TAB 2

2009 Family Law Update for Estates Lawyers

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2009 Family Law Update for Estates Lawyers

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I. Introduction

In 2009, four major issues emerged in family law that have a potential impact on lawyers practicing in the estates field. First, we will explore the impact of the recent statutory amendments to the *Family Law Act* ("*FLA*") concerning the treatment of jointly held property with a right of survivorship. Next, we will update Ms. Karen Bales' ("Ms. Bales") 2008 review of when domestic contacts and separation agreements should be set aside and specific clauses in separation agreements that may be of interest to estates practitioners.[2] Third, a post-separation decline in the value of one spouse's assets and how this may impact the law of estates will be explored. Finally, we will follow-up with a review of how constructive and resulting trust claims can be made out, including an update of Mr. Philip Epstein's ("Mr. Epstein") "favourite case" of 2007.

II. Statutory amendments to the *FLA*: sections 6(6) and 6(7)

Perhaps the most significant change to the *FLA* in the recent amendments is the treatment of jointly held property with a right of survivorship. Under the *FLA* prior to the amendments, the way the statute was written and subsequent case law interpreted it, a spouse could at the same time as claiming an equalization payment, benefit from ultimately holding jointly held property with the right of survivorship in their sole name and yet only providing for the value of 50% ownership rights at the date of separation for the purposes of equalizing the net family property.

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[1] Daniel Melamed is a Partner and Lindsay Mills is an associate in the family law group at Torkin Manes LLP.

[2] Karon C. Bales, "2008 Family Law Update", Paper presented to the Law Society of Upper Canada, 11th Annual Estates and Trusts Summit, 18 November 2008 [*Bales*].

As these properties were held jointly in equal proportions, the effect on the equalization payment was neutral but the living spouse benefited by becoming the sole owner of the property thereby providing a 50% windfall of the value of that property without having to account for it.

In the first and only case we are aware of where this issue was raised and reported is *Maw (Committee of) v. Maw Estate ("Maw")*[3]. In *Maw*, it was argued that this windfall was not the intention of the legislature. In a way to limit this windfall effect, it was argued at the time that the value of the said property should be discounted in the estate's Net Family Property ("NFP") for the likelihood that the surviving spouse would receive it and thus have a higher "value" in the property. A corresponding surviving spouse's NFP would be for the same corresponding amount. This argument could, and did only apply, when the deceased spouse was gravely ill on the date before death (valuation date) and therefore, factually, they were highly likely to predecease the other spouse.

In simple terms, if it was a fact known at or near the date of death that the deceased was likely to predecease their surviving spouse, in the case of a cancer patient who is in palliative care, for example, using valuation principles consistent with such things as the valuation of pensions and life expectancy, the determination of notional costs of disposition and the appropriate percentage of tax to be applied, the estate attempted to argue that because it was known that the deceased was very ill the day before the date of separation. The following argument could be put forward: if the property was worth $100,000.00 and it was 99 percent likely the day before the date of valuation that the subsequently deceased spouse would predecease the remaining spouse, most of the value of that property should be put on the surviving spouse's net family property and a corresponding reduction to its value to the estate. It was argued that the only likelihood that the

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[3] [1994] O.J. No. 4201 (O.C.J. Gen. Div.).

surviving spouse would have died on the date before would have been an accidental death and there were actuarial calculations available and other statistical evidence to provide the likelihood of that scenario occurring depending on the lifestyle, location of living, etc. In the case of *Maw*, the surviving spouse was very sedentary in his ways and primarily spent time either at his home or from time to time visiting his spouse in the nursing home where she resided. It was therefore posited that the likelihood of the deceased predeceasing the surviving spouse was highly likely and therefore the vast majority of the value of the jointly held asset should be placed in the net family property statement of the surviving spouse.

In the example above, if the value was $100,000.00 (assuming that it was 99 percent likely that the surviving spouse would in fact outlive the now gravely ill spouse), one might put $99,000.00 of value on the surviving spouse's NFP and $1,000.00 on the infirm spouse. This is also consistent with the notion that the surviving spouse would never sever the joint tenancy at that late a stage as they were going to benefit from that property's sole ownership upon the death of their spouse.

The Court rejected that argument in *Maw* as follows:

> The second issue before me relates to the submission that the Net Family Property of Mrs. Maw must include the value of the contingent interest which she had as a joint tenant of the matrimonial home. If her interest had a value, it would of course be cancelled by her husband's corresponding contingent interest as of the day before his death which means the question of whether the right of survivorship is a property interest within the meaning of the *Family Law Act* is irrelevant.[4]

The new amendments to the *FLA* have now provided for the closure of that loophole that was argued in *Maw* and that all estates practitioners are no doubt aware by providing that in addition to the offset already required by section 6(6) for certain named properties such as insurance proceeds or a lump sum payment, the new subsection 6(6)(c) adds that "[t]he recipient of

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[4] *Ibid.* at para. 23.

property or a portion of property to which the surviving spouse becomes entitled by right of survivorship or otherwise on the death of the deceased spouse"[5]. No doubt the use of the words "or otherwise" will definitely expand the list but it will be consistent with what was originally argued in *Maw* that was subsequently rejected by the Court. In a yet unpublished paper by Barry Corbin, he has, as is Mr. Corbin's skill, found a further difficulty with the language and writes as follows:

> The extent to which the words "or otherwise" will expand the scope of that new offset requirement is unclear. However, the language used in new subsection 6(7) suggests one surprising category of property that may be caught by this phrase. It refers to the surviving spouse's "entitlement to the property or portion of property [to which he or she became entitled by right of survivorship or otherwise on the death of the deceased spouse] *established by or on behalf of a third person*" [emphasis added]. Evidently, an economic benefit received by the surviving spouse from property that the deceased spouse neither owned nor controlled was thought to be something for which the surviving spouse should also have to account.
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> We question whether this is appropriate. The following example will illustrate our reservation. Suppose a parent (P), having a married child (C), makes a will that establishes a discretionary trust to be administered by a corporate trustee. Under the terms of the trust, C and C's issue alive from time to time comprise the class of income beneficiaries. While C's issue alone make up the class of capital beneficiaries, the trust terms provide that, upon the death of C's spouse (S), C will be added to the class of persons who may receive trust capital and C may effectively collapse the trust by requesting that the trustees distribute to him or her the whole of the trust capital.
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> It seems clear to us that C's entitlement to access the trust capital, arising as it does on S's death, must be offset against any equalization entitlement that C claims from S's estate pursuant to subsection 5(2) of the *Family Law Act*. New subsection 6(7) would exempt C from having to suffer that offset, if P's will has so stated.[6] It strikes us as being quite unlikely that P -- or P's will-drafting solicitor -- would think to make such a statement in the will.[7] And is it not extraordinary that C would have to offset the value of his or her interest in the trust when that value would be excluded in calculating C's net family property?[8]

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[5] *Family Law Act*, R.S.O. 1990, section 6(6)(c), as amended [*FLA*].

[6] As Barry Corbin notes, "[t]he offset obligation could likewise be ousted by an appropriate statement – however unlikely – in the deceased spouse's will. (It is not clear whether that statement would have to make specific reference to C's entitlement under P's will or whether it could be more generic so as to encompass all entitlements sourced with any third party.)"

[7] Barry Corbin also notes that, "[p]erhaps this amendment will give rise to a new type of *Family Law Act* clause along the following lines: Any entitlement of a beneficiary that arises upon the death of his or her spouse shall be in addition to the beneficiary's entitlement under section 5 of the *Family Law Act*."

[8] The full text of Mr. Corbin's paper will be published in *Money and Family Law* in the near future. We thank Mr. Corbin for his input with this paper.

III. Setting Aside Separation Agreements and the Interpretation of Insurance Clauses

The discussion that follows is an update to part II of Ms. Bales' 2008 paper wherein she addressed the recent case law of setting aside domestic contracts and the related issues.[9] Since Ms. Bales reviewed the leading principles in this area, including a summary of *Hartshorne v. Hartshorne*[10] we will not repeat it here in its entirety. However, as Ms. Bales remarked, suffice it to say, the courts are loath to interfere with contractual relations between parties, especially when each party has obtained independent legal advice. Pursuant to Part IV of the *FLA*, domestic contracts can be challenged and set-aside if full financial disclosure is not provided or inaccurate financial disclosure is provided; if one spouse did not understand the nature or consequences of the contract; and/or if one spouse unduly influenced or pressured the other to enter into the contract.[11]

This year, the following cases focused on the issue of when separation agreements can be set aside and the interpretation of insurance clauses: *Rick v. Brandsema ("Rick")*[12], *Richardson Estate v. Mew ("Richardson Estate")*[13] and *Turner v. DiDonato et al. ("Turner")*[14].

In *Rick v. Brandsema,* a Supreme Court of Canada ("SCC") case, Nancy Rick and Berend Brandsema were married for 27 years. They owned their farm and other properties as equal shareholders. They agreed to divide their assets equally and signed a separation agreement to that effect. However, the husband did not provide full financial disclosure, providing, instead an undervaluation of the parties' farm and willfully took advantage of his wife's mental instability.

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[9] *Bales*, *supra* note 2.
[10] [2004] 1 S.C.R. 550, 236 D.L.R. (4th) 193 (S.C.C.).
[11] *FLA*, *supra* note 5, s. 56(4).
[12] [2009] S.C.J. No. 10 (S.C.C.) (*Rick*).
[13] [2009] O.J. No. 1947 (Ont. C.A.) (*Richardson Estate*).
[14] [2009] O.J. No. 1113 (Ont. C.A.) (*Turner*).

The issue before the SCC was whether, due to the husband's conduct, the parties' separation agreement "was unconscionable and the wife should be compensated by an amount representing the difference between the negotiated 'equalization payment' and her entitlement under the *Family Relations Act*."[15] The SCC overturned the British Columbia Court of Appeal decision and reinstated an additional payment of approximately $650,000.00 to the wife. In doing so, the SCC held that separation agreements, in the family law context, are not treated in the same way as commercial contracts between parties. There are duties owed by spouses when they negotiate and execute a separation agreement, including, but not limited to providing full financial disclosure to each other. In a recent *Lawyers Weekly* article, Mr. Gordon Andreiuk ("Mr. Andreiuk"), a family law lawyer in Edmonton responded to this duty of full financial disclosure in the estates context, describing a case where an individual sued her trustee.[16] The disclosure of the value of the property was at issue. The trustee's estate secretly obtained an appraisal of the home and then said that a higher appraisal be utilized. After the monies had been paid out to the trustee's estate, the original appraisal (which represented the true value of the property) came to light and the individual brought an application. However, as Mr. Andreiuk asserts, the court failed to impose a similar *Rick* duty of disclosure in the case he describes, even though the contract that the parties' had entered into was based on the dishonesty of the trustee. It was arguably "unconscionable." Furthermore, Mr. Andreiuk notes that the trustee's estate was not bound by any "fiduciary duties"[17] as it was no longer considered the trustee. Mr. Andreiuk asks us to imagine these same facts in a family law case, as opposed to the estates context. After *Rick*, "[w]ould the family law trial justice use the duty of 'full and honest disclosure' to rectify

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[15] *Rick*, *supra* note 12 at para. 37.
[16] Gordon Andreiuk, "Top court changes the rules for property settlements", *Lawyers Weekly*, Vol. 29, No. 19 (Sept. 25, 2009) [*Andreiuk*].
[17] *Ibid.*

the agreed-upon house value, where the agreement had been based on deception?"[18] Mr. Andreiuk argues that *Rick* does not provide us much guidance. Perhaps a case next year will allow the courts to definitively answer this question.

The *Richardson Estate* case involved the interpretation of an insurance clause in a separation agreement and the general duties of a power of attorney. Mr. Richardson and Ms. Mew were married for 26 years and had two children. He separated from Ms. Mew in 1991 and married Ms. Ferguson in 1992, with whom he had three children. Two years later, Mr. Richardson and Ms. Mew entered into a separation agreement. One of the terms of the separation agreement required Mr. Richardson to designate Ms. Mew as the named beneficiary of a $100,000.00 Life Insurance policy up to February, 1995.[19] Mr. Richardson misplaced his policy and when it was reissued, he named his current wife, Ms. Ferguson, as the beneficiary. However, in 1994, Mr. Richardson signed a beneficiary designation appointing "Ms. Mew as the designated beneficiary, subject to revocation."[20] Ms. Ferguson maintained that this was a "temporary measure"[21] only and that he would amend this in the future. Four years later, in 1998, Mr. Richardson executed his will and appointed Ms. Ferguson as his trustee, leaving her the bulk of his estate. At the same time, he signed continuing powers of attorney for property and personal care in favour of Ms. Ferguson. Mr. Richardson was diagnosed with Alzheimer's disease shortly thereafter. In the beginning, Ms. Ferguson hired in-home care to assist Mr. Richardson's in his own home, while she was employed outside of the home. However, in 2003, he moved to a retirement home and in 2004, to a long-term facility where he died in November 2007.[22]

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[18] *Andreuik, supra* note 16.
[19] *Richardson Estate v. Mew,* [2009] O.J. No. 1947 (Ont. C.A.) at para. 8 [*Richardson*].
[20] *Ibid.* at para. 10.
[21] *Richardson, supra* note 19 at para. 10.
[22] *Richardson, supra* note 19 at para. 12.

Ms. Ferguson gave evidence that by 2006, Mr. Richardson's income stream had been exhausted and she was forced to pay all of Mr. Richardson's expenses out of her own income, including his care costs. When Mr. Richardson died, Ms. Ferguson received the benefit of two life insurance policies totaling $400,000.00. At Mr. Richardson's death, she also learned that his first wife, Ms. Mew was still the named beneficiary of the policy of insurance. Mr. Richardson had diligently paid the premiums on the policy until he became unable to manage his own financial affairs. Thereafter, Ms. Ferguson paid the premiums from the joint bank account that she shared with Mr. Richardson. In 2006 until his death, Ms. Ferguson paid the premiums on her own, as she was under the assumption that she was the named beneficiary of the policy.

Ms. Ferguson brought a motion for the proceeds of the policy. While Ms. Ferguson conceded that Ms. Mew was entitled to be the named beneficiary while Mr. Richardson had obligations to her under their separation agreement, after that period of time, Ms. Ferguson argued that Mr. Richardson did not intend for the beneficiary designation to continue in Ms. Mew's favour; he simply did not remember to change it. In addition, Ms. Ferguson said that if she was aware that Ms. Mew was the beneficiary, she would have used her power of attorney to change the named beneficiary or would have ceased making the payments toward the premiums.[23] She argued that Ms. Mew would be unjustly enriched if she received the insurance proceeds. The Court of Appeal held that it would not be unjust for Ms. Mew to receive the insurance proceeds. Further, Ms. Ferguson argued that "a constructive trust be imposed on the death benefit to prevent Ms. Mew from receiving a wind fall."[24] In fact, the Court found a "juristic reason" for the enrichment. Simply, Ms. Mew was the named beneficiary.[25] Estates practitioners will be

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[23] *Richardson*, *supra* note 19 at para. 18.
[24] *Richardson*, *supra* note 19 at para. 18.
[25] *Richardson*, *supra* note 19 at para. 61.

pleased to learn that due to Mr. Richardson's incapacity to manage his own financial affairs, Ms. Ferguson "owed him an even higher duty of loyalty when exercising the power of attorney. As a fiduciary in a role rising to that of trustee, she was bound to use the power only for Mr. Richardson's benefit."[26] In their weekly Family Law newsletter, "This Week in Family Law", Mr. Epstein and Ms. Madsen applauded Ms. Ferguson's creativity in trying to argue that had she known that Ms. Mew would be receiving the benefit, she would have used her power of attorney to change the beneficiary to name herself in order to receive the proceeds. While this claim failed, Mr. Epstein questioned whether Ms. Ferguson would have been able to use her power of attorney to designate Mr. Richardson's estate, so that at least his children (and hers) could have received the benefit instead of his first wife, Ms. Mew.[27]

Turner is another Ontario Court of Appeal case that involved the interpretation of an insurance clause in a separation agreement between a husband and his first wife. The separation agreement stated that the husband was to pay to his first wife, with whom he was married 26 years, spousal support until she was 65 years of age and to maintain a life insurance policy in the amount of $100,000.00 for her benefit until his obligation to pay spousal support ceased. The husband died at age 58 and while an insurance policy was in place for the first wife, it was only worth approximately $43,500.00 at the time of death and as a result, the husband had breached the insurance clause in the separation agreement.[28] The first wife brought an application against the husband's estate and against the husband's second wife (who was also the trustee of the estate) for the payment of the deficit in insurance proceeds, arguing that it was her understanding that the obligation to maintain life insurance was for the purpose of providing security for the spousal

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[26] *Richardson*, *supra* note 19 at para. 51.
[27] Philip Epstein and Lene Madsen, "Life Insurance – Security for Support", *Epstein and Madsen's This Week in Family Law*, 2009-26, (30 June 2009).
[28] *Turner v. DiDonato et al.*,[2009] O.J. No. 1113 (Ont. C.A.) at para. 2 [*Turner*].

support payments. The trial judge held that the first wife was entitled to the entire $100,000.00 and directed that the balance be paid out of the husband's estate.[29] The husband's second wife appealed. The Court of Appeal dismissed the first wife's appeal and agreed with the trial judge that the first wife was "entitled to receive the full $100,000 if [the husband] died before she reached the age of 65 years, even if that amount exceeded the present value of the outstanding support obligations."[30] In doing so, the Court of Appeal reviewed first principles concerning the interpretation of contracts and found that the parties' separation agreement was clear and unambiguous. The problem, which is common to insurance clauses in separation agreements, is that after there is no provision to automatically or periodically decrease life insurance as the support obligation diminishes, either in time or quantum due to the passage of time. For example, if the day before the last support payment is payable the payor dies, unless the life insurance payout requirement is decreased over time, these will be a windfall to the recipient spouse. Thoughtful drafting could prevent or limit this problem.

IV. Post-Separation Decline in the Value of Assets

The family law case that arguably received the most attention this year was the Ontario Court of Appeal decision in *Serra v. Serra.*[31] The sensational news headlines drew attention from the legal community and the general public alike. Barbara and Harold Serra were married for 24 years. During their marriage, the husband ran a successful textiles business. At the date of separation (or the "valuation date" when the parties' assets are generally valued), the husband's business interests were worth approximately $9.5 to $11.5 million. At the time of the trial, however, the value of his shares had dropped to approximately $2.2 million due to the falling

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[29] *Ibid.* at para. 23.
[30] *Turner*, *supra* note 28 at para. 39.
[31] [2009] O.J. No. 432 (Ont. C.A.) [*Serra*].

market for the manufacturing of textiles in Canada.[32] The trial judge ordered an equalization payment in the amount of approximately $3.3 million payable by the husband to the wife, despite the fact that this amount exceeded the husband's total net worth.

Another interesting part of this case involved the wife's initial claim for a beneficial interest in the husband's shares in the business. The wife tried to withdraw her trust claim at the start of the trial (likely due to the diminished value of the shares), but the issue was tried.[33] The judge found no constructive trust in favour of the wife.

The husband appealed. The Court of Appeal overturned the trial level decision and reduced the equalization payment owing to the wife to $900,000.00. The Court of Appeal reviewed the criteria under section 5(6) of the *FLA* to determine whether an "unequal" division of the parties' net family properties would be justified in light of post-separation changes in the value of a party's assets. While the Court of Appeal held that changes in the post-separation date value of a spouse's assets and the circumstances respecting the change may be taken into account in determining whether the equalization of the parties' net family properties would be unconscionable, this is an exceptional remedy. The factors to be considered include:

(i) where the circumstances giving rise to the change in value relate (directly or indirectly) to the acquisition, disposition, preservation, maintenance or improvement of property (s. 5(6)(h)), and

(ii) where equalizing the net family property would be unconscionable, having regard to those circumstances (taken alone or in conjunction with other factors mentioned in s. 5(6).[34]

To be clear, the Court of Appeal stated that the "threshold of 'unconscionability' under s. 5(6) is exceptionally high...[and] to cross the threshold, an equal division of net family properties in the

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[32] *Serra, supra* note 31 at para. 17 [*Serra*].
[33] *Serra, supra* note 31 at paras. 97-103.
[34] *Serra, supra* note 31 at para. 46.

circumstances must 'shock the conscience of the court.'"[35] In this case, the Court of Appeal found that the threshold for unconscionability was met. It was not, as the Court of Appeal points out, a case concerning a "post-separation drop in the value of an individual's stock portfolio, precipitated by a deep but temporary recession..."[36] In this case, the post-separation drop in the value of Mr. Serra's business that was not due to a temporary economic recession which would have made an order for the equalization of net family properties (that would have seen Mr. Serra pay more than the value of his total net worth to Ms. Serra) using the date of separation as the "valuation date" unconscionable.[37] In fact, it was seen that a permanent decline in the manufacturing of textiles in Canada, generally, had caused the precipitous decline in the value of Mr. Serra's business, post-valuation date.

The concern for the "floodgates" argument that was raised following *Serra* suggesting that parties who had suffered a depletion of their assets due to the downturn in the economy between valuation date and the date of the trial would try to rely on the principles espoused in *Serra* does not appear to have materialized. In the recent Ontario Superior Court of Justice case of *Cecutti v. Cecutti*[38] the husband sought an unequal division of net family property in his favour due to his partnership's decision to reduce his capital account, citing *Serra*. The Court did not agree that the husband (or the wife, for that matter who also sought the unequal division of net family property) had met the high threshold for unconcionability. The Court reiterated the caveat in *Serra* that section 5(6) of the *FLA* it is to be applied in rare circumstances only.

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[35] *Serra*, *supra* note 31 at para. 47.
[36] *Serra*, *supra* note 31 at para. 65. This finding was obviously designed to limit a flood of *FLA*, section 5(6) cases that could have arisen during this or other recessions.
[37] *Serra*, *supra* note 31 at para. 67.
[38] [2009] O.J. No. 2352 (Ont. S.C.J.).

The *Serra* case raises "valuation date" issues for estates lawyers as well. The Court of Appeal in *Serra* held that the "valuation date" may not always be used to value a spouse's assets for the purposes of equalization. As you are no doubt aware, if one spouse dies, there is the right to claim an equalization of the net family property of each spouse, but only if the surviving spouse has a lower net family property than his or her deceased spouse. The "valuation date" for these purposes is the "date before the date on which one of the spouses dies leaving the other spouse surviving."[39] A surviving spouse who wishes to commence a claim for equalization must file the *election* under section 6 of the of the *FLA* within six months of the spouse's death. If the spouse chooses the election, he or she loses the rights that would have been available under the *Succession Law Reform Act*, R.S.O., 1990, c.S.26. From a review of the case law in this area, it is unclear whether one can "un-elect" after the six month period if, as Mr. Epstein notes a spouse realizes "oops, I made a mistake and the net family property is not as big as I thought it was and I would rather take the benefits under the Will"[40] Mr. Epstein reviewed the *Iasenza v. Iasenza* [*Iasenza*][41] case for you in 2007 and set out the rules that the Court may consider when a spouse wishes to revoke his or her election under section 6(1) of the *FLA*. According *Iasenza*, the court has "residual jurisdiction"[42] to authorize the revocation.

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[39] *FLA, supra* note 5, s. 4(1).
[40] Philip Epstein, "Recent Developments in Family Law for Estates Lawyers", Paper presented to the Law Society of Upper Canada, 10th Annual Estates and Trusts Summit, 5 November 2007 [*Epstein*].
[41] [2007] W.D.F.L. 3501 (Ont. S.C.J.).
[42] *Ibid* at para. 25.

V. Constructive and Resulting Trusts

A. Constructive Trust

In 2007, Mr. Epstein's discussed the trial level decision of *Belvedere v. Brittain Estate*[43] and described it as his "favourite case of the year"[44]. He noted, however, that he believed the case was wrongly decided and should be read with caution. He was correct. In 2009, the Ontario Court of Appeal allowed the appeal and found that Mr. Brittain was not unjustly enriched and found no constructive trust in Ms. Belvedere's favour.[45] Mr. Epstein set out the facts of the *Belvedere v. Brittain Estate* [*Belvedere*][46] case, but we will summarize them here briefly for your reference.

Ms. Belvedere and Mr. Brittain were involved in a very short (two year) cohabiting relationship. Throughout their brief relationship, Mr. Brittain's had expressed his intention to transfer his five RRSPs to Ms. Belvedere. Ms. Belvedere would sign a cohabitation agreement and Mr. Belvedere would change his will. When Mr. Brittain died suddenly, no cohabitation agreement had been signed and Mr. Brittain did not have a chance to change his will.[47] Mr. Brittain's son was the main beneficiary under his father's will. Interestingly, Mr. Brittain's last will was dated January 31, 2001, which was during the time that the parties were discussing the cohabitation agreement. Ms. Belvedere claimed a constructive or resulting trust interest in Mr. Brittain's estate and damages for unjust enrichment. The trial judge found that Ms. Belvedere was entitled to a constructive trust in Mr. Brittain's RRSPs in the amount of $1.75 million. His estate was

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[43] (2007), 45 R.F.L. (6th) 81.
[44] *Epstein*, *supra* note 40.
[45] [2009] O.J. No. 12 (Ont. C.A.) at para. 56 [*Belvedere*].
[46] *Ibid.*
[47] *Belvedere*, *supra* note 45 at para. 2.

worth approximately $6.0 million at the time of his death.[48] The reasons for the trial judge's conclusion that Ms. Belvedere was entitled to a constructive trust in the RRSPs was that Mr. Brittain "was significantly enriched by the various services and benefits provided by Ms. Belvedere"[49], including her making meals, doing laundry, providing child care and making available her rights to Air Canada flights and accommodation for Mr. Brittain and his son. The trial judge also found a corresponding deprivation because Ms. Belvedere gave up a great deal of her work with Air Canada and sold her own car and house for a low price. In conclusion, the trial judge noted that the common theme that ran through the evidence was that "Ms. Belvedere would be taken care of [by Mr. Brittain] and that there was no dispute that Mr. Brittain had intended for her to receive his RRSPs as a spousal rollover if he died during the course of their relationship."[50]

The Court of Appeal, however, disagreed with the trial judge's findings and concluded that the "deprivation" suffered by Ms. Belvedere did not establish an unjust enrichment claim.[51] Since the Court of Appeal determined that Mr. Brittain had not been unjustly enriched, the trial judge also erred in finding a constructive trust claim had been made out. The Court of Appeal reviewed the familiar family law case law on constructive trusts. First, it is only available if "monetary damages are inadequate"[52] (see *Peter v. Beblow*[53]). In this case, it was clear that a monetary award (if it was found to be justified) would have been adequate. Second, a "link between the contribution that founds the action and the property"[54] in which the party claims the constructive trust must be established. In this case, the Court of Appeal found that Ms.

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[48] *Belvedere*, *supra* note 45 at para. 7.
[49] *Ibid.* at para. 31.
[50] *Belvedere, supra* note 45 at para. 35.
[51] *Belvedere*, *supra* note 45 at para. 44.
[52] *Belvedere, supra* note 45 at para. 50.
[53] [1993] S.C.J. No. 36 (S.C.C.).
[54] *Belvedere*, *supra* note 45 at para. 51.

Belvedere "did not contribute, directly or indirectly, to Mr. Brittain's RRSPs, and whatever potential interest she might arguably have had would, in any event, be limited to Mr. Brittain's last two payments of $13,500 per year during the time of cohabitation."[55] In sum, there was no link between Ms. Belvedere and the RRSPs. The alternative remedies of resulting trust or proprietary estoppel put forward by Ms. Belvedere were likewise rejected by the Court of Appeal. Mr. Epstein noted that, while difficult to make out, a resulting trust argument could be advanced in this case.[56] The trial judge did not address this issue because he found that a constructive trust claim had been established. The Court of Appeal considered the resulting trust argument briefly and concluded that Ms. Belvedere did not meet the test for a resulting trust in *Rathwell v. Rathwell*[57] because Ms. Belvedere did not make a contribution to Mr. Brittain's "acquisition of or improvement of the RRSPs."[58] In addition, as Mr. Epstein asserts, a resulting trust argument flies in the face of the income tax rules with respect to RRSPs.[59]

Mr. Epstein was correct to be astonished that Ms. Belvedere would get "$2,000,000.00 tax free after a two year relationship because [Mr. Brittain] said in a weak moment that 'I am going to look after you and give you the RRSP's'."[60] In setting aside the judgment of the trial judge and dismissing the action, the Court of Appeal ordered $25,000 in costs in favour of the estate.[61]

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[55] *Belvedere, supra* note 45 at para. 51.
[56] *Epstein, supra* note 40.
[57] [1978] 2 S.C.R. 436 (S.C.C.).
[58] *Belvedere, supra* note 45 at para. 63.
[59] *Epstein, supra* note 40 at pg. 9.
[60] *Epstein, supra* note 40 at p. 9.
[61] *Belvedere, supra* note 45 at para. 69.

B. Resulting Trust

In *Harrington v. Harrington* [*Harrington*][62], the Ontario Court of Appeal considered the common fact situation where an adult child holds funds in a joint account with their parent. There were three issues at play in this case. The first was whether trial judge's reasons were sufficient. The second was whether the wife was capable of working outside the home and therefore disentitled to full spousal support from the husband. The third issue, which will be of interest to estates practitioners and the focus of the following discussion, is the treatment of the funds originating from the husband's father.[63] In this case, the parties were married for 13 years and had no children. The husband, as power of attorney for his father, managed his father's financial affairs and engaged in various investments on behalf of his father. The husband "transferred approximately $500,000 out of a joint account" that he shared with his father into his own account and invested these funds "aggressively"[64]. On the date of separation (approximately 4 years later), the value of the account had grown to $640,000. Both parties retained experts to determine the calculation of the investments and how the assets could be traced.[65] The husband argued that the interest on his father's money was his own, but not the principal amount. The husband claimed that that the entire $500,000 and the increase of $140,000 should be excluded property on his NFP Statement because he held the funds as a resulting trust for his father.[66]

The Court of Appeal summarized the case law concerning resulting trusts in these circumstances. There is a "rebuttable presumption that an adult child holds monies in a joint account with their

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[62] [2009] O.J. No. 177 (Ont. C.A) [*Harrington*].
[63] *Ibid.* at para. 1.
[64] *Harrington, supra* note 62 at para. 5.
[65] *Ibid.*
[66] *Harrington, supra* note 62 at para. 6.

parent on resulting trust."[67] That is, the presumption can be rebutted if there is evidence to show that the transferor intended to make a gift. The Court of Appeal, citing *Pecore v. Pecore* [*Pecore*][68], noted that evidence may include: whether a power of attorney was granted to the child, how the bank documents were worded, the control and use of the monies, how the parties dealt with the tax issues of the joint account and other evidence that would reveal the transferor's intent at the time the monies were transferred.[69]

The Court of Appeal held that the $500,000 was excluded property under the *FLA*, but that the $140,000 increase formed part of the husband's "property" under section 4(1) of the *FLA*, which his wife was entitled to share. In other words, the $140,000 was not excluded property. Interestingly (and something that the Court of Appeal considered as per *Pecore*) was the fact that the husband alone paid the income tax on the earnings on the account for the relevant years.[70] The Court of Appeal ordered that the $140,000 be added to the husband's NFP and the equalization payment owing to the wife be adjusted.[71] Therefore, the husband met the test for the rebuttable presumption for the resulting trust for the $500,000 principal amount, but not for the $140,000 increase.

The *Paddock v. Paddock* [*Paddock*][72] case is another example of a resulting trust claim that involved the "tracing" of assets and the rebuttable presumption, described above. In this case, the wife had inherited a share of her parents' farm business. The husband appealed to the Ontario Court of Appeal, arguing that the trial judge had erred in finding that he held shares (and

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[67] *Harrington, supra* note 62 at para. 31.
[68] [2007] 1 S.C.R. 795 (S.C.C.) [*Pecore*]. Also see *Epstein*, supra note 40, for a full analysis of *Pecore*.
[69] *Harrington, supra* note 62 at para. 31.
[70] *Harrington, supra* note 62 at para. 36.
[71] *Harrington, supra* note 62 at para. 44.
[72] [2009] O.J. No. 1258 (Ont. C.A.) [*Paddock*].

a large portion of his interest in a shareholders' loan) in trust for his wife.[73] In addition, the husband argued that his wife should not be entitled to trace her inheritance into her shares and therefore should not be able to claim the exclusion under section 4(2) of the *FLA*. The Court of Appeal found that the wife could trace the inheritance into her shares.[74] In a similar vein to the Court of Appeal's reasoning in the *Harrington* case, above, the trial judge considered the factors in *Pecore* to conclude that the onus was on the husband to show that the wife intended to gift the shares and the shareholders' loan.[75] The Court of Appeal agreed with the trial judge that the wife "did not intend to give up her inheritance."[76] The trial judge concluded that the wife could trace her interest in the original farm to her current shares.

How do the rebuttable presumption for a resulting trust and the *Harrington* and *Paddock* cases fit into the estates context? According to subsection 4(1) of the *FLA*, the "valuation date", for our purposes, is "the date before the date on which one of the spouses dies leaving the other spouse surviving." Therefore, a person representing the estate (or a beneficiary) must look very carefully at joint accounts on the day *before* death to determine whether a resulting trust exists. However, this appears to be less important now in light of the recent amendments to the *FLA*, described in Part II of this paper, above. When advising clients about inherited monies, it is important that they are able to "trace" the inheritance (albeit shares, in the *Paddock* case) in order to be able to claim an exclusion under the *FLA* and to provide clear evidence (such as by a deed of gift) to prove it was a gift. Ms. Bales provides a full review of this issue in her 2008 paper.[77]

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[73] *Ibid.* at para. 1.
[74] *Paddock, supra* note 72 at para. 5.
[75] *Paddock, supra* note 72 at para. 2.
[76] *Paddock, supra* note 72 at para. 4.
[77] *Bales, supra* note 2.

VI. Conclusion

The year 2009 has been an interesting one for family and estates practitioners alike. From the statutory amendments of the *FLA* to the case that some commentators cautioned would open the floodgates to parties negatively impacted by the economic downturn to setting aside separation agreements and making out trust claims, this year has been rich with statute and case law that demonstrates the intersection the exists between estates and family law issues– and the corresponding obligation for lawyers practicing in both of these areas to be aware of the current developments.

LEGISLATION

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Succession Law Reform Act, R.S.O., 1990, c.S.26.

JURISPRUDENCE

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Paddock v. Paddock, [2009] O.J. No. 1258 (Ont. C.A.).

Pecore v. Pecore, [2007] 1 S.C.R. 795 (S.C.C.).

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