Wills & Estates
Fall Term 2022

Lecture Notes – No. 14

XVIII. SPOUSAL RIGHTS AND THE ESTATE: BASIC RULES AND STRATEGIES

- Ontario inherited its property law from English law. As the English law of property developed in the period after the Norman conquest, the feudal system and the principle of male primogeniture became central tenets of English land law. Over time, of course, the feudal system withered and died away but vestiges are with us even today.

- Succession law intersects with a number of other areas of law, including family law. Even the early property law developed some doctrine that stood at this intersection, well before 'family law' as such was known to law.

    - *Dower* began as a custom wherein the husband would give a gift to the wife on marriage of a share of his estate (freeholds), which could be held by the wife after he died. The custom later became law (around the 13th century). Through dower, the surviving wife became entitled to a 1/3rd share of her dead husband's freeholds on his death (by comparison, the husband became entitled to all of his wife's estate on her death through the doctrine of *curtesy*).

    - The testator could attempt 'to bar his wife's dower' in the Will by requiring her to elect either to take under the Will as he provided, or, to take her dower (a gift to the wife in the Will was otherwise regarded as operating in addition to her dower). This was an early, and weak, attempt to preserve some spousal entitlement after death. Both the law here and in England has moved considerably this early law.

- Today the **Family Law Act, R.S.O. 1990, c.F.3** preserves the concept of an election to a surviving spouse – now to take under the Will / intestacy / partial intestacy, or, to make an equalization claim under the statute.

- Please familiarize yourself with the general scheme of the Family Law Act. As the form of spousal rights are created by statute, they exist and develop within the family law regime. The rights that are at issue here are those falling to a spouse as defined in the relevant part of the FLA:

    "spouse" means either of two persons who,
    (a) are married to each other, or
    (b) have together entered into a marriage that is voidable or void,
    in good faith on the part of a person relying on this clause to assert any right.

An extended definition of spouse is used for other parts of the FLA, e.g. support obligations.

The Basic Framework

The Family Law Act provides the surviving **married** spouse of the deceased with a choice:

Option A: Take what is left to him or her under the Will / intestacy / partial intestacy

Option B: Elect to consider the death as an event that entitles the survivor to an 'equalization claim' wherein he or she is entitled to one-half of the 'net family property' held by the his or her deceased partner that exceeds the survivor's net family property.

Note: Please recall that when the spouses are separated on the date of death, the separated spouse loses his or her rights to inherit on an intestacy forcing an equalization claim; see SLRA, s. 43.1 (Lecture Notes 3).

The Nature of an Equalization Claim:

In essence, and subject to exclusion of the operation of the FLA through a domestic contract, family law regards a number of events as triggering an equalization claim under the statute. During the lifetime of the testator or testatrix, a claim can be triggered by divorce, an order declaring a marriage to be a nullity, or 'when the spouses are separated and there is no reasonable prospect that they will resume cohabitation'; s.5(1). **When one spouse dies, the other spouse is also entitled to make an equalization claim under the Act; s.5(2).**

The equalization claim is made in respect of a statutory concept – 'net family property'. This means all of the property of the other spouse less property that is excluded by the statute under s.4(2):

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

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

7. Unadjusted pensionable earnings under the *Canada Pension Plan*.

Where the spouses divorce or separate *inter vivos*, there is usually straight-forward equalization: the date of separation will usually be regarded as the valuation date, the net family property of each spouse is determined (and there are rules to safeguard against improvident depletion and fraudulent conveyance to defeat the statute by attributing the value of the disputed asset to the spouse), and the property will be equalized as between the two spouses. The equalization entitlement is *prima facie*, but the court can order unequal division of property under s.5(6):

> (6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
>
> (d) a spouse's intentional or reckless depletion of his or her net family property;
>
> (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
>
> (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
>
> (g) a written agreement between the spouses that is not a domestic contract; or
>
> (h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

There are also special rules in respect of the matrimonial home.

Where one 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'; s.5(2). Thus, the estate of the deceased has no equalization claim. Again, the court has a jurisdiction to order unequal division.

The 'matrimonial home' loses its status as such on the death of either spouse; s.20(6)(d).

Pragmatic Planning Considerations

- Given that the estate plan may be predicated on favourable tax treatment of capital assets that are transferred to a surviving spouse (usually through a testamentary spousal trust), the decision of the surviving spouse to elect to make an equalization claim may have far-reaching implications for the ability of others to take under the Will. Why? The capital assets will be taxed in a manner not contemplated by the testator or testatrix and there may no longer be enough property available to distribute assets in the manner planned. The issue of the spousal election in favour of equalization of net family property should be discussed with the client and his or her spouse in creating the estate plan.

- **The easiest way to plan for the possibility of an equalization election is for the testator or testatrix to purchase life insurance to fund the claim.** If the claim is not made, alternative provision can be made in the Will for disposition of the proceeds from the policy if the estate is the beneficiary (through making the testator's 'personal representative' the beneficiary as allowed by the Insurance Act, RSO 1990, c.I.18, s.190(1)) or a trustee (under a testamentary trust), or, the plan can be made predicated on the surviving spouse taking the insurance proceeds in addition to gifts in the will. **If the policy of insurance is designated in favour of the surviving spouse and he or she elects for equalization, the insurance proceeds are counted towards the Estate's liability to the spouse with any excess payable to the Estate; s.6(7).**

<u>The Statutory Provisions and Some Common Issues</u>

The basic provisions are set out in Family Law Act as follows:

> *Act subject to contracts*
>
> **2.--(10) A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise.**
>
> *Death of spouse*
>
> **5. (2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.**
>
> **Election**
>
> **Spouse's will**
>
> 6. (1) When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.

Spouse's intestacy

(2) When a spouse dies intestate, the surviving spouse shall elect to receive the entitlement under Part II of the Succession Law Reform Act or to receive the entitlement under section 5.

Spouse's partial intestacy

(3) When a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the Succession Law Reform Act, or to receive the entitlement under section 5.

Property outside estate

(4) A surviving spouse who elects to take under the will or to receive the entitlement under Part II of the Succession Law Reform Act, or both in the case of a partial intestacy, shall also receive the other property to which he or she is entitled because of the first spouse's death.

Gifts by will

(5) The surviving spouse shall receive the gifts made to him or her in the deceased spouse's will in addition to the entitlement under section 5 if the will expressly provides for that result

Amounts to be credited

(6) The rules in subsection (7) apply if a surviving spouse elects or has elected to receive an entitlement under section 5 and is,

(a) the beneficiary of a policy of life insurance, as defined in the Insurance Act, that was taken out on the life of the deceased spouse and owned by the deceased spouse or was taken out on the lives of a group of which he or she was a member;

(b) the beneficiary of a lump sum payment provided under a pension or similar plan on the death of the deceased spouse; or

(c) the recipient of 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.

Same

(7) The following rules apply in the circumstances described in subsection (6):

1. The amount of every payment and the value of every property or portion of property described in that subsection, less any contingent tax liability in respect of the payment, property or portion of property, shall be credited against the surviving spouse's entitlement under section 5.

2. If the total amount of the credit under paragraph 1 exceeds the entitlement under section 5, the deceased spouse's personal representative may recover the excess amount from the surviving spouse.

3. Paragraphs 1 and 2 do not apply in respect of a payment, property or portion of property if,

i. the deceased spouse provided in a written designation, will or other written instrument, as the case may be, that the surviving spouse shall receive the payment, property or portion of property in addition to the entitlement under section 5, or

ii. in the case of property or a portion of property referred to in clause (6) (c), if the surviving spouse's entitlement to the property or portion of property was established by or on behalf of a third person, either the deceased spouse or the third person provided in a will or other written instrument that the surviving spouse shall receive the property or portion of property in addition to the entitlement under section 5.

Effect of election to receive entitlement under s. 5

(8) When a surviving spouse elects to receive the entitlement under section 5, the gifts made to him or her in the deceased spouse's will are revoked and the will shall be interpreted as if the surviving spouse had died before the other, unless the will expressly provides that the gifts are in addition to the entitlement under section 5.

Idem

(9) When a surviving spouse elects to receive the entitlement under section 5, the spouse shall be deemed to have disclaimed the entitlement under Part II of the Succession Law Reform Act.

Manner of making election

(10) The surviving spouse's election shall be in the form prescribed by the regulations and shall be filed in the office of the Estate Registrar for Ontario within six months after the first spouse's death.

Deemed election

(11) If the surviving spouse does not file the election within that time, he or she shall be deemed to have elected to take under the will or to receive the entitlement under the Succession Law Reform Act, or both, as the case may be, unless the court, on application, orders otherwise..

Priority of spouse's entitlement

(12) The spouse's entitlement under section 5 has priority over,

(a) the gifts made in the deceased spouse's will, if any, subject to subsection (13);

(b) a person's right to a share of the estate under Part II (Intestate Succession) of the Succession Law Reform Act;

(c) an order made against the estate under Part V (Support of Dependants) of the Succession Law Reform Act, except an order in favour of a child of the deceased spouse.

Exception

(13) The spouse's entitlement under section 5 does not have priority over a gift by will made in accordance with a contract that the deceased spouse entered into in good faith and for valuable consideration, except to the extent that the value of the gift, in the court's opinion, exceeds the consideration.

Distribution within six months of death restricted

(14) No distribution shall be made in the administration of a deceased spouse's estate within six months of the spouse's death, unless,

(a) the surviving spouse gives written consent to the distribution; or

(b) the court authorizes the distribution.

Idem, notice of application

(15) No distribution shall be made in the administration of a deceased spouse's death after the personal representative has received notice of an application under this Part, unless,

(a) the applicant gives written consent to the distribution; or

(b) the court authorizes the distribution.

Extension of limitation period

(16) If the court extends the time for a spouse's application based on subsection 5 (2), any property of the deceased spouse that is distributed before the date of the order and without notice of the application shall not be brought into the calculation of the deceased spouse's net family property.

Exception

(17) Subsections (14) and (15) do not prohibit reasonable advances to dependants of the deceased spouse for their support.

Definition

(18) In subsection (17),

> "dependant" has the same meaning as in Part V of the Succession Law Reform Act.
>
> Liability of personal representative
>
> (19) If the personal representative makes a distribution that contravenes subsection (14) or (15), the court makes an order against the estate under this Part and the undistributed portion of the estate is not sufficient to satisfy the order, the personal representative is personally liable to the applicant for the amount that was distributed or the amount that is required to satisfy the order, whichever is less.
>
> Order suspending administration
>
> (20) On motion by the surviving spouse, the court may make an order suspending the administration of the deceased spouse's estate for the time and to the extent that the court decides.

"Property"

Borges v Santos
2017 ONCJ 651 (O.C.J.)

An interest in a discretionary trust can be "property" subject to division under the FLA; *Spencer v. Riesberry*, 2012 ONCA 418. A key determinant is the degree of control that a spouse has over the trust; *Eva v. Eva*, 2011 ONSC 5217 (S.C.J.). Certainly, a sham trust can be ignored; *Anderson v. Dudek*, 2011 ONSC 493 S.C.J.). In this case, it was held that a proper Henson trust does not vest any property in a spouse.

"Excluded Property"

Testani v Haughton
2019 ONSC 174 (S.C.J.)

Here a dispute arose between H and W where W produced a Promissory Note evidencing a debt to her mother. H did not prove his allegation that the funds were properly gifted to W. However, Jarvis J. applied a discount to its value:

> 18 Part 1 of the *Family Law Reform Act* ("the Act") deals with Family Property. Net Family Property is defined in s. 4(1) of the Act as follows,
>
> 4(1) net family property" means the value of all the property...that a spouse owns on the valuation date, after deducting,
>
> (a) the spouse's debts and other liabilities, and
>
> (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities related directly to the acquisition

or significant improvement of a matrimonial home, calculated as of the date of the marriage;

19 In determining the value of a spouse's net family property, a spouse is entitled to deduct their debts and other liabilities. The burden of proving entitlement to a deduction rests squarely with the claimant pursuant to s. 4(3) of the Act,

4(3) The onus of proof proving a deduction under the definition of "net family property...is on the person claiming it.

20 The wife must satisfy the court on a balance of probabilities that she owed her mother the value of the $125,000 promissory note on the valuation date. While the note may be evidence of that debt, it is not determinative of the issue, particularly where the husband challenges the note's authenticity and the likelihood of the wife ever being called upon to pay it.

21 The husband's challenge to the authenticity of the note was really a challenge as to when it was signed; the implication of this being that if the note was prepared after the parties separated, it was concocted in an effort to financially assist the wife, and, possibly, her mother. As serious and troubling an allegation as this is, it should have been investigated more thoroughly by the husband than he did. While the explanation of Filomena and the wife about the decision to transfer Wildfire and the making of the note might reasonably invite suspicion in circumstances of the parties' separation, I am not prepared to conclude that the note was made after the parties separated. That does not mean though, that the wife is entitled to a deduction equal to the note's face value.

…

29 Each case must be decided on its own facts. There was no discussion in Arora of the statutory burden of proof on the wife, or of the authorities dealing with the likelihood of the notes being repaid, although it is clear that the trial judge was alert to those issues. There was no evidence in that case, unlike this, of a pattern of generosity when funds were advanced, or of third party evidence (such as that of Mr. Maniaci), that suggested the transfer was being made for no consideration. Arora must be confined to its own facts.

30 In my view, the face value of the promissory note in favour of Filomena in this case must be discounted for the following reasons:

(a) the parties were of modest means. They had a combined income of between $65,000 and $70,000 a year and lived paycheque to paycheque;

(b) the mother owned three properties in 2005, two of which were income producing (Wildfire and Teahouse). She wanted to help the wife in 2013, as she had helped Massimo in 2012, build their financial security. It is not unreasonable to conclude that Filomena had no need for the equity in Wildfire when its' title was transferred to the parties in 2013, or had any need when the parties separated in 2015 (or even at trial);

(c) the note was not made contemporaneous with any actual advance of funds or with the transfer of title to Wildfire; that happened over four months later;

(d) the wife never told the lender about the note. Her evidence was that she told the lender that her mother was leaving her equity in the property;

(e) neither the wife nor Filomena told Mr. Maniaci about the note. Mr. Maniaci testified that there was no mention of any note or money owed to Filomena relating to the transfer; she asked him for some probate advice. I prefer his evidence to that of Filomena on what was said, and by whom, when the parties, Filomena, and he met at his office. He was uninterested in the outcome of this case and his evidence was unshaken in cross-examination. He did for the parties and Filomena the same work that he had done for Filomena and Massimo with respect to the Teahouse property;

(f) the husband was never told about the note until after the parties separated. I believe him. He must have been aware that Filomena was being generous to the parties when title was transferred but that does not mean that he was aware of the note or of any legal (as distinct from moral) obligation to pay anything to Filomena except for her taxes arising from the transaction;

(g) no demand for any payment pursuant to the note was made before the parties separated;

(h) although Filomena was retired when the parties separated, there was no evidence that before then, she had any financial, health-related, or other care needs;

(i) Filomena was more elderly and, she testified, in poor health at the time of trial but there was no evidence of her having any present financial or other care needs. She owned Vera Rd, where Massimo lived too;

(j) Massimo deposited into his bank account, not into the bank account owned by his mother and for which he held a Power of Attorney, the money paid to him by his sister, represented by the note. He had no reasonable explanation at trial why this wasn't done. He also used these funds to purchase a GIC in his name alone.

31 There is little likelihood, in my view, that immediately before she became aware that her daughter and her husband had separated, Filomena would have expected payment of the note. Not unlike Vaccaro, Filomena's generosity would have been returned to her in a way or ways which would not have required payment of the note, or debt. In Traversy, Mackinnon J. referred to a number of cases, including Cade and Poole, as providing "some guidance [in the choice of an appropriate discount factor], although this is clearly not an exact science..."17 In all of the circumstances of this case, I discount the value of the note to 10% of its face value, or $12,500, for equalization purposes.

Yamada v. Zolad
2007 CanLII 4328 (Ont Sup Ct)

An elderly couple lived in separate assisted residences. The husband won the lottery and later died. Did the equalization claim arise on death or before? On death – the couple may have lived separately due to infirmity but that did not create a legal separation in the sense of marital breakdown (under s.5(1)) to trigger the applicable provisions of the FLA.

Per Greer J.:

> [23] **I can find no evidence to support the proposition by the Estate Trustees that George had a fixed intention to separate from Katie on December 1, 2001. In my view, George's lottery win in July 2002 is the key to why the Estate Trustees have taken that position. There is no evidence before me that either organization, as a capital beneficiary of the Estate, has taken any position to oppose the one taken by Katie's Attorney to elect on her behalf, on the death of George, to take her distributive share of his estate.**
>
> **[24] In paragraph III (a) of George's Will, he acknowledges Katie's right to make such a claim under the *Family Law Act*, ("FLA") and authorizes his Estate Trustees to compromise and settle any such claims.** Given that John Gray and Greg Zolad are both beneficiaries, as well as Estate Trustees, they should have taken a neutral position and allowed the organizations to oppose Katie's claim, if the organizations were so advised by their own counsel to do so.
> [25] Sections 5 of the FLA deals with equalization of net family properties when a couple divorces, or their marriage is declared a nullity or they are separated and there is no reasonable prospect that they will resume cohabitation. Subsection 5.(2) states:
>
> 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 of the difference between them.
> Subsection 6.(1) of the FLA states:
>
> 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. **On George's death, Katie's Attorney, elected on her behalf to take her entitlement under Section 5 of the FLA, rather than to take her life interest in the residue of George's estate.**
>
> [26] In *Greaves v. Greaves* 2004 CanLII 25489 (ON SC), (2004), 4 R.F.L. (6^{th}) 1 (O.S.C.J), Madam Justice Mesbur spoke of the determination of the separation date under the FLA, as follows in paragraph 30:
>
> The separation date is relevant both for deciding whether there has been a permanent breakdown of the parties' relationship entitling them to a divorce, and also for the purposes of determining the valuation date under s.4(1) of the *Family Law Act,* to calculate net family property.

There is no evidence that George considered that there had been a permanent breakdown of his marriage to Katie, as he took care of her under his Will, knowing that he had won the lottery and had the money to now do so.

(11) If the surviving spouse does not file the election within that time, he or she shall be deemed to have elected to take under the will or to receive the entitlement under the Succession Law Reform Act, or both, as the case may be, unless the court, on application, orders otherwise.

…

The statute provides no power to a court to allow for revocation of an election that has been made. It was held in **Re Bolfan Estate (1992), 45 E.T.R. 23 (Ont. Gen. Div.)** that this was a deliberate decision of the legislature and that the court will not allow an election out of time in respect of a deemed election. Per Hawkins J:

> Applying the interpretive doctrine *expresio unius est exclusio alterius*, I conclude that the absence of any express grant of authority to the court to relieve against the consequences of an actual election by a surviving spouse is advertent.

However, in **Iasenza v. Iasenza Estate (2007), 34 E.T.R. (3d) 123; 39 R.F.L. (6th) 452 (Ont. Sup. Ct.)** Hackland J held that there was indeed such a quasi-equitable discretion to allow a re-election of an already-made election:

> 19 In *Re Bolfan Estate*, the applicant, the spouse of the late Elizabeth Bolfan and a beneficiary of 60% of her estate under her will, made an election under section 6(1) of the *FLA* to receive his entitlement under the Act in lieu of his gift under the will. He later sought to challenge the will and the question arose as to whether he had any standing to do so. Hawkins J. noted that the *FLA* expressly authorized the Court to grant relief against the consequences of a deemed election (referring to section 6(10) of the *FLA)*, whereas the Act is silent about relieving against the consequences of an actual election. Therefore, he concluded that the Court had no jurisdiction to grant any relief against an actual election, stating at page 122:
>
> > Applying the interpretive doctrine *expressio unius est exclusio alterius* I conclude that the absence of any express grant of authority to the court to relieve against the consequences of an actual election by a surviving spouse is advertent. I also find that there is no inherent jurisdiction in the court to grant any such relief.
>
> 20 Justice Hawkins accordingly concluded that the applicant no longer had any standing to challenge the will, having made his irrevocable election under the *FLA*.
>
> 21 In ***Re Van der Wyngaard*** **(1987), 59 O.R. (2d) 195 (Ont. Surr. Ct.), [cb., p. 834]** the respondent, the surviving spouse of the testatrix, filed a section 6(1) *FLA* election claiming entitlement to part of his late wife's estate. In 1985,

the wife named the respondent sole executor and gave him a substantial interest in her estate. In 1986, a second will made by the wife revoked any interest of the respondent in the estate and named the applicants executrices of the estate. The executrices brought a motion for an order to vacate a caveat alleging lack of capacity in respect of the second will filed by the respondent. The executrices submitted that the filing of the caveat was vexatious because a section 6(1) *FLA* election was also filed. McDermid Surr. Ct. J., in dismissing the motion, noted he must be guided by the avowedly remedial nature of the *FLA* and there would be nothing inconsistent with the spirit of the Act in permitting the husband's caveat to stand. Further, he held the election filed did not prevent or restrict the husband's entitlement under the first will. McDermid Surr. Ct. J. thus concluded that the intention of the husband was that the election should operate only with respect to the second will. The Court noted that section 6 of the *FLA* did not contemplate the situation presented in this case.

22 In *Varga Estate v. Varga* 1987 26 E.T.R. 172 (H.C.J.), counsel for the surviving spouse, Julianna Varga, moved for a declaration that she had not made an election pursuant to section 6 of the *FLA*. Oyen J. held that the wife had not made an election. She stated at page 177:

> At the time that Julianna Varga signed the form dated September 10, 1986 her solicitor, George Lantos, was negotiating with the solicitor for the estate for a settlement of the estate by the payment to her of one-half of the value of the estate. Neither George Lantos nor the solicitor for the estate were aware then that the amount of the entitlement as calculated under s. 5 would be substantially lower than one-half of the value of the estate.

The wording used in the form stated that the wife exercised her right "to elect one-half of the estate under the *FLA*". Justice Oyen noted that section 5 does not entitle a spouse to receive one-half of the estate. It was held the purported election was not an election under section 6 to take the entitlement under section 5 of the *FLA* and a declaration was issued that the wife had not made an election.

23 In my view, these decisions turn on their own specific facts. To the extent that the decision of Hawkins J. in *Re Bolfan Estate* may be taken to have ruled that an election under section 6(1) of the *FLA* is irrevocable in all circumstances, I choose not to follow it.

24 On the other hand, Hawkins J. makes a cogent point that the *FLA* does deal with revocation of "deemed" elections under section 6(10) and in that event a discretion is specifically conferred on the Court. In contrast, the *FLA* does not address actual elections. I think it is quite clear that there is no general right of revocation and a surviving spouse has no right to revoke an election. Such an approach would have the potential to prejudice the interests of third parties who relied on the election and would stand as a roadblock to the timely administration of estates.

25 The serious question to be answered is whether the courts have a residual jurisdiction to authorize a revocation of an election under section 6(1) of the *FLA*. I am of the opinion that such a residual discretion exists. It should be exercised in restrictive circumstances where the interests of justice require it and where the balance of the interests of effected parties clearly warrants it. In exercising this discretion, the Court should have particular regard to the following:

(a) **Was the election filed as a result of a material mistake of fact or law made in good faith?**

(b) **Was there any responsibility or culpability on the part of effected parties in relation to the election?**

(c) **Was the notice of intent to seek revocation of the election given in a timely way and, in particular, how long after the 6 month filing period was such notice given?**

(d) **Has the estate been distributed or would interested parties otherwise be adversely effected by a revocation of the election?**

(e) **Does the election result in an injustice to the surviving spouse in all of the circumstances?**

Election: Unintended Consequences

Ranking (Litigation Guardian of) v. Ranking Estate
2010 ONCA 315

Here the spouse made an equalization election which inadvertently brought joint assets back into the estate; the result was that the spouse did less well than he would have under the Will. Oops.

✧

There are two additional points to consider:

First, the preferable course is to apply to the court to extend the time for the election pending determination of the validity of the Will or other relevant issues such as the value of the testator or testatrix's 'net family property'. Such a motion is brought under the FLA, s.2(8):

> The court may, on motion, extend a time prescribed by this Act if it is satisfied that,
>
> (a) there are apparent grounds for relief;

(b) relief is unavailable because of delay that has been incurred in good faith; and

(c) no person will suffer substantial prejudice by reason of the delay.

Second, where the election has been made and later other facts come to light that render the decision to elect for equalization unsound, the survivor may argue for a greater share of the testator or testatrix's net family property (unequal division) under the FLA, or, bring a private law claim against the estate. For example, in one case the testatrix moved money out of joint savings and into her own name and then disposed of the property by Will to try and disinherit the surviving husband – the court ordered unequal division; see **Rivett v. Rivett Estate (1992), 45 E.T.R. 266 (Ont. Gen. Div.).**

Webster v Webster Estate
2006 CanLII 22941 (Ont. S.C.J.)

Here the surviving spouse brought a motion to extend her equalization election outside the 6-month limitation period.

The testator left an estate of over $22 million; the widow was to be given some properties for life and an annuity of $250,000 per year for life. After her death, the assets would be gifted to charity. At the time of the litigation, the widow was incapable by virtue of dementia and her adult child was her representative. Her estate was valued at about $1.65 million. The son argued that (in his role as representative) that he only became aware of the ability to elect for his mother after the expiry of the limitation period by two months. The motion was brought 6 months later. It was not allowed.

In respect of the requirement of 'good faith', Robertson J held:

> 32 The circumstances of the delay in this case must be put into context. Firstly, Mr. Armitage stated he only became aware of his mother's rights under the *FLA* in June 2004, which was eight months after Mr. Webster's death. However, it took him another four months to consult with a lawyer (October 2004) and another three months to file the application (January 2005). **The Application for equalization was commenced fifteen months after the death of Mrs. Webster's husband, which was well outside the six-month limitation period permitted under the *FLA*. There has been no reasonable explanation offered for the continuing delay after the awareness of entitlement.**
>
> 33 Secondly, Mrs. Webster was more than a beneficiary. She and Mr. Armitage were also co-Executors of the Estate. As Executors, they would have the opportunity to contact lawyers upon the death of Mr. Webster. Mr. Armitage, the co-Executor and son of the Applicant, has been an accountant with a national firm for decades. He is also a Director of Mr. Webster's company and had some knowledge of the family wealth and his mother's finances. Admittedly, he was appointed as an Executor to look after his mother's interests. Although he is not a lawyer and worked as an accountant outside of Ontario, he is a reasonably sophisticated person and might have made inquiries or sought independent legal advice either when the Will was

drafted and/or upon Mr. Webster's death. In addition, Mrs. Webster had the financial means consult a lawyer. For instance, she met with a lawyer and granted a Power of Attorney to her three children in about November 2004. She has $1.65 million in assets and is receiving income at $250,000 per annum from the Estate plus other benefits. As a person of means, it was reasonable for her to seek professional advice when matters fell outside of a comfortable knowledge realm. She chose to rely upon her family for advice.

34 There is evidence to suggest that Mrs. Webster was content with her benefits under the Will and was aware of and in agreement with her Will entitlements during the life of Mr. Webster. She may have even gone with her husband when he signed this will. This is of little relevance. The objectives of the *FLA* support her right to claim her lawful share of the marital partnership within the statutory framework. She was completely free to change her mind and seek an equalization payment within the six-month limitation period. After that time, the reason for delay must been considered by the court and the criteria in s. 2(8) must be met.

35 Although there is no doubt that Mrs. Webster was in a state of emotional upset and had much difficulty with Mr. Webster's death, the majority of surviving spouses would be in a similar state of grief. There is no evidence that Mrs. Webster suffered any differently from any other spouse going through a similar circumstance. Six months is a short limitation period when compared to many other types of actions. Here, the affected category of persons limited by the time limit is grieving spouses and the legislators decided to limit the time frame to six months knowing the affected group.

36 Simply put, the Applicant missed the limitation period. She failed to make inquiries in a timely way despite a plan put in place by Mr. Webster to have Mr. Armitage as a co-Executor to protect her interests. Regrettably, the Applicant did not provide the court with a suitable reason as to why she failed to make the necessary inquiries about her rights under the *FLA* to justify an extension.

37 The Applicant raised the issue of the Estate's obligation to advise her of her potential claim against the Estate. The Applicant was more than a beneficiary. Both the Applicant and Mr. Armitage were also co-Executors of the Estate. Section 2(8)(b) does not address good faith obligations of others. The test restricts the court to consider good faith in relation to the Applicant's delay. Both counsel produced information suggesting prudent practice for solicitors and executors to include advice to spouses about potential equalization claims. The issue of prudent practice for lawyers is not before the court. Mr. Webster knew of his wife's entitlement under the *FLA* and for whatever reason, did not protect his estate. Mr. Webster, as the Testator or planner, is responsible for the vulnerability, not the Executors of his Will. It is not my job today to gratuitously cast blame around for his business choice. The extension of time under s. 2(8) of the *FLA* is a very narrow issue.

38 In all the circumstances, even applying a liberal definition of "good faith"… the failure to make inquiries about Mrs. Webster's rights under

the *FLA* amounts to willful blindness. I find the Applicant has not met the criterion under section 2(8)(b) of the *Family Law Act*.

In respect to the exercise of the Court's residual discretion, Robertson J held:

> 60 Applying these principles to the circumstances of this case, I find that even if the criteria in s. 2(8) are met, there are "special circumstances" that support the exercise of judicial discretion to deny the extension of the limitation period. As stated in *Rae v. Rae*:
>
> If I were satisfied that the three tests set out in S. 2 (8) have been satisfied, I would not, in the exercise of my discretion, grant leave to bring an action which could not possibly benefit either of the parties.
>
> 61 In applying the law, the court must consider the purpose or objectives of the *FLA*. The intent of this legislation is to encourage and strengthen the role of the family. It recognizes marriage as a form of partnership and provides for the orderly and equitable settlement of affairs through predictable law. It specifically directs the court to consider the mutual obligations in family relationships, including the equitable sharing of responsibility for their children.
>
> **62 During their marital partnership, the Websters fostered the culture of philanthropy. Most of the property was held by a trust and not in either of their personal capacities.**
>
> **63 Representatives of the blended families were appointed as Executors and the children and stepchildren were similarly excluded from the main provisions under the will in favor of charity. The Will states that Mrs. Webster is to be provided for in the same manner to which she was accustomed when Mr. Webster was alive. There is discretion to ensure she has everything she possibly wants and there is no suggestion anyone is failing her.**
>
> **64 The *FLA* should not to be used as a scheme to rewrite a will and redistribute wealth contrary to a Testator's intention. The sad reality is that Mrs. Webster, in her failing health, is now a custodian of wealth to redistribute to a subsequent generation. Mrs. Webster's Will provides that her three sons are the sole beneficiaries of her estate. Accordingly, it would seem as though it would be Mrs. Webster's sons, as opposed to Mrs. Webster, who would benefit from an order granting the extension of time. This would be to the exclusion of Mr. Webster's children because Mr. Webster's share of the wealth would be distributed to charity under the terms of his will.**
>
> **65 Mrs. Webster shared in, and was presumably supportive of Mr. Webster's belief in philanthropy. Within the limitation period, she never made any objections to the provisions for her or made further inquiries as to her rights under the *FLA*. Mr. Webster's estate planning left open a large window of opportunity to allow Mrs. Webster, through the *FLA*, to exercise her right to redistribute the wealth as of her statutory right. The**

> **window of opportunity closed when the limitation period passed. The extension would not benefit the marital partnership as intended by the *FLA*, but rather it would benefit the children of one of the partners.**
>
> 66 I find it would be unjust and contrary to the objectives of the *FLA* to use the extension provision to secure this result. Accordingly, I do not exercise my discretion and the motion is dismissed.

As both parties acted in good faith, no costs were ordered; 2007 CanLII 2216 (Ont. S.C.J.).