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General

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Security for costs – when, why and how much

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Overview

Seeking security for costs is an available yet under-utilized recourse within the Ontario family law framework.

As we all know, family law litigation can be lengthy and expensive. Therefore, if a party anticipates an award for costs at the end of a trial, it is likely that they will want assurances that the other party will be able to pay them. This is where a claim for security for costs comes into play.

This article discusses the legal framework and general principles for seeking security for costs for a motion or a trial. It also highlights *Mooney v. Mooney* (2024 ONSC 4586) and *Alami v. Haddad* (2024 ONCA 300), two recent Ontario decisions that summarized and applied the legal principles.

In *Mooney* the wife was not successful in her claim of security for costs of $150,000. However, Justice de Sa ordered the husband to pay $5,000 should he decide to bring any further motion prior to trial. He also ordered $9,000 in costs due to, in part, the husband's conduct throughout the proceedings.

In *Alami*, the husband brought a motion before the Court of Appeal seeking $25,000 in security for his anticipated costs of the appeal brough by the wife. He claimed that the wife's appeal was frivolous and vexatious because it was devoid of merit, and that she had insufficient assets to pay his costs if she was unsuccessful. In dismissing the claim, the Court found no evidence that the wife brought the appeal to annoy or harass the husband or that her pursuits were in bad faith. The Court also found that the wife's one-half interest in the matrimonial home would be sufficient to satisfy the appeal costs.

The legal framework

The family law regime in Ontario falls under the umbrella of the civil litigation system. This is true especially with respect the legal scheme for security for costs. In addition to the *Family Law Rules*, judges usually rely on the *Rules of Civil Procedure* when discussing security for costs.

Family Law Rules

Subrules 24(13) to 24(16) and 38(26) of the *Family Law Rules* discuss orders for security for costs.

A judge may, on motion, make an order for security for costs that is just, based on one or more of the following factors:

a. **A party habitually resides outside Ontario**.
b. A party has an order against the other party for **costs that remains unpaid**, in the same case or another case.
c. A party is a corporation and there is good reason to believe it does not have enough assets in Ontario to pay costs.
d. There is **good reason to believe that the case is a waste of time or a nuisance and that the party does not have enough assets in Ontario to pay costs**.
e. A statute entitles the party to security for costs. (Rule 24(13)) (emphasis added)

A judge making an order for security for costs has the power to determine the amount of the security, its form and the method of giving it (Rule 24(14)).

Until the security has been given, a party against whom there is an order for security for costs may not take any step in the case, except to appeal from the order, unless a judge orders otherwise (Rule 24(15)).

Failure to give security as ordered can result in the party's case be dismissed or their pleadings being struck (Rule 24(16)).

With respect to appeals, on a motion by the respondent for security for costs, the court may make an order for security for costs that is just, if it is satisfied that,

> (a) there is good reason to believe that **the appeal** is a waste of time, a nuisance, or an abuse of the court process and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
>
> (b) an order for security for costs could be made against the appellant under subrule 24 (13); or
>
> (c) for other good reason, security for costs should be ordered. (Rule 38(26)) (emphasis added)

Rules of Civil Procedure

Several parts of the *Rules of Civil Procedure* deal with security for costs.

Rule 20.05(2) confirms that if an action is ordered to proceed to trial, the court may give such directions or impose such terms as are just, including an order for security for costs. Rule 20.05(6) indicates that where a party fails to comply with an order for payment for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

Rule 56 of the *Rules of Civil Procedure* is the foundation for the framework of rules about security of costs available within the *Family Law Rules*. Particularly, subrule 56.01(1) is similar to Family Law subrule 24(13) and Civil subrule 61.06 addressing appeals is similar to Family Law subrule 38(26). One of the main differences is the choice of language from "waste of time" and a "nuisance" to the use of the terms "frivolous" and "vexatious".

Guiding Principles

- An order for security for costs should only be made **where the justness of the case demands it**. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits…: (*Yaiguaje v. Chevron Corporation,* 2017 ONCA 827 at para. 23 (emphasis added))
- The party seeking security for costs **must prove on a balance of probabilities** that there is good reason to believe that the appeal is frivolous and vexatious and that the other party has insufficient assets in Ontario to pay the costs of the appeal. The "good reason to believe" standard requires the motion judge to reach only a tentative, not a definitive, conclusion on the absence of merit or assets (*Agboola v. Unoh,* 2023 ONSC 5129, at para. 34 (emphasis added))
- In deciding motions for security for costs, judges are obliged to first consider the specific provisions of the Rules governing those motions and then effectively **to take a step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront**. (*Yaiguaje* (above) at para. 22 (emphasis added))
- Both sets of rules (Civil Procedure and *FLR*) contemplate that the form of security to be provided is **to be crafted on a case-specific basis**, to meet the particular exigencies of the case. (*Clark v. Clarke*, 2014 ONCA 175 at para. 46 (emphasis added))

***Mooney v. Mooney* (2024 ONSC 4586)**

In *Mooney*, Justice de Sa heard a motion brought by the wife seeking that the husband post security for costs in the amount of $150,000 in advance of an anticipated three-week trial. She argued that the husband's approach to litigation, his evident delay tactics, his previous outstanding costs awards and his impecuniosity warranted an order for security for costs.

The husband submitted that he did not have any assets available to post security given his financial circumstances. He was on ODSP and had no funds other than his share of the funds held in trust from the sale of the matrimonial home. The husband submitted that his share of the sale proceeds was sufficient to cover any costs from the trial.

The wife's position was that the husband's share of the sale proceeds was earmarked for occupational rent, child support and other necessary reimbursements to her. She requested leave to proceed with a summary judgement motion or uncontested trial if the husband failed to post security for costs.

Justice de Sa referenced *Hodgins v. Buddhu* (2013 ONCJ 137) and held that in making an order under Rule 24, the court must apply the following analysis:

- The initial **onus is on the party seeking security for costs to show that the other party falls within one of the enumerated ground**s.
- If the onus is met, the court has discretion to grant or refuse an order for security.
- If the court orders security, it has wide discretion as to the quantum and means of payment of the order. *Clark v. Clark* (2014 ONCA 175)
- The order must be "just" and be based on one or more of the factors listed in subrule 24(13). (emphasis added)

His Honour also reiterated Justice Katarynych's narrative in *McGraw v. Samra* (2004 ONCJ 164):

> ... The "security for costs" remedy is but one of a number of remedies provided by the rules to stop a case in its tracks until the party veering outside of the rules brings himself or herself into line with them. It is a control on a blithe pursuit of another person in the courts without attention to the merits of the pursuit and the legal costs likely to be incurred by the respondent to defend the case. It is a remedy built on the principle that court proceedings are

> expensive and time consuming and not to be launched frivolously or without due regard to the impact on the responding party ...
>
> .. As a brother judge has recently pointed out, court proceedings are not designed to give individual litigants a forum for carrying on in whatever manner they may choose, oblivious to the impact of that conduct on the other side and oblivious to the mounting costs of the litigation… (at paras. 24-25)

Justice de Sa considered that on one hand, there were real concerns that the wife would be left without compensation for her costs at the end of the trial if she succeeded. Further, while the husband had retained new counsel, he had a history of discharging counsel which would inevitably protract matters and create unnecessary delays.

On the other hand, the husband did not have sufficient funds to post security, and it would not be right to prevent him from presenting his case on its merits (in the event that his pleadings were struck due to failure to post security). The husband had acknowledged that he had issues keeping matters on track when he was not represented. However, de Sa J. had confidence that the husband would make concerted efforts to keep the matter on track.

Ultimately, the court did not order the husband to post security for costs in the amount of $150,000. However, at paragraphs 24 and 25 of the decision, his Honour ordered that if the husband wished to bring any further motion prior to trial, he would be required to post security in the amount of $5,000, or alternatively require leave of the Court. His Honour also ordered that the outstanding costs owed to the wife would be paid from the parties' joint account.

Notably, the above motion was followed by a cost decision (2024 ONSC 6156) with Justice de Sa noting that he did not make an order for security for costs so as to permit the husband to advance his position at trial. However, the court still found the wife to be the successful party and ordered the husband to pay $9,000 in costs on a partial indemnity basis. The court reasoned in part that the wife's offer to settle was

similar to the order made and the Applicant's conduct throughout the proceeding required a motion of this nature to be brought.

Alami v. Haddad **(2024 ONCA 300)**

In this motion before the Court of Appeal, the husband sought security for his costs of the appeal brough by the wife from the order of Justice Bruhn, relying on subrules 61.06(1) (a), (b) and (c) of the *Rules of Civil Procedure*. Specifically, he asked the that the wife be required to post $25,000 as security for his costs and pay the outstanding costs orders as a condition of her being permitted to continue with her appeal.

The husband submitted that there was good reason to believe that the wife's appeal was frivolous and vexatious because it was devoid of merit, and she had insufficient assets to pay his costs of the appeal if she was unsuccessful. He highlighted her failure to pay outstanding costs orders that were not related to her appeal.

Justice Roberts referenced paragraph 33 of *York University v. Markicevic* (2017 ONCA 651) where the court confirmed that the criteria under subrule 61.06(1) (a) of the *Rules of Civil Procedure* are conjunctive.

Her Honour explained that for the husband to be granted security for costs, he would have to satisfy all of the criteria: there had to be good reason to believe that the wife's appeal was frivolous *and* vexatious *and* that she had insufficient assets in Ontario to pay the costs of the appeal.

(1) Was the wife's appeal frivolous *and* vexatious?

Before answering this question, the Court discussed what "frivolous" and "vexatious" mean in this context.

Justice Roberts referred to paragraphs 19 and 25 of *Lavallee v. Isak* (2022 ONCA 290) where the court discussed that a frivolous appeal is one devoid of merit and with little

prospect of success, and a vexatious appeal is one that is brought to annoy or harass and is conducted in a vexatious or "less than diligent" manner, or is pursued in bad faith or for an oblique purpose.

The Court analysed the wife's main grounds of appeal and discussed that the wife had essentially challenged the application judge's findings of fact without identifying errors in principle or palpable and overriding errors that would permit appellate interference. The Court was of the opinion that given the deference generally owed to the application judge's findings of fact, the wife faced a stiff uphill battle on her appeal. The likelihood of the wife's appeal being successful is low.

However, as her grounds were nevertheless arguable, Justice Roberts could not say that the appeal was so devoid of merit that it is frivolous.

The Court was also not persuaded that the wife's appeal was vexatious. The wife was exercising her right to appeal and had conducted her appeal in accordance with the *Family Law Rules*. There was no evidence that she brought the appeal to annoy or harass the husband and there was no evidence that she was pursuing her appeal for a bad faith or oblique purpose.

(2) Did the wife have insufficient assets in Ontario to pay the costs of the appeal?

The Court was also not convinced that the wife had insufficient assets in Ontario to pay the appeal costs. The wife's one-half interest in the matrimonial home would have been sufficient to satisfy the appeal costs once the home was sold.

The analysis then turned to subrule 61.06(1) (b) of the *Rules of Civil Procedure* which allows for an order for security for costs of an appeal to be made if it could be made against a party under subrule 56.01(discussed above). In discussing the implications of subrule 56.01(a)(c), the Court held that the husband had the protection provided

by the wife's one-half share of the home for the outstanding costs orders and appeal costs if awarded.

Finally, the Court considered subrule 61.06(1)(c) that allows an order for security for costs to be made "for other good reason". Justice Roberts discussed two cases.

In *Heidari v. Naghshbandi* (2020 ONCA 757), the Court of Appeal held that:

> …Although the list of reasons justifying security under this residual category is not closed, the "other good reason" must be: (1) consistent with the purpose for ordering security – namely, that the respondent is entitled to a measure of protection for costs; and (2) fairly compelling, because the residual category is only engaged where the respondent cannot meet the requirements of rr. 61.06(1)(a) or (b)... (at para. 23)

In *Henderson v. Wright* (2016 ONCA 89), the Court commented on the other reason:

> This "good reason" balances the need to ensure an appellant is not denied access to the courts, with the respondent's right to be protected from the risk the appellant will not satisfy the costs of the appeal. (at para. 28)

In reaching a decision, at paragraph 13 of the decision, Justice Roberts restated that that an order for security for costs is discretionary. Her Honour commented the husband's strongest argument in favour of security for costs from the wife was that the wife's appeal appeared to be weak. Ultimately, the Court did not order security for costs.

Conclusion

As noted in Covell v. Covell (2024 ONSC 4622):

> The main purpose of an order for security of costs is to protect a party from nuisance or irresponsible litigation, conducted without regard to the merits of the case or the costs likely to be incurred and that **security for costs is not intended as a roadblock for a person who has a genuine claim**. (at para. 13) (emphasis added)

The framework for security for costs under both the *Family Law Rules* and the *Rules for Civil Procedure* introduces checks and balances. On the one hand, it provides protection against oblique and litigious tendencies of parties who have disregard for the strain of their actions on other party's financial resources. It also safeguards a party's right to obtain costs in situations where the other party is unlikely of being unable to party costs awarded against them. On the other hand, the framework sets a high threshold to ensure that the provision for security for costs does not impede the right of litigants to be heard and to defend themselves.

While the analysis is case-specific, the above summary of applicable rules and recent cases should be a starting point for lawyers assisting clients in seeking security for costs.

Court-ordered alcohol monitoring during parenting time

Samantha Rich

Overview

Justice Abrams's recent decision of *Gibbons v. Byrne* (2024 ONSC 3898) sets out the legal framework with respect to the court's discretion to order alcohol monitoring as an incident of parenting time. The paramount consideration in this determination is the impact of the parent's alcohol consumption on their ability to meet the child's needs.

The party requesting an order for alcohol monitoring as an incident of parenting time bears the onus of proving that the circumstances warrant such a severe and invasive restriction on a party's parenting time. Thus, it is important that the requesting party places sufficient and compelling evidence before the court to advocate for such an order.

The court also has broad discretion to consider alternative parenting arrangements such as therapeutic intervention and supervised parenting time until the concerns regarding a parent's alcohol consumption have been satisfactorily addressed.

Legal framework

The court has broad discretion when determining a parenting order to consider whether a parent's abstinence from alcohol and the accompanying use of an alcohol monitoring system is appropriate. The best interests of the child outlined in *section 24* of the *Children's Law Reform Act* ("CLRA") are paramount in this determination (*Gibbons v. Byrne*, 2024 ONSC 3898 at para. 55).

Justice Finlayson in *W.A.C. v. C.V.F.* (2022 ONSC 2539) discussed how alcohol consumption may impair a parent's ability to meet a child's needs, and may therefore be a relevant consideration under *section 24(3)* of the *CLRA*. He stated that "past alcohol misuse may also engage the past conduct section 24(5), depending on the current circumstances of a case". He affirmed that the "Court's job is to consider, based on evidence, whether alcohol consumption impacts a child" (*W.A.C.*, at paras. 362 & 388).

Justice Abrams in *Gibbons* discussed the legal test for the court's authority to order alcohol monitoring as an incident of parenting time:

> Apart from the best interests test, there are no separately defined legal criteria that a court must consider before exercising its discretion to order alcohol monitoring as an incident of parenting time. However, the court may consider numerous factors to determine whether a party should be ordered to abstain from drinking during their parenting time and use an alcohol monitoring device to confirm their sobriety. The factors that have spoken to the appropriateness of alcohol monitoring include but are not limited to:
>
> a. a party's previous use of a breathalyzer device;
> b. a party's admission to drinking and driving under the influence of alcohol;
> c. a party's predisposition to anger when drinking;
> d. a party's minimization of his or her regular abuse of alcohol and lack of insight into the impact of his or her drinking on the other parent and/or the children;
> e. the risk posed by a party's drinking to the children's emotional and psychological safety;
> f. the other party's consistent expression of concern over a parent's alcohol consumption, including during prior negotiations and domestic contracts; and
> g. third party evidence, such as Children's Aid Society records, detailing the other party's or child's concerns about a party's drinking (*Gibbons*, at para. 56).

Onus of proof

The party requesting an order for alcohol monitoring as an incident of parenting time bears the onus of proving that the circumstances warrant such a "severe and invasive" restriction on a party's parenting time (*Gibbons*, at para. 58).

Therefore, the party making such a request will need to place sufficient and compelling evidence before the court to advocate that such an order is both necessary and in the child's best interests.

Building trust

One of the purposes of an alcohol monitoring system is to build trust again between parents where one parent has misused alcohol, "… as a means of fostering parties' co-parenting relationship by building trust and providing reassurance between parties…" (*Gibbons*, at para. 57).

The use of an alcohol monitoring system can also be used to protect the monitored parent from any false allegations by the other parent regarding alcohol misuse (*Gibbons*, at para. 65).

Types of breathalyzers

The following are some of the breathalyzer's which have received the judicial 'stamp of approval' when making an order for alcohol monitoring as an incident of parenting time:

1. Soberlink (https://www.soberlink.com/) (*R.A. v. D.A.*, 2023 ONSC 2873 at para. 12);
2. BACtrack (https://www.bactrack.com/) (*E.M.B. v. M.F.B.*, 2022 ONSC 4838 at Appendix A at paras. 23-25); and
3. SCRAM system (https://www.scramsystems.com/) (*S.C. v. C.C.*, 2022 ONSC 1763 at para. 122).

Cost of alcohol monitoring device

In most instances, the monitored parent will have to bear the full cost of the alcohol monitoring device. However, there are some instances where the court will order that both parents must contribute to the cost on some shared basis (*R.A. v. D.A.*, 2023 ONSC 2873 at para. 10).

Justice Conlan's decision of *R.A. v. D.A.* is an example of where the court ordered that the parties must split the cost of the alcohol monitoring system. His decision was largely based on the fact that there was no current evidence that the monitored parent was under the influence of alcohol when parenting:

> I think that this is one case where the parents should split the cost of Soberlink. Whether the father has an alcohol problem, and to what extent, remains hotly contested and is the subject of untested evidence. This Court erred on the side of caution in making the findings and the decision that it did in January, and those findings stand, but **this is not a case where there is any current independent evidence that the father is consuming alcohol or is under the influence of alcohol when he is around the children**. To account for that, and to account for the fact that, in my view, the mother needs further encouragement to help foster a more normal relationship between the father and the children, which encouragement could come in the form of her contributing to the cost of Soberlink, I make the following Temporary Order (*R.A. v. D.A.*, 2023 ONSC 2873 at para. 11). (emphasis added)

An order for therapeutic intervention

Justice Shore in her decision of *Greve v. Bezerra* (2024 ONSC 560) affirmed that the court has authority to make an order that a parent attend therapy or counselling to assist in resolving problems that impact a child's health, safety, and overall well-being. Importantly, she noted that a parent needs to acknowledge that they have a problem in order for therapy or counselling to be useful:

> Section 28(1)(c) of the CLRA provides that the court may "make any additional order the court considers necessary and proper in the circumstances". The case law has interpreted this subsection to include jurisdiction for the court to

> order the parties to engage in therapy, counselling, or other services aimed at resolving problems that impact a child's health, safety and overall well-being…
>
> …
>
> I am not going to make an order that the father attend for therapy or a rehabilitation program for alcoholics. **These programs are of no use unless there is an acknowledgement of an issue**. However, it would be wise for the father to give this some serious consideration." (*Greve*, at paras. 44-45) (emphasis added)

An order for supervised parenting time

A parent's consumption of alcohol will not necessarily warrant the necessity of an order for supervised parenting time. The party seeking an order for supervision of parenting bears the onus of proving that such supervision is justified in the circumstances (*Klymenko v. Klymenko*, 2020 ONSC 5451 at para. 23).

Justice Nishikawa in *Klymenko v. Klymenko* (2020 ONSC 5451) held that the use of an alcohol monitoring system could be sufficient to satisfy concerns of alcohol consumption during the monitored parent's parenting time:

> The Respondent's concerns about the Applicant's behaviour are based mainly on his alcohol consumption. These concerns can be addressed by the use of an alcohol monitoring system. The Respondent has suggested, and the Applicant has consented to, the use of Soberlink. The use of a monitoring system would ensure that the Applicant is not consuming alcohol during his parenting time."
>
> …
>
> In my view, **supervised access, especially at a supervised access centre, is a significant intrusion and is not warranted if the Applicant undertakes not to consume alcohol before and during his parenting time and if a monitoring system is used**. (*Klymenko*, at paras. 39 and 44) (own emphasis added)

AFCC Parenting Plan Guide: Parental Substance Abuse

The *AFCC Parenting Plan Guide* is a helpful reference to review regarding how substance abuse should be addressed in the context of parenting orders in the child's best interests:

> Mental illness or substance abuse problems may adversely affect parenting if that parent is emotionally unavailable, is unable to adequately discipline and set limits, or provide a safe environment for the children. In such cases, **it may be necessary to consider alternative parenting arrangements such as therapeutic intervention, supervised parenting time, or limited parenting time until the concerns have been satisfactorily addressed**. **Protocols may need to be put in place for ongoing or periodic monitoring** and for a resumption or gradual increase in parenting time.
>
> To the extent that parents with a mental illness or substance abuse issue are compliant with their treatment plan, or parenting is not affected, regular parenting time can be established or resumed. In many cases, it will be beneficial to proactively plan for a relapse, with provisions to address the affected parent's responsibility to communicate the relapse and the arrangements that will be in place to ensure the children's safety (e.g. supervisory arrangements, switch to virtual parenting time, temporary suspension of contact) while the parent takes steps to address their situation. Parents should also consider whether their children may benefit from psycho-educational programs to assist them in understanding the issue their parent is experiencing; in many situations, this may be an important element of safety planning.
>
> **Unless a parent with mental illness or substance abuse issues acknowledges their condition and its effect on parenting, it may be necessary for the courts to be involved in making a parenting plan.** It should, however, also be appreciated that even if a parent has substance abuse or mental health issues, if those are properly addressed, in the long-term children will often want and benefit from a relationship with that parent. (A*FCC Ontario Parenting Plan Guide*, pg. 48) (own emphasis added)

Conclusion

The court's discretion to order alcohol monitoring as an incident of parenting time is guided by the paramount consideration of the best interests of the child. As outlined

by Justice Abrams's decision of *Gibbons v Byrne*, given the severe and invasive nature of such an order, the party requesting an order for alcohol monitoring as an incident of parenting time bears the onus of proving that such an order is justified in the circumstances. Thus, such a request should not be made lightly, and sufficient evidence will need to be placed before the court.

An order for alcohol monitoring as an incident of parenting time can protect children from being negatively impacted by a parent's alcohol consumption, as well as help rebuild trust between parents where one parent has misused alcohol.

Other options include therapeutic intervention, such as an alcohol rehabilitation program, however, there needs to be an acknowledgement of an issue in order for these programs to be useful. It is also important to note that supervised parenting time will not always be warranted depending on the circumstances of the case. The party seeking an order for supervised parenting time bears the onus of proving that such supervision is justified in the circumstances.

Criminal charges: Not always a decisive blow for exclusive possession of the matrimonial home

Roxanna Cian

Overview

Do criminal charges always weigh heavily against a family law litigant seeking exclusive possession of the matrimonial home? In *Rana v. Rana* (2024 ONSC 5580), Justice LeMay did not seem to think so.

While a criminal charge in the context of family violence is consequential, *Rana* illustrates that it is not always the final nail in the coffin when a court determines who gets exclusive possession of the matrimonial home.

The facts

In the case of *Rana v. Rana* (2024 ONSC 5580), Justice LeMay dealt with a motion brought by the Respondent Mother for, among other claims, an order granting exclusive possession of the matrimonial home.

The couple married in India in February of 2021, moved to Canada in 2022, had one child, and separated by June of 2023.

Shortly following their separation, the Applicant Father was criminally charged with several domestic violence offences.

After being charged, the father was prohibited from entering the matrimonial home, where the mother and young child continued to live. As a result, the mother effectively gained exclusive possession of the home.

Notably, the father held sole title to the property and continued paying the carrying costs of the home following separation.

The law, generally

Subsection 24(3) of the *Family Law Act* sets out specific criteria that a court must consider when determining exclusive possession of the matrimonial home:

> 24(3) In determining whether to make an order for exclusive possession, the court shall consider,
>
> (a) the best interests of the children affected;
>
> (b) any existing orders under Part I (Family Property) and any existing support orders or other enforceable support obligations;
>
> (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** (emphasis added)

In the context of criminal charges, ss. 24(3)(f) emerges as a specifically relevant provision. As noted by Justice Kurz in *Robinson v. Robinson* (2020 ONSC 7533),

> Domestic violence, for the purposes of s. 24(3)(f) is broadly understood to include verbal abuse, threats, and intimidation and is a relevant factor in the determination of exclusive possession (*Menchella v. Menchella*, 2012 ONSC 6304 (Ont. S.C.J.) at para. 27). (at para. 82)

Any allegations of violence by one spouse against the other will have to be considered by a judge in determining exclusive possession. Presumably, evidence of a formal criminal charge substantiating the allegation could heavily affect the consideration of ss. 24(3)(f).

However, among the factors of ss. 24(3), the best interests of the child remain the paramount consideration (*Robinson*, at para. 83).

It is crucial to recognize, as Justice McGee highlights in *Menchella v. Menchella* (2012 ONSC 1861), that an order for exclusive possession has a highly prejudicial effect on the dispossessed spouse. Accordingly, Justice McGee states that "An order for

exclusive possession should not be made on a motion where there is conflicting evidence that requires findings of credibility that are only available at trial" (*Menchella*, at para. 15).

The father's position

In defending his position, the father referred to *Harper v. Harper* (2010 ONSC 4845). In *Harper*, Justice Spies was confronted with a similarly short marriage that included allegations of domestic violence and where the matrimonial home was solely owned by the father.

In that decision, Justice Spies observed,

> This case strikes me as one where the **Applicant is trying to use her *de facto* possession of the matrimonial home for leverage** against the Respondent. In my view, provided the court ensures that the Respondent does not delay in bringing this matter to trial, **she should not be permitted to do so**. (at para. 30) (emphasis added)

Spies J. further noted that given the short marriage, the father's pre-marital ownership of the home, and the mother's lack of financial contribution, the father had a strong claim for unequal division of the matrimonial home (*Hunter*, at para. 30).

The mother's position

In justifying her position, the mother relied on *Reshetnikova v. Reshetnikova* (2023 ONSC 7988). In that case, the husband was also prohibited from returning to the matrimonial home as a result of assault charges. The husband's mother sought to set aside the order of exclusive possession granted to the wife. Justice Kraft in *Reshetnikova* upheld exclusive possession for the wife and focused on the best interests of the children in coming to that conclusion (at para. 49).

Justice LeMay's findings

Justice LeMay granted the father exclusive possession in the matrimonial home. The basis for his decision included (a) the fact that the father was solely on title, (b) the mother had not paid any of the home expenses for more than a year, and (c) the difficulty to see how the father would be forced to sell the home at trial due to his pre-existing equity in the home. (at paras. 53 – 54)

LeMay J. further considered the fact that the equalization payment would likely not be large coming out of such a short marriage. Since a claim for occupation rent would likely exceed an equalization payment, this further supported granting the father exclusive possession (at para. 56).

Furthermore, Justice LeMay emphasized the financial burden on the father in him carrying all property-related costs, while also paying rent elsewhere. There was also photographic evidence suggesting that the mother was not properly maintaining the home while residing there alone (at paras. 55 & 57).

In addressing subsection 24(3)(f) of the *FLA*, Justice LeMay gave little weight to the criminal charges and allegations of domestic violence. As the charges were withdrawn and there was no finding of guilt, the court was not convinced that this factor outweighed the other factors outlined in section 24 that otherwise favoured exclusive possession for the father. (at para. 60)

In the end, Justice LeMay found that the balance of convenience favoured the father's claim to exclusive possession of the matrimonial home (at para. 61).

Conclusion

Indeed, subsection 24(3) of the *FLA* invites domestic violence-related criminal charges to be weighed in any assessment of exclusive possession. However, *Rana v. Rana* demonstrates that such charges are not necessarily enough to outweigh other

compelling factors that substantively favour granting the accused party exclusive control over the property.

Particularly where the marriage is short and the property was owned by the accused party prior to marriage, a court's assessment of the balance of convenience may lean more towards the party who brought the home into the marriage and continues to support it.