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STATUS OF RELIGIOUS MARRIAGES IN ONTARIO LAW

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Eighty-five year old Harry, a widower, wants to marry seventy-five year old Esther, but his children object, fearing that a marriage would put his money at risk.[1] Esther refuses to live with Harry without being married. They compromise and agree not to obtain a marriage license or register the marriage, but instead to have only a ritual ceremony in a rabbi's office.[2] Harry dies and his Will leaves his assets to his children from his first marriage. Does the religious marriage ceremony alone give Esther any rights to Harry's estate?

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1. For a review of the different legal rights and responsibilities in marriage and common law spouses see "Legal rights and responsibilities in marriage, common law and same sex unions: part I" on the Ontario Medical Association website by Louise Christofolakos, of the Riverdale Law Centre in Toronto at <http://www.oma.org/pcomm/omr/apr/03docsbiz.htm>. I also suggest you see the November 2002 Department of Justice Discussion Paper <http://www.justice.gc.ca/eng/dept-min/pub/mar/index.html>, which suggests:

> [m]any of the legal consequences of marriage, including this range of benefits and obligations under federal, provincial and territorial law, may also be applicable to other committed partners, such as common-law couples. . . . Since the Charter came into force, a series of court decisions has held that most benefits and obligations available to married couples should be extended equally to other couples in a conjugal or marriage-like relationship . . .
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> In 2000, Parliament enacted the *Modernization of Benefits and Obligations Act*, extending benefits and obligations under 68 federal statutes to common-law opposite-sex and same-sex couples. As a result, the majority of the legal consequences of marriage in federal law now also apply to all couples in committed common-law relationships. Many of the benefits and obligations granted to married couples under provincial and territorial laws and programs are granted equally to common-law couples of the same sex and the opposite sex in the majority of provinces and territories.

2. It is beyond the scope of this paper to address whether a clergyman who performs such a ceremony has contravened s. 4 of the *Marriage Act*, R.S.O. 1990, c. M.3. To marry only before one's clergy and not in accordance with the *Marriage Act* so as to qualify for a widow's pension may very well constitute a fraud on a federal agency and invite sanction on all those who participate.

Esther's legal rights will depend on whether having only a religious ceremony meets the various definitions of marriage under Ontario legislation.[3] In Ontario, a Will is revoked by a marriage as defined by the relevant legislation.[4] If there is no Will, then the surviving spouse has certain inheritance rights.[5] Should one spouse die and his net family property be more than the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.[6] If Esther's ceremony is not considered a marriage then she does not have these rights under Ontario statute (apart from her entitlement as a dependant under the *Succession Law Reform Act* (*SLRA*)).

1. Definition of Spouse under the *Family Law Act*

As Harry made a lot of money during their marriage, his net family property was greater than Esther's at the time of his death. Would she receive an equalization payment under the *Family Law Act* (*FLA*)? Unfortunately for Esther, the Ontario Court of Appeal decision in *Debora v. Debora*[7] suggests that she would not be entitled to elect to take an equalization payment.

In *Debora v. Debora*, a couple was first married by a rabbi in a ritual religious ceremony and only later married in a civil ceremony. When they divorced, the wife would have been entitled to a larger equalization payment if the court accepted the proposition that a religious ceremony was a "marriage" under the *FLA*. The Court of Appeal rejected this premise.[8] It held that the start date of the

3. In Ontario, there are various statutes that define spouses differently in the context of the rights accorded to them. So for example, the person who might be considered a spouse in the context of a support application for dependant's relief under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (*SLRA*), would not be considered a spouse either under the laws of intestacy outlined by that legislation or the right to elect to take an equalization payment under the *Family Law Act*, R.S.O. 1990, c. F.3 (*FLA*).
4. See *Covone Estate (Re)* (1989), 36 E.T.R. 114, 18 A.C.W.S. (3d) 1199 (B.C.S.C.). The law in Quebec is different in that a testamentary document is not revoked by marriage. See s. 15 of the *SLRA*.
5. See Part II, ss. 44-49 of the *SLRA*.
6. See s. 5(2) of the *FLA*.
7. (1999), 167 D.L.R. (4th) 759, 116 O.A.C. 196, 43 R.F.L. (4th) 179 (C.A.). The husband in this case was initially concerned about the loss of his widow's pension. Another case that deals with this subject is *Harris v. Godkewitsch* (1983), 41 O.R. (2d) 779 (Prov. Ct.).
8. Section 4 of the *Marriage Act* provides that no marriage may be solemnized except under the authority of a licence issued pursuant to the Act. The definition of spouse found in s. 1(1) of the *FLA* defines a spouse as "either of two persons who, are married to each other, or have . . . entered into a

marriage was the date of the civil marriage - not the date of the earlier religious marriage.

Applying the Court of Appeal decision to our situation, Esther would not have rights under the *FLA* because having married only in a religious ceremony, she does not come within the definition of "spouse" under the *FLA*.

2. Was Harry's Will Revoked?

By virtue of the *SLRA*, a will is revoked by marriage.[9] Does Esther's ritual religious marriage alone revoke Harry's previous will?

I have found no case law on the issue, but the definition of "spouse" in the *FLA* and the *SLRA* are virtually identical. The policy issues are the same. If Ontario's Court of Appeal decided that a religious Jewish marriage alone would not qualify a spouse for property rights under the *FLA* in *Debora v. Debora*,[10] it is certainly arguable that a religious ceremony alone would not have the effect of revoking the couple's Wills. However, in my view, it would be a mistake to assume that it would never revoke the Wills.

Decisions often turn on the facts specific to them. The Court of Appeal decision turned on the fact that both husband and wife knew that the religious marriage they entered into was not a legal marriage in Ontario.[11] If Esther, in good faith, believed that her ritual marriage was being conducted pursuant to Ontario law and she lived with Harry as husband and wife, then it is arguable that the legislation would deem the union to be a valid marriage that would revoke the Will.[12]

The rights of the surviving spouse to elect under the *FLA* or take under the laws of intestacy would flow accordingly.

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marriage . . ., in good faith on the part of [the] person relying on this clause to assert any right." The wife suggested that she "in good faith" entered into what she believed was a real marriage. The Court of Appeal disagreed. They said that the good faith required by the wife was the intention to comply with the *Marriage Act*, meaning that to be a spouse, the person has to think he or she was complying with the solemnization process of Ontario's civil law.

9. *SLRA*, s. 15.
10. See discussion above of *Debora v. Debora* and *Harris v. Godkewitsch*; both *supra*, footnote 7.
11. *Supra*, footnote 7.
12. See s. 31 of the *Marriage Act*, *supra*, footnote 2, "[i]f the parties to a marriage solemnized in good faith and intended to be in compliance with this Act . . . and after such solemnization have lived together and cohabited as a married couple, such marriage shall be deemed a valid marriage".

3. Definition of Spouse under the *SLRA* — Is There An Intestacy?

When a person dies and he or she has no will then the person is said to die intestate. That means that the estate assets are distributed according to specific rules of inheritance set out by the Legislature.[13] If a spouse dies without a will, his or her spouse is entitled to a preferential share of the estate (the first $200,000) and one-third of the balance where there are two or more children.

If Harry had no will, Esther's entitlement to inherit under the laws of intestacy depends on whether she is a "spouse" as defined under the SLRA The definition is virtually the same as it is under the FLA. Given the Court of Appeal's decision in *Debora v. Debora*,[14] it is unlikely that a woman who married only in a religious ceremony would have the same rights under an intestacy as a person married under a civil ceremony unless the court found that she believed the marriage was being conducted in accordance with the laws in Ontario. A decision by the Supreme Court of Canada suggests that a court would not interfere if the decision to be married only by a rabbi and not according to Ontario law was based on the premise that the couples taking such action intended not to form an economic union with one another normally associated with a civil marriage.[15]

4. Definition of Spouse in the context of Support Rights and Common Law

Those who marry only in a religious ceremony may be entitled to spousal support as dependants under Part V of the*SLRA*[16] as long as

13. *SLRA*, Part II, Intestate Succession. In particular see ss. 44-45 and O.Reg. 54/95.
14. *Supra*, footnote 7.
15. See *Walsh v. Bona* (2002), 221 D.L.R. (4th) 1 *sub nom. Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 *sub nom. Nouvelle-Ecosse v. Walsh*, 210 N.S.R. (2d) 273. This case dealt with the issue of whether common law spouses or gay and lesbian couples should be entitled to the property rights under the *SLRA* when there are not legally married. Relevant to our discussion are the comments in paras. 54-56 where the court says, ". . . parties who, by marrying, must be presumed to have a mutual intention to enter into an economic partnership. Unmarried cohabitants, however, have not undertaken a similar unequivocal act. . . . In my view, people who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious choice of the parties."
16. Part V, s. 57 of the *SLRA* that defines a spouse as follows:
    "spouse" means a spouse as defined in subsection 1(1) and in addition includes either of two persons who,

they had lived together as man and wife continuously for a period of not less than three years. They would have the same rights as any other common law spouses. Under the legislation, the court would determine the appropriate amount of support by considering how Esther and Harry organized their relationship and her needs and circumstances.

5. Common Law Claims

Esther might have a claim against the estate on the basis of equity. Under these circumstances the court may impose a constructive trust on estate property if it believed that Esther deserved some of the property that Harry left to his children.[17] She would have to demonstrate that the estate has been unjustly enriched, that she suffered a corresponding loss and there was no juridical reason that the estate should receive such a benefit. For example, if Esther gave up her job to take care of Harry for the last five years of his life and she was not paid for her services, she could try to make the argument that if not for her sacrifice the estate would have had to institutionalize Harry at a cost of $60,000 per year. She may argue that she did more than could normally be expected from a wife and that she lost earnings comparable to the unjust enrichment of the estate. To compensate her, the court might either order the estate to make a payment to Esther or declare that the estate trustee in charge of Harry's estate was holding some of the property owned by the estate in a constructive trust for Esther.

6. Conclusion

The issues raised in this paper impact on many Canadian citizens who seek to solemnize their marriages outside the *Marriage Act*. To take such steps is a recipe for misunderstanding and an invitation to future litigation.

(a) were married to each other by a marriage that was terminated or declared a nullity, or

(b) are not married to each other and have cohabited,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

17. *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289, [1978] 2 S.C.R. 436, 1 E.T.R. 307; *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834, 8 E.T.R. 143; *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1, [1986] 2 S.C.R. 38, 23 E.T.R. 143; *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 48 E.T.R. 1.

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