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— Franks & Zalev - This Week in Family Law

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Contents

To Summarize: Summary Judgment Summarily Dismissed (and pay no attention to that $21 million behind the green curtain)

Hevey v. Hevey (2021), 63 R.F.L. (8th) 24 (Ont. C.A.) — Feldman, Harvison Young, and Thorburn JJ.A.

In *Hevey v. Hevey*, the Ontario Court of Appeal reminds us that summary judgment is often not an appropriate process for dealing with a complicated family law case.

The parties were married in 1980, separated in 2006, and divorced in 2008.

After they separated, the husband swore a Financial Statement showing net family property of $nil. Both parties retained lawyers, and they were purportedly able to resolve the financial issues arising out of the breakdown of their marriage through negotiations. However, for reasons that are not entirely clear from the Court of Appeal's decision, the parties never actually signed an agreement, as is required under s. 55 of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*"): A domestic contract is unenforceable unless made in writing, signed by the parties, and witnessed.

In early 2019, the wife discovered that, at or around the time the husband had sworn the Financial Statement showing that his net family property was $nil, he had actually represented to his banks that he had a net worth in the range of $21 million. Oops.

Upon learning that the husband may have significantly misrepresented his financial circumstances when they separated, the wife commenced an Application for an equalization payment and spousal support.

Instead of filing an Answer and sworn Financial Statement as required under the *Family Law Rules*, O. Reg. 114/99, the husband brought a motion for summary judgment on the basis that the wife's claim for an equalization payment was statute-barred. (In Ontario, a party must bring a claim for property division two years after divorce or six years after separation — whichever is earlier.) The husband also claimed that the parties had verbally agreed not to claim equalization or spousal support from each other (but, again, any such verbal agreement would have been unenforceable in any case).

The motion judge determined that the husband did not have to file an Answer or Financial Statement pending the determination of the summary judgment motion. He was also satisfied that the record was sufficient to deal with the merits of the motion, and was puzzled as to why the wife, if she had procedural concerns before, did not raise them prior to consenting to the timetables and foregoing cross-examinations.

With respect to the merits of the motion, it is important to remember that the parties in this case *never* signed a written agreement or any written releases. Accordingly, this was not a case where the wife bore the onus of establishing that the Court should either set aside all or part of a written agreement pursuant to s. 56(4) of the *Family Law Act*, or override a support release pursuant to *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.). Those types of claims are quite different than the ones the motion judge was faced with in this case, where all he really had to decide was whether the husband was correct that there was no genuine issue requiring a trial with respect to:

> 1. The wife's request to extend the limitation period for her equalization claim (a hard claim to dismiss by way of summary judgment at the best of times);
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> 2. The wife's claim for spousal support pursuant to s. 15.2 of the *Divorce Act*, R.S.C., 1985, c. 3. (2nd Supp.), having regard to the support factors and objectives set out in ss. 15.2(4) and 15.2(6) (again, a hard — if not impossible — claim to determine on summary judgment); and/or
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> 3. The husband's claim that the wife verbally waived her claims for equalization and/or support (a non-starter given s. 55(1) of the *Family Law Act*).

The motion judge concluded that there was no genuine issue requiring a trial, and he dismissed the wife's property and support claims. Although the motion judge's reasons are not reported, the Court of Appeal's summary of the decision suggests that the motion judge granted summary judgment because he was of the view that the wife had understood (or ought to have understood) the husband's finances when they separated, had been represented by counsel, and there was no evidence that the husband had intentionally misled or defrauded the wife.

While these findings may *possibly* have been sufficient to dispose of a claim to set aside or override a prior *written* agreement (but even that would be difficult), as previously noted, this case did not involve a prior written agreement. As such, there was nothing, *per se*, to enforce.

In reversing the motion judge's decision and remitting the matter to trial, the Court of Appeal determined that the motion judge made two legal errors. First, the Court of Appeal was of the view that the motion judge made a palpable and overriding error by allowing the husband to proceed with his motion for summary judgment before he had filed an Answer and sworn Financial Statement:

> [29] In my view, and **without deciding whether an answer is always needed, an answer was needed here as required by the rules. Specifically, the answer would have been accompanied by a new sworn financial statement upon which [the husband] could have been cross-examined.** Cross-examinations, particularly about the nature of the [husband's] interest in the PNP trust could in fact be very helpful in this case. In their absence, the [husband's] affidavits could rely upon the complexity of the corporate arrangements and the PNP trust to skirt what might be, and might have been, a significant beneficial interest. For example, a cross examination on a financial statement might include a question such as "Despite not being a shareholder, have you received any benefit in any form from the trust, which holds your common shares in the corporations?" At the same time, the motion judge may have been inferring from the fact that neither party sought to cross-examine the other on the sworn affidavits that were in evidence that there would also not have been cross-examinations on a sworn financial statement.
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> [34] **Suggesting that [the wife] could have cross-examined [the husband] misses the mark. It is up to the party with the assets to make the disclosure and the valuation of assets.** According to the Ontario family law regime, and as already stated, financial disclosure is a paramount consideration. That also applies to a summary judgment motion such as this one. Moreover, **it is not up to the claimant to "ferret out" information, as the [wife] put it, about income and assets from the other party.** Although, in *Colucci*, the Supreme Court was dealing with retroactive child support, the same imperatives apply when dealing with issues of retroactive spousal support, namely that **courts must encourage proactive financial**

> **disclosure and in no way reward those who improperly withhold, hide or misrepresent information they ought to have shared**: at para. 54. [emphasis added]

Respectfully, we are not sure why it mattered whether or not the husband filed an Answer in these circumstances, as he presumably would have just denied the wife's claims, and would not have made any admissions that would have been helpful to the wife's claims against him.

However, we absolutely agree with the Court's comments about the importance of the husband filing a complete and accurate sworn Financial Statement. We would also add that we do not see how the husband could have *possibly* succeeded on his motion without putting forward detailed information about his financial circumstances given that:

> • The test for extending the limitation period for claiming an equalization payment under s. 2(8) of the *Family Law Act* is fairly easy to meet and, as discussed further below, requires the court to consider whether the claimant has provided a reasonable explanation for the delay. Without detailed financial disclosure from the husband, it is difficult to see how a court could, on summary judgment, dismiss the wife's explanation that she started her claim for an equalization payment upon learning of what appeared to be a ***$21,000,000*** discrepancy between the husband's sworn Financial Statement, and the information he provided to his bank. How could that not raise a genuine issue requiring trial as to the reasonableness of the wife's delay?
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> • There is no limitation period for claiming spousal support. As the parties were married for 26 years and had two children together, it is unclear how a court could reasonably assess the spousal support factors and objectives in the *Divorce Act* without a proper sworn Financial Statement from the husband.

To the extent that the husband was trying to argue that the parties had verbally agreed not to claim support from each other, it is also unclear how a motion judge could decide whether this was actually true solely based on a paper record (to say nothing of the fact that, again, s. 55(1) of the *Family Law Act* expressly provides that "[a] domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed"). That said, it would not matter if the wife had agreed to not claim support, if that agreement was oral and was based on faulty or misleading disclosure.

The second error the Court of Appeal identified was that the motion judge misapplied the test for extending the limitation period for claiming an equalization payment.

As the parties were divorced in 2008, the wife only had until 2010 to commence a claim for an equalization payment. Thus, by the time she started her claim for an equalization payment in 2019, it was already *prima facie* statute barred. But that was not the end of the analysis, because s. 2(8) of the *Family Law Act* provides that the limitation period can be extended if the moving party can establish that: (a) there are apparent grounds for relief; (b) relief is unavailable because of delay that has been incurred in good faith; and (c) no person will suffer substantial prejudice by reason of the delay.

When the motion judge applied this test, however, he considered whether the wife had raised a genuine issue about whether the husband had committed fraud. That is not the test, and the threshold for granting relief under s. 2(8) is significantly lower than that required to establish fraud. There is a world of difference between "apparent grounds for relief" and "proof of fraud."

The Court also determined that the motion judge erred by summarily rejecting the wife's explanation for the delay and her assertion that she had acted in good faith. There were serious questions about whether the wife "did not understand the arrangements, whether as a result of a lack of disclosure, misrepresentation, or other factors", and these questions raised genuine issues for trial about the wife's request to extend the limitation period.

As a result, the Court of Appeal set aside the motion judge's order and remitted the case to trial, but did so without prejudice to the parties' right to bring a fresh motion for summary judgment once the husband had filed an Answer and Financial Statement.

Open Your Mail

Keeping v. Keeping, 2021 CarswellAlta 2829 (Q.B.) — Leonard J.

The amendments to the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (the "*Divorce Act*"), include relocation provisions in ss. 16.9 to 16.96. Pursuant to those provisions, a person looking to relocate with a child must provide a Notice of Relocation, and a person objecting to the relocation must then provide a Notice of Objection to Relocation Form: Form 2 to the Notice of Relocation Regulations, SOR/2020-249.

It was only a matter of time before a court would have to deal with the following question: What if the parent that wants to move knows the other parent objects, but the objecting parent does not actually provide a copy of Form 2?

On July 12, 2021, the mother sent a Notice of Relocation to the father pursuant to s. 16.9(1) of the *Divorce Act*, by registered mail. The father did not collect the registered mail and the Notice was returned to the mother. On October 19, 2021, the mother advised the father (by text message) that she and the child had relocated to Moncton, New Brunswick.

The father served an Application for an Order requiring the mother to immediately return the child to Edmonton. At the time of the Application, the child was 11-1/2 years old.

The Divorce Judgement provided that the parents had joint custody, but that the mother had primary care of the child and was responsible for day-to-day decision making. The father had parenting time every Wednesday overnight and every other weekend from Friday after school to Monday morning.

The mother sought to move to New Brunswick to be closer to her extended family.

The father argued that he had always been against the child relocating to New Brunswick. He argued that he never received the Notice of Relocation, and that the move occurred without warning. Furthermore, after sending the Notice and getting no response, the mother did not ever try to engage the father in any discussions about the proposed move. Despite the parties communicating by text messages throughout the summer and fall, the mother never indicated when she planned to move, and led the father to believe that the move would not occur until the following year.

The mother argued that she properly sent the Notice of Relocation, and that absent objection from the father, she was entitled to relocate with the child to New Brunswick.

The evidence showed that the mother first raised the issue of a potential move to the Maritimes in December of 2020. From that time on, the parties went back-and-forth with text messages on the matter, with the mother clearly showing her desire to move and the father saying that he was not in favour of it.

On July 15, 2021, the mother told the father that she had sent him the Notice of Relocation. She also noted that the parties had had many conversations by text about a possible move to the Maritimes, and that the Notice was a "more formal way of discussing the matter."

The father responded by saying that he would not "ever" sign a letter for his daughter to relocate to another province.

On October 12, 2021, the father sent a text message asking the mother for parenting time during the week and to be able to drop the child off on Saturday, October 23, 2021. The mother responded by saying that they were moving on October 15, 2021. The father responded, "Yes it's the weekend after that I'm talking about."

October 19, 2021, the mother told the father that she had relocated with the child to New Brunswick. Notably, this notification occurred on the Tuesday before the father's scheduled Wednesday parenting time. It was clear from the chain of text messages that the father was not aware that a move to New Brunswick had occurred. The mother then told the father that he could see the child "whenever works" for him — Christmas, summer, March break — and that she had put all of this in the Notice that he did not pick up.

The mother then told the father, "I talked to a lawyer 3-4 months ago. I had to give you 60 days notice and I did. I expect you to be upset but we have talked about this for over a year. I desperately wanted you to move with us but you made that clear that you wouldn't . . . ".

The father responded that, according to his lawyer, it was "illegal" to move a child to another province without consent.

The mother argued that she had complied with the new relocation provisions in the *Divorce Act* and that the father's failure to formally object as required by the legislation entitled her to relocate.

Justice Leonard determined, correctly in our view, that the mother's Notice of Relocation satisfied the requirements of s. 16.9 of the *Divorce Act* (by providing the prescribed information at least 60 days prior to the proposed relocation).

While the father's evidence was that he did not receive the Notice of Relocation, Justice Leonard found that it had, in fact, been sent to his address by registered mail, an accepted means of service in Alberta. However, the Notice was returned to the mother after 17 days when it was unclaimed by the father after numerous delivery attempts.

The *Divorce Act* provides that a person may proceed with a proposed relocation after compliance with s. 16.9 and where the person who has received the notice does not object within 30 days of having received the notice. Furthermore, pursuant to s. 16.91(1), an objection must be in the form prescribed by the regulations or in an application for a parenting order or a variation order.

Here, there was no dispute that the father did not formally object pursuant to the requirements of s. 16.91(1). However, it was otherwise clear that the father opposed the move and had certainly never agreed. And when the mother told the father that she sent the Notice of Relocation, the father responded (as noted above) that he would never sign a letter consenting to a move.

The question was, therefore, whether in the face of the father's known objection, the mother was entitled to relocate with the child given the father's failure to object in the proper prescribed form and manner contemplated by s. 16.91(1) of the *Divorce Act*.

Relying on the reports of the Hansard debates, Justice Leonard was of the view that the objection procedure in the *Divorce Act* was mandatory. The debates refer to the intention of the legislation to "ensure there is a fair ability, as well as an efficient and smooth process, for all sides to have their opinions heard as a result of the potential relocation." [See Canada, Parliament, *House of Commons Debates*, 42 nd Parl, 1 st Sess, Vol 148, No 374 (January 30, 2019).]

Justice Leonard found that the 60-day notice period expired on September 10, 2021, a month before the move, and that the father made a "conscious decision" to not file a formal Notice of Objection. She also found that the father choosing to not respond to the Notice of Relocation did not "release" him from his obligations under the *Divorce Act* if he wanted to contest the move — and that it correspondingly did not disentitle the mother from relying on the provisions of the *Act*. According to Her Honour, the codification of a relocation notice process was intended to give both parties predictability:

> [45] In circumstances, as here, where the non-relocating parent refuses to engage in the process and is against the move, **it may seem more equitable** to conclude that the relocating parent should bring an application in Court for relocation, particularly where the relocating parent knows that the non-relocating parent is against the move. However, **this unnecessarily places the burden on the relocating parent** and undermines the predictability of the codified relocation notification process.
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> [46] The relocating parent is entitled to rely on the provisions of the *Divorce Act*, **even where there is knowledge that the non-relocating party is opposed to the move**. The non-relocating party cannot lay in the weeds and rely on his or her own refusal to participate. He or she must respond and engage in the process. [emphasis added]

Very respectfully, we are of the view that this is a very dangerous precedent that will actually cause more, not less, unpredictability. The mother knew the father objected. There was no question about it. He did not "lay in the weeds" as suggested; in fact, if anything, it was the mother that was spending time in the weeds. The father made his views known; he just did not do

so on a prescribed form. And for that, the mother was allowed to relocate from Alberta to New Brunswick — 4,500 kilometres away — causing a very significant change to the time the father and child would be able to see each other. Maybe the move would have been allowed after a full hearing. Or maybe not. But this surely is not the way to have the matter determined.

Nor are the comments about "unnecessarily placing the burden on the relocating parent" justified. If a parent wants to move with a child, and the other parent opposes the move, the moving parent always has to show that it is in the child's best interests.

The father's request for an Order requiring the mother to return the child was dismissed. However, the Court did make it clear that this decision "does not consider whether the relocation is in the best interests of the child," and said that the father could apply to the Court, with evidence, to determine whether the relocation is in the child's best interests. But in the meantime, the child was to remain in New Brunswick pending a determination on the merits of the relocation. Therefore, the child was to live in a situation that might ultimately be found to be inimical to her best interests while the father brought an application with the child already gone.

We are very concerned about this decision.

The "Fun" in "Dysfunctional"

Libfeld v. Libfeld, 2021 CarswellOnt 9565 (S.C.J.) — McEwen J.

This is not a family law case *per se*, but given the frequency with which family law separation and divorce drives corporate separation and divorce, it is a must-read for any such situation. Not only does Justice McEwen provide a treatise and roadmap for corporate and partnership dissolution, but this 21-day trial and 475-paragraph decision show what can happen when everything goes wrong, and reminds litigants that, once they cross the courtroom threshold, they lose control of the process and result.

The matter involved a complete breakdown in the business relationship of the four Libfeld brothers, all of whom were equal owners of the family business, the Conservatory Group, a real estate builder and developer in the Toronto area.

The patriarch of the family — the brothers' father — died in 2000. Before his death, he had been the primary decision-maker for the Group.

In the 21 years after their father died, the brothers never reduced their business relationship to any form of written agreement, a remarkable fact given the Group had grown into a vast web of corporate and business relationships worth an estimated $2.5 to $4 billion.

The only thing the brothers agreed on was that the overall business relationship between them had completely and irreparably broken down. They could not agree as to how to continue or disengage.

Over the course of the litigation, sides and allegiances changed, and the trial ultimately pitted two sets of brothers against each other.

Two of the brothers wanted to remain partners. The other two wanted to work alone in the industry. One set of brothers proposed a buy/sell transaction where they would either be the buyers or the sellers of the Group. Alternatively, they wanted a structured buyout that would result in them owning 100% of the Group. The other set of brothers proposed to divide the Group into four portions, with each brother being allocated one portion. In the alternative, they requested a total liquidation, wind-up, and sale of the Group on the condition that none of the brothers would be permitted to purchase any of the assets.

The factions also made various claims of oppression against the other.

Ultimately, Justice McEwen ordered a wind-up and sale under court supervision, with each of the brothers being permitted to be possible purchasers (a result none of the brothers supported). His Honour determined this to be the only reasonable option given the extreme dysfunction between the brothers, which included allegations of dishonesty, and both verbal and physical abuse.

Ultimately, in dealing with the breakdown of corporate relationships and partnerships, the court has very broad jurisdiction to do that which is just and equitable: *Partnerships Act*, R.S.O., 1990 c. P.5, s. 35(1)(f); *Business Corporations Act*, R.S.O. 1990, c. B. 16, s. 207(1)(b)(iv).

Here, it is notable that the Court ordered the relief it did notwithstanding none of the brothers asking for it. This just emphasizes that the court is empowered to do what is just and equitable, even if that is not what any of the parties want.

Justice McEwen considered the remedies requested by the parties and rejected them as either unworkable, not within the reasonable contemplation of the parties, unfairly favouring one faction over the other, or resigning the brothers to further litigation.

Justice McEwen was clearly significantly influenced by the incredible dysfunction between the parties. He stated:

> [450] Further, insofar as a partnership is concerned, the broad jurisdiction to intervene on equitable grounds is set out in the oft-quoted decision of the House of Lords in *Ebrahimi*, at pp. 383-384, in which Lord Cross commented that:
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> > People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended — unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen.
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> [451] In keeping with the above, I acknowledge that when considering whether to wind-up a company or partnership, the Court should interfere as little as possible with the affairs of the business. In this regard, the parties' reasonable expectations are important when determining the just remedy: see *Naneff*, at paras. 28, 31-33.
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> [452] This case, however, goes far beyond what has been described in the aforementioned case law as being necessary to wind-up a business. None of the factual patterns in the case law provided by the parties came close to matching the dysfunction that exists here. The unfortunate reality is that the Libfeld brothers' relationships with each other have been totally and likely irretrievably destroyed.
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> [453] The acrimony has grown to the point where, to summarize, the last 6 years have seen the following:
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> > • The Libfeld brothers have been unable to enter into written agreements which would allow them to collectively operate the Group. There is no reasonable prospect that they be able to do so given this historical failure and the current situation.
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> > • There has been a significant, ongoing and likely permanent breakdown in communication between Sheldon and Jay on the one hand and Mark and Corey on the other.
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> > • There have been physical altercations, accusations and cruel insults.
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> > • The Libfeld brothers have engaged in secretive dealings.
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> > • The Group failed to pay hundreds of millions of dollars in tax, while the Libfeld brothers have received significant financial benefits over the last 16 years alone.
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> > • Employees have been, at times, unfairly dragged into the middle of the dispute.
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> > • Relationships with their business partners have been adversely affected.
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> > • Family relationships have been significantly, perhaps irreparably damaged.

• The Libfeld brothers have dragged their mother into this litigation and are unable to agree upon the amount of money she is owed. This has damaged her relationship with some of her sons.

• There is no succession plan.

• The Group has not been able to enter into any new transactions since 2017, which best demonstrates the devastating effect of the aforementioned dysfunction.

As noted above, when spouses separate, a corporate divide or divorce is rarely far behind, but parties must be warned that it is usually best to structure a resolution in a tax-efficient and methodical manner. Once parties surrender their business to the court, they lose control over the process and outcome, and may end up with a result that none of them actually want.

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