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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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***Miglin v. Miglin + Rick v. Brandsema = Anderson v. Anderson?***

*Anderson v. Anderson* (2021), 61 R.F.L. (8th) 265 (Sask. C.A.), leave to appeal granted 2022 CarswellSask 159 (S.C.C.).

On April 7, 2022, the Supreme Court of Canada granted leave to appeal in *Anderson v. Anderson*, a case that considers how to determine the weight, if any, that should be given to family law property agreements that do not meet the formal requirements of the relevant matrimonial property legislation.

The husband and wife in *Anderson* signed an agreement about how they would divide their assets. Neither party had independent legal advice before the agreement was signed. The agreement also did not comply with the formal requirements for a binding interspousal agreement under s. 38 of Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3 (the "FPA"), which provides as follows:

38(1) The terms of an interspousal contract mentioned in subsection (4) are, subject to section 24, binding between spouses, whether or not there is valuable consideration for the contract, where the spouses have entered into an interspousal contract:

- (a) that deals with the possession, status, ownership, disposition or distribution of family property, including future family property;
- (b) that is in writing and signed by each spouse in the presence of a witness; and
- (c) **in which each spouse has acknowledged, in writing, apart from the other spouse, that he or she:**
  - (i) **is aware of the nature and the effect of the contract;**
  - (ii) **is aware of the possible future claims to property he or she may have pursuant to this Act; and**
  - (iii) **intends to give up those claims to the extent necessary to give effect to the contract.**

38(2) **A spouse shall make the acknowledgment mentioned in subsection (1) before a lawyer other than the lawyer:**

- (a) **acting in the matter for the other spouse; or**
- (b) **before whom the acknowledgment is made by the other spouse.** [emphasis added]

While there was no dispute that the parties' agreement did *not* comply with s. 38 of the *FPA*, s. 40 of the *FPA* still allowed the Court to take it account:

40. The court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable.

The wife wanted the Court to enforce the parties' agreement, while the husband wanted the Court to disregard it entirely.

In order to decide the case, the Court of Appeal had to decide what test to apply when considering s. 40 of the *FPA*. Drawing heavily from the Supreme Court of Canada's decisions in *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.) (which dealt with assessing the weight that should be given to an agreement about spousal support) and *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.) (which curiously extended the *Miglin* approach to property issues), the Court of Appeal established the following 4-step framework for future courts to consider:

[58] . . . (a) **Step one** — a court must ask itself **whether there is an agreement in the contractual sense of *consensus ad idem***. If the existence of an agreement is itself in question, the party seeking to enforce its terms must prima facie establish its existence. Where the existence of the agreement is challenged, a court should be particularly attentive to the lines of inquiry outlined in *Tether v. Tether* (2008), 56 R.F.L. (6th) 250 (Sask. C.A.)] (at para 62):

- (i) Was there a meeting of the minds that would be "manifest to the reasonable observer"?
- (ii) Did the parties achieve consensus on the "essential terms of the agreement"?
- (iii) Was the agreement intended to be "conditional upon, and subject to", some other condition being met?

(b) **Step two** — **if an agreement is prima facie established, the onus shifts to the party asserting it to be invalid, unenforceable or that it should be given little weight**. If challenged, a court must look to the circumstances surrounding negotiation and execution to determine whether there is any reason to discount the agreement. While the list of factors used to assess these matters is not closed or exhaustive, a court should pay particular attention to the following:

- (i) evidence of the conditions of the parties, i.e., whether there is any indication of "oppression, pressure or other vulnerabilities" in the circumstances at hand that would warrant a finding that the negotiation process was fundamentally flawed (*Miglin* at para 81); and
- (ii) evidence as to the "conditions under which the negotiations were held", e.g., the duration of the negotiations, whether professional assistance was provided, etc.

(c) **Step three** — **if no issues arise with respect to the negotiation or execution of the agreement, a court must go on to examine the substance of the agreement to determine if its terms are fair and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA***. In keeping with the *dicta* in *Miglin*, "Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not significant compliance with the Act" (at para 84).

(d) **Step four** — **where the agreement is found to be in substantial compliance with the general objectives of the *FPA* at the time it was prepared, great weight should be given to it, unless a new or a changed circumstance has arisen such that its terms "no longer reflect the parties' intentions at the time of execution" or are no longer in substantial compliance with the general objectives of the *FPA*** (at para 88). In this respect, the test is not strict foreseeability; rather, a court will examine "the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application" (at para 89). **If the change in circumstance can be said to have been within the contemplation of the parties at the time of execution, then the agreement may be given great weight.** [emphasis added]

After considering the evidence, the Court of Appeal concluded that even though the agreement did not meet the requirements of s. 38 of the *FPA*, it should still govern the parties' property rights because it "was fairly negotiated and substantially compliant with the *FPA* at the time of its execution", and the subsequent decline in the value of one of the assets "was not completely unanticipated or unforeseeable[.]"

The husband applied for leave to appeal to the Supreme Court of Canada and, as previously noted, leave was granted on April 7, 2022. The Court's eventual decision will be of significant interest to family law professionals across Canada, as most provincial family law property statutes have similar provisions to s. 40 of the *FPA* — see, for example: s. 8(g) of Alberta's *Family Property Act*, R.S.A. 2000, c F-4.7; s. 5(6)(g) of Ontario's *Family Law Act*, R.S.O. 1990 c. F.3; and s. 20(2) of New Brunswick's *Marital Property Act*, R.S.N.B. 2012, c. 107.

The other point of interest here is that we seem to be seeing a significant uptick in the number of successful applications for leave to appeal in family law cases. In 2021 alone, the Supreme Court of Canada released decisions in *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.); *Richardson v. Richardson*, 2021 CarswellOnt 14328 (S.C.C.); and *Association de médiation familiale du Québec v. Bouvier* (2021), 64 R.F.L. (8th) 1 (S.C.C.). It also heard and decided a trilogy of cases about standard of review and new evidence on appeal in family law cases, although the reasons are still pending [*Kreke v. Alansari*, 2021 SCC 50 (S.C.C.); *B.J.T. v. J.D.*, 2021 CarswellPEI 71 (S.C.C.); and *Barendregt v. Grebliunas*, 2021 CarswellBC 3793 (S.C.C.)].

Furthermore, just last week, the Court heard oral arguments in *N. v. F.* (2021), 62 R.F.L. (8th) 7 (Ont. C.A.), a case about the test to return a child to a non-*Hague*-signatory habitual residence.

Hopefully, this isn't just a temporary blip, but rather a sign of recognition by the Supreme Court that family law is of critical importance to Canadians. To paraphrase Sally Field: They like us! Right now they like us!

### **Sometimes Bad Facts Make Bad Law . . . And Sometimes . . . Well . . . the Law is Just Bad**

*Mitchell v. Reykdal*, 2022 CarswellAlta 751 (C.A.) — Slatter, Crighton, and Strekaf JJ.A.

We previously commented on the trial level decision of this case in the 2021-27 (July 19, 2021) edition of *TWFL*. As we predicted (a broken clock is right twice a day), the well-meaning trial judge was reversed by the Alberta Court of Appeal.

The appeal involved the interpretation of s. 5(2) of the Alberta *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5 (the "*Act*"). That section provides that a married person cannot become an adult interdependent partner "while living with his or her spouse".

David married Diane in September 1988, after eight years of dating. During their 30-year marriage David and Diane had three children. They lived in Red Deer.

Working in the oil patch, David was away from home for extended periods of time "working" throughout the marriage, returning home only every second weekend to spend time with Diane and the children. He was also present for family birthdays, special occasions, and Christmas.

Unbeknownst to Diane, in 2000, David began a long-term extramarital affair with Gwen.

Shortly after the affair began, Gwen and her daughter moved into a home that David rented for them in Red Deer, and for the next 17 years, Gwen lived in various homes that David arranged for her.

David spent most weeknights with Gwen, leaving every second weekend to return "home" to Diane and the children. Gwen's daughter viewed David as her father.

The trial judge conducted a thorough review of the two relationships. She found that Gwen and David met all the *indicia* of a "couple." They were emotionally committed to each other, and they shared each other's lives. They lived at "home" together

for most of David's free evenings, and every other weekend. They also held themselves out to the community as a couple, attending social functions together. Her Honour also accepted that Gwen sincerely believed David was separated from Diane. David was, in Her Honour's view, only visiting the matrimonial home with Diane and the children every second weekend, with some occasional weeknight visits and holidays, under the guise that he had to be away for work the rest of the time. She accepted that Diane was "blind-sided" by David's long-term affair.

The affair between David and Gwen ended in November 2017, and in March 2018, Gwen filed a Statement of Claim for support as an adult interdependent partner. Diane became aware of the affair and filed for divorce in April 2018.

All told, David lived this double-life for 17 years. During that time, Diane was unaware of Gwen, and Gwen understood that he was separated from Diane.

At trial, the Court determined that the facts established a long-term interdependent relationship between Gwen and David over the course of 17 years. Therefore, Gwen had standing as an adult interdependent partner — but for one glaring problem: s. 5 of the *Act*:

5(1) A person cannot at any one time have more than one adult interdependent partner.

5(2) A married person cannot become an adult interdependent partner while living with his or her spouse.

Section 5 of the *Act* is clear that a married person cannot become an adult interdependent partner while living with their spouse (this section seems particular to Alberta). To get around this prohibition, the trial judge determined that David had actually been separated from Diane for the entirety of the 17-year affair. That was a bit of a well-meaning-but-hard-to-accept interpretive stretch. Absent s. 5, Gwen would undoubtedly have been an adult interdependent partner, but one tenet of statutory interpretation is "thou shalt not pretend inconvenient sections of the Act do not exist."

In any case, as a result, the trial judge found that Gwen was entitled to adult interdependent partner support.

In considering whether Gwen's claim was barred by s. 5, the trial judge held that a person can only "live with" one person for the purpose of assessing entitlement to support under s. 5 of the *Act*. The trial judge then conducted a comparative analysis to determine which party David was *de facto* "living with". The trial judge concluded that David was primarily living with Gwen, and therefore, for the purposes of s. 5, was not living with Diane.

In sum, the trial judge had concluded:

[212] I find that Gwen does have standing before this Court as an AP because 1) her relationship with David satisfies the test as laid out in the *AIRA*; 2) in light of the *AIRA*'s test, statutory context, and purpose, I need to interpret "living with" in s. 5 remedially; and, 3) I find as a fact that David was not "living with" Diane for the purposes of s 5 of the *AIRA* during his relationship with Gwen.

Were she to have been wrong in her interpretation of s. 5, the trial judge found that Gwen would still be entitled to adult interdependent support because she fairly *believed* that she was in a marriage-like relationship with David. However, the trial judge cautioned that this would *not* extend to a person having an extra-marital affair with someone they knew was married. The key was the deception.

Enter the Alberta Court of Appeal.

The Court of Appeal agreed that David was "living with" Gwen. And the Court of Appeal agreed that Gwen would have qualified as David's adult interdependent partner, but for s. 5 of the *Act*. But that was pretty much the end of the "agreeing."

The Court of Appeal correctly noted that, despite the good intentions of the trial judge, the *Act* did not purport to apply to all people living in adult, interdependent marriage-like relationships: s. 5(1) was clear that a person cannot have more than one adult interdependent partner, and s. 5(2) was clear that a married person cannot become an adult interdependent partner if he

or she is living with his or her spouse. What the trial judge did was try to extend the coverage of the section "remedially", by suggesting that David was not living with Diane because he was living with Gwen more.

However, as noted by the Court of Appeal, if the test required the Court to determine with whom the defendant was "living more" — s. 5(2) would never be engaged. The *Act* just does not cover simultaneous relationships.

The Court of Appeal also (properly) noted that too narrow an interpretation of the meaning of "living with" would potentially exclude some legitimate claimants from obtaining the relief intended by the *Act*.

Ultimately, it was clear that David was "living with" Gwen and Diane at the same time, and the suggestion by the trial judge to the contrary was an error. This was precisely the kind of situation s. 5(2) was designed to address.

The Court of Appeal noted that David had deceived two women "in the most selfish and intimate way" for many years. And the Court had sympathy for both of them. But sympathy is not a tenet of statutory interpretation.

The appeal was allowed as David was "living with" both Gwen and Diane. Therefore, Gwen was not David's adult interdependent partner.

Respectfully, it might just be time for the Alberta legislature to repeal s. 5 of the *Act*. It is not for the legislature to morally "punish" parties that — knowingly or unknowingly — find themselves in a marriage-like relationship with a married person. If anything, that is for a higher authority. And we're not referring to nine judges in Ottawa.

### **Can the Rules of Evidence Cross the "Thin Blue Line"?**

*Hewitt v. Doyle* (2021), 62 R.F.L. (8th) 149 (Ont. S.C.J.) — Summers J.

The most basic rule of evidence (before getting to the exceptions, the exceptions to the exceptions, and then the exceptions to the exceptions to the exceptions) is evidence that is relevant is admissible: *R. v. Blackman*, 2008 CarswellOnt 3722 (S.C.C.). Therefore, it seems strange when clearly relevant evidence is inadmissible because of an exclusionary rule. Some of those exclusionary rules, such as the general rule against hearsay, have their roots in the common law. Other exclusionary rules are statutory and based on the theory that, sometimes, there are objectives that outweigh the search for truth in any given case. *Hewitt* is about one of those statutory exclusionary rules.

At the start of the trial of a high conflict parenting case, the mother brought a motion to determine the scope of the evidence that she could adduce about the father's "misconduct as an Ottawa police officer, the complaint made against him, the charges laid, his ultimate guilty plea, the decision rendered and the penalty sought."

The nature of the father's misconduct is not discussed in Justice Summers' decision. However, according to reports in the press, the father apparently used "his badge to abuse and mock vulnerable people with mental illness on video, and then circulated those videos among other cops". The father ultimately signed an agreed statement of facts and pled guilty to 10 counts of misconduct under the *Police Services Act*, R.S.O. 1990, c. P.15 (the "*PSA*"), and resigned from the police force before his sentencing hearing could take place. [See the CBC's article from October 15, 2021, entitled, "Ottawa police officer resigns after mocking, filming people with mental illness", which is available at <https://www.cbc.ca/news/canada/ottawa/police-officer-jesse-hewitt-resigns-1.6211215>.]

The first question that Justice Summers had to decide was whether evidence about the father's misconduct at work was relevant to the issues in the family law case. The mother argued that it was relevant to his "character and judgment", and "his abilities as a parent and this court should have that evidence before it when considering the best interest of the children." The father, on the other hand, argued that it was irrelevant "to his ability to meet the needs of his children", and "only speaks to his behaviour in the high stress environment of policing."

Given the low threshold for relevance when dealing with a child's best interests and the nature of the father's misconduct at work, it is not surprising that Justice Summers agreed with the mother and found that evidence about the father's "character and judgment is relevant to parenting issues and consideration of a child's best interests." But the inquiry did not end there.

The second question that Justice Summers had to grapple with was much more complicated. Complaints and disciplinary proceedings involving police officers are addressed in Part V of the *PSA*. Part V of the *PSA* includes the following provisions that "render certain witnesses non-compellable, certain documents inadmissible, and certain information privileged":

#### **Non-compellability**

83(7) No person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties under this Part, except at a hearing held under this Part.

#### **Inadmissibility of documents**

83(8) No document prepared as the result of a complaint made under this Part is admissible in a civil proceeding, except at a hearing held under this Part.

#### **Confidentiality**

95 Every person engaged in the administration of this Part shall preserve secrecy with respect to all information obtained in the course of his or her duties under this Part and shall not communicate such information to any other person except,

- (a) as may be required in connection with the administration of this Act and the regulations;
- (b) to his or her counsel;
- (c) as may be required for law enforcement purposes; or
- (d) with the consent of the person, if any, to whom the information relates.

According to the Ontario Court of Appeal in *F. (M.) v. S. (N.)*, 2000 CarswellOnt 2301 (C.A.), which dealt with similar statutory provisions when dealing with complaints (and allegations of negligence) against doctors under the *Regulated Health Professions Act*, the purpose of these types of provisions is to "encourage the reporting of complaints of professional misconduct", and to "ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings . . . fearing that a document prepared for [discipline] proceedings can be used in a civil action."

The father argued that under ss. 83(7), 83(8), and 95 of the *PSA*, "he is not required to answer any questions that pertain to any aspect of his misconduct or the resulting disciplinary proceedings." He also argued that he could not "be compelled to answer any question, produce any document, or provide any information whatsoever that is in any way connected to the disciplinary process".

The mother, on the other hand, argued that these provisions did not preclude her from adducing evidence about the following topics:

- (i) The fact that the father was charged under the *PSA*, and the nature of those charges;
- (ii) The facts underlying the charges as admitted by the father in the context of the *PSA* hearing; and
- (iii) The fact that the father pled guilty to all 10 charges against him, and that the Ottawa Police Services sought his termination as a result.

In rejecting the father's argument that the *PSA* essentially precluded the mother from adducing any evidence about his misconduct as a police officer, Justice Summers found that although the *PSA* prohibited the mother from compelling testimony from any witnesses about what occurred during the course of their duties under Part V of the *PSA*, it did not preclude her from leading other evidence about the events in question that would allow the Court to draw its own conclusions about the father's conduct:

[27] . . . The protections afforded [under Part V] relate to the source of the evidence insofar as it cannot come from a person who acquired it in the performance of his or her duties under Part V. The provisions do not otherwise proscribe evidence of events or circumstances that pre-date or give rise to the disciplinary process such as evidence of the alleged misconduct itself. In other words, **there is no immunity, in my view, when there is scope to prove facts necessary to a civil claim without reliance on evidence produced in another proceeding.** Accordingly, I find that [the mother] can adduce evidence from [the father], or others, with respect to the events leading up to the complaint, in an effort to establish facts in this proceeding from which the court may draw its own conclusion.

[28] . . . Reconciling the sections in light of the purpose of the provisions, leads me to conclude, as Laskin J.A. suggested in *M.F.*, that **there may be a distinction between the fact that there was a complaint made to trigger the disciplinary process and the written complaint itself. The former may be provable at trial, but the written complaint itself is not admissible at trial.** Only in that way is s. 83(8) consistent with ss. 83(7) and 95 and the protections afforded there to all information obtained in the course of a person's duties under Part V. [emphasis added]

As a result, Justice Summers concluded that:

1. The charges against the father were provable facts at trial, but neither the father nor any other person involved in the disciplinary process could be compelled to testify about the disciplinary process or the nature of the charges laid;
2. The mother could question the father and lead evidence about "the behaviour and circumstances leading up to the complaint against him but not with respect to the admissions made at the hearing."
3. The guilty plea and penalty sought might be provable at trial, but "no person involved in the disciplinary process including [the father] [could] be compelled to testify nor [could] any related documents be admitted."

It will be interesting to see how Justice Summers' ruling plays out in practice.

Presumably, the father will admit what he did, apologize for his behaviour, and try to establish that he has learned his lesson, and that his past misconduct at work is not indicative of his abilities as a parent.

But if the father denies or tries to minimize the misconduct for which he pled guilty under the *PSA*, this will raise a number of potentially interesting questions. For example:

- Will the mother then have to try to subpoena the complainants to lead evidence about what actually happened?
- Would it be an abuse of process or collateral attack for the father to try to deny or minimize the conduct he admitted during the course of the disciplinary hearing?
- Is the potential probative value of the father's misconduct at work sufficient to warrant the Court having to hear multiple days of evidence about this topic?
- How will the mother be able to prove that the father pled guilty if "no person involved in the disciplinary process including [the father] can be compelled to testify nor can any related documents be admitted"?

We will have to wait and see what happens.

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