

Table of Contents

<i>Foreword</i>	v
<i>Preface</i>	vii
<i>Acknowledgement</i>	ix
<i>Editor & Contributing Editor</i>	xi
<i>Contributors</i>	xiii
Chapter 1: Property Rights and Obligations of Married People: The Equalization Provisions Under Part I of the Family Law Act (Sections 4 and 5) 1	
Introduction.....	1
The Equalization Payment Calculation and Section 4 of Part I of the FLA.....	2
Proper Inclusions, Exclusions and Deductions	4
Inclusions	4
Trust Interests	5
Pensions.....	8
Licences	9
Employment-Related Benefits.....	11
Exclusions	13
Gifts	14
Tracing Excluded Property	16
“Losing” the Exclusion.....	17
Deductions	18
Marriage Date Deductions.....	18
Debts and Other Liabilities	19
Proving Net Family Property	27
Onus of Proof.....	27
Standard of Proof.....	27
Unequal Division of Net Family Property and Alternatives to Address Unfairness.....	28
Unequal Division of Net Family Properties.....	28
Alternative Remedies to Seeking Relief under s. 5(6).....	31
Schedule “A” - Consideration by the Court of Proper Inclusions	34
Schedule “B” - Consideration by the Court of Proper Exclusions.....	53
Schedule “C” - Consideration by the Court of Proper Deductions.....	71

Property Rights and Obligations

Schedule “D” - Treatment by the Court of Notional Disposition Costs in the Calculation of Net Family Property Since the 1994 Ontario Court of Appeal Decision in Sengmueller	92
Chapter 2: Estates Issues Relating to Ontario Family Law	
Property Rights and Obligations	131
Introduction.....	131
Recourse for Surviving Spouses Under the Family Law Act.....	132
Family Law Act Elections - Sections 5 and 6 of Part I of the FLA	132
FLA Elections: Key Concepts	132
The Impact of Elder Law Issues on Traditional Family Law Principles	136
Recent Amendments to the Family Law Act.....	137
Who Can Make the Election?.....	139
The Deadline to Elect, Restrictions on Administration and Timing Issues	139
Appropriate Notice of Election: The Commencement of an Application	142
The Family Law Act Election - Making the Right Choice	143
Revocation of an Election.....	144
Bars to Electing	146
Ancillary to Property Relief: Spousal Support Under Part III of the Family Law Act, An Obligation That Survives Death?	147
An Order for Support Binds the Estate.....	147
The Impact of Remarriages, Competing Spousal Support Claims and Death on Existing Support Obligations	148
Domestic Contracts Made Pursuant to Part IV of the FLA	149
A Note on Separation Agreements and Waivers of Rights.....	149
Setting Aside a Domestic Contract.....	151
Recourse for Surviving Spouses Under the SLRA.....	153
Defendant Support Claims under the SLRA.....	153
General	153
Who Can Make an SLRA Claim?	154
Who is a “Spouse” for Purposes of the SLRA?	154
Failure to Make Adequate Provision.....	156
The Deadline to Bring a Claim.....	159
Interim Support.....	160
The Support Award	161
Domestic Contracts and the SLRA.....	162

Table of Contents

Separation Agreement - Contains Full and Final Release of Support.....	163
Separation Agreement - Contains a Provision for Support	164
Marriage and Cohabitation Agreements.....	165
Conclusion.....	165
Section 44 of the SLRA and the Impact of Remarriage or Common Law Arrangements on Prior Wills	165
Common Law Property and Other Remedies.....	169
Claims for Resulting Trust, Unjust Enrichment and Constructive Trust and New Developments in the Law as a Result of Kerr v. Baranow; Vanasse v. Seguin.....	169
Resulting Trusts	170
Unjust Enrichment and the Remedial Constructive Trust.....	172
Application to Vanasse v. Seguin	178
Application to Kerr v. Baranow	179
Claims for Quantum Meruit.....	180
Spousal Claims for Proprietary Estoppel	184
Conclusion	187
Chapter 3: Property Rights and Obligations: Practice Issues (Sections 7 and 8 of the Family Law Act and Rules Related to Disclosure in All Property Applications).....	189
Introduction.....	189
Disclosure Obligations in Family Law Proceedings	190
Disclosure Gathering Process.....	192
Rule 19 - Affidavit Listing Documents	192
Documents in Non-Parties Control	194
Rule 22 - Request to Admit.....	198
Financial Statements	201
Lawyer's Obligations and Financial Statements	203
Disclosure and Domestic Contracts	205
Financial Disclosure Requirement under Section 56(4)(a)	206
Valuation Issues	209
The Obligation to Value Assets	209
Valuation Date.....	210
Interim Disbursements	211
Valuing Business Assets.....	213
What is a Chartered Business Valuator?.....	213

Property Rights and Obligations

When to Retain a Chartered Business Valuator	213
Selecting an Expert	214
The Retainer Process: Checklist.....	214
Maintaining the Expert’s “Independence”	215
Issues Requiring Expert Assistance.....	216
Valuation Methodologies	216
Other Assets Requiring Valuations by Experts	217
Pensions.....	217
Real Estate.....	217
Other Property	219
Export Reports	219
Rule 53.03.....	219
Expert’s Disclosure Obligations	219
Service of Expert Reports.....	222
Expert Qualifications.....	222
Number of Experts	223
Time for Service of Expert Reports	223
Qualifying the Expert	223
Fact versus Opinion Evidence	224
Admission of Expert Evidence.....	224
Examination-in-Chief.....	225
Cross-Examining the Expert	225
Reply.....	226
Sanctions For Non-Disclosure.....	227
Non-Compliance with Court Orders.....	228
Failure to File Financial Information	231
Failure to Follow Rule or Obey Order Regarding	
Documentary Disclosure	235
Striking Pleadings for Non-Disclosure.....	237
Reinstatement of Pleadings	239
Motions for Contempt for Non-Disclosure	240
Test for a Finding of Contempt.....	241
Orders Subject to Contempt.....	242
Requirements	243
Sanctions	245
Chapter 4: Property Rights and Obligations of Married People: The Ancillary To Equalization Provisions Under Part I of the Family Law Act (Sections 9 to 15)	249

Table of Contents

Introduction.....	249
Section 9	249
General.....	249
Section 9(1).....	251
Section 9(1)(a).....	251
Section 9(1)(b).....	251
Section 9(1)(c)	252
Sections 9(1)(d)(i) and (ii).....	253
Section 9(1)(d) is Not a Redistribution of Property Provision	253
Evidence of Past or Future Mala Fides Required	254
Not Meant to Satisfy Lump Sum Support	255
Section 9(1)(d) and Bankruptcy.....	255
A Word on Pensions.....	258
Other Considerations.....	258
Section 9(2).....	259
Section 9(3).....	259
Section 10	260
General.....	260
Section 10(1)(a): Declarations of Ownership and Possession	260
Possession	260
Ownership.....	260
Constructive Trusts	261
Unjust Enrichment	261
The Remedies.....	262
Quantifying the Monetary Remedy	263
Some Interesting Post Kerr v. Baranow Decisions.....	264
Section 10(1)(b): Compensation After the Sale of a Property	265
Section 10(1)(c): Partition and Sale	265
General.....	265
The Interaction of the Partition Act and the Family Law Act	265
Sale Under the Partition Act	266
Sale Under Section 10(1)(c).....	268
Interim Sale.....	268
Sale to Spouse/Right of First Refusal	269
Section 10(1)(d)	271
Section 11	271
General.....	271
Jointly Owned Farms/Businesses.....	272

Property Rights and Obligations

The Alternatives Set Out in Section 11(2)	274
Section 11(2)(a)	275
Section 11(2)(b)	275
Examples of When a Sale is Ordered	276
Examples of When a Sale is Refused.....	277
Section 12	277
The Purpose and Effect of a Section 12 Preservation Order	278
Considerations When Asking A Court to Order A Preservation Order.....	279
The Level of Evidence Required to Be Successful at Obtaining a Preservation Order.....	281
The Effect of a Section 12 Preservation Order on Third Parties.....	282
Section 12 Affects Assets Outside of the Jurisdiction as a Result of In Personam Jurisdiction	282
A Section 12 Preservation Order Is Not A Mareva Injunction	283
Mareva Injunctions	283
Section 13	284
Section 14	285
General.....	285
Exceptions	287
Onus or Burden of Proof.....	287
To Avoid or Defeat Creditors.....	288
Estate Planning	289
Section 15	290

Chapter 5: The Development of Property Rights and Obligations for Cohabitants

Preamble	295
Introduction.....	295
“Common Intention” Resulting Trusts and Constructive Trusts	296
Common Law Couples, Unjust Enrichment and Constructive Trusts	300
The Constructive Trust as a Proprietary Remedy.....	304
The Current Law of Unjust Enrichment: Kerr v. Baranow.....	310
Issue 1: Resulting Trusts No Longer Have a Role	310
Issue 2: Unjust Enrichment and Monetary Remedies	311
Monetary Awards	312
Quantum Meruit	312
A New Approach to the Monetary Remedy: Joint Family Ventures.....	313

Table of Contents

(1) Mutual Effort.....	314
(2) Economic Integration	314
(3) Actual Intent	315
(4) Priority of the Family	315
Proprietary Awards: Constructive Trust	316
Issue 3: Mutual Benefit Conferral	316
Issue 4: Reasonable or Legitimate Expectations	317
The Vanasse Appeal and the Kerr Appeal	318
The Vanasse Appeal	318
The Kerr Appeal	319
The Steps for Establishing Unjust Enrichment in Family Cases.....	320
Step One: Establish Unjust Enrichment	320
Step Two: Determine the Appropriate Remedy	321
Jurisprudence Following Kerr	322
Post-Kerr Cases on Unjust Enrichment	322
Post-Kerr Cases on Unjust Enrichment and a Joint Family Venture.....	325
Post-Kerr Cases on Mutual Benefit Conferral	334
Presumption of Resulting Trust	336
The Presumption of Resulting Trust and the Presumption of Advancement	336
The Applicability of the Presumption of Advancement	337
Possessory Rights of the Home.....	338
Family Home is Owned by One Party	338
Exclusive Possession as an Incident of Spousal Support	339
Claims for an Interest in the Home.....	340
Domestic Violence	341
Family Home is a Rental Property.....	343
Canada Pension Plan: Credit Splitting	346
Property Rights Upon Death.....	347
Constitutional Challenges.....	348
Property Division for Heterosexual Unmarried Cohabitants.....	348
Chapter 6: Tax Principles Arising From Property Rights and Obligations Under Family Law	357
Introduction.....	357
Matrimonial Property: Family Law	357
Schedule 1: Examples of Matrimonial Property	357
Types of Property - The Income Tax Act.....	360
Schedule 2: Types of Property Referred to in the Income Tax Act	360

Property Rights and Obligations

The Basic Taxation of Property	362
Schedule 3: Examples of Matrimonial Property Classified by (Usual) Income Tax Act Property Type	362
Schedule 4: Basic Taxation of Property - Basic Tax Calculations	364
The Basic Taxation of Non-Depreciable Capital Property	364
The Basic Taxation of Depreciable Capital Property	366
The Basic Taxation of Personal-Use Property and Listed Personal Property	367
The Tax Implications of Transferring Property Between Married, Separated and Former Spouse (and Common Law Partner).....	368
Tax Definition of Married, Separated and Former Spouse (and Common-Law Partner)	369
Tax Effects of Using the Section 73(1) Tax-Free Rollover and Electing Out of the Section 73(1) Tax-Free Rollover	370
Automatic Tax-Free Rollover between Spouses (and Common Law Partners) [Section 73(1) Rollover]	371
Section 73(1) Rollover - Qualification Criteria	372
Section 73(1) Rollover - Meaning of Capital Property	372
Section 73(1) Rollover - Mechanics	372
Election Not to Have the Section 73(1) Rollover Apply.....	372
Section 73(1) Rollover - Transfers to a Spousal Trust.....	373
Section 73(1) Rollover - Equalization Payment Transfers	373
Income and Capital Gains Attribution - Who Pays the Tax on Subsequent Income and Capital Gains?	374
Non-Residents	375
Transfers of U.S. Real Estate	375
Basic Tax Minimization Strategies.....	375
Schedule 8: Basic Tax Minimization Strategies	375
Tax Planning Opportunities.....	376
Matrimonial Home: Principal Residence Deduction	376
Capital Loss Utilization	376
Pensions: Tax Free Transfers	378
Registered Retirement Savings Plan (“RRSP”)	378
Registered Retirement Income Fund (“RRIF”)	379
Registered Pension Plan (“RPP”)	379
Locked-in Retirement Account (“LIRA”)	380
RRSP Contribution Room: Lump Sum Payments.....	381
Spousal RRSP Withdrawals.....	381
Registered Education Savings Plan (“RESP”)	381
Capital Gains Exemptions	381

Table of Contents

Small Business Corporation Capital Gains Exemption.....	381
General Capital Gains Exemption.....	382
Tax Free Savings Accounts (“TSFA”)	382
Canada Pension Plan (“CPP”): Pension Splitting.....	383
Private Corporation, Partnership, Proprietorship and Trust Interests.....	383
Other Considerations	384
Life Insurance	384
Release of Marital Support Rights.....	385
Joint and Several Tax Liabilities.....	385
Deductibility of Legal Fees	386
Deductibility of Financing Interest	386
Appendix A: IT325R2 Property Transfers After Divorce and Annulment	387
Appendix B: Joint Election Under Paragraph 74.5(3)(b) of the Income Tax Act	398
Appendix C: Transfer from an RRSP or RRIF to Another RRSP or RRIF on Breakdown of Marriage or Common-Law Partnership	399
Appendix D: Direct Transfer of a Single Amount Under Subsection 147(19) or Section 147.3	401
Appendix E: Definition of Fair Market Value.....	406
 Chapter 7: Insolvency Law Related to Ontario Family Law	
Property Rights and Obligations	407
Introduction.....	407
Overview of Insolvency Law.....	408
Bankruptcy and Insolvency Act.....	408
Purposes of Insolvency Law	409
The BIA is a “Businessman’s Statute”	409
Consumer Aspects of Insolvency Regime	410
Statutory Framework Relevant to Personal Insolvency	411
Ancillary Provincial Legislation	411
The Personal Property Security Act (the “PPSA”)......	411
The Execution Act.....	412
Creditors Relief Act, 2010 (the “CRA”)......	413
The Mortgages Act.....	414
Administrative Officials in a Bankruptcy	416
Trustee in Bankruptcy	416
Superintendent of Bankruptcy	417
Registrar in Bankruptcy.....	418

Property Rights and Obligations

Inspectors	419
National Insolvency Jurisdiction of the Courts.....	419
How Does Bankruptcy Occur?	420
Voluntary Assignment.....	420
Application for Bankruptcy Order.....	420
Failed Proposal.....	421
The Debtor is Now Bankrupt: What Happens Next?	421
Meetings of Creditors	422
Voting on Bankruptcy Matters.....	422
Proofs of Claim	423
Specific Aspects of Insolvency Law Affecting Property Rights and Obligations Pursuant to Ontario Family Law.....	423
General Rule Regarding Vesting of Property on Bankruptcy.....	423
Support Claims Vis-a-vis Equalization Claims: When Is a Claim Provable in Bankruptcy Not a Claim Provable in Bankruptcy?	424
The Implications of Holding a Claim Provable In Bankruptcy	425
The Stay	425
The Release.....	425
Preferred Status of Support Arrears.....	427
Effect of Section 69.41	427
Using Section 68 Garnishment Proceedings in Matrimonial Proceedings.....	428
Release of Equalization Claims.....	430
The Timing of the Bankruptcy in Relation to the Date of Separation	438
Alternative Suggestions for Dealing with Equalization Claims	439
Can Separation Agreements Be Used to Defeat the Priority of the Trustee in Bankruptcy?.....	440
Summary Re: Basics of the Interplay Between Bankruptcy Principles and Family Law Concepts.....	441
Effect of Insolvency on Specific Property.....	442
Matrimonial Home	442
Severance of Joint Tenancy	442
Application for Partition and Sale	443
Interest of Non-Bankrupt Spouse	445
Set Off	447
The Potential for the Application of Equitable Doctrines to Assist the Non-Bankrupt Spouse	449
The Equity of Exoneration.....	449
Equitable Charge	451

Table of Contents

Equitable Accounting	452
Estoppel	453
Rights to Personal Property.....	455
Chattels	455
Interest in an Equalization Payment	456
Interest in Support Payments	459
Registered Retirement Savings Plans (“RRSPs”), Registered Retirement Income Funds (RRIF’s) and Pensions	460
Registered Educational Savings Plans (“RESPs”).....	462
Special Considerations Regarding Pensions	462
The Effect of the Family Orders and Agreements Enforcement Assistance Act (the “FOAEAA”).....	466
Annulment of the Bankruptcy	466
Costs of Family Law Proceedings.....	468
Conclusion Re: Costs.....	473
Trust Claims	473
Express Trusts.....	473
Certainty of Intent.....	474
Certainty of Subject Matter	474
Certainty of Object	474
Resulting Trusts	475
Constructive Trust	477
The Concept of “Joint Family Venture”	479
Conclusion	481

Chapter 8: Planning: Family Property Protection Techniques Under Ontario Family Law **483**

Introduction.....	483
The Domestic Contract	483
Enforceability of Domestic Contracts	485
Independent Legal Advice	485
Financial Disclosure	486
Fairness	487
Property Models	489
Complete Release of all Property Claims under the FLA and/or Complete Release of all Common Law Trust Claims (Also referred to as “Separate as to Property”)	489
Graduated Equalization Scheme	489
Exclusion of Certain Assets or Categories of Assets	490
Exclusion of Marriage-Date Assets and Future Growth	490

Property Rights and Obligations

Additional Provisions to Consider	490
Compensation for a Release of an Equalization Payment	490
Dispute Resolution.....	490
Exclusion of Certain Assets from Satisfying an Equalization Entitlement or Other Property Claim	491
Establishing a Formula for the Valuation of Certain Assets	492
Asset-Specific Provisions	493
Intergenerational Gifts or Bequests.....	494
Gifts to Children	494
Request a Particular Use.....	495
Loans.....	495
Other Alternatives	496
Recommended Formalities and Record Keeping of Gifts.....	496
Purchasing Property with Excluded Property	497
Trusts	498
Transfer into Joint Ownership	498
Protection Techniques Specific to Business Interests.....	499
The Shareholders Agreement	499
The Spouse as a Party to the Agreement	499
Buyout Provisions	500
Funding the Buyout.....	502
Other Possible Provisions for the Shareholders Agreement.....	503
The Articles of Incorporation.....	504
The Relationship between the Domestic Contract and Shareholders Agreement	504
Estate Freezes	505
The Net Family Property Estate Freeze	506
The Net Family Property Estate Freeze Plus.....	507
Control Issues	509
Giving Children the Option to Purchase Shares in Certain Circumstances.....	509
Improvident Depletion and Unconscionability Issues.....	510
General.....	510
<i>Index.....</i>	513