



# Focus On



## TRUSTS & ESTATES LAW

# Few links between family, estates bars

## Despite obvious connections, two areas operate separately

BY JULIUS MELNITZER  
For Law Times

The intersection of family and estates law is long and wide, especially with the advent of the modern blended or extended household. Unfortunately, the same doesn't apply to the respective bars.

"Family law issues arise constantly in my estates practice," says Suzana Popovic-Montag, managing partner of Toronto's Hull & Hull LLP. "But there's a clear line between the family bar and the estates bar so that the estates bar isn't always aware of the everyday nuances of family law legislation and practice, nor is the family bar exposed to the nuances of estate practice on a regular basis."

In fact, the two bars often approach their clients' interests from very different perspectives. "Family law practitioners think of the marriage contracts and cohabitation agreements they draft as bulletproof, while we see them as possibly penetrable," says Popovic-Montag. However that may be, there's no question that family law considerations inform estate planning. For example, lawyers preparing an estate plan for a parent will have different considerations depending on whether a child is in a first or subsequent marriage.

"If the planning involves offspring who are older and have estates of their own, the general feeling is that they're wiser and don't have the same naïveté as younger people," says Howard Carr of Fasken Martineau DuMoulin LLP. "Younger people have a different thought process, which is not necessarily wrong but which is engaged by the magic of dating and engagement and the events leading up to marriage and which they don't want negated and destroyed by what they see as the vulgar commercial considerations that inform family law."

Parents frequently want to provide



There's 'a paucity of jurisprudence' on certain family law aspects of trusts and estates matters, says Howard Carr.

protection over the assets the child will inherit. But that's easier said than done, largely because of the anomalies that permeate the Family Law Act.

"For example, a gift prior to marriage is treated differently than a gift during the marriage, and the gap gets even more absurd in the case of a matrimonial home replaced during the course of a marriage," says Carr. "These are things that probably were not envisaged by the authors of the original legislation."

Sometimes, parents make a distribution based on a condition that a child enter into a marriage contract. "I don't know of any case law that suggests such a condition might be invalid, but there is a paucity of jurisprudence on the subject," says Carr. "My view is that it may be inappropriate, but that doesn't necessarily make it invalid."

that she could stay in the home and he would provide for her in his will. He also told her his investments were worth between \$500,000 and \$600,000.

After her husband's death, Iasenza obtained legal advice that led her to elect under the Family Law Act in August 2004. Soon after, she began the support application. Afterward, she discovered that the estate was considerably larger than what she and her counsel believed, meaning that she had been financially prejudiced by her election.

Justice Charles Hackland of the Ontario Superior Court, after noting the conflicting authorities on the issue of revocation and the fact that clear injustice had resulted from the election in this case, decided he had residual jurisdiction to authorize a revocation and that the following questions were relevant to the exercise of the court's discretion:

- Was the election, filed as a result of a material mistake of fact and law, made in good faith?
- Did the applicant have any culpability in relation to the choice made?
- Was the notice of intent to seek revocation timely bearing in mind the six-month limitation for making the election?
- Had the estate been distributed or would interested parties otherwise be prejudiced by a revocation?
- Did the election result in an injustice to the surviving spouse?

The estate bar welcomed the decision.

"The court addressed what had been an almost unresolvable problem for the estate bar and gave some guidance as to when the court might revoke," says Popovic-Montag.

"However, there are still competing authorities at the same level, and as such, we should continue to act with great caution when making an election," she adds. **11**

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