BE TRIGGER HAPPY: KNOW WHEN TO OBTAIN A SECTION 57 DECLARATION UNDER THE BRITISH COLUMBIA *FAMILY RELATIONS ACT.**

Paper prepared by

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Introduction

To declare or not to declare - that is the question. Early in family law litigation involving property division, the question arises or should arise for most family lawyers: "Should my client obtain a section 57 declaration of no prospect of reconciliation?" The answer to this question has far-reaching and often delayed ramifications for the client and his or her property interests. In this paper, I intend to canvass the issues that family lawyers must address in arriving at an answer to this question, and to proffer strategies that the family lawyer can employ in an effort to protect the priority of the client's property interests over those of judgment creditors.

I. What is a section 57 declaration?

Section 57 of the *Family Relations Act* R.S.B.C. 1996, c. 128 says as follows:

> On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

A section 57 declaration is a "triggering event" under section 56 of the *Family Relations Act*. A triggering event can be one of 4 possible events and it is the first one of those 4 possible events that occurs prior to March 31, 1979. It can be:

a) a separation agreement[1];
b) a declaratory judgment under section 57;
c) an order for dissolution of marriage [divorce] or judicial separation; or
d) an order declaring the marriage null and void.

The effect of a triggering event has been the subject of much litigation. A spouse's entitlement to a share of the family assets arises on the occurrence of a triggering event. (See: *Staires v. Staires*, (1991) 34 RFL (3d) 376 in which Curtis J. reviewed the jurisprudence on the effect of a triggering event, and decided that at the time of the triggering event, the one-half interest to which the spouse is entitled is vested.[2]) Until the triggering event, whether that triggering event

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[1] "Separation agreement" is not defined in the *Family Relations Act*. An oral agreement to split assets equally can qualify as a "separation agreement" under the Act. (See: *Speed v. Speed* [1995] BCD.Civ. 1680-03 (BCSC) and *Re: Spoklie* (1996), 18 BCLR (3d) 229 (BCSC)). Because so much hinges on whether a triggering event has occurred, the family lawyer must do a thorough analysis of the facts to determine whether the client may have unwittingly entered into a separation agreement that will qualify as a triggering event.

[2] See also *Blackett v. Blackett* (1984) 40 B.C.L.R. (2d) 99 (BCCA) wherein Southin J.A. confirmed that section 56 (then 43) of the *Family Relations Act* gives the parties each an undivided one half interest in the actual asset, not just the value of the asset. This reasoning is consistent with Curtis J.'s ruling in *Staires*, *supra* that the spouse's interest is vested as of the date of the triggering event.

is a section 57 declaration, or any of the other possibilities in section 56, the interests of each spouse in the assets of the other are governed by title to those assets rather than by a statutory claim. While we all know as family lawyers that the title to the assets is not determinative of the eventual division of assets at trial, the title to the assets is important until the eventual division and transfer of assets at trial.

II. What does a section 57 declaration do?

A section 57 declaration does the following:

a) vests the spouse's respective one-half undivided interest in the family assets; (see above)

b) transforms property held in joint tenancy to tenancy in common: (*Biedler v. Biedler* (1983) 33 R.F.L (2d) 366 (BCSC).[3] The transformation of property from joint tenancy to tenancy in common has implications for the parties in the event of the death of one of the spouses.[4]

c) crystallizes the family asset pool for division such that assets acquired after that date will not be taken into consideration in the division of assets. (*Blackett v. Blackett* (1989) 63 DLR (4th) 18 (BCCA).

d) sets the date for valuation of the family assets for the purposes of a determination as to whether the assets should be re-apportioned in favour of one spouse or the other. [5]

III. Who can obtain a section 57 declaration?

Section 57 states that one or both spouses[6] may apply to the Court for the declaration. Only one spouse needs to provide sworn evidence that there is no prospect of reconciliation in an

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The decision in *Staires, supra*, was followed in a subsequent decision of Melnick J. in *Schiavon v. Schiavon* (1993) 22 C.P.C. (3d) 264; [1993] B.C.J. No. 2186, paras 10 & 12.

[3] In *Biedler v. Biedler, supra,* the Court determined whether Mrs. Biedler had a vested interest in the family assets owned by Mr. Biedler on the date of the bankruptcy. Mrs. Biedler had obtained a section 44 declaration (now section 57) prior to the date of the bankruptcy. Because the Court held that the triggering event gave rise to Mrs. Biedler's one-half interest in the family assets as a tenant in common, only Mr. Biedler's one-half interest that remained vested with him after the triggering event vested with the trustee on the date of the bankruptcy.

[4] See part (v)(e), infra.

[5] See: *Blackett, supra,* and §4.77 of the Continuing Legal Education Society, *Family Law Sourcebook,* (1999 Update) for a thorough discussion of the choice of valuation dates.

[6] Section (1)of the Family Relations Act defines "spouse" as follows:

"spouse" means a person who

(a) is married to another person.

(b) except under Parts 5 and 6 [the provisions in the Act dealing with property division and pension division], lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,

application before the Court[7] for a section 57 declaration. Both spouses need not be in agreement that there is no prospect of reconciliation for the court to make the declaration. Another individual who is not a spouse, for example, a creditor, may not obtain a section 57 declaration.

IV. When will the Court grant a section 57 declaration?

Since the wording of section 57 is permissive rather than mandatory, the Court does have discretion over whether to grant a section 57 declaration. Where the application for a declaration is opposed by the other party, the court will inquire into the possible prejudice to each party in granting or not granting the section 57 declaration.

In *Chancey v. Chancey* (1994) 94 BCLR (2d) 391(BCSC), Lamperson J. outlined the factors that the court should address when determining whether to grant a section 57 declaration where one is opposed. In *Chancey,* all of the family assets were in the name of the wife. The husband sought the section 57 (then 44) declaration. The wife raised the concern that because the husband was not working, he may incur debts that may place his interest in the property in jeopardy. With a section 57 declaration, the wife argued that each party was vested with a one-half undivided interest in the family assets. She alleged that the husband's one-half interest could then be attached by creditors, potentially rendering any re-apportionment application unenforceable. Without considering whether the section 57 declaration coupled with a certificate of pending litigation would circumvent the hypothetical creditors, Lamperson J. stated that the wife's concerns over prejudicing her assets may be valid and declined to grant the declaration.[8]

The court also declined to grant a section 57 declaration in *Mineault v. Mineault* (1996) [1996] B.C.J. No 212 (BCSC) where there was possible prejudice to the husband if a section 57 declaration was granted. The wife was commencing a tort action for medical malpractice. The husband argued that he would be precluded from relying on any significant financial recovery

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(c) applies for an order under this Act within 2 years of the making of an order
  (i) for dissolution of the person's marriage,
  (ii) for judicial separation, or
  (iii) declaring the person's marriage to be null and void, or
(d) is a former spouse for the purpose of proceedings to enforce or vary an order.

As is clear from the definition, the property division provisions in the *Family Relations Act* are not available to unmarried persons unless the unmarried persons have entered into an agreement pursuant to section 120.1 of the Act which permits unmarried persons, of different or the same genders, to, *inter alia,* opt into the property division provisions of the Act. The Definition of "spouse" in the *Family Relations Act*, has yet to be the subject of a constitutional challenge. As such, with the current state of the law, unmarried persons without the requisite agreement must resort to trust claims in order to obtain an interest in an asset to which they do not have title.

[7] The only court that has the jurisdiction to grant a section 57 declaration is the Supreme Court of British Columbia as the declaration deals with property which is outside of the jurisdiction conferred upon the Provincial Court: (see sections 5 and 6 of the *Family Relations Act*).

[8] *Antanen, infra*, makes it clear that the wife would be able to assert her priority over the judgment creditors provided that she obtained a s. 57 declaration and a certificate of pending litigation before registration of creditor's judgment.

that the wife may obtain from the tort action if the section 57 declaration were granted as it crystallized the family assets as of its date.

V. What are the factors to consider in deciding whether to obtain a section 57 declaration for the Client?[9]

What follows are some important issues to consider when deciding whether to obtain a section 57 declaration for the client. Usually, these issues do not arise independently of one another and must therefore be considered in conjunction with one another. The decision often involves balancing risks. Unfortunately, the family law practitioner often does not know and cannot predict the likelihood of any of the risk factors arising. Some of the risks are obviously difficult to predict: Will the other party die? Will the client die? Are creditors about to register judgments? Is the opposing party about to declare bankruptcy? Is the other party about to encumber or sell a chattel? The family lawyer must canvass these contingencies with the client in order to properly advise the client of the ramifications of the decision regarding the section 57 declaration.

A. Title of the Property

The title of the property held by the spouses is relevant to the determination of whether to seek a section 57 declaration, because the section 57 declaration will trigger the non-owning spouse's interest in the property. Title to the property is even more important an issue if the client anticipates that creditors will soon be obtaining judgments against the property. If the client owns the assets and is deeply into debt such that there are not enough assets to satisfy all creditors, it is not in the interests of the client to have a section 57 declaration as it will offer some protection to the opposing party's share of those same assets that could otherwise be used to satisfy judgment creditors. In this way, the client may be able to, in effect, use some of the opposing party's assets to pay off creditors.

B. Value of Assets Relative to Title to Assets

Since by obtaining a section 57 declaration, each spouse obtains an undivided half interest in the family assets held in the other spouse's name, it is important to consider which party holds title to the greater value of assets. If the client has the bulk of the assets in his or her name, bear in mind that the section 57 declaration triggers the non-owning spouse's interest which then may become eligible by the non-owning spouse's creditors. If the client does not have the major assets in his or her name, he or she may wish to stake his or her claim to the opposing party's assets by obtaining a section 57 declaration.[10]

C. Nature of the Assets

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[9] I will use the terms "section 57 declaration" and "triggering event" interchangeably as the effect is the same.
[10] See *Antanen, infra.*

Consider whether the parties' assets are in the form of real property, and easy to protect with a section 57 declaration and a certificate of pending litigation.[11] If the assets are not land, a section 57 declaration may do little to protect the asset from claims by third parties as a result of section 64 of the Family Relations Act.[12] If there is a pension, the triggering event is an important date, as it is the presumed date for determining entitlement to a pension.[13] Therefore, if the client holds the pension, he or she will want to obtain the section 57 declaration immediately so as to terminate the non-owning spouse's interest as of that date. Conversely, if the client is the non-owning spouse, he or she may wish to delay the triggering event so as to benefit from the post-separation contributions of the owning spouse until the trial date.

D. A Claim for Re-apportionment

If the client is either a joint tenant of real property or a non-owning spouse but wishes to advance a claim for a re-apportionment, in order to protect his or her claim for the re-apportionment vis-à-vis judgment creditors, a section 57 declaration must be obtained and a certificate of pending litigation must be registered against the title.[14] The Land Title Office will not register a client's certificate of pending litigation against property held in joint tenancy with that spouse unless the spouse claims either a reapportionment of the family assets, or an order vesting that same property to the claiming spouse in the Statement of Claim.

E. Impending Death

If a section 57 declaration has been obtained, an action may be continued by the executor or personal representative of the deceased. If a section 57 declaration has not been obtained (and no other "triggering event" has occurred prior to the death of one of the parties), the other party cannot proceed against the deceased for relief pursuant to PART 5 of the *Family Relations Act*.[15]

Consider as well the fact that on the date of the triggering event, the joint tenancy is severed. Once the joint tenancy is severed, the surviving spouse no longer takes the deceased spouse's interest in the joint asset. If the opposing party is about to die, and the assets are primarily held in joint tenancy, barring any compelling reason to obtain a section 57 declaration, it may be wise to avoid one so as to ensure that the client will retain the other spouse's portion of the family

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[11] The significance of obtaining the certificate of pending litigation is discussed, *infra* at Part VII

[12] Section 64 states as follows:

> (1) In this section "interest of a spouse" means the interest of a spouse arising under section 56, a marriage agreement or a separation agreement.
> (2) Section 29 of the *Land Title Act* applies to an interest of a spouse in land.
> (3) If, on the acquisition of property other than land, a person does not have actual notice of the interest of a spouse in the property, the interest is not enforceable against that person.
> (4) Despite subsections (2) and (3), the interest of a spouse is enforceable against the other spouse from the date the interest comes into being.

[13] The Regulation to Part 6 of the *Family Relations Act* defines the "entitlement date" to the pension as the first triggering event, or another date fair in the circumstances, agreed to by the parties, or ordered by the court.

[14] A full discussion of the impact of a section 57 declaration, a certificate of pending litigation, section 31of the *Land Title Act*, and sections 56 and 65 of the Family Relations Act is discussed *infra* at Part VI and VII.

[15] See p. 13-6 of the Continuing Legal Education Society, *Family Law Sourcebook* (1999 Update) for a thorough review of the impact of death in matters relating to division of property.

assets held in joint tenancy, free from any testamentary bequests. However, if the opposing party is about to die and the assets are held in that party's name alone, a section 57 declaration will enable the surviving spouse (the client) to pursue his or her claims to the family assets.

F. Impending Bankruptcy

Upon bankruptcy, the only assets of the bankrupt that can vest in the trustee for bankruptcy are those that are vested in the bankrupt. Therefore, if the opposing party has sole title to the matrimonial home and may soon declare bankruptcy, the client will want to obtain a section 57 declaration so as to ensure that one half of the assets vest with the client prior to the bankruptcy. The net result is that only one half of the family assets vest with the trustee, as opposed to all of the assets in the bankrupt's name. If the client fails to obtain a section 57 declaration prior to the bankruptcy and the bankrupt has sole title to the matrimonial home, the entire matrimonial home will vest with the trustee in bankruptcy. Pursuant to section 67 of the *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B - 3, property held in trust by the bankrupt for another will not form part of the estate.[16]

G. Income Tax Liability

While the family law practitioner cannot be expected to be an income tax specialist, we are at least expected to know when the tax consequences of a particular decision require the involvement of a tax lawyer. As a section 57 declaration vests each party with an undivided one-half interest as a tenant in common in the family assets, the author submits that there would be a deemed transfer of one half of the property owned in the name of one spouse to the other.[17] If there is a deemed transfer of one half of the property owned by the owning spouse to the other, this may trigger tax consequences such as capital gains and perhaps a change in the tax liability for income earned from the property. While some transfers of property between spouses are tax-deferred transfers, not all transfers of property between spouses are tax deferred in all circumstances.[18] If the case involves valuable assets, assets that have significantly appreciated in value, or income-producing assets, the family law practitioner may wish to seek the advice of a tax specialist when deciding whether to obtain a section 57 declaration.

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[16] In *CIBC v. Croteau* (1985), 47 RFL (2d) 45 (Ont. S.C.), the husband had sole title to the matrimonial home. He declared bankruptcy and the wife was able to secure her one-half interest in the matrimonial home by establishing a resulting trust in her favour. See PART VIII, *infra*, for a discussion of the case law on the competing interests of the spouse and the trustee in bankruptcy. See PART IX, *infra*, for a discussion of the possible use of trusts to protect a client's property interest.

[17] The author credits Daniel S. Barbour, C.A., C.B.V., with Barbour, Young & Associates, Chartered Accountants, in Vancouver, British Columbia, for having brought the tax consequences to her attention, and for providing her with a detailed analysis of the tax consequences. See section 73(1) and 73(1.1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp) regarding the effect of an order that "vests" property in another person (73(1.1)) and regarding the tax-deferred transfer of capital assets between spouses (s. 73(1)).

[18] For example, if one spouse is a non-resident, or if the property is not "capital property" within the meaning of the *Income Tax Act*.

VI. How does a "triggering event" affect the client's position with registered judgment creditors?

There are a number of cases that address the issue of the competing claims of a spouse and a registered judgment creditor. The cases have all dealt with judgments registered against land and a married spouse's claims to either a one-half interest in the land, or a re-apportionment. The issue is one of priority or claims. What follows is a review of the case law and the emergence of principles which emphasize the critical roles that the triggering event and certificate of pending litigation play in the security of the client's property interest. If the reader bears in mind that ubiquitous latin maxim, "*nemo dat quod non habet*", the reasoning in the case law is clear, consistent and compelling. To summarize, without a triggering event, a client cannot even begin to assert priority over a creditor's registered judgment.

The first in a series of important cases on the issue of competing claims of creditors and spouses is *Malhotra v. Malhotra et al* (1983), 49 BCLR 8 (BCCA) [hereinafter "*Malhotra*"]. In *Malhotra*, the parties owned, *inter alia,* the matrimonial home in joint tenancy. The wife did not:

a) obtain a declaration pursuant to section 57 of the *Family Relations Act* (then section 44);
b) obtain any other triggering event until the trial; or
c) obtain and register a certificate of pending litigation against the matrimonial home.

One year before the trial, and therefore, one year before the triggering event, a judgment creditor registered a judgment against the husband's interest in the matrimonial home. At the trial, the wife applied for a reapportionment of the matrimonial home in her favour and sought to take the husband's interest free of any claim by the judgment creditor. In other words, the wife sought priority of her claim to a reapportionment over the judgement creditor's interest. Mr. Justice Macfarlane stated the following:

> Her husband's interest was subject to the judgment registered on 31st July 1981. The granting of a decree nisi on 7th May 1982 did not alter that situation nor could the order of 19th November 1982. In reapportioning the family assets under s. 51 [now 65], the court can only deal with the spouse's equity in those assets. The order made under s. 51 cannot ignore registered charges against the real estate. The court may order that the encumbrances be discharged out of other assets belonging to the spouses, but it cannot divest the holder of a registered charge of his legal interest....
> In this case the wife could not acquire, by vesting order or otherwise, an interest greater than that which her husband held at the date of the registration of the order. The interest of the husband was subject to the judgments registered against him in the Land Title Office. Any interest of the husband vested in the wife must be subject to those judgments.[19]

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[19] *Malhotra, supra*, p. 315.

The Court of Appeal's decision in *Malhotra*, is consistent with the effect of the triggering event as discussed above. It is the triggering event that establishes a spouse's claim to a reapportionment as the spouse's undivided one-half interest in the family assets triggered on that date is subject to a reapportionment under section 65.[20] Without a vested interest prior to the date the judgment creditor filed the judgment, the wife had no greater priority than the judgment creditor.

In the second important case in the series, *Maroukis v. Maroukis* (1984), [1984] 2 SCR 137 (SCC) [hereinafter "*Maroukis*"], the Supreme Court of Canada ruled on a case from the Ontario Court of Appeal involving the Ontario *Family Law Reform Act* R.S.O 1980, c. 152 and in particular, section 4 of that Act. In *Maroukis*, the parties held the title to the matrimonial home in joint tenancy. In 1978, the wife applied for an order for a division of family assets. Before an order was made dividing the assets, executions were filed against the husband's interest in the matrimonial home. There is no provision in the Ontario *Family Law Reform Act* for the equivalent of a "triggering event" that has the same impact as it has under the *Family Relations Act* in British Columbia. Sections 4(1) and (2) of Ontario *Family Law Reform Act*, read as follows:

> 4 (1) Subject to subsection (4), where a decree nisi of divorce is pronounced or a marriage is declared a nullity or where the spouses are separated and there is no reasonable prospect of resumption of cohabitation, each spouse is entitled to have the family assets divided in equal shares notwithstanding the ownership of the assets by the spouses as determinable for other purposes and notwithstanding any order under section 7.
>
> (2) The court may, upon the application of a person who is the spouse of another, determine any matter respecting the division of family assets between them.

The Court decided that section 4 of the Ontario *Family Law Reform Act* only entitles the spouse to apply for a division of assets; it does not vest any specific property interest in the spouse. Unlike in British Columbia, the vesting does not take place until the date on which the court order is made dividing the assets. All "triggering events" do under the Ontario regime is invoke the right of each spouse to require the court to determine the ownership of family assets. Accordingly, without the benefit of an order vesting her interest in her husband's share of the matrimonial home pronounced before the creditor's registered their judgments against the husband's interest, the wife was only able to take the reapportionment subject to the registered judgments. In other words, the creditors took priority over the wife's claim to a reapportionment. Since the Ontario *Family Law Reform Act* does not immediately confer a property right, but rather simply entitles the spouse to make an application to the Court for a determination of the division of assets, the decision in *Maroukis* is consistent with British Columbia jurisprudence. The *Maroukis* case has been distinguished in subsequent B.C. cases on the ground that it addressed an entirely different statute with entirely different provisions.

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[20] Section 56 in essence says that each party is entitled to an undivided half interest in the family assets as a tenant in common, upon a triggering event, subject to Parts 5 and 6 of the *Family Relations Act*, which parts include section 65, the reapportionment section. Prior to the triggering event, the spouse's undivided half interest in the family assets or claim to a reapportionment is inchoate.

VII. The Critical Ingredient - A Certificate of Pending Litigation

A certificate of pending litigation plays a critical role in establishing a client's priority over registered judgment creditors. *Whittall v. Whittall* (1987), 19 BCLR (2d) 202 (BCSC) is a B.C. case in which the wife claimed a reapportionment of family assets in her favour, and in particular, of the matrimonial home of which Mr. Whittall was the sole registered owner. Mrs. Whittall had obtained a decree *nisi* for divorce on September 30, 1986. She had previously registered a certificate of pending litigation on the title to the matrimonial home on March 9, 1983. Mrs. Whittall had not obtained a section 57 declaration, and as such, the decree *nisi* for divorce served as the triggering event. Two judgments against the husband for non payment of income tax were registered against title in 1987 after Mrs. Whittall had obtained her triggering event and after she had registered her *lis pendens*. The question for Prowse J. (as she then was) was the extent to which the judgments registered against the home interfered with Mrs. Whittall's interest in the home under ss. 43 and 51 (now 56 and 65) of the *Family Relations Act*.

Counsel for Mrs. Whittall argued that the combined effect of section 31 of the *Land Title Act*, RSBC 1996, c. 250 and sections 43, 45 and 51 (now 56, 58 and 65) of the *Family Relations Act* is that Mrs. Whittall's interest in the matrimonial home takes priority over any judgments filed after the date upon which the lis pendens was filed.

Section 31 of the *Land Title Act*, provides as follows:

> 31. If a caveat has been lodged or a certificate of pending litigation has been registered against the title to land,
>
> (a) the caveator or plaintiff, if that person's claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitled to claim priority that person's application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made after the date of the lodging of the caveat or registration of the certificate of pending litigation; and
> (b) if proof of service of notice of claim to priority on the subsequent applicant is provided to the registrar before registration is effected, the registration of the title or charge claimed by the caveator or plaintiff relates back to and take effect from the time of the lodging of the caveat or registration of the certificate of pending litigation, and that time, as well as the time of the application for registration of the title or charge so claimed, must be endorsed on the register.

The Court also considered the importance of section 69 (2) [then section 55(2)] of the *Family Relations Act* which reads as follows:

> Section 69(2) The rights under this Part [Part 5] are in addition to and not in substitution for rights under equity or any other law.[21]

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[21] *Whittall, supra*, para. 93.

The Court relied on this provision to back-date Mrs. Whittall's interest to the date she filed her *lis pendens*. The Court back-dated Mrs. Whittall's interest to the date she filed her *lis pendens* even though she had not yet obtained a triggering event on that date. Mrs. Whittall's *lis pendens* was filed on March 9, 1983, yet her decree *nisi* (triggering event) was not made until September 30, 1986. The Court determined that section 31 of the *Land Title Act* has the effect of giving priority to Mrs. Whittall's interest under both sections 43 and section 51 (now 56 and 65) of the *Family Relations Act*. As such, the Court determined that on the facts, Mrs. Whittall was entitled to a 100% reapportionment of the matrimonial home in her favour and she could take that reapportionment with priority over the registered judgment creditors. In reaching its decision, the Court considered the decision in *Malhotra* and distinguished it on its facts, citing in particular the fact that the wife in the *Malhotra* case had not yet obtained a triggering event when the creditors had registered their judgments.[22] In considering the *Maroukis* case, Prowse J. (as she then was) in *Whittall*, distinguished it on the basis that the judgment creditors had registered their judgments prior to the triggering event [which was the order dividing the property under the Ontario *Family Law Reform Act*] and that there was no indication that a lis pendens had ever been filed, or that there existed a statutory provision similar to section 31 of the *Land Title Act*, British Columbia.[23]

The same result was reached in *Hall v. Hall* (1990), 26 RFL (3d) 443 (BCSC). The parties held the matrimonial home in joint tenancy. The wife filed a *lis pendens* on September 3, 1987 and obtained a section 44 (now 57) declaration on September 18, 1987. Judgments by the husband's creditors were filed against the title to the matrimonial home in April and November of 1988, after both the triggering event and the *lis pendens*. The Court decided that Mrs. Hall was entitled to a reapportionment of the matrimonial home and that she could take the reapportionment in spite of the judgments registered.

Madam Justice Prowse later had the opportunity to rule on the priority issue between creditors and spouses in a subsequent case involving a certificate of pending litigation without a triggering event. In *Antanen v. Antanen (Guardian ad litem of)* (1992), 68 BCLR (2d) 300 (BCSC); [1992] BCJ No. 949, Prowse J. (as she then was) stated that one implication of her decision in *Whittall* had gone too far:

> To the extent that *Whittall* suggests that a person filing a *lis pendens* automatically obtains priority for his or her judgment over claims or charges registered subsequent to it, I conclude that the decision goes too far. The Royal Bank case[24] makes it clear that s. 31 of the LTA [*Land Title Act*] only permits the person filing the lis pendens to claim priority, rather than automatically obtain priority.[25]

In *Antanen*, the matrimonial home was in joint tenancy. The wife filed a certificate of pending litigation against the matrimonial home on March 5, 1991. A section 44 (now 57) declaration was then made on November 29, 1991. Revenue Canada's judgment against the husband was filed on June 19, 1991, after the certificate of pending litigation had been filed but before the

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[22] *ibid*, para. 86.
[23] *ibid*, para. 92.
[24] *Royal Bank of Canada v. Vista Homes Limited et al* (1985), 63 BCLR 249 (BCSC)
[25] *Antanen* [1992] BCJ 949, p. 12.

triggering event. Citing *Blackett v. Blackett* (1989), 40 BCLR (2d) 99 (BCSC) with approval, the Court emphasized that the interest of a spouse in a family asset does not come into existence until there has been a triggering event. Thus, when Mrs. Antanen registered her certificate of pending litigation, she did not yet have an "interest" in Mr. Antanen's half of the property. Clearly, as a joint tenant she had title to her half of the property (subject to any subsequent orders for reapportionment), but she did not yet have the ability to claim a reapportionment under section 65. Madam Justice Prowse succinctly summarized the case as follows:

> In this case, the greatest barrier which faces Mrs. Antanen in her claim for a reapportionment of the home free and clear of Revenue Canada's judgment is the fact that the judgment was registered prior to the triggering event, which was the declaration made under s. 44 [now 57] of the FRA on November 29, 1991. That being the case, and following a *Blackett* analysis, the judgment attached to Mr. Antanen's undivided one half interest in the home before Mrs. Antanen's right to a reapportionment could arise under s. 51 of the FRA. Therefore, all that was left to be reapportioned in her favour at the date of the triggering event was the interest of Mr. Antanen, subject to Revenue Canada's judgment.
>
> Does the fact that Mrs. Antanen filed a *lis pendens* prior to Revenue Canada's judgment being registered against Mr. Antanen's interest in the home give her a right to obtain the home free and clear of the judgment? I conclude that it does not.[26]

The Court considered the how the case might have been decided differently had Mrs. Antanen obtained a triggering event prior to the filing of the creditor's judgment. If she had obtained a triggering event, she would have received the reapportionment interest back to the date of the filing of the *lis pendens,* which was prior to the registration of Revenue Canada's judgment.[27] The Court also stated categorically that the Court has no authority to apply section 51 so as to override the rights of third party creditors who have filed their charges against title prior to the triggering event.[28]

As is clear from the foregoing, the registration of the certificate of pending litigation is a critical step in the protection of the client's property rights against registered judgment creditors. It does not create any substantive rights to the property, but rather gives a plaintiff whose claim is subsequently established, a right to claim priority over the interest claimed by a subsequent applicant for registration. The certificate of pending litigation does not give the holder "priority" but rather the right to claim priority. In order to preserve a client's property interest over a registered judgment creditor, one must have a registered certificate of pending litigation, and not an entry under the *Spouse Protection Act* RSBC 1996, c. 246. In *Vukelic v. Vukelic* (1993) [1993] BCJ No. 2206 (BCSC), the court held that an entry under the *Spouse Protection Act* does not have the same effect as a certificate of pending litigation. Despite the fact that the wife had obtained a section 57 declaration in advance of the registration of the creditor's judgment, the court did not grant the wife's interest priority over that of the judgment creditor because she did not have a certificate of pending litigation. Mrs. Vukelic's reapportionment was subject to the

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[26] *ibid*, p. 12.
[27] *ibid*, p. 12.
[28] *ibid*, p. 13.

registered judgments. From the reasoning in *Vukelic,* clearly the certificate of pending litigation is more than just a notice provision.

It may be prudent for the family lawyer to file a caveat in advance of a certificate of pending litigation. Many lawyers mistakenly believe that the certificate of pending litigation has the same injunctive effect as a caveat which it does not.[29] A caveat, although expiring after two months, may be preserved in its effect (i.e. as an injunction) by a certificate of pending litigation filed against the property prior to the expiry date on the caveat.[30] A person registering a caveat may run into difficulties in registering the caveat with the Land Title Office if the caveat is with respect to strictly a *Family Relations Act* claim. That difficulty may be eradicated if the *Family Relations Act* claim is made in conjunction with a constructive trust or resulting trust claim. A restraining order obtained by the Supreme Court of British Columbia can also have the effect of a caveat if it is registered on title pursuant to section 284 of the *Land Title Act*.[31] The steps to be taken are as follows:

(1) Obtain a restraining order with respect to the land in particular.

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[29] Effect of Caveat, Section 288 of the *Land Title Act:*

(1) As long as a caveat lodged with the registrar remains in force, the registrar must not:
  (a) register another instrument effecting the land described in the caveat unless the instrument is expressly to be subject to the claim of the caveator, or
  (b) deposit a plan of subdivision or otherwise allow any change in boundaries affecting the land described in the caveat, unless consented to by the caveator.

(2) An instrument expressed to be subject to the claim of the caveator may be registered or deposited, unless the claim of the caveator, if successful, would, in the opinion of the registrar, destroy the root of title of the person against whose title the caveat has been lodged.

[30] Lapse of Caveat, Section 293 of the *Land Title Act*:

(1) A caveat lodged under this Act elapses and ceases to affect title to land after the expiration of two months after the date it was lodged with the registrar, unless within that period the caveator commences an action to establish the caveator's title to the estate or interest claimed and registers a certificate of pending litigation.

(2) Despite section (1), if a caveatee, in accordance with the caveat serves, a least 21 days before the expiry of the two months referred to subsection (1), a notice in the prescribed form on the caveator or the caveator's solicitor or agent filing the caveat as the case may be, to withdraw the caveat or take proceedings in court to establish the claim made in the caveat, the caveat lapses and ceases to affect the caveatee's title to the land after the expiration of 21 days after the date of service, unless within the 21 day period the caveator commences an action to establish the caveator's title to the estate or interest claimed and registers a certificate of pending litigation.

(3) This section does not apply to a caveat lodged by the registrar.

[31] Power of Court to Issue Injunction, Section 284 of the *Land Title Act*:

(1) In this section, "order" includes injunction.

(2) The Supreme Court may,
  (a) on the application of a person interested in land, or
  (b) on application made on behalf of the owner of a future or contingent interest, make an order prohibiting dealing with that land.

(3) The court may annex to the order terms and conditions it may consider proper, including expiry date.

(4) The order may be lodged with the registrar, and, if lodged with the registrar, the registrar must deal with it in the same manner as a caveat.

(5) This section applies only to land registered under this Act.

(2) Specify the legal description on the order. Simply noting that all assets are to be restrained from disposition is insufficient. It is acceptable for the order to read "until further order of the court" or to be time-limited. However, if the order was obtained ex parte and states that the opposing party is at liberty to set the order aside on a certain number of days notice, the Land Title Office may not register that Order.
(3) Present a certified copy of the restraining order to the Land Title Office.
(4) Complete a Form 17 noting specifically that the lawyer has obtained "a court order pursuant to section 284 of the *Land Title Act*".
(5) Pay the required fee.

If the family lawyer is particularly concerned about creditors registering judgments against the property, a restraining order obtained and filed under section 284 of the *Land Title Act* will offer the greatest protection. It is still advisable, however, based on the jurisprudence reviewed herein, to obtain the certificate of pending litigation and the section 57 declaration, in addition to the caveat, for the reasons outlined above.

VIII. Distilling the Jurisprudence

There is an apparent inconsistency in the jurisprudence when one compares the line of authority in *Whittall, Hall* and *Antanen* to cases involving the competing interests of a spouse and a trustee in bankruptcy such as *Biedler v. Biedler*, (1983) 33 R.F.L (2d) 366 (BCSC). The apparent inconsistency is that in the *Whittall, Hall* and *Antanen* cases, the triggering event established the spouse's claim to a reapportionment, whereas in *Biedler*, it did not. While the results may appear to be inconsistent, there are important factual and legal distinctions between the two lines of authority which eliminate this apparent inconsistency. The principle distilled from the *Whittall, Hall* and *Antanen* cases is that a spouse's claim to assets held in the name of the other party, including a claim to a reapportionment, will defeat a registered judgment creditor if the spouse has a triggering event and a certificate of pending litigation before the creditor registers a judgment. In *Biedler*, the principle is that a triggering event is not enough to ensure a spouse's right to claim a reapportionment of the assets one a bankruptcy has occurred. In *Biedler*, the Court held that one half of the family assets in existence at the time of the bankruptcy could vest in the trustee for bankruptcy as there had been a triggering event prior to the bankruptcy. The Court rejected counsel's submission that the trustee should take the bankrupt's assets subject to the spouse's claim for a reapportionment. The most important distinction is that *Biedler* involved a bankruptcy and therefore was governed by the provisions of the *Bankruptcy and Insolvency Act* which provides that the assets held by the bankrupt automatically vest in the trustee upon bankruptcy. There are no equivalent statutory provisions for creditors where the debtor is not in bankruptcy. Secondly, the *ratio decidendi* of *Whittall, Hall* and *Antanen* is that it is the unique operation of section 31 of the *Land Title Act*, a registered certificate of pending litigation against the property in question, and a triggering event made prior to the registration of a creditor's judgment against the property that permits the spouse to take priority over the claims of a secured creditor. That unique operation was not present in *Biedler*.

Although the result in *Biedler* has been followed in *Pigeon v. Pigeon* (1993) 81 BCLR (2d) 100 (BCSC) and *Verbeek v. Craig* (1998), 37 RFL (4th) 143 (BCSC), a number of cases have also

been decided with the opposite result. In *Stasiuk v. Stasiuk* (1999) 46 RFL (4th) 382 (BCSC) and *Re: Thompson* (1993), 82 BCLR (2d) 22 (BCSC) the bankrupt was under an order restraining the disposition of assets before the bankruptcy. Viewing the bankruptcy as a violation of the court order and as an abuse of process, the court in *Stasiuk* annulled the bankruptcy and in *Re Thompson*, allowed the spouse to claim a reapportionment of the family assets after the bankruptcy. Although a restraining order was also granted on the same day as the section 44 declaration (now 57) in *Biedler*, Esson J. (as he then was) did not consider the effect of the restraining order. It is the author's view that the result in the *Biedler* line of cases which eliminates the spouse's ability to claim a reapportionment after bankruptcy is explainable by the statutory unique provisions in the *Bankruptcy and Insolvency Act*, and can be restricted to bankruptcy cases. The conflict in the bankruptcy cases appears to turn on the presence of a prior restraining order and the timing of the triggering event. Therefore, the family lawyer faced with a possible impending bankruptcy of an opposing party should obtain a restraining order on the disposition of assets and a triggering event, and should register a certificate of pending litigation immediately.

The following points can be distilled from the jurisprudence:

a) If the non-owning spouse obtains a section 57 declaration and a certificate of pending litigation prior to the registration of a creditor's judgment against the other party's property, the non-owning spouse's interest will take priority over the judgment creditor.(*Malhotra, Whittall, Hall*)

b) If the non-owning spouse does not obtain a section 57 declaration before a judgment creditor registers a judgment against property, the judgment creditor will take priority.(*Malhotra)*

c) If the non-owning spouse obtains a section 57 declaration but no certificate of pending litigation is registered prior to the registration of a judgment creditor, the judgment creditor will take priority. *(Vukelic)*

d) If the spouse is a joint tenant of a property, and is ultimately awarded a reapportionment of the property, the spouse will take priority over a judgment creditor (to the extent of the reapportionment) provided that the spouse has obtained a section 57 declaration, and registered a certificate of pending litigation against the property prior to the registration of the creditor's judgment.*(Whittal)*

e) A joint tenant's claim to a reapportionment will not defeat a registered judgment creditor's charge if the joint tenant has not obtained a section 57 declaration and filed a certificate of pending litigation prior to the registration of the judgment. *(Antenen)*

f) A registered certificate of pending litigation alone, without a timely triggering event will not give a non-owning spouse priority over the claims of a registered judgment creditor because the non-owning spouse's interest in the other spouse's assets remains inchoate until the triggering event and because the certificate of pending litigation gives no substantive rights to the holder. (See: *Swayze v. Swayze* (1994) 6 RFL (4th) 15 (BCSC).*(Antenen)*

g) A prior declaration pursuant to section 57 will ensure that only one-half of the family assets vest with the trustee in bankruptcy upon the bankruptcy.*(Beidler)*

h) A restraining order made in advance of or in conjunction with a triggering event may permit the spouse of a bankrupt to claim a reapportionment of the family assets in his or her favour even subsequent to the *bankruptcy (Stasiuk; Re: Thompson)*

i) Without a triggering event, all the assets in the bankrupt's name on the date of the bankruptcy will vest with the trustee subject to any trusts. *(Pigeon; Beidler)*

IX. Salvaging Property for the Non-owning Spouse

Often the family lawyer becomes involved with a client after critical events have already transpired which may have already prejudiced the client's position with respect to creditors. The client's marital status (unmarried), the nature of the property in question (not land) or the state of the proceedings (owning spouse has already declared bankruptcy, or creditors have already registered judgments prior to obtaining a triggering event) may make it necessary for the family lawyer to consider other options in an effort to salvage the client's property interest.

a) A trust claim

If the client has not obtained a section 57 declaration, and creditors have registered judgments on the title, an argument may be made for a declaration that the titled spouse has been holding the untitled spouse's interest in the home in trust for the other spouse.[32] The untitled spouse's trust interest arises from the date on which the trust was made. (See: *Rawluk v. Rawluk* (1990) [1990] 1 SCR 70; [1990] SCJ No. 4 at p. 12). With a trust interest arising on a date prior to the separation of the parties, a non-owning spouse may be in a position to defeat a subsequent creditor's interest.[33] However, in both *Rawluk*, *infra*, and *Soulos v. Korkontzilas* (1997) [1997] 2

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[32] It is beyond the scope of this paper to thoroughly address the use of the trust to protect a spouse's interest in property; however, it is raised as a potential option for the family lawyer to pursue where other remedies are either unavailable or provide inadequate relief. There is considerable debate amongst trust scholars as to the specific date on which a constructive trust claim arises. Some scholars are of the view that since the constructive trust is a remedy for unjust enrichment, and as such, the trust only arises when the court decrees it. Others state that once the constructive trust is found, the property interest then dates back to the time when the trustee was under a duty to make restitution. And finally, other scholars take the view that both the trust and the proprietary interest come into being from the date on which the duty to make restitution arises. For a thorough analysis of the various views on the initial date of the constructive trust, see: Oosterhoff, A.H. and Gillese, E.E., *Texts, Commentary and Cases on Trusts, Fifth Edition,* (Toronto: Carswell, 1998) at pp. 421-426.

The Supreme Court of Canada was also divided on this issue in the *Rawluk, supra,* case. Mr. Justice Cory, writing for the majority, stated that the property interest arises when the unjust enrichment first arose: *Rawluk, supra,* p. 12. By contrast, McLachlin J. (as she then was), dissenting, stated that the conferring of a property interest is discretionary and dependent upon the inadequacy of other remedies for the unjust enrichment: *Rawluk, supra,* pp. 17-18. As such, presumably the court would decide whether to extend the proprietary interest back in particular cases.

The commencement date of a resulting trust is far less controversial. A resulting trust comes into being when the equitable interest arises, permitting it to predate the subsequent claims of a trustee's creditors. (See: Oosterhoff and Gillese, *supra,* p. 295.

[33] The non-owning spouse should be able to substantiate notice to the creditor if she or he has registered a certificate of pending litigation on the title to the land before a creditor registers judgment.

SCR 217 at para. 51, the courts have cautioned that the law of trusts must be applied with attention to the interests of third parties and creditors.

Either a trust or a fiduciary relationship has been successfully employed to the benefit of a non-owning spouse in the following cases: *Gregory v. Gregory*, (1994) 92 BCLR (2d) 133 (BCSC); *CIBC v. Croteau, supra*; and *Lee v. Mike Hutchinson Properties Inc.* (1995) [1995] O.J. No. 3065. In *Gregory*, the court held that the husband who was in control of an asset (a pension) was in a fiduciary relationship with his wife with respect to that asset after separation. Just before he died, and before the wife had obtained her triggering event, the husband had changed the beneficiary of his pension from his wife to his girlfriend. The designation to the girlfriend was set aside because the court held that he was in a fiduciary relationship with his wife and that transferring the beneficiary was a breach of his fiduciary obligation to his wife. In *obiter*, the court stated that the wife had met the criteria for establishing a constructive trust although she did not require one in the circumstances of the case.

In *CIBC v. Croteau*, *supra*, a resulting trust was established by the wife in the matrimonial home in the sole name of the husband. The parties had not separated and therefore could not invoke the property division provisions of the *Family Relations Act* and could not obtain a triggering event. The imposition of the resulting trust successfully prevented the trustee in bankruptcy from taking 100% of the matrimonial home. The wife was able to retain a one-half share in the matrimonial home because of the operation of the trust. The same result was held on similar facts also involving a bankruptcy in *Lee, supra*.

It may be that the trust is the only protection remedy available to an unmarried spouse. The only mechanism through which an unmarried spouse can obtain title to a property owned by his or her spouse is through a trust claim.[34] An unmarried spouse cannot protect himself or herself with a section 57 declaration or any other triggering event to ensure that his or her property interest "arises" before a creditor registers judgment against the title to the matrimonial home. The unmarried spouse could take advantage of the caveat followed by a certificate of pending litigation, strategy outlined in Part VII herein, or register a restraining order in the Land Title Office under section 284 of the *Land Title Act*. However, these mechanisms do not, as described, *supra*, establish the client's interest in the asset, as a trust would. The traditional protection mechanisms analyzed in this paper are not available to unmarried persons. If an unmarried spouse could establish a resulting or a constructive trust that pre-dates the registration of a creditor's judgment against the property, the trust may survive the creditor's judgment. It remains to be seen to what extent the equity and trust principles established in *Croteau*, *Gregory* and *Lee* could assist a spouse, married or otherwise, in defeating a judgment creditor outside of the bankruptcy context.

The trust may also be the only avenue available to protect the client's interest in property other than land. Sections 64(3) and (4) of the *Family Relations Act* say as follows:

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[34] There is another option now open to an unmarried spouse. He or she can opt into the division of property division provisions of the *Family Relations Act* under section 120.1.

(3) If, on the acquisition of property other than land, a person does not have actual notice of the interest of a spouse in the property, the interest is not enforceable against that person.
(4) Despite subsections (2) and (3), the interest of a spouse is enforceable against the other spouse from the date the interest comes into being.

It appears from section 64(3), that if the client is not on title to an asset other than land, his or her interest is easily defeated by any *bona fide purchase for value without actual notice* of the client's interest. In *Gregory, supra*, the spouse was able to defeat the third party's interest with a resulting trust; however, the court did not consider section 64(3) of the *Family Relations Act* as there had been no triggering event before Mr. Gregory's change in beneficiary. Therefore, the property provisions of the *Family Relations Act* had not yet "triggered", and no cause of action arose under the Family Relations Act respecting this transaction. It remains to be seen whether a prior trust will defeat a *bona fide* creditor's interest in property other than land, given the legislative provisions of section 64(3).

Perhaps the cautious family lawyer should invariably plead unjust enrichment and the constructive trust remedy in addition to Part 5 property relief, even for married clients, in order to leave the door open for the client to pursue equitable remedies if the statutory provisions are inadequate. Since section 69(2) of the *Family Relations Act*, says that "[t]he rights under this Part are in addition to and not in substitution for rights under equity or any other law", a claim for a trust is available to a married spouse as well as an unmarried spouse. If the married client has not or is not able to avail him or herself of the protection devices proffered herein, and discovers a competing creditor's claim, the married client may wish to pursue a claim for a resulting or constructive and argue that it should defeat the creditor's claim.

One might consider advancing a trust claim arising in the following contexts:

a) the client has failed to take the appropriate steps to protect his or her property claim and has not obtained a section 57 declaration or a triggering event;
b) the client has obtained a section 57 declaration but has not registered a certificate of pending litigation;
c) the client needs to protect non-land assets (with non-land assets, the combined effect of the triggering event and the certificate of pending litigation that protects the spouse's interest in land, is not available); or
d) the client is unmarried and cannot benefit from the triggering event.

b) Statutory provisions to protect an interest in property that is not land

Usually, protecting a client's interest to an interest in property that is not land is not a pressing concern because enough other assets exist with which to compensate the client for any interest lost in the non-land asset. However, sometimes non-land assets are the most valuable assets owned by the parties, or the client has a viable claim for a substantial reapportionment such that securing every possible asset to satisfy the reapportionment is advisable. The following statutory provisions can be used to protect the client's interest in assets other than land:

a) Request an interim order changing ownership of the asset to joint tenancy pending further order of the court pursuant to section 66(2) or 66(3) of the *Family Relations Act*, coupled with a restraining order dealing with assets pursuant to section 67 of the *Family Relations Act*. Joint title to the assets will at least protect 50% of the asset for the client. This provision could be applied to land although the protection strategies outlined in the preceding sections offer better protection for the spouse.[35]

b) Request an interim order of the court granting the client possession of and use of the chattel in question pursuant to section 67(2) of the *Family Relations Act*, as without possession of the asset, it may be more difficult for the opposing party to encumber it.

X. Summary

Protecting a client's property interest is increasingly relevant in this age of overindulgence and deficit financing. As such, the family lawyer must be able to properly advise the client of the ramifications of the triggering event which is the critical ingredient in securing the client's interest in property. Different clients require difference advice. The asset-rich client should protect his or her property interests by avoiding marriage and maintaining sole title. The asset-poor client should seek marriage and endeavour to obtain joint tenancy over assets. The prudent and paranoid client will obtain legal advice, file a caveat, seek a restraining order, register the restraining order at the Land Title Office, obtain an immediate section 57 declaration, register a certificate of pending litigation before the caveat lapses, seek an order to changing title to non-land assets, seek an order for possession of valuable chattels, and plead a trust claim (just in case). The asset-poor, unmarried client or the client who sought legal advice too late will have to resort to a trust claim.

In this paper, I hope that I have persuaded the reader just how critical the timing of the triggering event is. Family law practitioners often think too linearly and gloss over the complexities that are required in coming to a well reasoned and informed decision on the timing of the triggering event. Nor is it good enough to consider only one factor such as which is the best valuation date. It is not good enough to make a decision based solely on the fact that the client's spouse is likely to declare bankruptcy. Without considering all of the factors outlined in this paper before coming to the decision on obtaining a section 57 declaration, the family law practitioner runs the risk of unwittingly creating a tax liability for the client; depriving the client of a realizable claim to a re-apportionment; placing too many assets in the hands of the trustee in bankruptcy; giving away too much of a pension; depriving the client of the benefits of joint tenancy upon death; or losing the client's priority over a judgment creditor, to name a few. Avoid the risk; think laterally, not linearly.

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[35] A triggering event plus a certificate of pending litigation registered against land offers better protection to the non-owning spouse as it protects the claim to reapportionment, whereas a change in title alone will not protect the claim to a reapportionment.