the he had expressed doubt about the respondent's paternity. They asked for an order for DNA testing. The court found that the deceased had signed the certificate of live birth, admitted paternity in a family law proceeding with the mother, and paid child support. These facts were taken to establish a presumption of paternity pursuant to ss. 8 and 9 of the *Children's Law Reform Act* (CLRA).

The court refused to order the DNA test, declared that the respondent was the son of the deceased, and granted his application to be appointed as estate trustee without a will.

A will obviously could have prevented this kind of dispute. This is also good example of how basic assumptions, like knowing who your children are, may not be so obvious after all. More concretely, it is authority that a court may make a declaration of paternity with respect to a deceased person on the basis of the presumptions in the CLRA.

Children – Ontario: *Kelly Estate (Trustee of) v. Kelly*[116]

This case distinguishes *Collis*. The facts were similar to those in *Collis*, in that the mother of the deceased claimed to be entitled to inherit as the sole heir at law, which was challenged by an alleged daughter of the deceased.

As in *Collis*, the facts supported a presumption of paternity as a result of the application

[115] 2009 CarswellOnt 6518 (S.C.J.).

of s. 8 of the CLRA. Unlike *Collis*, neither of the parties had asked the court to make a declaration of parentage. Instead, the sister of the deceased, who had applied to be appointed as estate trustee without a will, simply sought a DNA testing order. Despite the presumption of parentage, the court ordered DNA testing.

The Court distinguished *Collis* on two grounds. First, the DNA testing order provision does not make reference to the declaration of parentage provisions of the CLRA. The Court has the discretion to order a DNA test whenever it is just, regardless of the presumption of parentage. By contrast, the provision governing a declaration of parentage does refer to the presumption of parentage provision in the CLRA. Because the Court in *Collis* was bound to make a declaration of parentage, no DNA order was necessary in that case.

The second ground on which *Collis* was distinguished was on the facts. The Court reviewed the evidence and determined that, while the presumption of parentage applied, the actual evidence of parentage was quite weak and would be best settled by a DNA test. The Court made an order for testing.

It must be remembered that only biological and adopted children inherit on intestacy. A failure to make a will could have a harsh effect on a child that the deceased treated as his or her own and intended to benefit but was not a biological or adopted child. Furthermore, in line with the theme of this discussion, the failure to address the existence of unacknowledged or unascertained child simply opens up an opportunity to engage in litigation.

PROFESSIONAL RESPONSIBILITY

The complicated circumstances of fractured families add a layer of complexity to the mosaic of legislation and case law that establishes the claims available to living and

[116] 2010 CarswellOnt 8927 (S.C.J.).

deceased spouses. Estate planners must be carefully attuned to the intricacies of the law and their clients' circumstances to identify the relevant issues and deal with them appropriately.

One professional responsibility issue stands out as a potential danger for lawyers who advise clients in complex families on estate planning: what are the consequences of the death of one of the spouses in a joint estate planning retainer where a family dispute arises involving the deceased's estate? This scenario engages the rules applicable to joint retainers, conflicts of interest and maintaining confidentiality.

Joint retainers by spouses for estate planning must be approached cautiously where either or both of the clients have former spouses and/or children from other relationships.

Rule 2.04(6) provides that,

> 2.04(6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
>
> (a) the lawyer has been asked to act for both or all of them,
>
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

The *Rules of Professional Conduct* specifically deal with the context of joint retainers by spouses in estate planning matters. The commentary to Rule 2.04(6) provides in part that:

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, 1992 S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
(b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
(c) the lawyer would have a duty to decline the new retainer, unless;

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
(ii) the other spouse or partner had died; or
(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Spouses might have a long-term relationship with the lawyer; the firm might handle their business matters, real estate, and even act as litigation counsel to both for example. During their lives, the spouses might have been perfectly content to waive the conflict of interest and retained counsel jointly. However, after the death of one spouse, the retainer by the surviving spouse becomes problematic. The following problems can

arise:

- If the surviving spouse is an estate trustee and one of multiple beneficiaries, the lawyer cannot act for him or her in both capacities, since this would result in a conflict of interest between the surviving spouse's role as a fiduciary for the benefit of all of the beneficiaries and his or her self-interest in the estate;

- If there is a claim against the estate that involves determining the testator's intentions, capacity, or other issues, the solicitor might be compelled to produce his or her file. As a consequence of the prior joint retainer, the surviving spouse's confidential information will be disclosed to all parties. This could be embarrassing or, worse, compromise the spouse's position in the case.

- If the estate solicitor becomes a witness in a family dispute, the surviving spouse will not be able to retain him or her in any capacity in the case. Furthermore, the solicitor will be compelled to disclose privileged information if called as a witness with respect to the deceased's estate planning.

A joint retainer that begins in happy circumstances and continues harmoniously over the course of a lifetime is not likely to give the clients or the lawyer much pause. However, in complex families where there may be claims against one of the spouse's estates, the lawyer should remain vigilant and advise on any foreseeable problems in the retainer. If a dispute is likely, the lawyer might even decline a joint retainer for estate planning.

Professional practice and negligence

Although this is not by any means intended to be an exhaustive list, the following are some conclusions that we can draw from the developing law evolving out of litigation among complex family units:

- It is important to consider the complete family 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 their partners are spouse 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.
- 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 into the existence and lineage of children and other issue.
- It is crucial to get copies of all domestic agreements, including cohabitation agreements, marriage contracts (pre-nuptial and post-nuptials 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 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 against the estate or other equitable claims.

For further writings on this topic, please see our WHALEY ESTATE LITIGATION blog site: http://whaleyestatelitigation.com/blog/, 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.

Also for helpful checklists please see our website:

http://whaleyestatelitigation.com/blog/checklists-for-attorneys-and-guardians/

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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