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# — Franks & Zalev - This Week in Family Law

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**Contents**



## The *Calmusky* Conundrum Continues — Time to Let Sleeping Declarations Lie

*Fitzgerald Estate v. Fitzgerald*, 2021 CarswellNS 869 (S.C.) — Murray J.

As we discussed in the 2021-15 (April 19, 2021) edition of *TWFL*, in *Calmusky v. Calmusky*, 2020 CarswellOnt 6539 (S.C.J.), relying on cases primarily from B.C. and Manitoba, the Ontario Superior Court of Justice determined that the principles of resulting trust from *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.) apply to beneficiary designations (for RRSPs, RRIFs and the like). The decision created a fair amount of controversy amongst the family and estates bars, and in the investment management community.

The issue was considered again in *Mak (Estate) v. Mak*, 2021 CarswellOnt 8904 (S.C.J.), wherein Justice McKelvey expressed doubts as to whether *Calmusky* had been correctly decided. [For further discussion of *Mak Estate*, see the 2021-33 (August 30, 2021) edition of *TWFL*.]

In *Fitzgerald Estate v. Fitzgerald*, Justice Murray of the Supreme Court of Nova Scotia has now thrown his hat (or should we say "sash") into the ring, and expressed concerns about the application of the principles of resulting trust to what are essentially testamentary documents.

In *Fitzgerald*, the deceased had named his adult daughter, the respondent, as the beneficiary of his TFSA. The Estate sought a determination as to whether the daughter was holding the TFSA in trust for the Estate (pursuant to *Calmusky*), or whether the TFSA belonged to the daughter.

The deceased had eight children, all of whom were independent adults at the time of their father's death, and all of whom were named as equal residuary beneficiaries under his Will. Notably, all of the siblings, save for the respondent, had moved away. Only the respondent remained in Sydney, Nova Scotia, where her father lived before his death. The respondent also held a joint account with her father, but she agreed the account was properly an asset of the Estate. But she took the position that her father specifically intended that she receive the TFSA.

Justice Murray reviewed the conflicting case law to date. Ultimately, his Honour did not accept that the presumption of resulting trust should apply to a beneficiary designation:

> [103] With respect, I see things differently. There are several reasons why the same reasoning should not apply to TFSAs (as opposed to a joint account), starting with the fact that a TFSA is not held jointly, nor is it transferred *inter vivos* during the transferor's lifetime. Instead, it is transferred upon his or her death.

> [104] Beyond the fact that the "transfer" may be gratuitous, there are significant and distinct differences between joint bank accounts and a beneficiary designation, be it a RIF or a TFSA. **There is no immediate transfer of asset into joint names. In a designation the asset remains in owner's name, not in both names as was the case in *Pecore*.**
>
> [105] It is also a **contract** that binds the institution where the funds are held. The legislation not only requires the funds to be paid to the person designated but also entitles that person to receive the funds. The word "contract" appears nowhere in the *Pecore* decision.
>
> [106] In addition, unlike a joint account, **there is no access to the funds by the person designated. The owner continues have sole authority to use the funds during their lifetime**, as was the case before the designation was granted.
>
> [107] Significantly there is **no fiduciary aspect** to a TFSA designation. In *Pecore*, the court clearly stated that the rationale for applying the presumption of resulting trust is that the beneficiary is a fiduciary. That is simply not the case with a designation, unless the beneficiary is identified as a trustee. That is also not the case here. [emphasis added]

Justice Murray preferred the reasoning of Justice Graesser in *Morrison v. Morrison*, 2015 CarswellAlta 2249 (Q.B.), and accepted that a beneficiary designation was more akin to a testamentary instrument:

> • As with beneficiary designations under insurance policies, there is a benefit to the owner of an RRSP or RRIF to be able to designate a beneficiary rather than have the plan go to his or her estate, including possible tax advantages and possible creditor-proofing.
>
> • There was no sound policy basis to treat beneficiary designations under RRSPs, RRIFs, TFSAs, and insurance policies the same as beneficiary designations under a will. None of these "gifts" take effect until the death of the owner of the plan or policy. Such designations were much closer to testamentary transactions than to *inter vivos* gifts such as transferring bank accounts into joint names.
>
> • Generally, the owner of the plan or policy is free to change beneficiaries during his or her lifetime.

According to Justice Murray, the deceased's intentions really could not have been much more clear. As a result, the presumption of resulting trust was not applied to the TFSA, and the respondent was determined to be the beneficial owner of the funds in question.

With the greatest of respect to those that think otherwise, this is the correct result. It is time for the uncertainty and litigation caused by this debate to end. The owners of such plans and policies have a clear choice: they can designate a person as beneficiary, or they can designate their estate as beneficiary. Whatever that designation may be, absent clear, cogent, and compelling evidence to the contrary, it should be presumed that, with respect to such beneficiary designations, the owner meant what was said, and said what was meant.

**Knock-Knock. Who's There? Police. Police Who? Police Can the Court of Appeal Deal with this Issue?**

*Monteiro v. Monteiro*, 2022 CarswellOnt 5993 (S.C.J.) — Mitchell J.

*Fekete v. Brown* (2022), 69 R.F.L. (8th) 183 (Ont. S.C.J.) — Summers J.

As we have discussed a number of times in *TWFL*, in Ontario, the case law is hopelessly conflicted when it comes to enforcing an agreement to arbitrate that does not meet the formal requirements for a "family arbitration agreement" under the *Family Law Act*, R.S.O. 1990, c. F.3 ("*Family Law Act*") (see our previous discussion about this issue in our comment on *Moncur v. Plante* (2021), 60 R.F.L. (8th) 102 (Ont. S.C.J.) in the 2021-36 (September 20, 2021) edition of *TWFL*). And when we say "*hopelessly conflicted*", we mean hopelessly conflicted.

 

Don't believe us? *Monteiro* and *Fekete* are two recent cases that illustrate our point better than we ever could hope. The key facts in both cases were almost identical. The decisions were released only a few months apart. And the Court in both cases came to completely different conclusions.

### *Monteiro v. Monteiro*

The parties in *Monteiro* were married for 11 years and had two teenage children together. They signed a Separation Agreement in 2014 that provided, among other things, that they would resolve any future financial or parenting disputes through arbitration:

> 6. DISPUTE RESOLUTION
>
> 6.1 If Mark and April disagree about a reviewable or variable term of this agreement, they will try to resolve the dispute through negotiation, either between themselves or with their respective counsel.
>
> . . . . .
>
> 6.5 **If Mark and April cannot agree within 60 days of the request for review or variation, they will try arbitration. They will jointly select an arbitrator at the time the issue arises.**
>
> 6.6 Mark and April will share the costs of arbitration on a 50/50 basis.
>
> 6.7 **The arbitrator's decision shall be binding on the parties.** If neither party address the dispute by this process and no further action is taken on an issue in dispute within the required 60 days as set out in the separation agreement, the matter is at an end and the issue cannot be raised at a later date. [emphasis added]

Despite section 6 of the Separation Agreement, the mother started a proceeding to vary the parenting arrangements. In response, the father brought a motion to stay the proceeding pursuant to s. 7 of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Arbitration Act*"), which ***requires*** a court to stay a court proceeding to deal with issues that the parties have agreed to arbitrate:

> 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).

[For further discussion of s. 7, see *Haas v. Gunasekaram*, 2016 CarswellOnt 16116 (C.A.), where the Court of Appeal noted, among other things, that "the statutory language in s.7 of the current *Arbitration Act* is directory, not equivocal. It strongly favours giving effect to an arbitration agreement."]

The Separation Agreement required the parties to arbitrate future parenting disputes, and s. 7 of the *Arbitration Act* required the Court to stay court proceedings that deal with issues that the parties have already agreed to arbitrate. Seems pretty straightforward, no?

But there was a problem. Section 59.7 of the *Family Law Act* allows parties to agree to arbitrate future disputes as part of a Separation Agreement, which the *Act* refers to as a "secondary arbitration". However, s. 59.6 of the *Family Law Act* provides that an arbitration award that is made as a result of a secondary arbitration is only enforceable if the arbitration agreement complies with the *Family Arbitration* regulation, O. Reg. 134/07 to the *Arbitration Act* (the "*Regulation*"), which provides that secondary arbitration agreements must contain the following provisions:

> 1. The arbitration will be conducted in accordance with, *(choose either i or ii)*
>
> i. the law of Ontario, and the law of Canada as it applies in Ontario, or
>
> ii. the law of ..... *(name other Canadian jurisdiction)*, and the law of Canada as it applies in that jurisdiction.

  

2. Any award may be appealed as follows: *(choose either i or ii)*

i. A party may appeal the award in accordance with subsection 45 (1) of the *Arbitration Act, 1991*.

ii. A party may appeal the award on, *(choose one or more of the following)*

A. a question of law,

B. a question of fact, or

C. a question of mixed fact and law

3. The arbitrator for this arbitration is ..... *(name of arbitrator)*.

. . . . .

5. I, ..... *(print name of arbitrator)*, confirm the following matters:

i. I will treat the parties equally and fairly in the arbitration, as subsection 19 (1) of the *Arbitration Act, 1991* requires.

ii. I have received the appropriate training approved by the Attorney General.

iii. The parties were separately screened for power imbalances and domestic violence and I have considered the results of the screening and will do so throughout the arbitration, if I conduct one.

iv. The parties were separately screened for power imbalances and domestic violence by someone other than me and I have considered his or her report on the results of the screening and will do so throughout the arbitration.

.....

*(Signature of arbitrator)*

While it is not necessarily difficult to deal with appeal rights and choice of law as part of a Separation Agreement, it is certainly more cumbersome and inconvenient to have the parties screened for power imbalances, pick an arbitrator, and have the arbitrator sign a certificate to deal with a future dispute that may or may not ever arise. To repeat what we said in our comment on *Giddings v. Giddings* (2019), 35 R.F.L. (8th) 418 (Ont. S.C.J.) in the 2020-05 (February 10, 2020) edition of *TWFL*:

> The difficulty is that it is sometimes very inconvenient to take those steps when parties want to settle their case "now" — at a Settlement Conference or four-way meeting, for example. As a result of the amendments to the *Arbitration Act, 1991* and the *Family Law Act*, it is not (or, subject to what we suggest below, may not be) possible for parties in a four-way meeting, before a motion, in a Settlement Conference or pretrial — or at the courtroom door — to settle their matters in any way that includes a binding commitment to arbitration without actually signing an Arbitration Agreement at that time (and having the chosen arbitrator sign it as well).

The mother argued that the *Regulation* says what it says and requires what it requires. And, as there was no question that the parties' Separation Agreement did not meet the requirements of the *Regulation* (it did not specify the law that would apply, deal with appeal rights, name the arbitrator, or contain the necessary certificate), the father's motion for a stay should be dismissed. Relying on *Horowitz v. Nightingale* (2017), 94 R.F.L. (7th) 151 (Ont. S.C.J.), where Justice Nelson found that the parties were not bound to arbitrate because they had not complied with the *Regulation*, Justice Mitchell agreed that the parties could not be compelled to arbitrate because they had not complied with the Regulation, and dismissed the father's motion for a stay:

> [12] **The regulation is mandatory and applies to all secondary arbitrations. The dispute resolution clause contained in the separation agreement does not contain the necessary formalities** (reproduced above) and, therefore, does not

 

> constitute an arbitration agreement for purposes of the *Arbitration Act*. **Accordingly, s. 7 of the *Arbitration Act* has no application and cannot be invoked to stay these proceedings.**
>
> [13] I have adopted the approach taken in *Horowitz v. Nightingale*. In *Horowitz* the court rejected the suggestion that where arbitration is intended as part of a dispute resolution clause contained in an agreement, the court should endeavor to carry out the intentions of the parties despite a lack of technical compliance with the formalities of the regulation.
>
> [14] **This court is without jurisdiction to read into the dispute resolution clause the formalities required by the regulation.** Consequently, a failure to comply with the requirements of the regulation is fatal to the enforcement of the arbitration provisions contained in the dispute resolution clause. [emphasis added]

And, with that, one settled case was no longer settled.

[For further discussion of *Horowitz v. Nightingale*, see Philip Epstein's comment in the 2017-20 (May 22, 2017) edition of *TWFL*.]

***Fekete v. Brown***

In 2020, the parties signed a consent that contained the following terms:

> 19. Any support review moving forward shall be on a moving forward basis with no retroactive adjustment. The review shall be prospective, and not retroactive. **It shall be conducted via an in-writing Arbitration process with Ms. Julie I. Guindon. The initial costs associated with this process shall be shared equally by the parties.**
>
> . . . . .
>
> 27. **All future disputes between the parties will be resolved via an Arbitration process.** This term replaces subparagraph 12.5 of the Final Divorce Order. [emphasis added]

They subsequently took out a consent Order that incorporated these terms, and drafted an arbitration agreement that would have met the formal requirements of the *Regulation*. However, they did not finalize the arbitration agreement, and a further agreement was never signed. Instead, the wife started a court proceeding to deal with the very issues that the parties had agreed, and the Court had ordered, were to be dealt with through arbitration.

In response, the husband brought a motion to stay the wife's proceeding pursuant to s. 7 of the *Arbitration Act*. (Sound familiar?)

As neither the consent nor the Order on which it was based dealt with the appeal rights or choice of law, and as the parties had not been screened for power imbalances and had the arbitrator sign the necessary certificate, they clearly did not meet the requirements of the *Regulation*. And, based on the court's reasoning in *Monteiro* and *Horowitz*, the husband's motion for a stay was clearly going to be dismissed, right?

Nope.

After reviewing the case law, Justice Summers agreed with Justice Laliberté's reasoning in *Moncur*, where his Honour ordered the parties to sign an arbitration agreement that complied with the *Regulation* on the basis that "[t]he Court must have the power to require parties subject of a court order to live up to their obligations."

As a result, Justice Summers ordered the parties to sign the necessary arbitration agreement, and granted the husband's motion to stay the proceeding that the wife had brought.

**Some Further Thoughts**

It could be argued that the differing results in *Monteiro* and *Fekete* can be explained by the fact that *Monteiro* only involved an agreement, while *Fekete* involved a court order. But in our view, that argument would be wrong. Since the Court could not

  

have made the consent order in *Fekete* without the agreement of the parties (as courts cannot order parties to arbitrate family law cases unless it is on consent), whether the parties took the extra procedural step of having an agreement incorporated into a court order is wholly irrelevant to the question of whether they should be bound to comply with a clear agreement to arbitrate. There is also nothing in the *Family Law Act* or the *Arbitration Act* to suggest that the *Regulation* does not apply if the parties have incorporated an agreement to arbitrate into a court order. And then there is the fact that the issuance of a consent order (that does not deal with child support) is often a somewhat perfunctory, administrative task.

In neither case did the Court try to reconcile the competing lines of cases (in fact, *Monteiro* does not mention *Moncur* or any of the other cases like it, while *Fekete* does not mention *Horowitz*). It is the jurisprudential equivalent of parallel play.

We have clearly reached the point where it is impossible to predict what a court is going to decide when considering whether to hold parties to an agreement to arbitrate. The Government of Ontario may have had good intentions when it enacted the *Regulation* and amended Ontario's arbitration legislation over a decade ago to add specific requirements for family arbitrations. However, the current state of the law in this area is completely untenable, and is in desperate need of either reform, or clarification from an appellate court. But unless and until that happens . . . good luck.

**Allow Travel for Others as You Would Want to Travel Yourself?**

*C.M.J.G v. M.M.C.* (2022), 67 R.F.L. (8th) 243 (B.C. Prov. Ct.) — Brecknell Prov. J.

Because this is a case mostly about travel consents, it does not technically break our "no more COVID-19 cases" rule. The fact that this case *resembles* a COVID-19 travel case is purely coincidental.

The child's mother wanted to travel with the child to Jamaica with members of her immediate and extended family (we do not know how old the child was as all identifying information was redacted from the decision). The father would not consent to the trip.

The mother's father was gravely ill in Jamaica, and his prognosis was not good. The mother and her siblings, their families, and some close friends were planning a trip to an all-inclusive resort in Jamaica, so that the family could gather with the mother's father while he was still able to enjoy the reunion.

The father had COVID-19 related concerns, and also had concerns regarding "criminal elements" in Jamaica as set out in the Government of Canada travel advisory.

Judge Brecknell concluded that he could take judicial notice of such government advisories, much the same way judicial notice could be taken of government health guidelines: *Hasan v. Hasan*, 2020 CarswellBC 1424 (S.C.). Although at the time of the motion, non-essential travel was "discouraged" it was not prohibited. Travel, therefore, was the prerogative of the individual.

The purpose of this particular travel was certainly of no concern. In *Barritt v. Barritt*, 2016 CarswellOnt 12001 (S.C.J.), the Court noted (in paragraph 8):

> It is well known that when dealing with issues of custody and access the court's only concern is the best interests of the child. What is in the best interest of the child is contextual and will depend upon the particular circumstances of the child under consideration. . . . a review of the case law has indicated that attending a family wedding, and in particular a wedding of a parent, will very often be held to be in the child's best interests . . .

Similarly, in *Broda v. Broda*, 2000 CarswellAlta 1501 (Q.B.), the Court noted the intangible benefits of such experiences (at paragraph 18):

> In this case, it is obvious that the children would like to be allowed to leave the province to attend a family wedding in California and that such a trip would provide benefits to them. Apart from the pleasure of a trip, the trip would allow them to attend at, and participate in, a family wedding; a social ritual like a wedding may assist in the building and strengthening of emotional links to a strong and stable family network of support which is assuredly important for children.

 

> Their participation in any such activities help anchor their place in a loving family and is obviously to be encouraged. The constellation of likely benefits associated with participation in the family wedding can perhaps be summarized by saying that this activity is likely to add to the children's sense of belonging. . . .

On the other side of the argument, COVID-19 travel concerns and the stated reluctance of courts to allow unnecessary COVID-19 travel: *Grieder v. Zabinski*, 2021 CarswellOnt 7441 (S.C.J.); *Onuoha v. Onuoha*, 2020 CarswellOnt 4103 (S.C.J.).

Finally, the court in *Hasan v. Hasan*, 2020 CarswellBC 1424 (S.C.) offered a compromise position (at paragraph 53):

> Arriving at an order that adequately protects the children from real risk of harm, while respecting the autonomy of a parent to freely travel with their child, is a delicate balancing act. The goal is not to eliminate all risk, but to bring the risk to an acceptable level, recognizing that the best interests of the child require consideration of not only the physical health, but also the emotional well-being of children. . . .

Absent the then-current travel advisories, there is little doubt the trip would have been allowed. Subjectively, it was an important trip. But objectively, with the advisories, there were concerns. An order affecting a child must be in the child's best interests, and will not be so unless it protects the child's physical, psychological, and emotional wellbeing to the greatest extent possible.

This is where things get interesting. In considering the factual matrix, Judge Brecknell was of the view that the child's best interests would *not* be served by an order that the father sign the necessary travel consent.

However, Judge Brecknell made it clear that while he was not prohibiting the mother or anyone else — other than the child — from travelling to Jamaica; he was also not prohibiting the child from travelling to Jamaica. Rather, his Honour cleverly left the decision up to the father, as a guardian, to decide whether or not he would complete the required travel consent. If he did not want to complete the letter, that would be his prerogative. However, "he must consider only the Child's best interests regarding not only this travel, but any future travels he may contemplate with the Child." In other words, if the father refused the travel, he should not expect to be allowed to travel himself anytime soon. And his Honour further suggested that the father, "would be well advised to give any [further] requests by [the mother] careful consideration even if they temporarily affect his parenting time with the child while [the mother's father] is still alive."

So, father, don't allow the trip if you don't want to. But if you don't, maybe don't think the court is going to have much sympathy for your travel interests in the future. The "Golden Rule" at work: Do unto others as you would have them do unto you. Clever judge.

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