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

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Common law spouses and exclusive possession: still an 'open question'?

Oriana Visser

Outline

This article highlights a gap in the law that currently exists for common law spouses who wish to seek exclusive possession of the family home. Specifically, there have not been any recent legislative changes with respect to this issue, and appellate courts have not provided clarity either.

In the face of this gap, this article looks at the suggested remedies and themes found in recent case law, as well as relevant factors that courts assess when asked to determine a claim for exclusive possession.

Introduction

Common law spouses face a challenging legal battle if they wish to seek exclusive possession of the home. In the 2008 decision *Joyce v. O'Neill*, Justice Hackland, referring to non-titled spouses, commented that, "It remains an open question whether a common law spouse can obtain interim possession of the other spouse's property" (2008 CanLII 68120, at para. 16).

More than a decade later, Justice Mackinnon observed the relevant case law and noted that, "These decisions essentially delay enforcement of the owner's legal right to possession, rather than standing for authority that the court may create a substantive right to exclusive possession by use of inherent or equitable jurisdiction" (*Souleiman v. Yuusuf*, 2021 ONSC 6994 at para. 11).

Common law spouses who are also joint owners of the family home are further restricted in how they can seek exclusive possession, as both parties have an equal right to possession based on ownership. The only possible exception for common law joint owners is through using section 34 of the *Family Law Act* in a dependent's claim for support (*Souleiman v. Yuusuf,* at para. 15).

Nevertheless, courts have made it clear as recently as last year that they will dismiss claims for exclusive possession by unmarried spouses. For example, in *Hurdon v. Crooks*, the parties were not married and thus their residence was not legally a matrimonial home. Fregeau J. thus found no jurisdiction in the *Family Law Act* to make an interim order for exclusive possession (*Hurdon v. Crooks*, 2023 ONSC 481 at para. 44).

Even married couples need to beware. Justice Kraft pointed out in *Fatima v. Agha* (2024 ONSC 1441 at paras. 40 – 42) that if there is a temporary exclusive possession order in place and the couple subsequently get divorced, that order would no longer be valid.

> Given that Part II of the *Family Law Act* applies to married spouses, an interim order for exclusive possession would become invalid if Ms. Fatima is not a "spouse" as defined in s.1(1) of the Act…

Similarly, in *Oppong Nketiah v. Oppong Nketiah* (2021 ONSC 4807 at para. 6), the common-law wife's right for exclusive possession of the home was extinguished as a result of the parties' subsequent divorce. The parties were no longer spouses, and the wife could not rely on section 24 of the *Family Law Act* to claim exclusive possession.

Legislative background

Section 24 of the *Family Law Act* vests authority in the court to award exclusive possession of the matrimonial home to one spouse. Common law spouses are excluded from the protection that this remedy provides. In fact, no *specific* statutory authority exists enabling courts to grant exclusive possession of the family home to common law spouses akin to what section 24 provides for married spouses. Common law spouses seeking to obtain exclusive possession of the home must do so as an incident to other claims.

Only a handful of potential grounds to claim exclusive possession have been articulated in the case law. They are as follows:

1) As a form of spousal support under s.34(1)(d) of the *Family Law Act*;
2) As part of a pending trust claim;
3) As an effect of a restraining Order under section 46(1) of the *Family Law Act* or section 35(1) of the *Children's Law Reform Act*; and,
4) As an effect of a parenting order. (*Perks v. Lazaris, 2016 ONSC 1356* at paras. 27 – 28)

Despite potential pathways to an Order akin to exclusive possession, little authority exists for these Orders to be made on any of the grounds listed above. The case law remains extremely fact-specific, and success of claims varies widely based on ownership status of the home, current occupancy status of the home, strength of trust and spousal support claims, and the presence of parenting issues (such as incidences of family violence).

Recent case law

A sampling of recent case law considering common law spouses' applications for exclusive possession or occupation of the home, demonstrates the wide variety of outcomes in cases dealing with this issue, demonstrating the effect of a lack of clarity from legislatures and higher courts.

Titled spouse successfully evicts non-titled spouse

In the recent case of *Martelly v. Belgrave* (2024 ONSC 2746), the Applicant common-law husband, who was the owner of the home but not living in the home, was successful in obtaining a Writ of Possession to evict the non-titled Respondent who remained in the home. However, the trial proceeded uncontested. The Respondent did not appear, and no claims or evidence were brought on her behalf. Justice Coats was unable to consider if the Respondent common-law wife had any trust claims or claims for support.

Non-titled spouse may remain in home pending trust claim

In *Anthony v. Oqunbiyi* (2023 ONSC 861), the non-titled common-law wife did not initially advance any trust claims as she sought an Order that the parties were married. While Justice Shaw found that the parties were not married, he declined to order the wife to vacate the property and found that she had reasonable justification to remain at the home.

The wife had been living in the property since 2017. She remained living there along with the parties' two children and the husband post-separation. As she did not yet have the opportunity to advance a trust claim, the judge was unable to determine if such a claim would be unmeritorious. The wife was allowed to remain in the home on an interim basis, pending adjudication of this issue at trial.

Absence of meritorious trust claims

In *Abdulaziz v. El Zahabi* (2022 ONSC 2591), the court found that the mother, who was a non-titled spouse, failed to present meritorious claims based on unjust enrichment and resulting trust. However, the judge declined to order her to vacate the home, finding that the balance of convenience favoured her and the children remaining in the home pending its sale (at para. 41).

Absence of statutory authority

In *Souleiman v. Yuusuf* (2021 ONSC 6994), the court cited "absence of statutory authority" and declined to award exclusive possession to the mother who was a joint owner of the home. The parties had cohabited from 2016 to 2020 and had two children, ages two and four. The parties both remained living in the home after separation. The court found that both parties had a right to possession based on ownership and that no legal right existed for sole occupation "for which equity can provide a remedy" (at para. 18).

The court acknowledged that had the parties been *married*, the Applicant's claim for exclusive possession would have been granted. Justice Mackinnon commented on this 'gap' in the law, stating:

> Because of an absence of statutory authority these parties are left in the anomalous situation where both the motion for exclusive possession and the motion for sale are dismissed, and unless one party decides to move out of the family home in the interests of the children, they are likely to continue to be exposed to parental conflict and tension until their parents' case is finalized. (at para. 24)

Earlier Cases of Note

Perks v. Lazaris, 2016 ONSC 1356

In *Perks v. Lazaris*, the parties had been in a 25-year common law relationship. They were the parents of three children, a 24 year old daughter and 10 and 12 year old sons. The father was solely on title to the home. An incident took place on the date of separation and the father moved out of the home. A nesting Order was put in place. The father brought a motion to terminate the nesting Order and evict his ex-spouse from the family home.

Justice McGee held that it is not a given that a non-titled spouse has no basis upon which to remain in the family home following separation and articulated the 3 main pathways: pending a trust claim, as a form of support, or as an effect of a restraining order.

The court relied on section 28(1) of the *Children's Law Reform Act* and found that "In order to protect the children from exposure to adult conflict, I find it is necessary to prohibit the father from attending at the home."

Interestingly, the Order did not specifically state that the non-titled spouse was granted exclusive possession, rather the judge ordered that the father be prohibited from attending within 250 metres of the home and terminated the nesting Order.

***Akman v. Burshtein*, 2009 CanLII 16574 (ON SC)**

In *Akman v. Burshtein*, Justice Ferrier considered whether exclusive possession of the home should be ordered as a form of support. The parties had been in a common law relationship for at least 10 years, although the length of the relationship was disputed. Mr. Akman sought to sell the home, which he was no longer living in. Ms. Burshtein remained in the home. The parties did not have children.

The court relied on section 34(1)(d) of the *Family Law Act* (i.e. to may make an order with respect to the exclusive possession of a matrimonial home) and considered the factors set out in section 24(3) of the Act:

(a) The best interest of the children affected;
(b) Any existing orders under Part 1 (Family Property) and any existing support orders;
(c) The financial position of both spouses
(d) Any written agreement between the parties;
(e) The availability of other suitable and affordable accommodation; and
(f) Any violence committed by a spouse against the other spouse or the children.

Considering these factors, Ferrier J. declined to order exclusive possession in favour of Ms. Burshtein, finding that there were no children of the relationship, no existing orders, and that while the titled spouse was in a better financial position, this could be remedied through a monetary support Order.

***Joyce v. O'Neill*, 2008 CanLII 68120 (ON SC)**

In *Joyce v. O'Neill*, the parties lived together in a common law relationship for approximately 22 years. The property was solely owned by Mr. Joyce. A domestic incident occurred, and Mr. Joyce was charged with assault. His bail conditions

stipulated that he could not return to the home. Mr. Joyce subsequently moved into an assisted living facility for seniors.

Justice Hackland reasoned, on *a balance of convenience basis*, that Ms. O'Neill should be entitled to exclusive possession of the home. She had claimed interest in the property by way of constructive trust and a trial on the issues was pending. The house had been her home for many years, and it was unlikely that Mr. Joyce would be able to return to the home due to a decline in mental and physical health. Mr. Joyce also had considerable means and a number of options available to him, whereas Ms. O'Neill was entirely dependent on Mr. Joyce for support.

Practically Speaking

In addition to the issue of exclusive possession, there is always a risk that the opposing party may try to sell the home without consent against your client's wishes. Raymond Goddard and Janice Ho summarized this issue in their 2018 CFLQ article titled *Things to Consider When Dealing with Interim Property Issues* (37 C.F.L.Q. 150). In their article, they write as follows:

> If a spouse is not a registered co-tenant or a co-tenant in equity, he or she is not entitled to request partition and sale of the other party's property. Obtaining a copy of the PIN from the Land Registry Office early in the retainer is recommended, if not even at the first client meeting.
>
> Where a married spouse is not a co-owner, his or her counsel should advise the spouse to file a matrimonial home designation on title. **Where a common-law spouse is not a co-owner but may have a constructive trust claim or a joint family venture claim over the family residence, counsel should canvass this claim in as much detail as possible as early as possible**. If the claim appears meritorious, then consideration should be given as to whether obtaining a certificate of pending litigation is required to protect the client's interests until a final determination at trial is made.
>
> When advancing a claim for partition and sale, ensure that the relief is sought in the party's pleading as well as in the notice of motion under the proper statute, otherwise the client risks a denial of his or her request if it is not properly pled and therefore not before the Court. **For common law spouses, the spouse must make a constructive trust or joint family venture claim**

> **over the family residence in addition to the request for partition and sale under the *Partition Act* in the action and in the motion in order for the Court to have jurisdiction**. (emphasis added)

Conclusion

The case law articulates potential grounds for common law spouses to claim exclusive possession of the family home. These include as a form of spousal support under s.34(1)(d) of the *Family Law Act,* as part of a pending trust claim, as an effect of a restraining Order or, potentially, as an effect of parenting Order. However, it is clear that a significant gap remains and courts do not shy away from simply dismissing such claims for non-married spouses.

No remedy exists for common law spouses that is akin to what section 24 of the *Family Law Act* provides to married couples. The case law has made clear that common law spouses do not have an inherent right to exclusive possession and there is little authority to make such orders even under the grounds articulated above.

Common law spouses seeking to claim exclusive possession should be made aware that they must do so as part of alternative claims. Those alternatives include trust claims or claims for spousal support. Nonetheless, the case law is extremely fact specific in those situations, thus leading to a questionable chance of success.

The path to independence: self-sufficiency in the modern world

Roxanna Cian

Overview

This article discusses the obligation to pursue financial self-sufficiency following separation in the context of a spousal support claim. By examining recent Ontario court decisions, this article reviews the varied approaches courts have taken when conducting self-sufficiency analyses. Most recently, the outcome in *Gillespie v. Gillespie* (2024 ONCJ 124) suggests a harsher stance on self-sufficiency may be gaining traction in the Ontario courts.

Introduction

Like other principles of support, the idea of economic self-sufficiency is a concept embedded in statute. Both the Federal *Divorce Act* and Ontario's *Family Law Act* underscore the importance of attaining financial independence following the dissolution of a relationship.

Section 15.2(6) of the *Divorce Act* sets out that:

> An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should,
>
> …
>
>> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Similarly, s. 33(8) of the *Family Law Act* reads as follows:

> An order for the support of a spouse should,
>
> …
>
>> (c) make fair provision to assist the spouse to become able to contribute to his or her own support

Further, s. 33(9)(c) of the *Family Law Act*, stipulates that:

> In determining the amount and duration, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including,
>
> …
>
> (c) the dependant's capacity to contribute to his or her own support

The question of "self-sufficiency" frequently arises some years after support issues are determined, as in a Motion to Change or an Application for Review. These questions are often based on the belief that enough time has passed since separation to reasonably expect greater economic independence from the recipient spouse. Other times, the discussion arises at the beginning of a proceeding when a spouse maintains that full or partial self-sufficiency is impractical due to age, disability, educational capacity, or other limiting factors.

The failure to achieve self-sufficiency is one factor to be considered in determining quantum and duration of support (*Leskun v. Leskun*, 2006 SCC 25 at para. 27). The absence of meaningful effort towards reaching financial self-sufficiency may motivate a court to give this factor more weight than others in determining quantum and entitlement and may even result in no support being awarded (*MacEachern v. MacEachern*, 2020 ONSC 31). Self-sufficiency is to be assessed in light of the standard of living enjoyed during cohabitation (*MacEachern v. MacEachern*, 2020 ONSC 31 at para. 27 citing *Fisher*). Some would say this is a disadvantage of marriage.

The question of imputing income goes hand-in-hand with any inquiry of self-sufficiency. If a party has not put forward meaningful efforts to transition to financial independence following the breakdown of the economic partnership inherent to marriage, courts can declare a party intentionally under/un-employed and apply the consequences that flow from such determination.

Taking self-sufficiency seriously

With the gradual end of the COVID-19 pandemic no longer posing a barrier to employment, one may wonder if Ontario courts are increasingly taking a harsher stance on assessing the pursuit of self-sufficiency.

In *Gillespie v. Gillespie* (2024 ONCJ 124), the court reviewed a separation agreement entered in 2014. The agreement established that the wife would provide regular evidence of meaningful efforts to obtain gainful employment and that the parties would annually exchange financial disclosure.

The wife held an MBA from a Polish university and a post-graduate diploma in Public Relations, and previously earned approximately $60,000 a year as a business development coordinator. Two experts brought on by the husband estimated her annual earning capacity at $70,000 to $78,000 in addition to collecting rental income. The mother submitted that she could not work in recent years as she needed to be home assisting her daughter with school during the pandemic.

To determine whether income should be imputed to the wife, the court deployed the three-pronged test set out in *Drygala v. Pauli* (2002, 167 OAC 274):

First, the court asked whether the wife was choosing to earn less than what she is capable of, and if so, if it was voluntary and reasonable. Second, the court assessed weather there were any reasonable educational, health, or child needs that prevented her from employment. Third, the court evaluated the evidence put forward by the wife with regards to the reasonableness of her decision.

Overall, the court found that:

> (1) Her education, health, and both children being in school indicated intentional unemployment;
>
> (2) there was no indication the wife could not have worked during covid and;

(3) no evidence existed to reasonably justify the unemployment.

Justice Paulseth took harshly to the fact that in the ten years following their separation, the recipient wife did not actively pursue her own employment income, but rather solely relied on the husband's support.

In particular, Justice Paulseth emphasized that rather than making strides to achieve self-sufficiency, the wife was using litigation "as an excuse to finding employment and saving money" (at para. 161(e)).

Justice Paulseth explained,

> Anna has made very perfunctory efforts, through electronic employment opportunities, to apply for jobs. The court accepts the evidence of Andrew that these efforts perhaps amounted to no more than one hour a week (at para. 166).

Paulseth J. imputed her income at $84,000, found her entitlement to spousal support ended two years prior, and ordered a reimbursement of $58,496 to the husband for the over-payment of spousal support as per her imputed income. This decision ultimately sent a clear message to intentionally underemployed litigants.

Gillespie **– the rule or the exception?**

The outcome in *Gillespie* is a marked departure from the approach taken in *Howard v. Howard* (2021 ONSC 7784). There, at the time of separation, the wife had been out of the workforce for 14 years. The parties had settled an agreement for the husband to pay spousal support for five years, after which support would be subject to review.

The husband argued that the wife did not make adequate efforts to become self-sufficient nor find meaningful employment, as shown by her failure to follow his recommendations to take pharmaceutical courses or seek teaching opportunities in British Colombia.

Alternatively, the wife argued she had a strong compensatory claim and that the husband's focus on self-sufficiency was unreasonable. She emphasized that her role during the marriage precluded her from employment despite the husband insisting that her unemployment during the marriage was a personal choice (at para. 15).

Justice McDermot accepted the wife's evidence that the husband's financial success as a doctor, which was double the income average for a family practitioner in Ontario, was only made possible by her undertaking of child rearing responsibilities and household duties. Justice McDermot found that her role in the marriage placed her at an indefinite disadvantage for employment.

Justice McDermot condemned the husband's focus on self-sufficiency, citing *Moge*:

> The objective of self-sufficiency is only one of several objectives enumerated in the section and, given the manner in which Parliament has set out those objectives, I see no indication that any one is to be given priority. Parliament, in my opinion, intended that support reflect the diverse dynamics of many unique marital relationships. (at para. 46)

Justice McDermot further explained, "Her missteps were excusable under the circumstances and cannot be seen as purposeful avoidance of career advancement or opportunities" (at para. 48).

Evidently, while Justice McDermot placed equal weight on the compensatory nature of support in *Howard*, the decision in *Gillespie* signals a tightening stance on deliberate underemployment. As courts increasingly scrutinize efforts toward financial independence, the message is clear: reliance on support without meaningful pursuit of employment may face rigorous consequences.

Picky with work? Don't be…

In *Boudreau v. Jakobsen* (2021 ONCA 511), the Court of Appeal was faced with reviewing the support obligations following a 21-year common-law relationship. Here, the respondent was economically reliant on the appellant throughout the entirety of

their relationship. Following their separation, the respondent relied on disability benefits, lived in shelters, and frequented food banks.

The Court alerted,

> Economic self-sufficiency does not mean mere subsistence but is a relative concept tied to the achievement of a reasonable standard of living having regard to the lifestyle the couple enjoyed during their relationship and the time needed to reach the goal of self-sufficiency. (at para. 17)

However, the Court of Appeal denounced the respondent's deliberate lack of efforts towards attaining self-sufficiency as demonstrated by his self-limiting attitudes against certain types of work he deemed "would really rip out his soul". Instead, the Court of Appeal championed the trial judge's decision to impute income to the respondent, emphasizing the risk of termination or reduction of support in the absence of the recipient's meaningful efforts towards economic self-sufficiency.

When a disability impedes self-sufficiency

Although the third prong of the *Drygala* test allows parties to reasonably justify their unemployment, recent case law indicates there is a relatively high threshold to meet when it comes to relying on a disability to justify the lack of effort towards attaining self-sufficiency.

If a client is relying on medical circumstances to defend a claim for imputation of income, counsel should be well-prepared to provide a medical report detailing diagnoses, prognosis, treatment plan, and how the medical condition specifically affects one's ability to work (*Davidson v. Patten*, 2021 ONCJ 437).

In *McChesney v. McChesney* (2023 ONSC 5388), the applicant wife claimed that her diagnoses of PTSD, depression, and anxiety obstructed her from attaining her desired self-sufficiency. She argued that she could not work because she was grappling with the effects of the respondent's husband's history of physical and psychological abuse.

Justice Kurke found that without psychological or medical evidence rendering the wife unemployable, it was reasonable to impute an income parallel to full-time employment income at a minimum wage job.

Similarly, in *Mohamoud v. Farah* (2023 ONCJ 103), the court did not accept a three-year-old medical report diagnosing the respondent husband with carpel tunnel syndrome as enough to render him incapable of achieving financial self-sufficiency.

Furthermore, in *Gillespie*, as previously discussed, despite the wife's medically substantiated ulcerated colitis, the court concluded that because it was in described by the specialist as in remission, there was no indication her diagnoses would interfere with the ability to work.

Conclusion

Overall, recent Ontario decisions regarding self-sufficiency have made a point to frown upon the use of spousal support as a lottery ticket of sorts. The outcome in *Gillespie* serves as a cautionary tale towards the potential consequences of not reasonably pursuing financial self-sufficiency.

The degree of self-sufficiency expected when leaving a marriage or common law relationship will heavily depend on the length of the marriage, the age of the parties, their qualification, and what burdens they bared by the very nature of the relationship. Indeed, some courts have shown significant leniency when it comes to evaluating one's efforts towards self-sufficiency. However, it appears that for the most part, courts do not respond compassionately when faced with a support recipient's unnecessary indulgence in a payor's income.