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2010 Family Law Update for Estates and Trusts Lawyers

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Continuing Professional Development

2010 Family Law Update for Estates and Trusts Lawyers

Daniel S. Melamed and Lindsay G. Mills[1]

I. Introduction

Another year – another family law update for estates and trusts lawyers. In 2009, we explored four issues that emerged in family law that had a potential impact on lawyers practicing in the estates field: the statutory amendments to the *Family Law Act* ("*FLA*") concerning the treatment of jointly held property with a right of survivorship, when domestic contacts and separation agreements should be set aside, including specific clauses in separation agreements that may be of interest to estates practitioners, a post-separation decline in the value of one spouse's assets and how this may impact the law of estates, and how to make constructive and resulting trust claims.

This year, we will continue to examine the current issues and trends in family law that may arise in the estates and trusts law contexts and that may be of interest to you and your clients. First, we will review the impact of the *Family Statute Law Amendment Act* or Bill 133 with specific changes to the *Pensions Benefits Act*, an update of the effect of a post-separation decline in the value of one spouse's assets, how to effectively protect "gifts" from equalization, and some recent family law cases that may be of interest to estates and trusts practitioners.

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II. *Family Statute Law Amendment Act* - Bill 133: Pension update

Bill 133 received Royal Assent on May 14, 2009. The Regulations to this Act, however, have not been enacted. Therefore, Bill 133 is not yet in force. The Acts affected by this Bill are as follows:

- *Change of Name Act*
- *Child and Family Services Act*
- *Children's Law Reform Act*
- *Courts of Justice Act*
- *Domestic Violence Protection Act, 2000*
- *Family Law Act*
- *Pension Benefits Act*
- *Vital Statistics Act*

It is the changes to the *Pension Benefits Act* (when it eventually comes into force) that will be of particular interest to estates and trusts law practitioners.[2] As you are aware, a spouse's pension forms part of his or her "net family property" for the purpose of equalization upon marital breakdown. In many cases, it is a spouse's pension that is the greatest asset to be divided after the matrimonial home is considered. For example, if the value of the pension was $250,000.00 at the expected retirement age of 65 (and there were no other assets to divide), the plan member would owe their spouse an equalization payment of one-half of this amount or $125,000.00.

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[2] For a thorough analysis of the effects of Bill 133 on pension division, see Jodi Kovitz's paper entitled, "Dividing Pensions on Marriage Breakdown in Ontario: A Delicate Balancing Act" that appeared in *Money & Family Law* (Vol. 25, No. 8, August, 2010). Jodi is an associate in the family law group at Torkin Manes LLP.

Usually, the onus is on the plan member spouse to have his or her pension valued by a pension valuator for the years that the parties were married. Deductions are made for any portion of the pension value that was earned prior to marriage. There is also an option that parties can authorize the pension administrator to divide the plan "if and when" it becomes payable. This means that the non-member spouse may receive his or her payment years after the parties' separation.

Bill 133 ushers in changes to the *Pension Benefits Act* that will be of particular note for family law practitioners, pension valuators and administrators. For example, preliminary valuations of pensions will now be valued by pension plan administrators[3] (such as OMERS or the Ontario Teachers Pension Plan) by way of a prescribed formula and not by pension valuators or actuaries, as is currently the case. It has been lauded as a way to reduce the high cost often associated with pension valuation and as a way to simplify the process, especially for unrepresented parties. In addition (and once the Regulations are passed) the plan member may be able to satisfy the payment owing by way of a lump sum transfer to a prescribed retirement savings account, if the pension is not yet in-pay and if these intentions are clearly set out in the parties' separation agreement or by way of court order.[4] There are specific changes to the *Pension Benefits Act* that may affect estate planning as well. Pursuant to section 67.3(5) of this Act, if the lump sum is not transferred before the death of the non-member spouse, the lump sum is payable to the non-member spouse's estate.

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[3] *Pension Benefits Act*, R.S.O. 1990, Chapter P.8, section 67.2(1).
[4] *Ibid at* section 67.3(1), (2).

<u>III. Post-Separation Decline in the Value of Assets – The *Serra* case revisited</u>

As discussed last year, the family law case that arguably received the most attention in 2009 was the Ontario Court of Appeal decision of *Serra v. Serra ("Serra").*[5] By way of a brief re-cap: Barbara and Harold Serra were married for 24 years and 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 market for the manufacturing of textiles in Canada.[6] 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.

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. 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.

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.[7] In fact, it was

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[5] [2009] O.J. No. 432 (Ont. C.A.) [*Serra*].
[6] *Serra,* supra note 5 at para. 17.
[7] *Serra*, supra note 5 at para. 67.

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.

As discussed in 2009, the "floodgates" argument 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*. A review of the case law since *Serra* suggests that this concern may be exaggerated; however there are recent cases that have followed *Serra* and have also opened its principles to interpretation. In 2009, we discussed the Ontario Superior Court of Justice case of *Cecutti v. Cecutti ("Cecutti")*[8] where the husband sought an unequal division of net family property in his favour due to his partnership's decision to reduce his capital account. 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 unconscionability.

Since our 2009 review, there have been a number of cases across Canada that have cited *Serra*.[9]

The court in *Medeiros v. Medeiros ("Mederios")*[10] echoed *Cecutti* stating that the threshold for finding "unconscionability" and for ordering an unequal division of net family properties is very high and was not met in that case. In *Medeiros*, the parties had executed a promissory note in favour of the wife's brother. It was never satisfied. The purpose of the promissory note was to protect the proceeds that the wife had received on account of a settlement from her first marriage from forming part of her net family property. While the husband and the wife understood the

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[8] [2009] O.J. No. 2352 (Ont. S.C.J.) [*Cecutti*].
[9] For this paper, we have reviewed the cases that have focussed on the unconscionability of equalizing net family properties, the major issue that was raised in *Serra*. There are, however, other issues raised in *Serra*. For example, *Nikore v. Jarmain Investment Management Inc.*, 2009 CarswellOnt 5258, 97 O.R. (3d) 132 (Ont. S.C.J. Sep 09, 2009) cited *Serra* for the withdrawal of an Answer and *Kittirath v. Doan*, 2009 CarswellBC 425, 2009 BSSC 224 cited *Serra* for the withdrawal of judicial admissions.
[10] [2009] O.J. No. 4309 (C.A.) [*Medeiros*].

purpose of the promissory note, it was not legally enforceable and the wife effectively paid more than her share of the parties' liabilities. The wife argued that the trial judge had erred in failing to find that she was entitled to an unequal division of the parties' net family properties. However, the Ontario Court of Appeal reasoned that "any unfairness that may exist does not rise to the level of unconscionability."[11] The Ontario Court of Appeal stated that the husband and wife could have executed a contract to exclude the wife's settlement proceeds from equalization, but no such contract was drafted.

In *Murray v. Murray ("Murray")*[12], the parties cohabited for two (2) years prior to marriage and were married for a further two (2) years. The judge reasoned that the parties may have been able to argue that an equal division of net family properties was "unfair", as their total relationship was less than five (5) years in length[13], but they could not demonstrate that an equal division would "shock the conscience of the court". The husband owed the wife approximately $20,000.00 on account of equalization. An unequal division of net family properties was not ordered.

The case of *Kean v. Clausi ("Kean")*[14] followed *Serra* and in doing so, has opened the door to a more general interpretation of *Serra*. The applicant wife argued for an unequal division of net family properties due to a significant decline in the value of a TD investment account from the date of separation that was held in the wife's name (and created at the insistence of the husband). The respondent husband stated that the reasoning in *Serra* should not apply, as the facts did not meet the high threshold test. Justice Mossip disagreed and reasoned that *Serra* is neither "limited

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[11] *Medeiros*, supra note 10 at para. 65.
[12] [2010] O.J. No. 3276 (Ont. S.C.J.) [*Murray*].
[13] According to s. 5(6)(e) of the *FLA*, one of the eight factors that the Court should consider in making the finding of unconscionability is if the amount the spouse would receive is disproportionately large in relation to a period of cohabitation that is less than five years.
[14] [2010] O.J. No. 2941 (Ont. S.C.J.) [*Kean*].

to extreme cases involving only the very wealthy…[nor]…limited to those cases in which the actual equalization payment would result in a figure greater than a party's net worth as was the case for Mr. Serra."[15] The court made the finding that it would be unconscionable for the wife to "bear the entire burden of a decrease in value of an asset created at the instigation of the husband, for the purpose of maintaining the matrimonial home, out of the equity in the matrimonial home – and largely managed by the husband."[16] Justice Mossip ordered that the value of the wife's TD investment account was the value as at the date of trial (and not as at the valuation date).

The facts in *Sfeir v. Sfeir ("Sfeir")*[17] arguably give rise to a finding of unconscionability. The husband had stock options that had decreased substantially by the time of the trial. The husband had previously sold some of his stock options to satisfy his support obligations. Citing *Serra*, the husband argued that the wife should share in the post-separation decrease in the value of this particular asset. The husband gave evidence that he did not cash out the options prior to trial on the advice of his lawyers and a motion judge who advised that he not make any "major transactions" until trial.[18] The judge noted that since the husband had previously sold some of his stock options to satisfy his support obligations, he could have sold the other stocks if he chose to do so. In addition, the judge stated that unlike *Serra*, the wife in this case had not claimed a constructive trust interest in the stock options. Despite the fact that the value of the husband's stocks had decreased by over 90% to $7,618 by the time of trial, the husband was to include the full value of the stock options at the time of separation in his net family property ($89,877). The judge concluded that the test for unconscionability was not met and the wife

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[15] *Kean*, supra note 14 at para. 13.
[16] *Kean,* supra note 14 at para. 17.
[17] [2010] O.J. No. 682 (Ont. S.C.J.) [*Sfeir*].
[18] *Sfeir*, supra note 17 at para. 44.

should not have to share in the post-separation decrease in the value of the husband's stock options.

As outlined in 2009, the *Serra* case raises "valuation date" issues for estates lawyers as well. The "valuation date" may not always be used to value a spouse's assets for the purposes of equalization. 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."[19] A surviving spouse who wishes to commence a claim for equalization must file the election under section 6 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*.

IV. The characterization of a "gift" and *Serra*

The issue of whether an unequal division of the parties' net family properties would be justified in light of post-separation changes in the value of one spouse's assets is possibly the "hot topic" issue that emerged in *Serra*. There are, however, other nuanced issues that come out of this case, both at the trial and appellate levels, including how a "gift" is characterized and defined, that may be of interest to estates and trusts lawyers.

The onus to prove whether the property in question is a gift (and therefore should be excluded from his or her net family property) rests with the spouse claiming that it is a gift. Under s. 4(2) of the *FLA*, the value of the following property which a married spouse owned on the valuation date is excluded from a spouse's net family property:

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[19] *FLA*, s. 4(1).

- Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage. If one spouse receives an inheritance during the marriage and it is placed in a joint bank account, there is a presumption that this was intended to be a joint asset (and therefore not excluded), unless the spouse can rebut this presumption.

- Income from property referred to paragraph 1 above, if the donor or testator expressly stated that such income is to be excluded from the spouse's net property.

- Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.

- Proceeds or the right to proceeds of life insurance as defined in the *Insurance Act*, that are payable on death of the life insured.

- Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

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

- A gift from one spouse to the other ("interspousal gift") cannot be excluded and becomes part of the receiving spouse's NFP.

The trial judge reviewed the purported "gift" of shares from Mr. Serra's dying brother where no money was exchanged between the parties. These shares were deemed to be a gift to Mr. Serra and could be excluded from net family property. The term "gift" was defined as follows:

> A gift is the voluntary transfer of property without consideration (*Birce v. Birce* (2001), 56 O.R. (3d) 226 (Ont. C.A.) at para. 17). It has the following elements: intention to transfer property; certainty as to the property to be transferred; certainty as to the recipient of the gift; and delivery and perfection of the gift by doing everything necessary to effect an irrevocable transfer (*Ruwenzori Enterprises Ltd. v. Walji*, [2004] B.C.J. No. 1147 (B.C. S.C.)).[20]

A number of recent cases have referred to, or adopted the above definition. In *Knowles v. Alachiotis [Knowles]*[21], the mother (the alleged "gifter") did not testify (despite her availability) as to whether the monies in question were really a gift to her son. The court drew "an adverse

[20] [2007] O.J. No. 446 (Ont. S.C.J.).
[21] [2010] O.J. No. 2751 (Ont. S.C.J.) [*Knowles*].

inference that if she had been called she would not have supported the [son's] evidence that the money was gifted".[22] The court concluded that the son had not met the onus of proof and the monies allegedly received were not classified as gifts.

In *McNamee v. McNamee* ("*McNamee*")[23], it was the husband's position that the shares he received from his father as part of an estate freeze and a corporate restructuring should be excluded from his net family property because they were "gifts". In addition to the definition utilized in the trial level decision in Serra[24], the court explored other definitions of "gift", including those definitions found in Black's Law Dictionary, the Canadian Encyclopedic Digest, other secondary sources, as the term "gift" is not defined in the *FLA*.

The court in *McNamee* also dealt with the "acceptance" of the gift. The husband in the present case must have had knowledge of the transfer of the shares (and that he was the donee) at the time of the transfer. The court explained that Mr. Serra had accepted the transfer of the shares to him from his brother.[25] According to the court in *McNamee*, this is a necessary element.

The court concluded that the essential factors of a gift are as follows and the onus is on the person claiming that it is a gift to prove that these factors exist:

1. Capacity of the donor;
2. Intention on the part of the donor to transfer the property without consideration, without expectation of remuneration;
3. The intention of the donor must be...without conditions, from detached and disinterested generosity, out of affect, respect, charity or like impulses and not from the constraining force of any moral or legal duty or from the incentive of anticipated benefits of an economic nature...[and] more...than solely a sophisticated tax planning transaction;

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[22] *Knowles,* supra note 21 at para. 182.
[23] 2010 ONSC 674 [*McNamee*].
[24] Supra note 20.
[25] *McNamee*, supra note 23 at para. 212-213.

4. The donor divests himself of all power and control over the property and gives such control to the donee;
5. Intention of the part of the donee to accept the property as a gift; and
6. Delivery by the donor to the donee completed.[26]

In *McNamee*, the court reviewed each factor above. While the court found that the first factor (i.e., capacity) was satisfied, the court found that the husband failed to satisfy the second criterion because there was "consideration". The father's "consideration" for the transfer of the shares to his son (the husband) was that the father would "not redeem his preference shares beyond the point where he would lose control. Before that point was reached he would stop redeeming his shares and put himself back on salary."[27] The court found that the husband failed to prove that the transfer of shares was a "gift" from father to son/husband and therefore it was to be included in the husband's net family property. The court noted that it was unnecessary to review the other factors, due to finding that there was no "gift", but did so in any event.[28] The court concluded that only factors 1 and 6 were met in this case. Therefore, the husband had to include the value of the shares at the valuation date in his net family property. In this case, the value of the 500 common shares was $418,200 that the husband had to equalize in the settlement.[29]

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[26] *McNamee*, supra note 23 at para. 215.
[27] *McNamee*, supra note 23 at para. 223.
[28] We will not review each factor in detail for this paper; however, it may be instructive for you to review paragraphs 216-282 of the *McNamee* decision for a more thorough analysis.
[29] *McNamee*, supra note 23 at para. 284-286.

In light of the above factors, the following review (from a family law perspective) may be instructive to estates and trusts practitioners.[30] Please review the following factors and remember to "paper" your file:

Gifts/Inheritances before marriage

As deductions are all assets owned by a person on the date of marriage, if a tax freeze or a trust is done before marriage, the value of the asset <u>at that date</u> can be deducted. Even though it may be a "gift", it is not an exclusion. Thus, any increase in the value of that asset will form part of the recipient's net family property and, as a result, can form part of the calculation of the equalization payment. Thus, the creation of a trust while clearly a gift cannot be an exclusion if it was created before marriage. This is usually the case where property is added to the trust <u>after</u> marriage.

"Gift"

If your client wants to gift property outright to a third party and wants the gift to be excluded from his or her net family property, they should have a deed of gift prepared. It must contain the appropriate language to exclude the income if that too is the desired effect.

"Gift" via a trust

These are exclusions if they are truly gifts or estate-based trusts. However, once the payment is made from a trust to the beneficiary, how that person handles it is critical. If they use it to pay

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[30] These review points also appeared in our paper, "Family Issues in Estate Planning: What You Need to Know about the financial aspects of family law" presented to The Canadian Tax Foundation's Ontario Tax Conference in October, 2009.

down a mortgage on a matrimonial home, for example, the gift will no longer be excluded. If it is paid to a joint account, it is deemed to be a joint asset and will not be excluded.

"Estate freeze"

There are many manners of the estate freeze. Often, the particular manner of the ownership of the asset that is the object of the intended freeze, the objective of the owner and the nature of the freeze property determines the technique to be employed in the freeze plan. If the primary objective of the owner is to protect from taxes, some techniques do not employ a gift and thus will not result in an exclusion. Therefore, care must be taken to determine the objective of the donor in order to ensure that the primary result is achieved.

V. Recent Family Law Cases that intersect with Estates and Trusts law

i. *Ranking (Litigation Guardian Of) v. Battah (Trustee Of)* [2009] O.J. No. 4628(S.C.J.), aff'd [2010] O.J. No. 1828 (C.A.) ("*Ranking*")

This case involves a long-term marriage. Dr. Gerald Ranking and Rosella Ranking were married for twenty-five years before Mrs. Ranking's death in 2006. This was the second marriage for both parties. Two months before her death, the parties executed their wills. Mrs. Ranking named Dr. Ranking as her executor and in the alternative, her nephew, David Battah ("Mr. Battah"). In her will, Mrs. Ranking left her personal and household items to Mr. Ranking, but the bulk of her estate was left to Mr. Battah.

According to section 5(2) of the *FLA* as set out in *Ranking*:

> When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.

Further at section 6(1) of the *FLA*:

> When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5 (of the *FLA*).

Following the death of Mrs. Ranking, Dr. Ranking had a stroke and his son, also Gerald Ranking ("Mr. Ranking Jr.") was appointed as litigation guardian for his father. In his role as litigation guardian, Mr. Ranking Jr. made an election under section 6 of the *FLA*. Filing an election is a good choice, in a case such as this, when the one spouse is essentially "shut out" of the will.

In the present case, there were substantial jointly held assets the day before the death of Mrs. Ranking and these jointly held assets were passed to Dr. Ranking by right of survivorship.[31] Mr. Ranking Jr. suggested that the above sections of the *FLA* should be interpreted so that he received "one-half the difference between two net family property statements valued the day before death and the payment to him without deduction for jointly held assets which he receives the day later by operation of law."[32]

Justice Dunn concluded, "it is only reasonable to interpret the *Family Law Act* as requiring a division of only one-half of those joint held assets valued the day before death. To interpret the result otherwise would be to create unwanted mischief."[33] Justice Dunn provides the example of an estate that only consisted of jointly held assets. In those circumstances, the applicant would not only receive "all of the assets on the day of death but having a claim against the estate for half the like amount in the face of a will that disposed of assets otherwise."[34] Therefore, Justice Dunn concluded that Mr. Ranking had "received by reason of the operation of the joint

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[31] *Ranking (Litigation Guardian Of) v. Battah (Trustee Of)* [2009] O.J. No. 4628 (Ont. S.C.J.) [*Ranking*] at para. 7.
[32] *Ranking,* supra note 31 at para. 9.
[33] *Ranking,* supra note 31 at para. 11.
[34] *Ibid.*

ownership provision the value of his wife's interest in those assets and…this sum should be credited to any amount due to him as equalization otherwise."[35]

The Ontario Court of Appeal, in upholding Justice Dunn's decision, provided a succinct endorsement that stated, in part:

> "[i]n our view, the analysis and conclusion reached by Dunn J. are correct in law. The appellant made an election to take under the *FLA* as opposed to the will. Having done so, while he is entitled to the benefits of this choice, he must bear its burdens. The result that flows is consistent with the underlying purpose of the equalization provisions of the *FLA*. In so concluding, we are mindful that the legislation has been clarified and is consistent with this result.[36]

Barry Corbin of Corbin Estates Law Professional Corporation provides a thoughtful analysis of both the trial and appellate level decisions of this recent case in his paper entitled "Who Knew?" that appears in the October, 2010 issue of *Money & Family Law*.[37]

Mr. Corbin quite accurately critiques Justice Dunn's assertion that in most cases "it would hardly make a difference" and it only made a difference in this particular case because the jointly held assets were sizeable. As Mr. Corbin states, "with all due respect, the quantum of the windfall to the surviving spouse can hardly justify what can best be characterized as pulling a rabbit out of a hat."

Next, Mr. Corbin questions the "unwanted mischief" to which Justice Dunn alludes. Mr. Corbin writes that there appears to be "some gap, inconsistency or ambiguity in the statutory language

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[35] *Ranking,* supra note 31 at para. 11.
[36] [2010] O.J. No. 1828 (C.A.) at para. 2.
[37] The full text of Mr. Corbin's paper entitled "Who Knew?" is published in the October, 2010 issue of *Money & Family Law*, Vol. 25, No. 10, October 2010. The specific page references to this paper can also be accessed in this *Money & Family Law* issue. We thank Mr. Corbin for his input with this paper.

pertaining to the calculation of the surviving spouse's equalization entitlement under subsection 5(2)" but Justice Dunn goes no further to describe it in any detail.

Mr. Corbin also refers to the 1993 *Report on Family Property Law* issued by Ontario's former Law Reform Commission in his critique of the *Ranking* decision(s). This report set out the problems regarding the definition of "valuation date" under section 4(1) of the *FLA* as the date before the date on which one of the spouses dies leaving the other spouse surviving. According to Mr. Corbin, these problems include "the windfall accruing to the surviving spouse who elects in favour of an equalization of NFPs and enjoys the right of survivorship in property held between the spouses as joint tenants, despite the inclusion in the deceased spouse's NFP calculation of one-half the value of that property."

The Ontario Court of Appeal noted that the result in *Ranking* is "consistent with the underlying purpose of the equalization provisions of the *Family Law Act*." Mr. Corbin states that that is "no justification for reading in a provision that is not even hinted at by the language of the statute…[a]nd for the appellate court to say that the changes wrought by Bill 133 are consistent with the result is to dismiss out of hand the possibility that the amendments may actually have changed the law."

ii. ***Middel v. Vanden Top Estate* 2010 CarswellOnt 4169 (Ont. S.C.J.) ("*Middel*") – An Application under section 58(1) of the *Succession Law Reform Act***

The applicant, the former wife of the deceased, brought an application under section 58(1) of the *Succession Law Reform Act*, R.S.O. 1990, c. S. 26 (the "*Act*") seeking $500,000.00 by way of lump sum or monthly payments. This case raises the following issues: (1) was the applicant a "dependent" of the deceased at the time of his death and was the deceased supporting the applicant at the time of his death, and if so, (2) did the deceased make "adequate provision" for the applicant, and if not, (3) what relief should be granted to the applicant.[38]

The parties were married in 1958. There were two (2) children of the marriage. The parties separated in 1973 and divorced in 1975. The applicant gave evidence that the property settlement reached between herself and the deceased was "very poor" for her, but found it "difficult to fight the deceased."[39] The deceased had not paid spousal support to the applicant following their separation. In sum, the applicant argued that the deceased had not adequately provided for her following the breakdown of the marriage.

In 2003, when the applicant discovered that the husband had cancer, she sent him a get-well card and asked him "if he was going to keep the promise he had made [by way of a note to the applicant when the parties separated]…so many years ago and pay…spousal support."[40] The deceased responded to her card and provided her with "support". Over the next five (5) years, the deceased provided the applicant with the following sums of monies:

- 2003 - $5,000.00;
- 2004 - $10,000.00;
- 2005 - $10,000.00 plus $124,000.00, for a "life lease" unit in a retirement home facility;
- 2006 - $2,000.00
- 2007 - $10,000.00

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[38] *Middel v. Vanden Top Estate* 2010 CarswellOnt 4169 (Ont. S.C.J.) ["*Middel*"] at para. 2.
[39] *Middel*, supra note 38 at para. 12.
[40] *Middel*, supra note 38 at para. 12.

- 2008 – the deceased provided the applicant with an annuity of approximately $9,000.00 per year (distributed monthly) over the course of her life.[41]

The deceased was aware that his spousal support obligations were "extinguished" after the divorce and that the support that he had provided to the applicant approximately 28 years after their divorce was entirely voluntary. In fact, he had told the executor and trustee of his estate that he "had made adequate provision for his former wife through the acquisition of the life lease in a retirement home and an annuity which provided the applicant with a monthly stipend for the rest of her life."[42]

One of the parties' children, Hartley (who incidentally was also a residual beneficiary of his father's/the deceased estate), provided information that was wholly inconsistent with the evidence contained in the applicant's Affidavit in support of her application. For example, Hartley explained that the house his mother had received in the separation from the deceased was not in "poor condition", as she alleged, but was "comfortable" and provided her with rental income. In addition, the common law relationship (following her marriage to the deceased and subsequent divorce) that the applicant stressed in her application materials was brief, was described by Hartley as a "fairly long term common law arrangement combined with a business partnership that provided the applicant with a comfortable living."[43] Hartley denied that the applicant lived "in poverty" following the divorce and opined that the applicant was not "disadvantaged because of her earlier marriage to and divorce from the deceased."[44] Hartley also gave evidence that the deceased provided child support to the applicant. The court stated that the conflicting evidence between Hartley and the applicant raised "serious credibility issues"

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[41] *Middel*, supra note 38 at para. 18.
[42] *Middel*, supra note 38 at para. 20.
[43] *Middel*, supra note 38 at para. 22.
[44] *Middel*, supra note 38 at para. 23.

for the applicant "not the least of which is the deliberately sketchy and misleading description of her life following her separation from the deceased."[45]

The judge reviewed section 58 of the *Succession Law Reform Act.* This section provides as follows:

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

The definition of "dependent" is: (a) the spouse of the deceased, (b) a parent of the deceased, (c) a child of the deceased, or (d) a brother or sister of the deceased. As the judge correctly notes, "spouse" is defined broadly and includes "either of two persons who were married to each other by a marriage that was terminated or declared a nullity."[46] There is no doubt that the applicant is a "spouse" for the purposes of the *Act*.

The court went on to consider the second question – "was the deceased providing support for the applicant immediately before his death?"[47] The court found that the payments made by the deceased from 2003 to 2008 met the definition of "support". It made no difference that the deceased had no "legal obligation" to provide support to the applicant, but rather, that he did so voluntarily.

Next, the court provided a detailed analysis to respond to the third issue – did the deceased make "adequate provision for the proper support of the applicant"?[48] The court considered each of the following factors (as set out in section 62 of the *Act*) in reaching its conclusion that the applicant

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[45] *Middel*, supra note 38 at para. 30.
[46] *Middel*, supra note 38 at para. 34-35.
[47] *Middel*, supra note 38 at para. 36.
[48] *Middel*, supra note 38 at para. 41.

was not justified to any relief. In fact, the court noted that the applicant had not led evidence on many of the following factors:

(a) the dependant's current assets and means;

(b) the assets and means that the dependant is likely to have in the future;

(c) the dependant's capacity to contribute to his or her own support;

(d) the dependant's age and physical and mental health;

(e) the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living;

(f) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

(g) the proximity and duration of the dependant's relationship with the deceased;

(h) the contributions made by the dependant to the deceased's welfare, including indirect and non-financial contributions;

(i) the contributions made by the dependant to the acquisition, maintenance and improvement of the deceased's property or business;

(j) a contribution by the dependant to the realization of the deceased's career potential;

(k) whether the dependant has a legal obligation to provide support for another person;

(l) the circumstances of the deceased at the time of death;

(m) any agreement between the deceased and the dependant;

(n) any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;

(o) the claims that any other person may have as a dependant;

(p) if the dependant is a child,

> (i) the child's aptitude for and reasonable prospects of obtaining an education, and
>
> (ii) the child's need for a stable environment;

(q) if the dependant is a child of the age of sixteen years or more, whether the child has withdrawn from parental control;

(r) if the dependant is a spouse,

(i) a course of conduct by the spouse during the deceased's lifetime that is so unconscionable as to constitute an obvious and gross repudiation of the relationship,

(ii) the length of time the spouses cohabited,

(iii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iv) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(v) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(vi) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse had devoted the time spent in performing that service in remunerative employment and had contributed the earnings to the family's support,

(vii) the effect on the spouse's earnings and career development of the responsibility of caring for a child,

(viii) the desirability of the spouse remaining at home to care for a child; and

(s) any other legal right of the dependant to support, other than out of public money.

The court specifically considered the circumstances of the deceased. At the time of his death, it was well-established that the deceased was of significant means. His success, however, was not due to the applicant's labours (nor did the applicant lead evidence to support this claim). The court held that the applicant's "vague and generalized allegations in support of a potential claim which was statute barred even before the deceased death are insufficient to justify any relief."[49]

[49] *Middel*, supra note 38 at para. 43.

In any event, the court concluded that the deceased had made adequate arrangements for the applicant's support. The court went further to explain that the *Act* does not mandate that the "support be commensurate with the size of the estate but only with what is adequate for a dependant's proper support in all the circumstances."[50] In this case, despite the deceased's apparent wealth, the support that he provided to the applicant (including the life lease and the annuity), was adequate. The onus was on the applicant to prove that the deceased did not provide her with adequate support. She failed to do so. As a result, her application for support was dismissed.

iii. *Robinson v. Morrell Estate* [2009] N.S.J. No. 597 (N.S.C.A.) ("*Morrell Estate*") – The failure to revoke a Will in light of a Separation Agreement

This Nova Scotia Court of Appeal case involves the waiver of an estate claims provision in a separation agreement and the fact that the husband did not change his will before his death to effect this term. The trial judge held that the separation agreement did not revoke the will and the wife was entitled to take under her (former) husband's will. The mother of the deceased husband appealed. The Court of Appeal upheld the trial judgment, but stated that the trial judge's reasoning was flawed. The result, however, was not incorrect in law.

The parties married in 2001. In 2002, the husband executed a will and left the residue of his estate to his wife. In 2005, the parties separated and in 2006 executed a comprehensive separation agreement. Interestingly, the wife was represented by counsel, but the husband had waived independent legal advice. Among the usual provisions, including spousal support,

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[50] *Middel*, supra note 38 at para. 48.

equalization and life insurance, the separation agreement included the "waiver of estate claims", which forms the basis of this appeal.

The waiver of estates claims (clause 20 of the parties' separation agreement) read as follows:

> The parties hereby forever renounce and waive any claim in the estate of the other and any right to share in the estate of the other, whether such claim or right arises under statute or otherwise, including the right to administer the estate of the other in the event of the death of that party.[51]

Further, the separation agreement also contemplated a "full and final settlement" of the parties' rights and obligations under federal and provincial legislation, including the *Divorce Act* and the *Matrimonial Property Act* of Nova Scotia.

In 2008, the husband died suddenly in an automobile accident. He had not revoked or changed his will. In addition, he had not changed the beneficiary designation on his life insurance policy.[52]

The issue in this case was whether the wife was entitled to take under the husband's will. The husband's mother argued that the wife had entered into a contract (the separation agreement) with the husband to renounce any interest that she may have had under the husband's will.

The Court of Appeal reasoned that when the wife signed the separation agreement, she "could not and did not immediately renounce any interest in the estate of the late [husband] pursuant to his will. At that time, there was nothing more than expectancy.[53] The Court of Appeal held that the trial judge had reached the correct result, that is, the wife was entitled to take under the

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[51] *Robinson v. Morrell Estate* [2009] N.S.J. No. 597 (N.S.C.A.) [*Morrell Estate*] at para. 6.
[52] *Morrell Estate,* supra note 51 at para. 9.
[53] *Morrell Estate*, supra note 51 at para. 30.

husband's will, but that the trial judge had relied on case law that could be distinguished from the present case.

The Court of Appeal added that the separation agreement was entered into between the husband and the wife and that its terms were "binding on their heirs, administrators, executors, successors and assigns."[54] Since the husband's mother (who was appealing) was neither a party named to the contract nor was an heir, administrator, executor, successor and/or assign, no "privity of contract" existed between the wife and the husband's mother. Therefore, the husband' mother could not enforce the "waiver of estates claims" clause of the separation agreement.[55]

The obvious lesson here is to make it clear to your client before he or she executes the separation agreement and in your subsequent reporting letter that a separation agreement does not revoke a gift to a spouse in a will, a divorce does not revoke a bequest and remarriage has the effect of revoking an entire will. As a result, you should advise your client to contact a lawyer who specializes in wills and estates to change his or her will (or make a will if your client has not done so) and to change the beneficiary designations to life insurance policies and RRSP designations, if applicable, immediately following separation.

iv. *Brennan v. Brennan* [2010] O.J. No. 1161 (C.A.) ("*Brennan*") – The Validity of Trust Agreement

The *Brennan* case involves the validity of a trust agreement. The wife appealed the decision that confirmed the validity of a trust agreement between herself and her husband. The parties separated and the wife argued that she was entitled to an interest in property (that subsequently

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[54] *Morrell Estate*, supra note 51 at para. 44.
[55] *Morrell Estate*, supra note 51 at para. 44.

became the parties' matrimonial home) despite the existence of a trust agreement to the contrary. Specifically, the wife argued that even if the trust agreement was valid, she had an interest in the matrimonial home by virtue of the *FLA*. The trial judge held that since the property was not a matrimonial home when the agreement was entered into between the parties, the fact that neither the wife nor the husband had an interest in the property until after the date of the trust agreement and the fact that the wife had no legal or equitable interest in the funds that made up the trust, the wife had no interest in the property.[56]

The wife also argued that the trust should be set aside for lack of certainty of subject matter. The trial judge rejected that argument as well and concluded:

> ...the subject matter of the trust was the monies paid by the [husband] into the trust account of the parties' solicitor....[and] on the [wife]'s own evidence, these monies were held in trust by the [wife] for the [husband]'s benefit prior to the transmittal to the solicitor. It was these monies that constituted the subject matter of the trust thereafter created. In these circumstances, certainty of the subject matter of the trust was demonstrated.[57]

Finally, the wife asserted that she entered into the agreement under duress. The Court of Appeal did not interfere with the trial judge's finding. No duress had been established.

VI. Conclusion

There is a clear connection between family law and estates and trusts issues. A review of the recent case law and the statutory amendments highlights this intersection. As a result, neither family law nor estates and trusts practitioners can practice their respective areas of law in a vacuum. It is our hope that this paper has provided you with an effective overview into the current family law issues facing estates and trust lawyers.

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[56] *Brennan v. Brennan* [2010] O.J. No. 1161 (C.A.) [*Brennan*], at para. 3.
[57] *Brennan*, supra note 56 at para. 4.

LEGISLATION

Family Law Act, R.S.O. 1990, c. F.3.

Family Statute Law Amendment Act, S.O. 2009, c. 11 – Bill 133

Pension Benefits Act, R.S.O. 1990, Chapter P.8

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

JURISPRUDENCE

Brennan v. Brennan [2010] O.J. No. 1161 (C.A.).

Cecutti v. Cecutti, [2009] O.J. No. 2352 (Ont. S.C.J.).

Kean v. Clausi, [2010] O.J. No. 2941 (Ont. S.C.J.).

Knowles v. Alachiotis, [2010] O.J. No. 2751 (Ont. S.C.J.).

McNamee v. McNamee, 2010 ONSC 674 (Ont. S.C.J.).

Medeiros v. Mederios, [2009] O.J. No. 4309 (Ont. C.A.).

Middel v. Vanden Top Estate, 2010 CarswellOnt 4169 (Ont. S.C.J.).

Murray v. Murray, [2010] O.J. No. 3276 (Ont. S.C.J.).

Ranking (Litigation Guardian Of) v. Battah (Trustee Of) [2009] O.J. No. 4628 (Ont. S.C.J.).

Ranking (Litigation Guardian Of) v. Battah (Trustee Of) [2010] O.J. No. 1828 (Ont. C.A.).

Robinson v. Morrell Estate [2009] N.S.J. No. 597 (N.S.C.A.).

Serra v. Serra, [2007] O.J. No. 446 (Ont. S.C.J.).

Serra v. Serra, [2009] O.J. No. 432 (Ont. C.A.).

Sfeir v. Sfeir, [2010] O.J. No. 682 (Ont. S.C.J.).

SECONDARY SOURCES

Corbin, Barry S., "Who Knew?" *Money and Family Law*, Vol. 25, No. 10, October 2010.

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FOR PROFESSIONALS IN FAMILY LAW, ESTATE AND TAX PLANNING

Who Knew?

*Barry S. Corbin**

Evidently, there are parts of the *Family Law Act* written in invisible ink that only Ontario judges – both at the trial and appellate levels – have the ability to discern. Need we add that we were, to put it mildly, astonished to read what the Ontario Court of Appeal court had to say[1] when it affirmed the lower court's decision in *Ranking (Litigation Guardian) v. Ranking Estate*?[2]

For our readers, here is a quick synopsis of the facts in the *Ranking* case. Gerald and Rosella Ranking had been married for 25 years (each for the second time after having been previously widowed) when Rosella died. Two months before her death, Rosella had made a new will in which she left her household goods and personal effects to Gerald and everything else to her nephew. When Gerald suffered a stroke shortly after Rosella died, his son, in the capacity of litigation guardian, elected in favour of an equalization of net family properties (NFPs). Because the couple owned significant assets between themselves jointly with a right of survivorship, Gerald became the sole owner of all of them.

The issue in dispute was whether Gerald had to account for that economic benefit as an offset to the equalization claim. Justice Dunn disposed of this issue in the following way:

> The applicant urges an interpretation of the *Act* as requiring the payment to him of one-half the difference between two net family property statement [sic] valued the day before death and the payment to him without deduction for jointly held assets which he receives the day later by operation of law.
>
> In many Estates this would hardly make a difference. Here, however, the jointly held assets are substantial.
>
> The intent of the legislation must be interpreted and there is little room for judicial flight of fancy. Joint ownership has been used exclusively as part of the Estate planning process. Here, it is only reasonable to interpret the *Family Law Act* as requiring a division of only one-half of those joint held assets valued the day before death. To interpret the result otherwise would be to create unwanted mischief. For example, an estate that consisted solely of joint assets would result in the applicant not only receiving all of the assets on the day of the death but having a claim against the estate for half the like amount in the face of a will that disposed of assets otherwise. *I conclude that the applicant has received by reason of the operation of the joint ownership provision the value of his wife's interest in those assets and that this sum should be credited to any amount due to him as equalization otherwise.* [emphasis added]

When the surviving spouse took the case to the Ontario Court of Appeal, a *per curiam* judgment issued in the following even more succinct terms:

* Corbin Estates Law.

1 The appellate court's reasons for judgment can be found at 2010 CarswellOnt 2609.

2 2009 CarswellOnt 6738.

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> In our view, the analysis and conclusion reached by Dunn J. are correct in law. The appellant made an election to take under the *Family Law Act* as opposed to the will. Having done so, while he is entitled to the benefits of this choice, he must bear its burdens. The result that flows is consistent with the underlying purpose of the equalization provisions of the *Family Law Act*. In so concluding, we are mindful that the legislation has been clarified and is consistent with this result.

Let's look at the judicial commentary made at each court level. Justice Dunn states that in many estates the difference between the parties' respective positions in the case before him "would hardly make a difference" and that it did so here only because the assets held jointly were substantial. With all due respect, the quantum of the windfall to the surviving spouse can hardly justify what can best be characterized as pulling a rabbit out of a hat.

As for the extreme example Justice Dunn offers to support his interpretation of the statute, if all of the assets were held jointly between the spouses, there could be no windfall to the surviving spouse because there would be no assets against which to enforce his or her equalization entitlement (which would presumably have arisen because the deceased spouse had started from a lower net worth position on the date of marriage).

Justice Dunn asserts that his interpretation of the statute is necessary to avoid "unwanted mischief." This would suggest that he had identified some gap, inconsistency or ambiguity in the statutory language pertaining to the calculation of the surviving spouse's equalization entitlement under subsection 5(2). But he offers no indication as to where that gap, inconsistency or ambiguity is to be found. If there is a mischief to be avoided, it must surely be judicial law-making in the guise of statutory interpretation.

As for the Ontario Court of Appeal's implication that recently enacted Bill 133[3] merely clarified

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existing law, how then does one explain the commentary in the 1993 *Report on Family Property Law* issued by Ontario's former Law Reform Commission? The report identified a number of problems arising from the choice of valuation date as the date before the deceased spouse's death. Those problems included the windfall accruing to the surviving spouse who elects in favour of an equalization of NFPs and enjoys the right of survivorship in property held between the spouses as joint tenants, despite the inclusion in the deceased spouse's NFP calculation of one-half the value of that property. As well, the suggestion that Bill 133 represented a clarification of existing law ignores the fact that the expanded scope of economic benefits accruing to a surviving spouse for which he or she must now account in an equalization claim arising under subsection 5(2) goes well beyond the right of survivorship in jointly held property.[4]

Nor should one forget that even before the amendments wrought by Bill 133, the *Family Law Act* required the surviving spouse, upon electing in favour of equalization, to take

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3 Bill 133 was enacted as *Family Statute Law Amendment Act, 2009*. Among other things, this legislation substantially expanded the surviving spouse's obligation to offset against his or her equalization claim entitlements received as a consequence of the death of the other spouse. This legislation was examined in a series of articles appearing in *Money & Family Law*, Volume 24, Nos. 7 through 10.

4 Bill 133 came into force with Royal Assent on May 14, 2009. From the docket number, it appears that the equalization application in *Ranking* was commenced in 2007. The matter came before Justice Dunn on July 30, 2009. Since Justice Dunn made no reference to the amending legislation of the *Family Law Act*, presumably no argument was put to him that the amended legislation should have been applied. Likewise, the appellate court clearly would have said so if it thought the amended legislation was applicable. (See the August 2009 issue of *Money & Family Law* on this point.)

into account other entitlements: firstly, as a beneficiary of certain life insurance policies; and secondly, as a beneficiary of any lump sum payment under a pension or similar plan. Surely one might have expected the court to address the obvious argument that if the legislature had intended there to be an offset for the right of survivorship connected with property held in joint tenancy between the spouses, it would have said so.

The appellate court asserted that the result was consistent with the underlying purpose of the equalization provisions of the *Family Law Act*. Surely that is no justification for reading in a provision that is not even hinted at by the language of the statute. Isn't that what legislatures are for? And for the appellate court to say that the changes wrought by Bill 133 are consistent with the result is to dismiss out of hand the possibility that the amendments may actually have changed the law.

Judicial flights of fancy indeed.

Death Benefits and Family Law

*Penny E. Hebert**

Should death benefits[1] be included in the value of the pension when the marriage breaks down? How do you ensure that the death benefit will be paid to the intended spouse? Can a former spouse benefit twice from the death benefit?

Many are familiar with the case of *Ontario Teacher's Pension Plan Board v. Ontario Superintendent of Financial Services*,[2] (the "Stairs" case) in which Anne Stairs, who was not the spouse at the time of Roger Mowbray's death prior to his retirement, was awarded a portion of his pre-retirement death benefit. This case is currently the precedent in cases where entitlement to the pre-retirement death benefit is at issue. However, this decision does not mean that the pension plan will automatically award a former spouse a portion of the pre-retirement death benefit.

This article will explore death benefits from a legislative perspective, through court decisions, and from Standards set by the Canadian Institute of Actuaries for the calculation of Family Law lump-sum pension values.

The Legislation

The Pension Benefits Act (PBA)

The *Pension Benefits Act* does not explicitly state that pre-retirement death benefits are included in the portion of the pension that is available to a former spouse. However, section 51(1) of the PBA states that a domestic contract or an order will give a 50 per cent share of the *pension benefits* earned during the marriage to a former spouse. The regulations to the PBA in section 56 (1) state that the 50% share of the former spouse's entitlement is to be calculated on the assumption that the plan member had terminated employment on the valuation date. In other words, the former spouse's share is based on their portion of the commuted value of the pension, which includes pre-retirement benefits.

Pension plans that are covered by the PBA are required to include provisions for pre-retirement death benefits to be paid when a pension plan member dies prior to receiving their pension. Post-retirement death benefits, other than the joint-and-survivor pension, are not mandatory under the PBA. Section 48 of the PBA sets out the rules for payment and entitlement to the death benefits. Section 48(3) says that plans need not pay a pre-retirement death benefit to a deceased member's former spouse if they were living 'separate and apart' on the date of the member's death. However, section 48(13) of the PBA provides an opportunity for a former spouse to be entitled to an amount up to 50% of the pre-retirement death benefits, accrued by the member during the period of the marriage, by means of a domestic contract as defined in Part IV of the *Family Law Act of Ontario* (FLA) or an order under Part I of the FLA. The non-member spouse is given a mechanism for accessing their entitlement to their portion of all the benefits provided by the pension plan to the member and the plan member is given a mechanism with which to assign a portion of the their death benefit entitlements to a former spouse using section 48(13) of the PBA.

By virtue of the PBA, the plan member has a right to both their pension and the death benefits. The plan member pays for the death benefits, whether or not they personally contribute to the plan, by receiving a smaller pension when they retire. If the plan member dies before they retire, someone will receive their death benefit, depending on entitlement rights as defined under section 48 of the PBA.

Section 48(11) of the PBA states that a

> pension plan may provide for reduction of an amount to which a person is entitled under this section to offset any part of a prescribed additional benefit that is attributable to an amount paid by an employer,

subject to prescribed conditions in section 63 of the PBA regulations. One could argue that the possibility of a reduction in the amount of pre-retirement death benefit paid on the death of a pension plan member to offset death benefits paid through a group life insurance policy results in the possibility that the plan member and their spouse may not be entitled to the full amount of the pre-retirement death benefit, therefore, the value of these benefits should not form part of the plan member's property. Not all employers have group life insurance coverage for their employees so; this section of the PBA does not apply to all pension plan members. It would add to the complexity of placing a value to the pension when the marriage breaks down if this aspect were taken into consideration as well.

* Penny Hebert, B.A.S. (Hons.), President and Specialist in Pension Appraisals, Pension Appraisal Solutions Inc., www.pensionappraisals.com

1 All references to death benefits throughout this article include both pre- and post-retirement non-spousal death benefits, and do not include post-retirement survivor pensions.

2 2004 CarswellOnt 526, 1 R.F.L. (6th) 326 (Ont. C.A.).

One can conclude that, from the perspective of the PBA, the pre-retirement death benefits do form part of the value of the pension when the marriage breaks down. Also, there is a mechanism for the spouses to ensure that the former spouse gets their entitlement to the pension, if the plan member dies before they start their pension, offering security to an 'if and when' pension division, should the member die before starting their pension.

The Family Law Act (FLA)

There is no question that a pension is property under the *Family Law Act.* If death benefits are a mandatory component of a plan member's pension plan, it would then follow that death benefits are part of the proceeds of the pension benefit and that the former spouse should receive their appropriate share. When the marriage breaks down, should the death benefit be included in the plan member's property that must be equalized under the FLA, or should there simply be an assignment as in section 48(13) of the PBA, or both?

The FLA does not specifically reference death benefits in Part I, section 4(1), but it does include pensions (*(c) in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons*). The *Law Reform Commission of Ontario* report on Family Law, 1993, recommended that, "*the definition of "property" in section 4(1) of the Family Law Act should be amended to include a death benefit payable under the terms of a pension plan on the death of the member spouse to a designated beneficiary or to the member's estate.*" By virtue of this recommendation, which never became implemented, one could conclude that section 4(1) of the FLA, is not specific enough to offer guidance as to whether the non-spousal death benefits are indeed family property.

On the other hand, the reference to "*spouse's rights under a pension plan*" suggests that, since pre-retirement death benefits are a legislated part of the terms of the pension plan governing the member's pension, then they should be included in the value of the pension for family law purposes. The term 'spouse's rights' could be broadly interpreted to include all spouses. The spouse is given entitlement to their portion of all the benefits provided by the pension plan to the member with section 4(1) of the FLA.

This conclusion is supported by the exclusion of the pre-retirement death benefit in section 4(2). If it were the intention of the FLA not to allow entitlement to pre-retirement death benefits arising from the member's pension, surely those benefits would have been added to the list of excluded property.

Case Law

The *Stairs* case proves that the legislation allows for an assignment of the pre-retirement death benefits, but it does not indicate whether the value of the pre-retirement death benefit was included in the value of the pension for Net Family Property purposes.

O'Connor A.C.J.O recognized, in the *Stairs* case at paragraph 66, that,

> Mr.Mowbray had an assignable interest in the pre-retirement death benefits provided by the Plan and that he intended to assign an interest in those benefits to Ms.Stairs with respect to his employment both before and after January1, 1987,

because section48(13) of the PBA specifically permits an assignment of pre-retirement death benefits by way of a domestic contract and there is no requirement that a subsequent spouse be a party to the domestic contract in order to make the transfer effective.

These are O'Connor A.C.J.O.'s reasons:

> [61]...The capacity to assign pension entitlements, including death benefits, provides flexibility to the parties or to a court in resolving family property issues in an equitable manner that recognizes the economic reality of many families.
>
> [62] Moreover, the transfer of pre-retirement death benefits to a former spouse under a separation agreement does not unfairly prejudice a subsequent spouse. As I point out below, the subsequent spouse living at the time of a member's death is assured of at least 50per cent of the death benefits by virtue of s.51(2) of the *PBA*. Further, a subsequent spouse who marries after a valid assignment of a pre-retirement death benefit to a former spouse should not reasonably expect to receive the already-assigned interest.
>
> [63] Accordingly, I conclude that at the time he entered into the separation agreement, Mr. Mowbray had an assignable interest in the pre-retirement death benefits that would become payable under the Plan on his death.
>
> [64] It is clear from the separation agreement that Mr.Mowbray intended to assign to Ms.Stairs that portion of the pre-retirement death benefit that accrued during their marriage, including that portion of the death benefit that derived from his pre-1987 employment. In s. 10(1) of the separation agreement, the parties agreed that Ms.Stairs had a "substantial interest" in the benefits under Mr.Mowbray's plan. In that section, Mr. Mowbray assigned a one-half interest in the pension benefits that would be payable to him if and when he retired.
>
> [65] The Plan also provided for benefits payable if Mr.Mowbray died before retirement. Section 10(4) of the separation agreement addresses the situation that in fact occurred: Mr.Mowbray predeceased Ms.Stairs, the death benefit became payable, and Mr.Mowbray had a subsequent surviving spouse. In anticipation of such circumstances, Mr.Mowbray assigned to Ms.Stairs the portion of the death benefit that reflected benefits accrued under the Plan during their 25 years of marriage.

It is clear that Anne Stairs was awarded her entitlement to Mr. Mowbray's death benefits specifically because Roger Mowbray had exercised his rights under sections 48(13) and 51(2) of the PBA and assigned them to her in a separation agreement. Would O'Connor A.C.J.O have come to the same conclusion if instructions for the payout of the pre-retirement death benefit had not been included in the separation agreement?

The following two cases specifically contemplate the issue of the value of the death benefit, and whether it should be considered in the parties' equalization analysis.

In the case of *LeCouteur v. LeCouteur*,[3] Vogelsang J. concluded at paragraph 92 that, "... *while death benefits represent property with value, they are not included in a Family Law*

3 2005 CarswellOnt 1129, 18 R.F.L. (6th) 386 (Ont. S.C.J.).

Act assessment." He states the following as his reasons:

> The non-spousal death benefits which might be paid to Mrs. LeCouteur (or another person then qualified, or his estate) should not form part of the notion of pension value at separation. Any money paid would become due by reason of Mr. LeCouteur's death and would never form part of his property. While there may be elements of control that a prospective pensioner might exercise over the benefits, they do not assume the status as "property" so as to require calculation of a date of separation value.

The *LeCouteur* decision followed the *Stairs* decision. The *Stairs* case was not referred to in this case. This is because the issue of pre-retirement death benefits as property were not at issue. The actuarial expert in *LeCouteur* case, Mr. James E. Jeffery, a highly regarded expert in his field, stated that,

> It is a legal issue whether or not the value of the lump-sum non-spousal death benefits should be included in the values for Family Law Act purposes.

Vogelsang J. concluded that non-spousal death benefits should not form part of the notion of pension value at separation because any money paid would become due by reason of Mr. LeCouteur's death and would never form part of his property. Vogelsang J. further indicated at paragraph 92 that,

> While there may be elements of control that a prospective pensioner might exercise over the benefits, they do not assume the status as "property" so as to require calculation of date of separation value.

In the earlier case of *Lindsay v. Lindsay*,[4] Killeen J. concluded at paragraph 44 that he agreed with James E. Jeffery's opinion that the non-spousal aspect of these death benefits should not be brought into account. Mr. Jeffery analogized these benefits in his pension report to term life insurance policies by suggesting the following,

> Clearly these do have a lump-sum value. But then so do many personal term life insurance policies. It is my understanding that these are normally not included as family property when they have no cash surrender value; possibly because the insured can never receive a benefit from these personally, possibly because no benefit may ever be received by anyone at all, or possibly because the value tends to be relatively small. All of these arguments apply to pension plan death benefits as well.

The question then becomes, do pre-retirement death benefits forming part of a member's entitlements under the pension plan have a cash surrender value? No one doubts that these benefits have a lump-sum value. It is true that a member cannot obtain funds from the pension plan representative of their pre-retirement death benefit in satisfaction of a property equalization debt, under current rules. It is also true that section 48(13) of the PBA offers the member a mechanism to assign up to 50% of the pre-retirement death benefit earned during the period of the marriage to a former spouse in a separation agreement or court order.

The Standards

When a pension valuator provides the lump value of a pension for family law purposes, they must follow the Standards for calculating the capitalized value of pension plan benefits for a marriage breakdown, as set by the Canadian Institute of Actuaries. The latest version of these Standards is updated to April 2009. Section 4320.07 of the latest Standards states that,

> The benefits to be valued would include all of the plan's contractual benefits, including pre- and post-retirement death benefits ...

This suggests that the value of the death benefits ought to be considered property under the FLA.

Analysis

As Ferrier J. concluded in *Dick v. Dick*,[5]

> Death benefits have a uniqueness which makes them difficult to compare to other forms of assets. They are property. They have value.

While not willing to include death benefits in valuing the pension, Ferrier J. recognized that they might have value in certain circumstances.

Including the value of death benefits in the value of the pension for property equalization purposes in some circumstances and not in others only complicates an already complicated issue. Most pension valuation reports in Ontario include the value of the pre-retirement death benefits with the lump sum value of the pension, noting that values excluding them can be provided upon request. Reporting pension values in this way allows the lawyer and the court to have access to all the information needed to make a fair decision and the freedom to do so. Their reasoning for doing so is because the member's estate or appointed beneficiary will receive a lump-sum death benefit if death occurs before retirement. Also, the pre-retirement death benefit is included in the commuted value of the pension if the plan member terminates their employment before they start their pension and they elect to transfer the commuted value out of the plan.

With average life expectancy for males now at 83 and for females 86, according to Stats Canada, the likelihood that the death benefits would be paid out is very low, which tends to decrease the value of the death benefit when calculating its value for FLA purposes. When the likelihood of the death benefit ever materializing is minimal, it may not be reasonable to include it in the value of the pension for property equalization purposes. It may be more reasonable to, alternatively, assign a portion of the death benefits in an order or separation agreement.

Consider this scenario,

- if the value of the death benefit is included in the value of the pension, and
- the separation agreement properly address the issue of death benefits, and
- the parties equalize their property outside of a pension benefit split at retirement, and
- the member dies before retirement,

then the former spouse could end up with double their entitlement to the

4 1995 CarswellOnt 687, 19 R.F.L. (4th) 103 (Ont. Gen. Div.).

5 1993 CarswellOnt 320, 46 R.F.L. (3d) 219 (Ont. Gen. Div.).

death benefit. This is clearly not the intention of the FLA and equal property division.

Conclusion

Are death benefits property in terms of the FLA? Research for this article has produced more court-based judgements against including the value of the death benefit in the pension value for FLA property equalization purposes than for doing so. The courts tend to agree that the death benefit should not be included unless the facts of the case give reason to do otherwise. The PBA will not allow a death benefit to be paid to a former spouse if they were living separate and apart when the member dies unless the member has assigned a portion of the death benefit to a former spouse in an order or agreement. Section 4(1) of the FLA is not specific on the matter.

Our analysis of death benefits under a pension plan reveals some reasons why it would not be reasonable to include the value of the death benefit with the pension value when the parties separate. However, the Standards clearly specify that an expert, who prepares a report of the value of a pension when the marriage breaks down, must include the value of the death benefits with the value of the pension. If the pension valuation report includes the value of the death benefits by default, and the courts conclude that death benefits are not to be included, what is the lawyer to do? If the lawyer chooses to include the value of the death benefits in some circumstances and not others, a report, which includes the value of the death benefit with the pension, becomes difficult to work with.

Perhaps a better way to deal with the death benefit is to exclude it from the property equalization process and include it in the separation agreement or order through an assignment as per section 48(13) of the PBA. That way, if the member dies before retirement, the former spouse and the member's spouse at their death or beneficiaries will share in the member's death benefit entitlement only if that situation arises. There would be no risk of double dipping.

We conclude that, because a pension plan is under no obligation to pay death benefits to a former spouse who was living separate and apart from the member on their death, unless there is an order of assignment, the separation agreement or order must set out the parties' intentions with respect to the assignment of the death benefits. The separation agreement or order must clearly state that the member has assigned a portion of the death benefit to the former spouse when the parties have to settle the equalization debt using future pension payments. Otherwise, the death benefit will go to the spouse at the time of the member's pre-retirement death, or the named beneficiaries. On the other hand, if the parties choose an *in specie* division or cash transfer to satisfy the equalization debt, it may be more reasonable to include the value of the death benefits with the value of the pension and exclude an assignment of the death benefits in the separation agreement.

To comply with the Standards, the Legislation, and the Courts, the value of the death benefits should be shown separately in the pension valuation report. This will allow the lawyer to help the parties to share their family property equitably and according to their wishes.

Spousal Trust – How to Protect Your Assets and Lower Income Taxes*

Couples commonly have wills that bequest all of their property to the surviving spouse after the death of the other. A concern may arise that, if the surviving spouse ever remarries, all or some of the property that was intended to remain "in the family" may find its way into the hands of a stranger. Many individuals would like to protect the inheritance they intend to leave to their children. One such strategy might be to leave more property directly to their children as opposed to leaving it to the surviving spouse. The problems with this strategy are two-fold. First, under family law equalization obligations, leaving most of your property to your children may be challenged by the surviving spouse. Second, transfers to a spouse or former spouse can occur on a tax-free basis while transfers to your children will occur at fair market value meaning that capital gains, recaptured depreciation and business income may be triggered by the transfer.

A way to avoid these problems while still protecting the assets is by way of a spousal trust. Instead of naming your spouse as the beneficiary of your property, the will can name a trust for the benefit of your spouse as the beneficiary. The terms of the trust may be such that your spouse is the income beneficiary and your children are the capital beneficiaries. This entitles your spouse to enjoy use of the income for the remainder of his/her life without risking the capital which is reserved for the children.

A concern might be that while the income is expected to be sufficient to maintain the surviving spouse's lifestyle, what if costs suddenly escalate, perhaps due to medical needs, and there is insufficient income for the spouse? You may not want to create a situation where your spouse has to ask your children for additional funds. Instead, the trust can provide the surviving spouse with the right to encroach on capital in such circumstances subject to the trustees' approval. This takes the decision out of the hands of individuals with a biased interest.

In addition to the asset protection offered by the spousal trust, there are income tax advantages. Similar to tax rules discussed above, a transfer to a spousal trust has the tax-free advantages of a transfer to spouse or former spouse – that is, it occurs at cost triggering no taxable income. Even more valuable can be the

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income splitting advantages afforded by the trust's testamentary nature. There are two types of trusts – an inter vivos (meaning "in life") trust, which is created in the settlor's life and a testamentary trust, which is created on death, usually in the settlor's will. A spousal trust created by one spouse's will is a testamentary trust. Trusts are taxed at personal income tax rates. A major difference between these two types of trusts is that an inter vivos trust is taxed at the highest marginal rate on all of its income while a testamentary trust is taxed at graduated rates like an individual. That means, for example, that on $37,000 of income, a testamentary trust would pay about $7,400 of tax. If this income was taxed in your spouse's hands and he/she was already taxed in the highest bracket in Ontario, the tax would otherwise be over $17,100 resulting in about $9,700 of tax savings.

A significant concern of many surviving spouses is the sudden increase in income tax following one spouse's death. Two spouses each earning about $100,000 of retirement income might pay tax of about $25,000 each depending on the type of income. However, if one dies and the surviving spouse must report all $200,000 of income, most of the additional income is taxed at 46.4% resulting in much higher taxes on this same level of income because it is reported on just one tax return. Leaving half the income to be taxed in a testamentary trust instead can alleviate this tax problem by allowing the family to continue splitting income between two taxpayers. As can be seen, even if asset protection was not a primary concern, the use of a testamentary trust created for the benefit of your surviving spouse can be advantageous.

If you are planning to utilize the tax and asset protection afforded by a spousal trust, you should ensure your will is amended and that assets which you wish to transfer to the spousal trust are not held as "joint tenants with right of survivorship". Such ownership forces the property to be transferred directly to the joint tenant without passing through the intended trust.

Since there are many issues to be considered besides asset protection and income tax minimization, individuals should consult with an income tax and estate specialist.