Ontario Family Law Monthly

O.F.L.M. 2023-10

A monthly review and discussion of family law in Ontario

In the October 2023 issue:

General

The editors-in-chief of the Ontario Family Law Monthly (OFLM) are David Frenkel and David Tobin.

Various authors contribute to the text of the OFLM.

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Long live rough justice: the wild west of interim spousal support motions

David Frenkel

Overview

This article analyzes the recent case of *Yu v. Xiao* (2023 ONSC 4781) and reviews the principles relating to interim spousal support motions based on the reported Ontario decisions of 2022.

In a nutshell, the recent decisions indicate that even though there are recurring legal principles that courts continue to consider, rough justice prevails with evidence being the major factor affecting the direction and the extent of where the judgement ultimately lands.

Introduction

The case of *Yu v. Xiao* is yet another reminder that when it comes to seeking temporary spousal support orders, the results of rough justice can swing both ways depending on the evidence being presented.

But beyond any single case, it is also interesting to see how courts have treated spousal support motions in general with respect to the legal principles reviewed and applied.

Background

In *Yu*, the parties were married for approximately 30 years with one adult child. They separated in 2019 (as claimed by the husband) or 2021 (as claimed by the wife).

The wife appeared to have strong compensatory and non-compensatory bases for spousal support, in part due to taking care of the parties' child and her leaving her job as a physician in China to help the husband in his businesses.

The husband's story was not as straight forward – to say the least.

The husband appeared to have created various corporations during the marriage, including a golf course with a claimed annual revenue by the wife of $1,000,000 and different residential development projects. Properties were purchased using investment funds, third party mortgages and vender take-back loans. After the parties separated, the husband apparently forced the parties' adult child to transfer her corporate shares to him which he then transferred to his second wife and cousin. And if that wasn't enough, he also transferred shares in Canadian and Chinese corporations and re-organized the corporate structures. This resulted in the husband no longer being a shareholder of any of the Canadian entities.

Among the husband's other shady actions, he

- removed $480,000 from the parties' joint bank accounts,
- stopped paying the matrimonial home's mortgage (resulting in a power of sale),
- stopped paying the wife's expenses and car lease (the car subsequently being towed away),
- started a Divorce Application in China in 2023 despite the wife having already commencing her Application in Ontario in 2022 (spousal support apparently is not awarded in China),
- sold a golf course in June 2023 without the wife's consent and possibly below market value with the sale proceeds having been deposited in an unknown account,
- claimed his income to be $27,000 while showing annual expenses of $200,000 on his sworn financial statement,
- claiming to receive monetary gifts from his father and other relatives to pay for his lifestyle, and
- failed to provide full disclosure resulting in an order to provide numerous paragraphs from the wife's Request for Information within 30 days.

Support claims

The wife claimed support of $39,000 per month based on an imputed annual income to the husband of $1,600,000 and retroactive spousal support of $243,507.

Justice Himel referred to ***Di Sabatino v. Di Sabatino*** (2022 ONSC 334) which reiterated the concept that the court aims to achieve "rough justice" on interim support motions without engaging in comprehensive review and analysis of the parties' respective circumstances.

Additional factors for interim spousal support motions as noted by Justice Himel were as follows:

- support should be based not on a budget of expenses of the recipient but on income sharing (*Cassidy v. McNeil*, 2010 ONCA 218);
- the parties' needs and means take on greater significance and the recipient's need to achieve self-sufficiency is of lesser significance;
- the payor's "means" is given an expansive interpretation (*Leskun v. Leskun*, 2006 SCC 25); and,
- support should generally fall within the SSAGs unless circumstances dictate otherwise (*Blatherwick v. Blatherwick*, 2012 ONSC 2456).

In ordering $15,000 per month in spousal support, Himel J. imputed the husband's income to at least $550,000 despite the husband's claims of near poverty. The court also considered a number of factors including (a) the parties' lifestyle during the marriage ($3,000,000 home, luxury vehicles, expensive restaurant meals, significant LCBO expenses, their travels to China); (b) the wife needing time to return to the workforce (she was taking a Chinese medicine re-training program); and (c) the wife's dire financial circumstances (dissipating her funds and obtaining loans for living expenses).

The court also imputed income to the husband as his Income Tax Returns did not reflect the money that was available to the parties. "Evidence of a lavish lifestyle provides a basis upon which inferences about a party's access to undisclosed income may be drawn." (*Bak v. Dobell*, 2007 ONCA 204)

2022 year in review on interim spousal support motions

The case of *Yu v. Xiao* is just one of many examples of a motion for interim spousal support. However, to appreciate what patterns or principles emerge when courts approach these issues, often times it is helpful to look at more than one sample.

With that in mind, it was interesting to review all the reported Ontario decisions in 2022 that addressed interim spousal support motions and to see how the legal principles looked like from a bird's eye view.

Although not mentioned in detail in this article, motions for spousal support in other provinces in Canada had similar principles. The 2022 examples of reported motions for spousal support in provinces other than Ontario included *M.T.P. v. R.L.B.* (2022 BCSC 156), *J.T. v. C.C.* (2022 PESC 12), *Lyons v. Lyons* (2022 SKQB 70), *Chwilkowski v. Tylicka* (2022 BCSC 732), *Ishwarlall v. Ishwarlall*, (2022 BCSC 794), *Hildebrand v. Hildebrand*, (2022 MBQB 139), *Buliziuk v. Buliziuk* (2022 BCSC 1187), *Kadyschuk v. Behan* (2022 BCSC 1370), *Chiveldave v. Chiveldave* (2022 ABKB 647), *Greenough v. Greenough* (2022 BCSC 2051), and *King v. MacDonald* (2022 ABKB 736).

In nearly all of the Ontario cases, the legal analysis started with the legislative provisions in s. 15.2(4) and s.15.2(6) of the *Divorce Act* or s. 33(8) and s.33(9) of the *Family Law Act* – depending on the legal jurisdiction of the parties. As a refresher, the *Divorce Act* states the following:

> **s.15.2(4)**
>
> In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> > (a) the length of time the spouses cohabited;
> >
> > (b) the functions performed by each spouse during cohabitation; and
> >
> > (c) any order, agreement or arrangement relating to support of either spouse.
>
> **s. 15.2(6)**
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> > (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

After reviewing the legislation, the court typically listed the relevant principles that interpret the legislation. It then determined the extent compensatory and non-compensatory entitlement factors were present followed by calculating support using the *Spousal Support Advisory Guidelines* (SSAGs).

The following cases included substantive principles and discussions that complemented the theme of this article:

Fitzgerald v. Fitzgerald

Simply referring to the legislative provisions without applying the facts can result in prejudicial outcomes. This occurred in *Fitzgerald v. Fitzgerald* (2022 ONSC 2445 at para. 37) where the court was unable to decide the issue of spousal support at a motion due to a lack of application of the facts. The court left spousal support to be determined by the trial judge.

Sondhi v. Sondhi & K. v. D.

In *Sondhi v. Sondhi* (2022 ONSC 202 at para. 11) and in *K. v. D.* (2022 ONSC 1071 at para. 17), Justice Papageorgiou referred to *McConnel v. McConnel*, 2015 ONSC 2243 and *Faccio v. Faccio*, 2018 ONSC 1225 and reminded us of the governing principles applicable to interim spousal support motions:

a. The Applicant's needs and the Respondent's ability to pay assume greater importance;

b. An interim order should be sufficient to allow the Applicant to continue living at the same standard of living enjoyed prior to the separation, if the payor's ability to pay warrants it;
c. The court achieves rough justice at best – and does not embark on an in-depth analysis of the parties' circumstances;
d. The court should not unduly emphasize one of the *Divorce Act* statutory considerations above the others;
e. The need to achieve self-sufficiency is often of less importance;
f. Interim support should be ordered within the range suggested by the SSAGs unless exceptional circumstances indicate otherwise;
g. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out; and
h. Where there is a threshold issue, it becomes less advisable to order interim support.

Norouzi v. Bokharaei

In *Norouzi v. Bokharaei* (2022 ONSC 615 at para. 24), Justice MacPherson quoted *Knowles v. Lindstrom* (2015 ONSC 1408) and noted that the following general principles guide the court's discretion when dealing with interim support motions:

> It is well-established that interim support motions are not intended to involve a detailed examination of the merits of the case. Nor is the court required to determine the extent to which either party suffered economic advantage or disadvantage as a result of the relationship or its breakdown. These tasks are for the trial judge. Orders for interim support are based on a triable or prima facie case. An order for interim support is in the nature of a "holding order" for the purpose of maintaining the accustomed lifestyle pending trial…

MacPherson J. took the quote one step further and defined *prima facia* to mean "a standard higher than balance of probabilities" referring to the Blacks Law Dictionary definition:

> At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Justice MacPherson also referred to the principles in *Knowles v. Lindstrom* and *Cassidy v. McNeil* in his decision of *Petersen v. Peterson* (2022 ONSC 808). MacPherson J.

reiterated that at motions, the court tries to achieve "rough justice" in the absence of the opportunity to carry out an in-depth analysis of the parties' circumstances.

Haughton v. Corner

In *Haughton v. Corner* (2022 ONSC 869) Justice McDermot also added that with respect to evidentiary issues in interim spousal support motions:

> … the court often sees affidavit evidence either denying cohabitation or a conjugal relationship, which often conflict with the recipient spouse's evidence as to the relationship. This does not mean that someone is lying; … there are at the end of the relationship, vastly different perceptions of that relationship and the elements of that relationship. One party's perception of the nature of cohabitation or whether the parties are spouses is not necessarily determinative of whether the parties come within the statutory definition.
>
> Because of this and the evidentiary challenges on a temporary motion, the courts have relaxed to some extent the standard of proof for entitlement to spousal support. …

Ford v. Waldhart

With respect to the issue of *prima facie*, Justice Shore in *Ford v. Waldhart* (2022 ONSC 6277) added that the party claiming temporary support has the onus of establishing that there is a triable (prima facie) case, both with respect to entitlement and quantum – with the merits of the case in its entirety to be dealt with at trial.

S.M. v. C.B.

In *S.M. v. C.B.* (2022 ONSC 340) Pinto J. referred to the "seminal case" of *Samis v. Samis* (2011 ONCJ 273) when determining temporary spousal support. The summary in *Samis* complements the principles already discussed above:

a. Interim support is intended as a place holding measure in order to maintain the applicant's accustomed lifestyle (if possible) until trial.
b. A complete enquiry is not required.

c. Need and ability to pay take on a greater importance on temporary support motions.
d. The need to achieve self-sufficiency is of less importance.
e. Temporary support should only be ordered where a case for entitlement has been made out.
f. Support should be ordered within the range of Spousal Support Advisory Guidelines unless there are exceptional circumstances.

Karabegovic v. Karabegovic

In *Karabegovic v. Karabegovic* (2022 ONSC 3153 at para. 11), Justice Chappel added similar principles with respect to interim spousal support motions but also noted that “In the event that a spousal support claimant cannot establish an arguable case for entitlement to spousal support, the motion for temporary relief should be dismissed, even if the claimant has need and the other party has the ability to pay.”

Mulik v. McFarlane

In the Ontario Court of Justice, the spousal support principles are similar, despite using the *Family Law Act* as the legislative basis. It was surprising to see that in 2022, there were nearly no reported ONCJ decisions on interim spousal support. The one case that was found was *Mulik v. McFarlane*, (2022 ONCJ 67 at para. 16), where Justice Sherr listed very similar principles as noted above but referred to *Politis v. Politis* (2015 ONSC 5997) as the source of those principles.

Additionally, Sherr J. added that “a temporary support award is a temporary order only and inevitably imperfect” and that it is meant to provide “a reasonably acceptable solution to a difficult problem until trial”.

Conclusion

On the one hand, a spousal support motion appears to be a simple step in the litigation process where lawyers can rely on the "rough justice" principle and easily obtain support for their clients.

However, underestimating the motion's importance and being ill-prepared may result in orders that are prejudicial to your client.

Orders at motions can last a very long time – especially in jurisdictions where trials are hard to come by. Therefore, not getting enough support or paying too much can result in real financial consequences for either side.

And if one tries to subsequently vary a temporary order for support, the threshold is quite high and unlikely to be successful.

Therefore, the ducks really need to be in a row in the first instance.

Furthermore, what the above cases remind us is to not underestimate the power of evidence for past and present lifestyles. Simply claiming the parties lived a lavish lifestyle may not be sufficient without bank statements, receipts or affidavits from individuals that knew the parties. For example, if your payor client is claiming a frugal post-separation lifestyle, perhaps a lifestyle spending analysis may be of assistance from a certified business valuator. The parties' sworn financial statements with supporting evidence can also be critical.

Lack of disclosure can also result in an adverse inference whether income is imputed to your client or not. It typically is better to over-produce income and banking information and show the court that your client has little if anything to hide.

And when it comes to first principles, go back to the legislative provisions and apply them carefully to the circumstances of your case. It is easy to overlook sections 15.2(4) and 15.2(6) of the *Divorce Act* especially when one has read them over and over again before. In practice, judges almost always start their decisions by reviewing them and determining their applicability before diving into the case law.

Do not forget that it is from legislation that the entitlement analysis begins. Therefore, if one does not take the time to see how each and every section of the legislation applies to a client's case, one may miss a significant step in the process.

Finally, when using the SSAGs, remember to input the incomes and assumptions of the parties correctly. Differences in entries can have wrong outcomes that may be significant. Some examples include entering the differentiated incomes as listed in the Income Tax Return rather than just entering the Line 15000 amount. There may be tax/credit implications for employment income, dividend income, business income, etc. Also, the ranges in the SSAGs differ when the custodial parent is paying support versus receiving support, so make sure you adjust those assumptions in the program.

Also, judges find it useful when more than one SSAG calculation is provided. Do not assume that your income assumptions are the correct ones. The more calculations a judge can review, the more flexibility they will have when making their final decision.

With the above points in mind, your next motion for spousal support may still be a form of rough justice, but hopefully a little smoother around the edges.

Section 33(10) of the *Family Law Act*: when is spousal conduct relevant to support?

David Tobin

Overview

There exists an under-utilized provision of the *Family Law Act* that permits a party to seek a reduction of spousal support based on misconduct. This article explores this issue and reviews the important decisions that show when and how this legislation can and should be applied.

Introduction

It is well understood that conduct of a spouse cannot undercut their entitlement to spousal support: We know that infidelity will not cancel a stay-at-home parent's right to compensatory spousal support. However, we often overlook Section 33(10) of the *Family Law Act*, which specifically allows a party to seek a reduction of the quantum of support – even to nil – in some circumstances where the conduct warrants it. To be clear, it is a rare case that will properly fall within the ambit of Section 33(10). (This brief article does not explore the different but related section in the *Divorce Act* or the similarly worded section in the *Succession Law Reform Act*.)

Section 33(10) of the *FLA* states that when making an order for support, the court may have regard to a spouse's conduct in determining the amount. Specifically, this section states:

> The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

Course of Conduct

The term “*course of conduct*” in this section has been interpreted, maybe obviously so, to mean that “*something more than an isolated event is required*” (*Menegaldo v. Menegaldo*, 2012 ONSC 2915 at para. 63). Therefore, a single event of bad behaviour should not be captured under section 33(10). Using this interpretation of the act, repeated infidelity may (and has) constituted a course of conduct, but attempted murder of a spouse or their family members will not. A curious result, but in a reported case where such facts presented themselves, the judge dismissed the respondent’s claim for spousal support because of a prior attempted murder conviction. The judge held that “spousal support is not appropriate in these particular circumstances” – he came to that conclusion without reference to section 33(10).

So Unconscionable

In *Menegaldo*, Justice Chappel refers to the case *Morey v. Morey* to articulate the test that an applicant must meet to show that the conduct was unconscionable. The considerations are reproduced below:

> 1. The course of conduct must be exceptionally bad. In this regard, the court quoted the definition of "unconscionable conduct" in *Black's Law Dictionary* as being "conduct that is monstrously harsh and shocking to the conscience."
>
> 2. The conduct must be such as could reasonably be expected to destroy the relationship.
>
> 3. The conduct must have persisted in the face of innocence and virtual blamelessness on the part of the other spouse.
>
> 4. The commission of a so-called matrimonial offence is not necessarily sufficient by any means.
>
> 5. The party raising the issue of relevant conduct should be prepared to undertake that there is a *bona fide* belief that the test can be satisfied while acknowledging the risks of punitive costs if the Court finds on the whole of the evidence that the issue is frivolous.
>
> 6. The pleadings or subsequent written particulars should set out a summary of the conduct relied on to meet the test so that the Court can

make a preliminary ruling based on the likelihood of the test being met. (*Menegaldo v. Menegaldo*, 2012 ONSC 2915 at para 63).

Given societal changes over the decades, it may not be helpful to look too far in the past at how cases have interpreted "unconscionable" or a "gross repudiation". There are plenty of cases from the 90s which suggest that a recipient's spousal support may be reduced because of their relationship with a new partner (note that it was not the reduction of the recipient's need, it was the gross repudiation of relationship which resulted in the reduction of support). For example:

1. In *Mills v. Mills* (1992 CarswellOnt 289), Justice Granger held that "the relationship between Mrs. Mills and Skolly is so unconscionable as to constitute an obvious and gross repudiation of the relationship, and such conduct should be reflected in the amount of support which is awarded to Mrs. Mills."

2. In *Krigstin v. Krigstin* (1992 CarswellOnt 309), Justice Macdonald found a recipient's relationship with a friend/her accountant constituted an obvious and gross repudiation of the relationship between the recipient and her husband because the recipient and her 'friend' were not forthcoming "with respect to financial arrangements".

It is doubtful that a post separation relationship could ground a claim in section 33(10) in 2023.

In the 2002 case of *Belleville v. White* (2002 CanLII 53252), the court found it appropriate to resort to section 33(10) of the *FLA* to deny a wife's spousal support claim where 1) the wife assaulted the husband with a beer bottle; 2) the wife had "involvement in cybersex on the computer" (remember, it was 2002); 3) she unreasonably withheld access to the children; and 4) the wife called the husband's employer and alleged he was defrauding them. Based on these facts, the judge found that the wife's contact was "so unconscionable as to constitute an obvious and gross repudiation of the relationship and in these circumstances she should not receive spousal support".

More recently, there has been a general reluctance from the court to reduce support under section 33(10). In *McConnell v Finch* (2022 ONSC 5271 at para. 31), the payor, an 88-year-old man allegedly with mental health issues, claimed that his spouse putting him in a long-term care facility was so unconscionable that it constituted an obvious and gross repudiation of the relationship. Justice Jain refused to make such a finding because she was "not satisfied with the evidence provided by the Respondent to make a finding that the Applicant repudiated the parties long-term common law relationship by placing him in a long-term care facility".

Interestingly, a case in which a judge was willing to accede to a payor's defence rooted in section 33(10) was one in which an applicant mother was seeking parental support from her adult daughter under section 32 of the *Family Law Act.* In *L.F.D. v. X.* (2016 ONCJ 878 at para. 404), the trial judge, Justice Gregson considered the mother's request for support. Her Honor stated that:

> …the Applicant's conduct is exceptionally bad. She alienated her daughter from her father, exposed her daughter to domestic violence during her childhood, has threatened her daughter, has had histrionic angry outbursts, has belittled her daughter, made false criminal allegations against her daughter and Mr. K., sued her daughter and her partner civilly, caused her daughter and her partners to pay large sums of legal fees, disrupted her daughter's marriage, threatened her career and slandered her character. The Respondent fears her mother. The Applicant's conduct destroyed the mother-daughter relationship. It is difficult to imagine circumstances which would more obviously and grossly repudiate a mother-daughter relationship. Frankly, the mother's abusive conduct towards her daughter over the years disentitles her to any parental support from her daughter. I can think of no clearer case based on this set of facts.

It may be that the policy behind parental support and spousal support are different enough that the court finds limiting parental support less repugnant that limiting a spouse's entitlement.

Other Canadian jurisdictions have similar provisions in their provincial legislation. Newfoundland and Labrador's *Family Law Act* has a section which reads substantially similar to section 33(10) of the Ontario *Family Law Act.* It states:

> 39(10) the obligation to provide support for a spouse or partner exists without regard to the conduct of either spouse or partner, but the court may in determining the amount of support have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

There are cases under this act which found that a recipient's infidelity, although unsettling, does not meet the threshold for an obvious and gross repudiation of the relationship. In *SS v. BH* (2019 NLSC 110 at para 175), after a finding that a recipient has at least three sexual/romantic relationships outside of the spousal relationship, Justice A. MacDonald stated, "infidelity by one is not sufficient to trigger section 39(10)."

Conclusion

In theory, spousal misconduct can be considered as a factor in decreasing or nullifying spousal support claims.

However, in practice, its not easy to be successful in raising such a defence, as the conduct must be exceptional, not occurring in isolation and the claimant must prove a level of blamelessness that may be hard to do.

Therefore, if your client wants you to pursue this claim, get out a dictionary and fully review with them the definitions of unconscionability and gross repudiation among other terms.

And yes, be ready to apply the definitions to the facts.

Consolidation of family and civil proceedings: a review of the test and recent decision of *Alsous v. Shahin*

Christina Hinds

Overview

This article will set out the factors which are to be considered when determining if two proceedings should be consolidated, with a specific focus on consolidation of family proceedings and civil proceedings. The recent decision of the Superior Court of Justice decision, *Alsous v. Shahin* (2023 ONSC 3995), addressed this very issue.

Introduction

In the fallout of a separation, disputes may arise between a spouse and another individual, such as a family member, friend, or business partner. In appropriate circumstances, a family proceeding may be consolidated with a civil proceeding.

In *Alsous v. Shahin*, the wife was also the plaintiff in the civil proceeding. The wife had brought a civil claim against her husband's sister and brother-in-law. The husband and the defendants in the civil proceeding brought a motion to consolidate the two proceedings.

Justice Broad ultimately determined that two proceedings should not be consolidated. His Honour held that Rule 6 of the *Rules of Civil Procedure* was not satisfied and further, the "balance of convenience" factors set out in *Canadian National Railway v. Holmes* (2011 ONSC 4837) and *Malkov v. Stovichek-Malkov* (2015 ONSC 4836) did not support an order that the proceedings be consolidated.

Facts

In *Alsous*, the family proceeding included claims for divorce, spousal support, child support, decision-making responsibility, parenting time, and the equalization of net family properties.

The civil proceeding concerned the ownership of a property. The wife pleaded unjust enrichment and sought a declaration that she was a beneficial owner of the property (title to which was registered in the defendants' names) by way of a resulting or constructive trust.

The wife alleged that she paid funds to the defendants to be applied toward the purchase price, closing costs, renovations, and to help the defendants pay off their debts in order to facilitate financing of the property. In contrast, the defendants alleged that the father's estate was the beneficial owner of the property notwithstanding that title was registered in their names and that when the father died intestate, the property became beneficially owned by the defendants and their siblings.

The defendants alleged that the father had previously acquired a property and placed the sister on title. Upon the sale of that property, the proceeds were paid to the sister with a view to the sister using those proceeds to acquire another property on behalf of the father. They alleged that the funds advanced to the defendants were the sale proceeds from the previous property and that the wife did not have any legal, beneficial, or equitable interest in those funds.

The Test

In determining if two proceedings should be consolidated, the first stage requires that the criteria in Rule 6 of the *Rules of Civil Procedure* be met. The second stage involves a determination as to whether the "balance of convenience" factors support a consolidation order. (at para. 21)

1. Rule 6 of the *Rules of Civil Procedure*

While Rule 12(5) of the *Family Law Rules* provides that the court may combine two or more cases if it would be more convenient to hear them together, Justice Broad explained that in relation to the consolidation of a family and civil proceeding, jurisprudence has considered Rule 6 of the *Rules of Civil Procedure* as is it is "more particularized and instructive". (at paras. 17 and 18)

Rule 6.01 of the *Rules of Civil Procedure* provides that, where two or more proceedings are pending in the court, and it appears to the court that:

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under the rule

the court may order that the proceedings be consolidated or heard at the same time or one immediately after the other.

The focus at this stage is "whether the proposed common issue has sufficient importance in relation to the other facts or issues such that it would be desirable that the matters be consolidated, heard at the same time, or after each other". (at para. 20)

Justice Broad determined that there was no issue of law in common between the two proceedings and therefore the criteria of Rule 6 were not satisfied. Justice Broad explained that the legal issue in the family proceeding was whether the subject property formed part of the wife's net family property and specifically, whether the wife had a beneficial interest in the property on the date of separation. On the other hand, the issue in the civil proceeding was the more discrete issue of whether the wife had a beneficial interest in the property by way of a resulting or constructive trust. (at para. 24)

Justice Broad acknowledged that the two proceedings may have an issue of fact in common (that being, whether the funds advanced by the wife resulted in beneficial ownership) – however, a common issue of fact is not sufficient to satisfy the first stage of the test. (at paras. 25 and 26)

2. The Balance of Convenience Factors

Justice Broad also considered the factors set out in *Malkov v. Stovichek-Malkov* (2015 ONSC 4836) which were derived from a longer list of factors set out in *Canadian National Railway v. Holmes* (2011 ONSC 4837). Those factors, and Justice Broad's application of the factors, are set out below.

a. The extent to which the issues in each action are interwoven

Justice Broad held that the issues in the two proceedings were not interwoven – the finding in the civil proceeding depended upon the wife's dealings with the father which was not relevant to the family proceeding. (at para. 30)

b. Whether there is a risk of inconsistent findings or judgments if the actions are not joined

There was no risk of inconsistent findings. If the civil proceeding is tried first, Justice Broad stated that it would be determinative of whether such interest forms part of the wife's net family property in the family proceeding. (at para. 31)

c. Whether the issues in one action are relatively straightforward compared to the complexity of the other action

Justice Broad found that the issues in the civil proceeding were relatively straightforward compared to the family proceeding, which involved parenting and support issues, and other assets relevant to the equalization of the parties' net family properties. (at para. 32)

d. Whether a decision in one action, if kept separate and tried first, would likely put an end to the other actions or significantly narrow the issues for the actions or significantly increase the likelihood of settlement

Justice Broad stated that a decision in the civil proceeding, if kept separate and tried first, would significantly narrow the issues in the family proceeding or increase the likelihood of settlement. (at para. 33)

e. The litigation status of each action

The civil proceeding was ready for trial. The family proceeding was not. (at para. 34)

f. Whether any of the parties will save costs, or alternatively have their costs increased, if the actions are tried together

Justice Broad noted that the estimated trial time for the civil proceeding was 3-5 days. There was nothing to suggest that trying the civil proceeding with the family proceeding would result in any significant cost savings or trial time. (at para. 35)

Timing of the Motion

In addition to the factors set out above, Justice Broad also considered the timing of the motion for consolidation. In ***Flitney v. Howard*** (1958 CanLII 118*)* the Ontario Court of Appeal held that an order for consolidation "on the very eve of trial" does not accomplish the purposes of saving expense and avoiding multiplicity of pleadings and proceedings.

Conclusion

If Rule 6 of the ***Rules of Civil Procedure*** is satisfied and the "balance of convenience" factors favours consolidation, a family proceeding may be consolidated with a civil proceeding.

Consolidation of proceedings saves time, expense, and avoids the multiplicity of pleadings and proceedings.

Prior to bringing a motion for consolidation, it is important to review Rule 6 of the ***Rules of Civil Procedure*** and the factors set out in ***Canadian National Railway v. Holmes*** and ***Malkov v. Stovichek-Malkov.***

Alsous v. Shahin also reminds us that:

- A motion for consolidation of two proceedings should be brought early on in both proceedings;
- A common issue of fact is not sufficient to satisfy Rue 6 of the ***Rules of Civil Procedure*** – there must be a common legal issue; and
- Even if Rule 6 of the ***Rules of Civil Procedure*** is satisfied, the balance of convivence factors must also favour consolidation of the proceedings.

Unjust Enrichment and Joint Family Venture: Just tools for common-law property division

Amruta Ponkshe

Overview

In Ontario, when a marriage breaks down, division of property and equalization is dealt with under the *Family Law Act* – a fairly simple procedure with straight forward rules of calculating property division. However, equalization does not apply to common-law spouses. For common-law spouses, ownership and division of assets usually comes down to which party has title to the property in question.

And, when the non-titled common-law spouse makes contributions to the assets or family in general (monetarily or otherwise), life for family law lawyers gets significantly harder. Because now, how spouses are compensated for their contribution requires additional legal principles to consider and apply.

Fortunately, the Supreme Court of Canada decision in *Kerr v. Baranow* and *Vanasse v. Seguin* (2011 SCC 10) consolidated the law of unjust enrichment and created the useful concept of "joint family venture" to assist us in the process.

Kerr v. Baranow and Vanasse v. Seguin (2011 SCC 10)

<u>Unjust Enrichment</u>

The Supreme Court of Canada in *Kerr* confirmed that unjust enrichment remains the "primary vehicle" to address claims of inequitable distribution of assets upon the breakdown of a relationship between unmarried couples.

As discussed in *Peel (Regional Municipality) v. Canada* (1992 CanLII 21 SCC), and reiterated in *Kerr* at paragraph 31, "[a]t the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain."

The three elements required to establish a claim for unjust enrichment were reiterated in *Kerr*:

a. **Enrichment of the other spouse (the Respondent)** – the Applicant must demonstrate that they gave a tangible benefit to the Respondent that enriched the Respondent and that can be given back to the Applicant either monetarily or in property.

b. **Corresponding deprivation to the Applicant** – the Applicant must show that they suffered a corresponding deprivation because of the enrichment of the Respondent.

c. **Absence of juristic reason for the enrichment** – the Applicant must demonstrate that there is no reason in law or justice for the Respondent's retention of the benefit conferred by the Applicant, making its retention "unjust" in the circumstances of the case.

<u>Monetary versus proprietary remedy</u>

As discussed in *Kerr*, once a claim for unjust enrichment has been established, the Applicant may be entitled to a monetary award or a proprietary remedy. The first remedy to consider is always a monetary award (at para. 47).

In *Martin v. Sansome* (2014 ONCA 14 at para. 52), the Ontario Court of Appeal discussed the framework from *Kerr* to address cases in which proprietary awards may be appropriate. Justice Hoy established that the framework established in *Kerr* requires the court to ask the following questions:

1. have the elements of unjust enrichment -- enrichment and a corresponding deprivation in the absence of a juristic reason -- been made out;
2. if so, will monetary damages suffice to address the unjust enrichment, keeping in mind bars to recovery and special ties to the property that cannot be remedied by money;

3. if the answer to question 2 is yes, should the monetary damages be quantified on a fee-for-service basis or a joint family venture basis; and
4. if, and only if monetary damages are insufficient, is there a sufficient nexus to a property that warrants impressing it with a constructive trust interest?

Value Received versus Value Survived

The Supreme Court in *Kerr* at paragraph 49 established that monetary relief may not be limited to the monetary value of unpaid services, often referred to as the ***quantum meruit*** or "value received" or "fee-for-services" approach. But in certain circumstances, monetary relief may be assessed more flexibly – in effect, on a value survived basis – by reference, for example, to the overall increase in the couple's wealth during the relationship. Justice Cromwell at paragraph 80 further stated:

> …Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of … a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact.

In order to apply the value survived approach, it is necessary to identify whether the parties have been engaged in a joint family venture.

Joint Family Venture

The Supreme Court of Canada held that a "joint family venture" may form the basis for an unjust enrichment claim. To obtain an award for unjust enrichment arising from a joint family venture, the Applicant must demonstrate that (a) a joint family venture existed and (b) there was a link between the Applicant's contribution to the joint family venture and the accumulation of wealth or assets.

In *Symmons v. Symmons* (2012 ONCA 747), the Ontario Court of Appeal discussed the *Kerr* decision and reiterated that:

> A joint family venture is characterized by a relationship in which the contributions of both parties have resulted in an accumulation of wealth. It can be identified with reference to the **mutual effort of the parties**, **their degree of economic integration**, **their actual intent during the relationship**, and the **prioritization of the family unit in decision-making**. For the purposes of an unjust enrichment claim, the applicant party must demonstrate that one party has retained a disproportionate share of the economic fruits of their joint efforts. (emphasis added)

In *Kerr*, the Supreme Court of Canada discussed the above four elements as follows:

a. **Mutual effort** involves the parties working collaboratively towards common goals. Indicators include:
   - the pooling of efforts and resources, such as, the use of parties' funds entirely for family purposes, or where one spouse takes on all or a greater portion of domestic labour, freeing the ither spouse from those responsibilities, and enabling him or her to pursue activities in the paid workforce [see Nasser v. Mayer-Nasser (*2000 CanLII 5654 ONCA*), Panara v. Di Ascenzo (*2005 ABCA 47*];
   - the decision to have and raise children together; and
   - the length of the relationship, etc.

   For example, in *Mullin v. Sherlock* (2023 ONSC 3744), Ms. Mullin claimed unjust enrichment, quantified on a joint family venture basis, for her contribution towards the substantial growth of Mr. Sherlock's business during the period of approximately eight years when the parties cohabited prior to their marriage. Justice Bloom found that a joint family venture existed before the parties were married. In reaching this conclusion, his Honour considered that Ms. Mullin ran the household of the parties so that Mr. Sherlock could devote himself to the business. She was responsible for cooking and maintenance of their home as well as caring for their dogs. She gave up her architectural career and suffered deprivation corresponding to the benefit conferred on Mr. Sherlock.

in ***Farkas v. Bedic*** (2016 ONCA 82), the parties cohabited for around thirteen years. Mr. Bedic appealed the trial judge's decision that Ms. Farkas had a half interest in two motel properties and specifically that Mr. Bedic held title to one of the hotels in trust for himself and Ms. Farkas equally. The trial judge found that a joint family venture existed in connection with a motel as the parties had contributed jointly to its acquisition, maintenance and improvement. Mutual effort was demonstrated by the parties' collaborative teamwork in renovating and operating the motel. In reaching this conclusion, the trial judge gave consideration to Ms. Farkas' contribution in running the motel, which included cleaning the rooms, making the bed, cooking all meals and the fact that she worked five hours a day at the motel, for which she was not paid.

b. **Economic integration** concerns the degree of economic interdependence and integration that characterizes the parties' relationship. The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely is it that they should be considered as having engaged in a joint family venture. Examples include:
   - the existence of a joint bank account that was uses as a "common purse";
   - jointly held assets, etc.

   In ***Sullivan v. McCarthy*** (2017 ONSC 94), Justice McSorley held that the transfer of funds from one party to another in order to pay bills constituted financial integration.

c. The **actual intent** of the parties must be given considerable weight in considering whether there is a joint family venture. Courts may infer from the parties' conduct that they intended to share the wealth they jointly created. Examples and indicators include:
   - where the parties accept that their relationship is "equivalent to marriage" or hold themselves out to the public as married;
   - the stability of the relationship and length of cohabitation;

- title to property may reflect an intent to share wealth; and
- plans for property distribution on death of either party.

In *Mullin* (discussed above), Justice Bloom concluded that the parties intended to share wealth jointly taking into consideration a number of factors:

- that the parties discussed their future together during cohabitation,
- that Ms. Mullin was the sole beneficiary under Mr. Sherlock's will, and
- that she was also designated as his attorney under the power of attorney for personal care and under the power of attorney for property.

d. Whether and to what extent the parties gave **priority to the family** in their decisions-making is the fourth factor to consider in determining whether the parties were engaged in a joint family venture. The focus is on the contributions to the domestic and financial relationship, and particularly the financial sacrifices made by parties for the welfare of the collective or family unit. Indicators include:

- whether the roles of the parties fall into the traditional wage earner/homemaker division;
- one party relies on the success and stability of the relationship for future economic security, to his or her own economic detriment, in ways that include
  - leaving the workforce for a period of time to raise children,
  - relocating for the benefit of the other party's career,
  - foregoing educational or career advancement for the benefit of the family or relationship, and
  - accepting unemployment in order to balance the financial and domestic needs of the family unit.

For example, in *Porteous v. Conway* (2015 ONSC 5871), Ms. Porteous accompanied Ms. Conway to Nipigon to accommodate a career move, even if that meant she would have to live away from her two daughters from her previous relationship. The parties also moved to Peterborough to accommodate Ms. Conway's career and Ms. Porteous' medical needs. The parties made these decisions together, in consultation with one another, and with an eye to their future together. Justice Gordon held that these actions indicated that the parties gave priority to the family and that pointed to the existence of a joint family venture. For a more detailed review of the concept of joint family venture and examples of its application, please see David Frenkel's article in the Canadian Family Law Quarterly titled "Joint Family Venture: A Synthesis of the Post-Kerr Case Law", 34 CFLQ 35.

*Galbraith v. Kinsley (*2023 ONSC 3332*)*

Galbraith v. Kinsley is a case that involved unmarried spouses who cohabited for around 10 years from January 2008 to September 2018. The parties had three children together during that time. The parties had resolved all other issues arising from their separation, except for the issue of Ms. Galbraith's trust claim for a share of the home Mr. Kinsley purchased in January 2008.

<u>Summary of Facts</u>

- The parties began dating in or around 2003, when Ms. Galbraith was 15 years old, and Mr. Kinsley was 19 or 20 years old. In 2007, Mr. Kinsley wanted to move out of his parents' home and wanted to buy a house. He discussed this with his parents and with their support started looking for a house to purchase.
- The parties disputed the extent of Ms. Galbraith's involvement in the process of viewing and selecting the house. However, it is agreed that Ms. Galbraith attended the viewing of 150 Dundalk, the house which Mr. Kinsley ultimately bought.

<u>Finding of Unjust Enrichment and Joint Family Venture</u>

On applying the principles discussed in *Kerr* to the facts of this case, Justice Chown concluded that this case met the test for unjust enrichment and that the parties were engaged in a joint family venture.

Justice Chown established that Mr. Kinsley was enriched through the actions and efforts of Ms. Galbraith. The financial contributions made by Ms. Galbraith during cohabitation supported the family's lifestyle and Mr. Kinsley's lifestyle in very tangible ways.

His Honour referred to ***Peter v. Beblow*** (1993 CanLII 126) in discussing that the provision of domestic services can support a claim for unjust enrichment. He also discussed *Kerr* and reiterated that "there is no reason to distinguish domestic services from other contributions". The services "constitute an enrichment because such services are of great value to the family and to the other spouse; any other conclusion devalues contributions, mostly by women, to the family economy."

Justice Chown applied the principles discussed in *Kerr* as follows:

a. <u>Mutual effort</u>
   His Honour highlighted the fact that during the relationship, the parties worked together towards common goals. The parties moved into their home soon after Mr. Kinsley purchased it. While Mr. Kinsley purchased the supplies for most of the home improvements, Ms. Galbraith did most of the housekeeping. The parties raised their three children together and Ms. Galbraith took maternity leave for each child and did most of the childcare. Simply put, the parties generally divided their efforts along traditional gender roles, and their efforts were integrated for the benefit of the family.

b. <u>Economic integration</u>
   While the parties maintained separate bank accounts, they shared expenses. Ms. Galbraith generally paid for groceries, phone plans, internet, cable TV,

natural gas (for home heating), and household contents such as towels, curtains, and bedding. Mr. Kinsley paid the mortgage, insurance, taxes, hydro, water, and repair work for the property. The parties consulted on major expenses such as vehicles. Sometimes who would pay for things depended on who had money in their bank account at the time. On reviewing the manner in which the parties shared expenses of the family, Justice Chown was of the opinion that there could be no doubt that the parties integrated their economic well-being and economic lives.

c. <u>Actual Intent</u>

Mr. Kinsley argued that the parties did not have any actual intent to have a joint family venture. He pointed to the lack of planning surrounding children, the absence of discussions about the long-term future and the parties' long-term goals, Ms. Galbraith's opposition to marriage, etc. Mr. Kinsley testified that "All this came about… kids came. We didn't think of having kids. We didn't say we were having kids. It was just the way life came." While Mr. Kinsley bought a ring for Ms. Galbraith at some point in the relationship, Ms. Galbraith did not take the ring because she did not want it. Mr. Kinsley denied proposing to Ms. Galbraith and said that the purpose of the ring was to say that he appreciated her to being the mother of his children. However, Mr. Kinsley agreed that the act of marriage would not have changed things.

Justice Chown concluded that the fact remained that the parties were in a relationship that resembled marriage.

d. <u>Priority of the Family</u>

Ms. Galbraith took three maternity leaves during the ten-year cohabitation. She did everything that was necessary to allow Mr. Kinsley to work long hours. These facts alone show she prioritized the family over her individual economic welfare.

Further, Justice Chown noted that there was no justifiable basis to conclude that the parties did not contribute equally to the joint family venture. Mr. Kinsley earned a higher income, but this was possible because of the parties' mutual decision that Ms. Galbraith would take primary responsibility for raising the children and for other household responsibilities.

Similarly, Mr. Kinsley did most of the home improvement work, but Ms. Galbraith and her family contributed and, no doubt, much of the work Mr. Kinsley did was made possible or more efficient because Ms. Galbraith looked after the children while he was doing that work.

Monetary or Proprietary Award

Justice Chown reiterated that in an unjust enrichment claim, monetary (as opposed to proprietary) relief "constitutes the default position": Mitchell McInnes, ***The Canadian Law of Unjust Enrichment and Restitution, 2nd Ed***. (Toronto: LexisNexis, 2022), at 28.01[5][a]. A constructive trust will be awarded only if a monetary order would be inadequate: ***McInnes***, 28.01[5][b][i].

Despite the circumstances of this case meeting the requirement for a proprietary award, that is, Ms. Galbraith had shown a direct link between the property and the services rendered, as required by ***Kerr,*** Justice Chown was of the opinion that a proprietary award was not appropriate in the circumstances or necessary to achieve a just result. This was because Mr. Kinsley had refinanced the property after separation and ordering the sale of the property would unnecessarily undermine efforts Mr. Kinsley made to preserve the property and may permit Ms. Galbraith to unjustly benefit from the re-financing Mr. Kinsley had arranged. Secondly, Ms. Galbraith did not provide an adequate reason to depart from the default position of a monetary award.

Justice Chown concluded that the circumstances of this case called for a monetary remedy and for a "value-survived" approach to determination of the amount of the monetary remedy.

Conclusion

The typical Ontario family continues to diverge further from the traditional marriage set-up that was once the norm and increasingly more couples are living in common-law relationships.

As a result, the *Family Law Act* in Ontario will continue to need the complement of equitable principles that are missing in the legislation.

Accordingly (and as seen in the recent case of *Galbraith v. Kinsley)*, the Supreme Court of Canada's decision in *Kerr* remains the comprehensive guide in understanding and applying the common-law principles of unjust enrichment and the joint family venture.

Relocating with children: the best interests of the child requirement and the burden of proof

Samantha Rich

Overview

Justice Chang's decision of *Shearhart v. Shearhart* (2023 ONSC 4931) is an instructive illustration of the factors the court is obliged to assess when considering a relocation application. The focus in this article is the best interests of the child requirement as well as the burden of proof for the parent relocating and the parent objecting to a relocation proposal. In *Shearhart,* Justice Chang considers and applies the factors as set out in the *Divorce Act* as well as the leading jurisprudence on relocation cases in considering whether the relocation application is in the best interests of the children.

Definition of Relocation

Section 2(1) of the *Divorce Act* defines relocation as:

> …a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility - or who has a pending application for a parenting order - that is likely to have a significant impact on the child's relationship with
>
> a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
> b) a person who has contact with the child under a contact order.

Notice Period Required for Proposed Relocation

Section 16.9(1) of the *Divorce Act* provides that:

> A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, **at least 60 days before the expected date of the proposed relocation** and in the form prescribed by the regulations, any other person who has parenting time, decision making responsibility or contact under a contact order in respect of that child of their intention. (emphasis added)

Best Interests of the Child Requirement – *Divorce Act*

Section 16.92 (1) of the *Divorce Act* sets out the factors the court is obliged to take into consideration when considering whether a proposed relocation meets the requirement of being in the best interests of the child:

> In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16:
>
> (a) the reasons for the relocation;
>
> (b) the impact of the relocation on the child;
>
> (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
>
> (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
>
> (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
>
> (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
>
> (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Best Interests of the Child Requirement – Jurisprudence

At paragraph 14, Justice Chang cites the Supreme Court decision of ***Barendregt v. Grebliunas*** (2022 SCC 22), in discussing the factors which the court must consider when assessing whether the proposed relocation is in the children's best interests:

> In determining whether or not a relocation should be authorized, "the crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being", which is a highly fact-specific and discretionary inquiry … The court must consider the best interests of the particular child in the particular circumstances of the case ...

Justice Chang applied the ***Barendregt*** factors in making his determination on whether or not the Applicant's relocation proposal was in the children's best interests:

> a. the children's views and preferences - the applicant has adduced no evidence that the children's views and preferences favour relocation;
>
> b. the history of caregiving - as outlined above, the applicant has adduced no evidence that childcare arrangements were historically anything other than equal, the parties previously agreed to an order for substantially equal parenting time and they have each sought equal parenting time on these motions;
>
> c. any incidents of family violence - the applicant has adduced no evidence of family violence and the investigations of both the police and the CAS have identified no applicable concerns;
>
> d. the reasons for the relocation - the applicant's stated reasons for relocation are that her "friend group" is in Brampton, the family … previously lived in Brampton before moving to Oakville seven years ago and the cost of housing, none of which is supported by any evidence that her proposed relocation is in the children's best interests;
>
> e. the impact of the relocation on the child - the applicant has adduced no evidence that the impact of her proposed relocation will positively impact the children;
>
> f. the amount of parenting time spent with the child and the level of the parties' involvement in the child's life - as outlined above, the applicant has failed to adduce any evidence that the parties' parenting time and level of involvement in the children's life has been anything other than substantially equal;

> …

There are two competing and interdependent factors at play in relocation applications: the reasons for the relocation and the impact of the relocation on the child. This was aptly noted by Justice Akazaki in *Shipton v. Shipton* (2023 ONSC 1342 at para. 57):

> … My assessment of the evidence focuses on these two important factors, although the entirety of both lists are intended to require the court to engage in a holistic assessment of interdependent factors.

Justice Akazaki in *Shipton*, also highlighted that when assessing the various factors against the relocation proposal, one needs to look at the particular child and the particular circumstances when making a decision, he stated that, "the court must consider the proposed relocation site in terms of the best interests of a particular child whom the court would be committing to a particular locale until she reaches adulthood."

Justice Nieckarz in *B.S. v. K.S.* (2023 ONSC 3366 at para. 67) elaborated on the consideration of family violence as a factor when deciding a relocation application:

> With respect to the allegations of family violence, the inclusion of this factor in the best interests of the child test in the legislation recognizes the significant impact on children when family violence is present in a home. Violence is not merely physical harm, but can be verbal or emotional abuse, coercive or controlling behaviour, or actions that compromise the safety of a child or spouse.

Justice Laskin in *Reeves v. Brand* (2018 ONCA 263 at para. 17) discussed the balancing act which courts have to employ when deciding relocation applications:

> Relocation or mobility cases, where one parent wants to take a child and move some distance away from the other parent, are among the most difficult cases in family law. If the custodial parent is permitted to move with the child, inevitably the relationship between the non-custodial parent and the child will be affected and may suffer. Typically the court must balance the custodial parent's legitimate interest in relocating with the non-custodial parent's

> legitimate interest in maintaining a relationship with the child. But in every case, the ultimate question is what is in the best interests of the child.

Burden of Proof in Relocation Applications

Justice Chang at para. 18 discussed the applicable burdens of proof for a relocation application:

> a. where there is substantial compliance with a court order, arbitral award or agreement that provides that the child spend substantially equal time in the care of each party, the party intending to relocate the child has the burden of proving that the relocation would be in the child's best interests …
>
> b. where there is substantial compliance with a court order, arbitral award or agreement that provides that the child spend the vast majority of their time in the care of the party intending to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the child's best interests…; and
>
> c. in all other cases, the parties share the burden of proving whether the relocation is in the child's best interests ...

Justice Akazaki in *Shipton* discussed the rationale behind sub*section 16.93(2)* of the *Divorce Act* at paragraph 102:

> … The effect of subsection (2) is essentially to protect a custodial parent from being controlled by a relatively uninvolved ex-spouse by discouraging objections made in bad faith …

In *Barendregt, the SCC also* discussed in what circumstances a relocation order is likely to be approved at paragraph 121:

> … In practice, a move is more likely to be approved where the clear primary caregiver for a child seeks to relocate and more likely to be denied if there is a shared parenting arrangement. Professor Thompson refers to this as the unspoken "primary caregiver presumption"…

Therefore, in all cases, the history of caregiving will be relevant. In terms of the practicality of an interim motion for relocation, Justice Fraser in *Wyatt v. Silliphant* (2023 ONSC 4710 at paras. 51-53) discussed the reservations courts have in permitting relocation applications on a temporary basis:

> Courts are generally reluctant to permit relocation on a temporary basis. The decision will often have a strong influence on the final outcome of the case, particularly if the order permits relocation. Allowing a move prior to determining the issues on a final basis necessarily creates the risk that the lives of children will be disrupted when that result may cause further disruption later if the order is reversed. This is particularly so when the proposed relocation involves a great distance.
>
> …
>
> Therefore, on an interim motion, the status quo should not be lightly interfered with unless there are compelling reasons to do so.

In *Sohal v. Bhattal* (2023 ONSC 4148 at para. 15), Justice Gibson elaborated further on the inherent difficulty courts are faced with interim relocation motions:

> Interim mobility rights motions are inherently very difficult due to the fact that the court does not have a full record of evidence before it upon which to base the decision … in the present case the many affidavits filed contain conflicting evidence, and no cross-examination has yet been held … the relatively small scope of information and evidence available on an interim motion, and the very nature of temporary orders, means that such orders are meant to be "Band-Aids" for the parties: the purpose of an interim order is to provide a solution to a problem that is reasonably acceptable in the circumstances to get the parties through to trial where the issues will be canvassed more thoroughly based on a full evidentiary record.

Conclusion

In *Shearhart v. Shearhart*, Justice Chang found that the Applicant failed to satisfy the burden of demonstrating compelling circumstances that justified the proposed relocation.

After considering the factors enumerated in the *Divorce Act* as well as leading jurisprudence, Justice Chang was not satisfied that the Applicant's proposed relocation was in the children's best interests. He found that the Applicant presented insufficient evidence to prove that the relocation would be in the children's best interests. In fact, he stated that the evidence indicated quite the contrary.

Moreover, Justice Chang stated that the Applicant's proposed relocation to Brampton would result in a 'much greater geographic distance' between the Applicant and the Respondent's residence in Oakville. Justice Chang cited ***Barendregt***, stating that geographic distance "reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child."

With the ultimate consideration being the best interests of the children, Justice Chang denied the Applicant's request for relocation.

The case of ***Shearhart v. Shearhart*** illustrates the application of the best interests factors as well as reviewing the SCC decision of ***Barendregt v. Grebliunas***.

Understandably, in relocation cases the court has the important task of assessing a parent's relocation proposal carefully. The court must assess the past and present ***status quo*** to determine whether or not the future relocation proposal takes into account the child's physical, emotional and psychological safety, security and well-being. The court's assessment is very much fact-based as the court has to take into account the particular child and the particular proposed location the child would be relocating to in making a decision. We see the court exercising the utmost respect for all parties who have parenting time with the child to ensure that those relationships are maintained and fostered.

Parents relocate for a number of reasons, such as better career prospects or being closer to family for emotional support. While a parent's reasons for relocating are to be considered and respected, those reasons cannot trump the child's best interests, including their relationship with the other parent, schooling and community, among others.

Therefore, if you are retained by a party seeking to relocate, we suggest to thoroughly prepare your client's case based on the evidence and the relevant legal decisions as discussed above.

The role of therapeutic orders in cases of parental alienation

Ainsley Doell

Overview

In the September issue of the OFLM, Samantha Rich wrote about parental alienation and the different remedies available to litigants who establish its presence. Through a discussion of the recent decision of ***C.B. v. E.G.*** (2023 ONSC 1571), this article will focus in on one of those remedies, namely, reunification therapy. While orders for reunification therapy can be a powerful tool for responding to parental alienation, they are not always appropriate and there may be significant barriers to their enforceability. This article seeks to provide legal professionals with guidance on when it may be appropriate to advance these requests on behalf of their clients.

Introduction

Therapeutic orders, including orders for reunification therapies, can be powerful tools for repairing parent-child relationships which have been damaged through parental alienation. However, courts have noted that this kind of intervention is not always appropriate even where alienation can be made out, and that such orders are to be made "sparingly".

This article will be discussing ***C.B. v. E.G.*** (2023 ONSC 1571), a decision released earlier this year which provides a useful example of how litigant's requests for reunification therapy ought to be handled, applying the 2022 Court of Appeal decision in ***A.M. v. C.H.***, 2019 ONCA 764.

In ***C.B. v. E.G.***, Justice Bale offers an interesting analysis of the role of the views and wishes of mature minors in cases of parental alienation. In providing an overview of the law on therapeutic orders, Justice Bale clarifies the contentious issue of whether the consent of child is required in order to make a therapeutic order.

This article will begin by briefly describing what reunification therapy is. Through a discussion of *C.B. v. E.G.*, it will then address the authority of the court to order it, the perceived role of such an order, the circumstances in which such orders have been made, and the circumstances in which such orders are inappropriate.

This article aims to outline considerations for legal practitioners who are representing clients where parental alienation may be at play, and to help them assess whether a request for reunification therapy is likely to be viewed favourably by the court.

What is an order for reunification therapy?

Orders for reunification therapy are aimed at re-establishing a relationship between children and their estranged parents. They can come in many forms and are often sought in high-conflict family law cases where an access parent is alleging that the primary parent is engaging in alienating behaviours that are damaging the parent-child relationship.

This therapy can take the form of joint counselling sessions, such as was sought in *Leelaratna v. Leelaratna* (2018 ONSC 5983).

On the other end of the spectrum, depending on the severity of the alienation, reunification therapy could involve a more intensive multi-day intervention. In *E.T. v. L.D.* (2017 ONSC 4870), the court used its *parens patriae* jurisdiction to compel the parties' attendance at the multi-day program Families Moving Forward, led by parental alienation expert Dr. Barbara Jo Fidler.

Cost is an important consideration when judges consider whether to order reunification therapy, and is therefore something that lawyers ought to consider when seeking it on behalf of their clients. Justice Shaw noted in *Barrett v. Huver* (2018 ONSC 2322) that the Families Moving Forward program is costly, and that he would "require compelling evidence as to the likely success of the proposed intervention therapy, as well as the financial ability of [the respondent] to afford the costs of the program" before making an order compelling participation (at para. 46).

Where a court declines to order participation in a program such as Families Moving Forward, they may opt to order a less invasive therapeutic intervention: In *Milne v. Milne* (2023 ONSC 27), a father sought an order enrolling his children in Family Bridges; a program involving a four-day workshop, a five-day vacation with the estranged parent, and then a 90-day suspension of contact between the alienating parent and the children. While Justice Steele made an order for reunification therapy to resume immediately, she declined to make the order as requested by the father due to a lack of expert evidence before her demonstrating that an intervention of this magnitude would actually benefit the children.

Where these orders are made, they may be made in tandem with orders for individual therapy for the children or parents.

For example, in *Milne*, Justice Steele ordered individual therapy for the children, to get to the root of the underlying issues in the parent-child relationship (at para. 63).

In *M.S. v. K.A.* (2021 ONSC 7853), Justice MacPherson found that the mother had engaged in alienating behaviour and ordered reunification therapy for the father and daughter. It was also ordered that the mother attend therapy herself in order to better understand the value of the daughter having a relationship with her father.

C.B. v. E.G: **case overview**

In the recent case *C.B. v. E.G.*, the applicant father brought a motion for urgent family therapy, aimed at mending the relationship between his 16-year-old daughter ("D") and the paternal family. This motion was opposed by both the mother and the Office of the Children's Lawyer ("OCL").

The parties shared two children, ages 18 and 16 respectively. The proceedings only concern the youngest child, D, who is still a minor. Following their separation in 2016, the parties had a written agreement that provided for shared parenting time. However, both children resided primarily with their father from separation until 2020. In May 2020, the parenting status quo was abruptly disrupted when both children refused to return to their father's care (at paras. 5-8).

The father's position was that this abrupt change was a result of the mother's alienating behaviours. He argued that he shared a close relationship with D, and that her mental and physical health have been in decline since leaving his care. He claimed that the mental health issues experienced by D were not present while she resided with him (at paras. 9-10).

The mother denied that she had any role in the decline of the father's relationship with their children and her position was that D's views and wishes be respected regarding contact with her father.

The father's account is starkly contrasted by the statements that D made to the OCL. The OCL report stated that D does not share the same close and loving view of her relationship with her father, and that she believes her father to be coercive and controlling. She did not want any contact with her father.

Justice Bale dismissed the father's motion. In making her decision, she considered the following issues:

1. The jurisdiction of the court to make therapeutic orders;
2. The best interests of the child;
3. Weighing the views and preferences of children; and
4. The implications of making therapeutic orders against the wishes of a mature minor.

Below, I will outline Justice Bale's analysis of these issues, elaborating on some of the decisions she cites and drawing in additional relevant case law.

1. ***Jurisdiction***

There has been conflicting case law on the issue of whether the court has the authority to make therapeutic orders absent the consent of the people subject to them, including orders for reunification therapy.

The case law points to three sources of the court's jurisdiction: The *Divorce Act*, the *Children's Law Reform Act*, and if all else fails, the court's *parens patriae* jurisdiction.

However, some case law rejects this jurisdiction on the basis that the court cannot make an order for therapy without the consent of all subjected parties.

The *Health Care Consent Act* (SO 1666, c. 2) provides that consent is needed for the delivery of all health care treatments. There has been discord as to whether reunification therapies are captured under the definition of "treatment" and therefore fall under the purview of this legislative scheme.

In *Barrett v. Huver*, the father was seeking an order that the parties and their two children attend Families Moving Forward — a multi-day family therapy intervention program. Justice Shaw noted that counselling requires the cooperation of all parties involved. Further, he held that given their age, the *HCCA* applied and the children's consent was therefore required.

In other cases, it is found that reunification therapies do not fall within the definition of "treatment," and such orders are within the jurisdiction of the court even absent the consent of the children (see, *e.g.*, *Leelaratna v. Leelaratna*, 2018 ONSC 5983).

In *C.B.*, Justice Bale notes that the Ontario Court of Appeal decision in *A.M. v. C.H.* (2019 ONCA 764) speaks definitively on this issue. Writing for the court, Justice Pardu held that the *Health Care and Consent Act* was not a controlling factor, and that judges have broad authority to make orders for counseling under section 16 of the *Divorce Act* as well as section 28 of the *Children's Law Reform Act*.

In this case, Justice Bale found that the court's authority to make such an order could be found in section 28 of the *CLRA*.

Moving forward, it may be tough to argue that the court lacks jurisdiction to make an order for reunification therapy. Practitioners looking to dismiss a claim for such an order would be better served basing their arguments on the best interests of the child or practical issues such as cost or enforceability, as discussed below.

2. ***Best interests of the child***

The best interests factors enumerated in section 24 of the *CLRA* apply to all parenting orders made under the Act. The analysis under section 24 is very fact dependent. *C.B.* points to two cases that enumerate guiding principles to apply to the best interests analysis as it relates to orders for reunification therapy.

The first case, *Testani v. Haughton* (2016 ONSC 5827), is widely cited in decisions regarding reunification therapy. Justice Jarvis provided the following considerations (at para. 18):

1. Such orders [for reunification therapy] are to be made sparingly.
2. There must be compelling evidence that the therapy will be beneficial.
3. The request must be adequately supported by a detailed proposal identifying the proposed counselor and what is to be expected.
4. Resistance to therapy is an important factor but is not the determining factor whether such an order should be made.
5. Where a clinical investigation or assessment is underway, no order should be made pending their conclusion.
6. Wherever practical, appropriate direction should be given to the counselor/therapist and a report made to the court.

In *Testani*, an order for reunification therapy was made for a father and his 13-year-old daughter. It is worth noting that the father had proposed a particular therapist to conduct the reunification therapy, and the court had the benefit of being able to assess that that therapist's approach was well suited to the needs of the family. This suggests that item 3 above requires more than simply proposing a counsellor who has their own methods. As discussed above, reunification therapy could be as simple as ordering joint counselling or as complicated as requiring attendance at a multi-day multi-stage intervention. The moving party and their counsel must turn their minds to finding services that respond to the specific needs of the children involved.

Justice Bale notes that these factors were added to in *Leelaratna*, where Justice Audet included the following practical considerations in her analysis (at para. 69):

1. Is the cause for the family dysfunction (whether alienation, alignment or reasonable estrangement) clear based on expert evidence or otherwise? If not, does it matter in light of the type of therapy proposed?
2. At what stage is the therapeutic order sought (motion based on potentially incomplete evidence vs. trial based on full evidentiary record)?
3. Are the parents likely to meaningfully engage in counselling despite their initial resistance to the making of the order? Will a strong judicial recommendation compel participation and cooperation by the recalcitrant parent?
4. Is the child likely to voluntarily engage in counselling therapy?

Justice Bale highlights both cases as providing guidance with respect to how to apply the best interests factors to cases of parental alienation where the relief being requested is an order for reunification therapy.

Both *Testani* and *Leelaratna* are broadly cited in this context, and practitioners can feel confident looking to these ten factors together for guidance when assessing the strength of their case and deciding whether to proceed with seeking reunification therapy.

3. *Weighing the views and preferences of children*

Per section 24(3)(e) of the ***CLRA***, a child's views and preference ought to be considered in conducting a best interests analysis, where they can be ascertained, and given weight in accordance with the child's age and maturity.

Justice Bale conducts a thorough analysis of the appropriate role of the views and preferences of a mature child.

Her analysis begins with noting that this is a right given to children under the ***United Nations Convention on the Rights of the Child***, Article 12: children must be given a right to express their own views, and those views must be "given due weight in accordance with the age and maturity of the child' (*Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 12).

However, despite the presence of this right domestically and internationally, it must be balanced with the court's duty to "act protectively"— which may be at odds with a teenager's "strong claims to autonomy" (***C.B. v. E.G.*** at para. 22; discussing ***A.M. v. C.H***).

In ***W.C. v. C.E.*** (2010 ONSC 3575 at para. 139), expert on parental alienation Dr. Fidler presented evidence that if there is a finding that a child has been subjected to parental alienation, little weight should be attached to the child's wishes.

So, how is this protective duty reconciled with a child's right to their autonomy?

In ***C.B.***, Justice Bale states that the maturity of a child needs to be assessed in light of the severity of the potential consequences of refusing or receiving the reunification treatment (at para. 22).

Bale J. cites factors from ***Decaen v. Decaen***, 2013 ONCA 2018 at para. 42:

> Generally, in assessing how much weight to give to children's wishes in family court proceedings, a court should consider:
>
> a. Whether the parents are able to provide adequate care;
>
> b. How clear and unambivalent the wishes are;

c. How informed the expression is;

d. The age of the child;

e. The child's maturity level;

f. The strength of the wish;

g. How long they have expressed their preference;

h. The practicalities of the situation;

i. Parental influence;

j. Overall context; and

k. The circumstances of the preference from the child's point of view.

When the views expressed are with respect to medical decision-making, ***C.B.*** provides a further list of factors from ***A.C. v. Manitoba (Director of Child and Family Services)***, 2009 SCC 30:

i. What is the nature, purpose and utility of the recommended medical treatment? What are the risks and benefits?
ii. Does the adolescent demonstrate the intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences?
iii. Is there reason to believe that the adolescent's views are stable and a true reflection of his or her core values and beliefs?
iv. What is the potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment?
v. Are there any existing emotional or psychiatric vulnerabilities?
vi. Does the adolescent's illness or condition have any impact on his or her decision-making ability?
vii. Is there any relevant information from adults who know the adolescent, like teacher's or doctors?

(See paras. 69-70, citing ***A.C. v. Manitoba (Director of Child and Family Services)***, at para. 96).

In the case at hand, Justice Bale affords considerable weight to the views and preferences of the child, D. The following evidence supported this determination:

- D is 17 years old, nearing the developmental stage where she will be separating from her parents;
- Her views are strong, consistent, and well informed: It is clear that D understands her father's request, as she is familiar with the concept of therapy, having attended in the past, and she has read her father's motion materials;
- The "obvious hallmarks" of parental alienation are absent in this case; there is no "ongoing warfare" between D's parents.

It is explicitly noted that D's strong opposition to reunification therapy was not determinative: It was necessary for Justice Bale to explore the context in which D held these views, how she arrived at them, and how strongly she held them.

4. Implications and additional considerations

It is important to keep in mind that court orders are not made in a vacuum – just because an order for reunification therapy is made does not mean that the child subject to it will readily comply. This is a real practical concern when the child in question is a mature minor. A 17-year-old who does not want to attend therapy may simply just not attend, which leads to the issue of enforceability.

When the children are younger, it may be easy for a court to order that their parents complete the necessary paperwork and take other steps to enroll them in therapies and facilitate their attendance. But if the parents are doing all that they can do, how is a court supposed to enforce an order to compel a teenager to attend and meaningfully engage?

This is discussed by Justice Bale, who states that "the court should not be drawn into making orders that cannot reasonably be expected to be implemented" (*C.H. v. E.G.* at para. 39).

Other examples, in brief

Given the fact-driven nature of this analysis, what follows is a brief overview of some other cases from the last five years where the court has considered whether to grant an order for reunification therapy.

<u>Reunification therapy ordered:</u>

***Rea v. Rea* (2018 ONSC 3723)**: Justice Jarvis orders reunification therapy, stating that the best interests of the children are best served by starting right away, in tandem with the preparation of the *CLRA* section 30 assessment. The mother sought reunification therapy with the parties' youngest child, born in 2006. The father argued that a lawyer should be appointed for the child to ascertain his views. Justice Jarvis notes that "where a parent says that a child does not wish to see the other parent, it is not enough for that parent to leave the decision up to the child" (at para. 15). There was no consideration in this case of whether the court had jurisdiction to make a therapeutic order, or reference to where the authority came from.

***R.N. v. A.N.* (2019 ONSC 163)**: Father seeking reunification therapy, claiming that the mother and her new partner have engaged in alienating behaviour. Parties share three children: 19, 14, and 12 years of age. Both parents "support an outcome that involves family reunification therapy and counselling", but the mother thinks that the father should have to attend counselling and anger management classes first. Justice Jarvis ordered reunification therapy for the 14- and 12-year-old, but no access at that time.

***M.S. v. K.A.* (2021 ONSC 7853)**: Reunification therapy was not specifically sought as relief. Justice MacPherson ordered reunification therapy, to begin immediately, the cost of which is to be shared as a section 7 expense. The mother unnecessarily minimized the father's role in their 6-year-old daughter's life and lacked insight into the impact of her own behaviours. The behaviours of the child clearly indicated the presence of alienation. Because the mother had ignored orders for reunification therapy in the past, Justice MacPherson went as far as to provide the father with sole decision-making authority and primary care, noting that he was better positioned to facilitate the reunification therapy. The mother was also ordered to attend therapy herself in order to better understand the value of her daughter having a relationship with her father.

***Milne v. Milne* (2023 ONSC 27)**: Discussed above. The father sought intensive multi-day intervention, but Justice Steele opted to instead order less invasive reunification therapy and individual therapy for the children. This was not a case of "extreme" alienation; there was evidence that the mother had been attempting to facilitate parenting time. The children were 8 and 11 years old, respectively. It was noted that the cause of the relationship breakdown was unclear, and the father seemed "laser focused on re-establishing his time with the children," rather than on understanding or addressing the underlying causes.

No reunification therapy ordered:

***Leelaratna v. Leelaratna* (2018 ONSC 5983)**: The father sought an order for joint counselling for him and his 11-year-old son, as recommended by a child psychologist. The child was experiencing physiological symptoms due to the stress of parenting time with his father. The mother unsuccessfully argued lack of jurisdiction. Justice Audet found that, at this time, any form of access would not in the child's best interests, but that reunification therapy may be appropriate in the future. In the meantime, she made orders for individual therapy for the mother, father and son. In this case, it was noted that a professional therapeutic intervention may be the only chance that the father and son have to rebuild a positive relationship.

***Barrett v. Huver* (2018 ONSC 2322)**: Discussed above. Father sought an order for the parties and their children, 14 and 12 years of age, to attend Families Moving Forward. The evidence presented was contradictory affidavits and there was no expert evidence presented; it was "impossible" to determine the cause of the harm to the relationship or whether the harm could be meaningfully addressed by this costly program.

***Cucci v. Cucci* (2019 ONSC 1565)**: The father unsuccessfully sought an order for the family to attend Families Moving Forward. The children in question were 15 and 17 years of age, respectively. The cause of the relationship breakdown was the nature of the parties' separation, which occurred following a confrontation about an affair. Justice Kumaranayake noted that the evidentiary record before her was deficient: she needed more evidence about the nature of the proposed program and more evidence about the views of the children in relation to the specific relief requested, especially given their ages. What was clear, however, were the children's consistent views that they did not want to have access with their father.

Conclusion

The breakdown of a parent-child relationship can be devastating, but that does not always mean that therapeutic intervention is appropriate. It is important for parents and legal practitioners to remember that courts will always put the best interests of the child at the forefront of their decision-making, and the outcomes will not always lead to what they feel would be a 'happy ending'.

Some judges have found that the cause of parental estrangement is relevant to whether reunification therapy is appropriate, and others are less concerned with that as long as it can be found that re-establishing a healthy parent-child relationship is in the child's best interests.

C.B. v E.G. provides a clear articulation of the state of Ontario courts' approach to orders for reunification therapy, providing especially helpful guidance on how to appropriately weigh the views of mature minors.

If you think back to when you yourself were 17 years old, as in *C.B.*, consider whether you would have been receptive to being forced not only to attend but to meaningfully participate in this kind of intervention.

Among other practical considerations is the sad reality that the cost of therapy can be prohibitive for many parties. Accordingly, the court may not order reunification therapy where it is clear that the parties do not have the means to pay, even where parties may be able to benefit from the services.

Additionally, it appears that courts are more willing to intervene where children are younger and more directly under the influence of their primary parent.

Finally, the important take away from the above case law is that intervention should be sought as soon as possible, to begin the healing process and avoid irreparable harm.