FLA Spousal Elections & the Impact of *Iasenza v. Iasenza Estate*

by Justin de Vries[1]

As is widely known, the *Family Law Act*[2] ("**FLA**") allows a surviving spouse to elect to either receive benefit under the deceased's will (or on an intestacy if there is no will), or receive an equalization of net family property under the FLA. Normally, the surviving spouse seeks information regarding each of the options and then elects for the greater benefit. An application for an equalization payment must be brought within six months of the first spouse's death, otherwise the surviving spouse is deemed to have chosen to take under the will.

Two relatively recent cases consider FLA spousal elections and deserve some scrutiny: *Iasenza v. Iasenza Estate*[3] and *Webster v. Webster Estate*[4]. Both cases are discussed below. However, given the time constraints that apply to speakers at the 2008 Law Society of Upper Canada's Six-Minute Estate Lawyer, my oral presentation focused on *Iasenza v. Iasenza Estate* alone.

Iasenza v. Iasenza Estate

In *Iasenza v. Iasenza Estate*, Melinda Iasenza ("**Mrs. Iasenza**") brought an application to set aside a spousal election she made under section 6(1) of the FLA requiring equalization of net family properties between herself and her late husband, Joseph Iasenza ("**Mr. Iasenza**"). In considering Mrs. Iasenza's application, the court noted that there were conflicting authorities as to whether the court had a residual discretion to set aside a section 6(1) election to avoid an injustice or whether such an election was irrevocable.

The facts are fairly straight-forward, but make for compelling reading: Mrs. Iasenza came to Canada in 1990 from the Philippines. Her ability to speak and understand English was limited. Mrs. Iasenza initially worked in the Belleville area as a nanny and then in a donut outlet. Mrs. Iasenza became a Canadian citizen in 1995. She and Mr. Iasenza met and dated for about a year and began to live together in Mr. Iasenza's home in 1995. He was divorced and she had never married. The couple eventually got married in May of 2000. While Mr. Iasenza had two adult sons, Michael and Paul, the court happily noted that "[e]veryone got along during the marriage".

Unfortunately, tragedy struck, as Mr. Iasenza was diagnosed with brain cancer in November 2002. He died approximately one year later. Mrs. Iasenza did not work during her husband's illness, but committed her time and energy to looking after Mr. Iasenza; she was a devoted and caring wife.

According to the evidence, Mr. and Mrs. Iasenza seldom spoke of finances, although Mr. Iasenza told his wife that his investments totalled more than $500,000. Mr. Iasenza also assured his wife that he had made adequate provision for her in his will and that she could remain in the family home. In fact, Mr. Iasenza took Mrs. Iasenza to see his solicitor approximately six months before he died with a view to transferring title to the house to her or,

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[2] *Family Law Act*, R.S.O. 1990, c. F.3, as amended

[3] *Iasenza v. Iasenza Estate (2007)*, 34 E.T.R. (3d) 123 (Ont. S.C.J.)

[4] *Webster v. Webster Estate (2006)*, 25 E.T.R. (3d) 141 (Ont. S.C.J.); supplementary reasons (2007), 30 E.T.R. (3d) 165 (Ont. S.C.J.)

alternatively, to putting the house in their joint names. However, Mr. Iasenza's solicitor declined to act, as Mr. Iasenza's ability to communicate at this point was impaired.

When Mr. Iasenza died, Mrs. Iasenza retained a solicitor, Mr. Ross. Mr. Ross obtained a copy of the will and made inquiries as to what assets were in the estate. Mr. Iasenza's will divided the estate into three equal shares for Mrs. Iasenza and his two sons, one of whom was named as estate trustee. Mr. Ross became concerned that two major assets were not available for distribution under Mr. Iasenza's will, namely: a RBC Dominion Securities account worth approximately $202,000 and a $67,000 RRSP with the Bank of Nova Scotia. Both the RBC Dominion Securities account and the RRSP account had apparently been transferred to one of Mr. Iasenza's sons a few weeks before Mr. Iasenza's death pursuant to a power of attorney for property.

Mr. Ross sought assurances from the estate trustee that the RBC Dominion Securities Account and the RRSP account would be included as estate assets. When those assurances were not forthcoming, and given that the six month limitation period was rapidly approaching, Mr. Ross advised Mrs. Iasenza to file a spousal election, which she duly did. In her evidence, which the court accepted at trial, Mrs. Iasenza stated that she did not understand the issues surrounding a spousal election and consequently relied entirely on her lawyer's advice.

The estate ultimately determined that all of the assets would pass under the will. Mr. Iasenza's estate was worth about $612,000. However, by electing under the FLA, Mrs. Iasenza did not receive the one third share bequeathed to her under the will. Rather, based on the net family property calculations, Mrs. Iasenza owned the estate money, although the FLA does not require the surviving spouse to make such a payment.

In deciding whether the court had the jurisdiction to set aside the surviving spouses elections under section 6(1) of the FLA, the court characterized the situation as "a clear injustice". For the reasons set out below, the court ordered that Mrs. Iasenza's election be set aside.

After canvassing the conflicting decisions, the court held that it had the residual jurisdiction to revoke a spousal election under section 6(1) of the FLA. However, the court stated that such jurisdiction should be exercised in restrictive circumstances where (1) the interests of justice required it, and (2) where the balance of the interests of effected parties clearly warranted it. The court succinctly stated as follows:

> In exercising this discretion, the Court [sic] should have particular regard to the following:
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> (a) Was the election filed as a result of a material mistake of fact or law made in good faith?
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> (b) Was there any responsibility or culpability on the part of effected parties in relation to the election?
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> (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?

In setting aside Mrs. Iasenza's spousal election, the court noted that at the time the election was made there was a material misunderstanding or lack of knowledge as to what assets would form part of the estate. The court considered this a "mistake of fact". Furthermore, the court held that the estate trustees had to bear some of the responsibility. In this regard, the estate refused any commitment to include in the estate for distribution purposes the significant assets that had been transferred to Mr. Iasenza's son by way of the power of attorney. Moreover, Mrs. Iasenza's intention to challenge her spousal election was given in a "sufficiently timely way to avoid prejudice to the other beneficiaries". Furthermore, the estate had not yet been distributed. Finally, the court also commented favourably on the remedial nature of the FLA generally. According to the court, the FLA was designed to enlarge rights not restrict them.

Iasenza v. Iasenza Estate clearly stands for the proposition that the court has the residue jurisdiction to set aside a spousal election where warranted. In exercising its inherent jurisdiction, the court will want to avoid a "clear injustice". A surviving spouse now has a greater degree of flexibility to undo an innocent or inadvertent mistake. However, the court's decision also reminds all parties of the importance of timely disclosure when it comes to estate assets available for distribution. Indeed, timely and complete disclosure will help avoid an application made at some later date by a surviving spouse to set aside a section 6(1) election as a result of insufficient information originally circulated.

Webster v. Webster Estate

In *Webster v. Webster Estate*, Mrs. Webster did not file an election within the prescribed six months of her husband's death. This meant that she could no longer elect to equalize their net family property. Mrs. Webster sought an order extending the time within which she could file an election to make an equalization claim from the estate of her deceased husband. The Ontario Superior Court of Justice considered limitation periods and a FLA spousal election.

The Webster family was well known in Montreal and the world of philanthropy. Mr. & Mrs Webster were married for 29 years. It was a second marriage for both parties. Mrs. Webster was a devoted wife. The Websters gave generously to their community. They lived happily ever after until Mr. Webster's death on October 11, 2003. Mr. Webster was 87 years old when he died. Mrs. Webster was then 81 years old.

Mr. Webster's estate was valued at around $24 million. Mrs. Webster was provided for under the terms of the Will, but the bulk of the estate was left to the Eric T. Webster Foundation. Unfortunately, since the death of her husband, Mrs. Webster developed Alzheimer's disease, which had progressed to the point where she was unable to testify as a witness in the proceeding.

The will appointed four estate trustees or executors of the estate including Mrs. Webster and her son by her first marriage who was also Mrs. Webster's legal representative and the step-son of Mr. Webster.

Mrs. Webster did not file a spousal election within the prescribed six months. However, Mrs. Webster and her son both alleged that they were unaware of any right to elect to receive an equalization payment under the FLA in the six months following Mr. Webster's death. Mrs. Webster therefore sought an order extending the time within which she could file an election to make an equalization claim from the estate.

Unfortunately for Mrs. Webster, and her son who ultimately spearheaded the proceeding, they did not receive a sympathetic hearing from the court. According to the court, while there was evidence to suggest that Mrs. Webster was content with her benefits under the Will during the life of Mr. Webster, the court nevertheless recognized that she was completely free to change her mind and seek an equalization payment within the prescribed time.

Section 2(8) of the *Family Law Act* provides that the court may, on a motion, extend the prescribed time if it is satisfied that: (1) there are apparent grounds for relief; (2) relief is unavailable because of delay that has been incurred in good faith; and (3) no person will suffer substantial prejudice by reason of the delay.

While courts have generally been liberal in extending the time limit, especially where there is any sign of ongoing negotiation prior to the limitation period lapsing, the court stated that was not the situation here.

Mr. & Mrs. Webster had also signed a prenuptial agreement in Quebec in 1974. The agreement provided that Mrs. Webster and her husband would be separate as to property upon dissolution of the marriage by death. According to the court, however, the marriage contract did not bar the wife from an equalization claim because it did not expressly address election issues upon the death of one of the spouses (an important drafting point to take note of).

Mrs. Webster and her son alleged that they were initially unaware of any right to make an election for equalization of the net family property. Six months after the expiration of the limitation period, the son learned otherwise, consulted a lawyer, and an application was brought a further six months later. No explanation was offered for the delay incurred after Mrs. Webster's son became aware of the right to make an election for equalization. While the court recognized that Mrs. Webster might have been in a state of emotional upset and had much difficulty in dealing with Mr. Webster's death, it noted that the majority of surviving spouses would be in a similar state of grief. Moreover, the court held that there was an opportunity for Mrs. Webster and her son to obtain legal advice upon the death of Mr. Webster, which they did not do.

Given the above, Mrs. Webster did not meet the criteria for an extension of the prescribed time because the delay in filing an election was not incurred in good faith. The failure by Mrs. Webster and her son to make inquiries amounted to wilful blindness. There was no justifiable reason for not making such inquiries.

The court also held that Mrs. Webster's declining health during the delay substantially prejudiced the ability of the estate to defend the motion. The court also held that this was not a case that warranted an exercise of judicial discretion in Mrs. Webster's favour, due to the clear expression of Mr. Webster's intention to redistribute his wealth to charity. The court held that the FLA should not be used as a scheme to rewrite a will and redistribute wealth contrary to the testator's intension. Accordingly, the court declined to exercise its discretion and dismissed Mrs. Webster's motion.