FAMLNWS 2022-22
Family Law Newsletters
June 20, 2022

— Franks & Zalev - This Week in Family Law

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Interim Sale of a Jointly-Owned Matrimonial Home — The Pendulum *Continues* to Swing

R.L. v. M.F., 2022 CarswellOnt 3259 (S.C.J.) — Kurz J.

In this *Newsletter*, we have previously discussed the fact that, with respect to the interim sale of a jointly-owned matrimonial home, the pendulum continues to swing (see e.g. our discussion of *Gole v. Meier* (2021), 67 R.F.L. (8th) 408 (Alta. Q.B.) in the 2022-13 (April 11, 2022) edition of *TWFL*).

Whereas even 10 years ago, interim sale, if requested, was close to a certainty (subject to proof of malicious, vexatious or oppressive behaviour or interfering with a genuine property right), in recent years, a request for interim sale has become far less certain.

In this case, Justice Kurz considered a motion for the pre-trial sale of the jointly-owned matrimonial home. You be the judge as to where on the pendulum swing we find ourselves now.

As an aside, and to be clear, we agree there are times when a home should not be sold before trial — and not all those times can be shoe-horned into the test of malicious, vexatious, or oppressive conduct. For example, where one party may want to try to buy the home, but cannot know if it is possible until his or her property and/or support entitlement is known — that would appear to be a good reason to deny an interim sale — especially where a party cannot determine their financial wherewithal because of lack of disclosure.

Here, the parties were married in February 2006, and separated in February 2020. There were two children of the marriage, ages 15 and 13. The parties continued living separate and apart in the matrimonial home until the husband moved to a rental apartment in January 2022 (a month prior to the hearing of this motion).

The husband was an investment banker and had an income in the range of $1.5 million a year. The wife was a radiologist and earned approximately $350,000 a year. The husband was paying child support of $18,541 a month, spousal support of $14,000 a month, and 72% of the children's significant section 7 expenses.

The husband brought a motion to sell the home. He argued that the parties should take advantage of the lucrative "spring market."

Justice Kurz reviewed the "standard" test and "usual" case law regarding interim sale. And the husband, of course, relied on his *prima facie* right as a joint tenant to claim interim sale (subject to malicious, vexatious, or oppressive conduct, etc.).

But Justice Kurz threw a bit of a curve ball. He noted that while this was *generally* the test for partition and sale of any jointly-owned property, a matrimonial home brought certain unique considerations into play. When dealing with a matrimonial home, the court's analysis should not start and stop with a joint owner's *prima facie* right to sale. Rather, the court must consider the best interests of any children involved. Orders for the sale of the matrimonial home prior to trial are not to be made as "a matter of course." While the onus remains on the individual resisting the sale, each case must be considered on its own facts. The person resisting the sale may demonstrate that a legitimate claim would be prejudiced in some way or that the children's best interests would be negatively impacted.

Justice Kurz summarized things in the following two paragraphs:

> [31] In a nutshell, while partition and sale is presumptively available at the behest of a joint owner, that principle is subject to greater discretion when the court is dealing with a matrimonial home and when the request is made at an interim rather than trial stage of the proceedings. In an interim motion, the court is called upon to engage in a holistic review of the merits of the sale, while considering the interests of each party and the children. Further the court must balance the prejudice to the claims of each party regarding the home against prejudice to the other and the advantages of sale.
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> [32] **A key point in the interim family law context is how the best interests of the children before the court, rather than an abstract notion of children in general, would be affected by sale before trial. The best interests of the children before the court may, in themselves, may be sufficient to overturn the presumption regarding partition and sale, unless other facts mandate that sale.** [emphasis added]

While these sentiments are not necessarily "new", it has been far more common that the best interests analysis does not materially enter into consideration when dealing with a motion for interim sale. Historically, the presence of children alone would not result in refusal of sale: *Barker v. Barker* (2002), 27 R.F.L. (5th) 231 (B.C. C.A.) — nor would a general wish to allow children to finish their current school year: *Coffey v. Coffey*, 2007 CarswellOnt 8639 (S.C.J.). There was also a general sense that young children are generally resilient and would not be adversely affected by the sale of a home, as long as the new home was appropriate: *Chmielowiec v. Chmielowiec*, 2011 CarswellOnt 1995 (S.C.J.); *Goldman v. Kudeyla* (2011), 5 R.F.L. (7th) 149 (Ont. S.C.J.).

Some upset to children because of a sale was thought to be expected and inevitable and should not prevent an interim sale: *Gainer v. Gainer* (2006), 24 R.F.L. (6th) 18 (Ont. S.C.J.); *Chrobok v. Chrobok*, 2006 CarswellOnt 4890 (S.C.J.); *Peterson v. Peterson*, 2018 CarswellOnt 15466 (S.C.J.); *Delongte v. Delongte*, 2019 CarswellOnt 20274 (S.C.J.). And in any case, it would take a "robust record" of potential harm to children to prevent an interim sale: *Petit v. Petit*, 2016 CarswellOnt 1565 (S.C.J.).

In this case, Justice Kurz ultimately determined *not* to order the sale of the matrimonial home for the following reasons:

- The husband had implicitly admitted that it was in his children's best interest to remain in the matrimonial home when he and the wife had a conversation with them a couple of months before the motion where he indicated that he would do anything in his power to keep them in the home.

- The sale of the matrimonial home would prejudice the wife's claim to exclusive possession of the home until the eldest child completed high school.

- The husband would owe the wife a significant equalization payment, so significant that she would easily be able to afford to buy him out of the home.

- As a result of the equalization payment the husband would not see a benefit from the sale of the matrimonial home — his half of the net proceeds would be paid into trust.

- The husband's rental apartment was very comfortable, with significant amenities.

- While the husband might miss the spring market — in these "volatile times" it "cannot be said that there is a clear prejudice or advantage to selling now."

And, with that, Justice Kurz dismissed the husband's motion to sell the home. He did, however, give the husband leave to renew the motion if the matter was not reached on the upcoming fall trial list.

The pendulum continues to swing; partially for better (more individual justice); and partially for worse (less predictability).

Wouldn't It Be Nice if there Were *Not* Different Provincial Rules for Bankruptcy?

Bowes v. Bowes (2022), 66 R.F.L. (8th) 262 (N.L. C.A.) — Hoegg, O'Brien, and Butler JJ.A.

In *Schreyer v. Schreyer* (2011), 1 R.F.L. (7th) 1 (S.C.C.), the Supreme Court of Canada considered the impact of bankruptcy on matrimonial property claims in jurisdictions that use what it referred to as an "equalization model" (Ontario, Quebec, Manitoba, Northwest Territories, Nunavut and Prince Edward Island). As the Court explained in its decision:

> [15] **The equalization model involves a valuation of the family assets and an accounting. The value of the assets is then divided between the spouses, usually in equal parts, although family courts have a limited discretion to order an unequal division.** The valuation and the division give rise to a debtor-creditor relationship in the sense that the creditor spouse obtains a monetary claim against the debtor spouse. But the assets themselves are not divided. **Each spouse retains ownership of his or her own property both before and after the breakdown of the marriage. Neither acquires a proprietary or beneficial interest in the other's assets.** Assets are transferred only at the remedial stage, as agreed by the parties or as ordered by the family court in exercising its discretion, as a form of payment or execution of the judgment. . . . [emphasis added]

The Supreme Court also determined in *Schreyer* that property/equalization claims under an "equalization model" are provable in bankruptcy. And, as a discharge under s. 178(2) of the *Bankruptcy and Insolvency Act* "releases the bankrupt from all claims provable in bankruptcy," *Schreyer* ultimately means that in "equalization model" jurisdictions, a discharge releases a bankrupt spouse from any further liability with respect to an equalization payment.

Schreyer did not expressly deal with the impact, if any, of bankruptcy on matrimonial property claims in jurisdictions that use a "division of property model" (Newfoundland and Labrador, Saskatchewan, Alberta, Nova Scotia, New Brunswick, and the Yukon), which the Court explained "give[s] rise to a proprietary or beneficial interest in the assets themselves, not just in their values." That is the very issue that the Newfoundland and Labrador Court of Appeal had to decide in *Bowes v. Bowes*.

The parties in *Bowes* were married in 2001 and had five children together. When they separated in 2013, they owned a home in Newfoundland and a cottage on Prince Edward Island, but title to both properties were registered in the husband's sole name. The parties also had various joint debts.

In March 2014, the wife commenced an Application for the usual family law relief, including property division pursuant to s. 21 of the *Family Law Act*, R.S.N.L. 1990, c. F-2, which provides that upon separation, "either spouse is entitled to apply to a court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order that division."

Furthermore, although the wife was not on title to the home in Newfoundland, she had a 50% interest in the property pursuant to s. 8(1) of the *Family Law Act*, which provides that "[n]otwithstanding the manner in which the matrimonial home is held by either or both of the spouses, each spouse has a 1/2 interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has."

In October 2014, the husband made an assignment in bankruptcy. By doing so, he left the wife solely responsible for several joint debts. Furthermore, as the mortgages on both properties were in default, the husband's trustee transferred both properties to the mortgagees. However, taking a page from the Book of *Schreyer*, this was done without notice to the wife.

The trial judge dismissed the wife's claim for compensation with respect to the two properties as well as her claims to have the husband contribute to various joint expenses she incurred after they separated. However, he did order the husband to pay

the wife approximately $5,000 to reimburse her for his half of a joint overdraft account and credit card and for the interest she had paid on a joint line of credit. The parties also owed approximately $37,000 on a joint line of credit, and the trial judge ordered the husband to assume one half of the balance owing on the principal of the line of credit and make arrangements with the bank to repay his share of that debt.

The wife appealed.

The Court of Appeal started its analysis by confirming that the wife's property claim under s. 21 of the *Family Law Act* was *not* affected by the husband's bankruptcy because, unlike in *Schreyer* and other cases involving "equalization models", claims in jurisdictions that use a "division of property model", including Newfoundland and Labrador, are ***not*** provable in bankruptcy:

> [61] The effect of section 21(1) of the *Family Law Act* on [the husband's] bankruptcy was that (unlike the situation in *Schreyer*), [the wife] was not a creditor. **[The wife's] application for division of assets was not a claim provable in bankruptcy and it was not stayed on [the husband's] application for bankruptcy.** Had she received notice of [the husband's] application under the *BIA*, and been advised of her right to do so, [the wife] could have filed a proof of claim relative to any assets which the Trustee considered had vested in him on behalf of [the husband] (*BIA*, section 81).
>
> [62] In these circumstances, **there was no impediment to [the wife's] application for division of matrimonial assets and apportionment of matrimonial debts.** It was reasonable to expect that [the wife's] rights would have received greater protection than those of a non-bankrupt spouse in an equalization jurisdiction (compare for example *Schreyer* and *Balyk v. Balyk*, [1994] O.J. No. 764, 113 D.L.R. (4th) 719, at 723-724 (Ont. Gen. Div.)). As will become apparent, this expectation did not bear out. [emphasis added]

The Court of Appeal was highly critical of the husband's trustee, who knew the husband was separated from the wife, for not recognizing that the wife had a proprietary interest in the two properties, and for failing to notify her of its intention to transfer the two properties to the mortgagee or her right to file a proof of claim:

> [65] A spouse making application for bankruptcy is obliged to disclose his marital status to the Trustee in Bankruptcy. **When, as here, the bankrupt is separated and family property and support claims are in process, the Trustee should recognize that under the *Family Law Act* (unless there is a valid agreement affecting the non-bankrupt spouse's rights), the non-bankrupt spouse:**
>
> - **has a proprietary interest in any matrimonial home** (*Family Law Act*, section 8); and
> - **has the right to claim a beneficial interest in all matrimonial assets** (however held or registered) entitling the non-bankrupt spouse to the right to a declaration of a proprietary interest (sections 21 and 26).
>
> [66] **The Trustee should give notice of the bankruptcy to the non-bankrupt spouse and inform him/her of their right to file a proof of claim** against any non-exempt assets of the bankrupt.
>
> [67] The evidence supports that **the Trustee understood that the parties were married but separated. This fact alone should have caused him to consider beneficial ownership of [the Newfoundland property]**. The Trustee's testimony at trial was that he could not recall if title was registered in [the husband's] name alone or whether he had been aware of either the Opting-Out or Opting-In agreement. This Court was not referred to any evidence to suggest that the Trustee had taken any steps or made any enquiries on the ownership of this home. [emphasis added]

Despite these criticisms, the Court of Appeal ultimately declined to grant any relief to the wife with respect to the two properties because the wife's own evidence showed that there was no equity in the Newfoundland property, and there was no evidence to indicate that the husband had received any benefit when his trustee transferred the Prince Edward Island property to the mortgagee.

With respect to the wife's claims for a contribution to the parties' joint debts, the Court of Appeal agreed with the trial judge's decision to order the husband to pay the wife approximately $5,000 to reimburse her for the joint overdraft, credit card, and

interest payments. However, it found that the trial judge had erred by ordering the husband to repay the bank for his share of the principal on the line of credit. As the husband's liability to the bank had already been discharged by his bankruptcy, that aspect of the trial judge's Order was unenforceable. However, that did not preclude the Court of Appeal from ordering the husband to repay his share of the debt to the wife, and that is exactly what the Court did.

The Court of Appeal also found that the trial judge had erred in rejecting the wife's claim for reimbursement for approximately $17,000 that she spent to maintain and repair the two properties after the parties separated, and confirmed that the *Family Law Act* gave the court jurisdiction to reapportion debts incurred both during the marriage and after separation:

> [97] While matrimonial debt is defined in the family property legislation of some jurisdictions, apportionment of debts is not the subject of specific provision in the *Family Law Act*. This has not however prevented courts in this province from apportioning debt incurred both during marriage and where appropriate, after separation (see *Reid v. Reid*, 2018 NLSC 33, at para. 36; *Fleming v. Fleming*, 2009 NLUFC 2, at para. 13; and *Martin v. Martin* (1998), 168 Nfld. & P.E.I.R. 181, at paras. 21-22 (Nfld. C.A.)).

In total, therefore, the Court of Appeal ordered the husband to pay the wife approximately $32,000 for his share of the joint debts and expenses she had paid for after they separated.

The next question the Court of Appeal had to consider was how the $32,000 should be paid. The husband was likely judgment proof, and had not made any payments towards the joint debts that the trial judge had ordered him to repay. Furthermore, the trial judge had decided the spousal support issues before he dealt with the property issues, which we know from the case law is an error. For example, as the Ontario Court of Appeal noted in *Greenglass v. Greenglass* (2010), 99 R.F.L. (6th) 271 (Ont. C.A.):

> [44] . . . the amount of the equalization payment and the impact of any potential income-generating potential associated with the assets with which each party is left will almost invariably affect the support analysis. As a matter of law, therefore, **the calculation of the division of assets and resulting equalization payment must always precede any support analysis.** [emphasis added]

Accordingly, after reviewing a number of similar cases where courts have used spousal support to compensate a spouse for taking on a disproportionate share of the family's debts (see paragraph 117 of the reasons), the Court of Appeal concluded that it would be appropriate for the husband to pay the wife an extra $500 a month in spousal support (which it estimated would net her about $400 a month after tax) until the $32,000 had been repaid "to address the economic consequences to [the wife] having shouldered these debts."

By requiring the husband to pay the wife spousal support for his share of the joint debts, the Court increased the wife's chances of actually being able to collect from the husband because the payments can now be enforced by the provincial support enforcement agency. The husband's obligation will also now survive a subsequent bankruptcy. That being said, in some cases, this type of Order can end up being a double-edged sword. Unlike most monetary judgments, spousal support Orders are almost always variable in appropriate circumstances. While this will probably not be an issue in this particular case, it is something you should at least keep in mind before trying to turn what would ordinarily be a simple monetary judgment into a support Order.

Betcha Didn't Know About the Common Law Principle of Apportionment

Kim v. Kim, 2022 CarswellOnt 4178 (S.C.J.) — McGee J.

This interesting case dealt with the enforcement of a pre-existing court order.

The parties had a trial in September of 2010. The final order (the "Order") provided for Table child support, and arrears of child (including s. 7 expenses) and spousal support. The arrears totalled $149,043.

The Order further required the husband to make a lump sum spousal support payment of $480,000, and an equalization/property payment of $311,495.00 — for a total of $791,495. The $791,495 was to be enforced by way of garnishments from five entities

that received commissions and/or other fees earned by the husband. The ongoing support and arrears were to be enforced by the FRO.

The husband brought a motion to change in October of 2017 on the basis that he should not longer have to pay child support for the parties' 27-year-old child. The FRO had not collected all of the arrears outstanding under the 2010 Order, but the husband had maintained his ongoing child support payments — even after the child had ceased to be a child of the marriage. As a result, the parties agreed that $8,853 remained owing by the husband on account of child support.

While the wife had not previously raised the issue prior to the husband's motion to change, as it turns out, the garnishments for the property and lump sum spousal support the husband owed had not been very successful. Of the $791,495 that was owed for property and lump sum spousal support, the wife had only collected $277,709.

The wife sought an order that the amount collected through the garnishments be credited and apportioned to the property amounts owing to her. The wife was concerned that the husband would file for bankruptcy thus "wiping out" any equalization amount owing — but the amounts owing to her for lump sum spousal support would survive bankruptcy. The wife argued that the common law "Principle of Apportionment" gave her (a creditor) discretion as to how to apportion undifferentiated payments from a single debtor (the husband) towards multiple debts held by the creditor (the wife).

The husband, on the other hand, argued that all payments garnished to date by the court must first be applied to the lump sum spousal support because spousal support is a priority debt under section 2(3) of the *Creditors Relief Act, 2010*, S.O. 2010, c. 16, Sched. 4.

Justice McGee was of the view that "priority" under the *Creditors Relief Act* refers to priority as amongst multiple creditors, not priority in allocation of debts owing by a single creditor. The husband, as the debtor, could not rely on that provision to "allocate" the garnished funds towards spousal support:

> [25] Therefore, it is clear that "priority" in s. 2(3) of the *Creditors Relief Act* refers to "priority as against other creditors" and does not apply to funds received from a single debtor for multiple debts owed to the same creditor when specific payments are not earmarked for specific debts. It follows that **a creditor has the discretion to apportion an undifferentiated payment towards multiple debts as he or she sees fit to maximize recovery.** [emphasis added]

That is, a creditor has discretion to apportion an undifferentiated payment towards multiple debts as he or she sees fit to maximize recovery — the Common Law Principle of Apportionment: *Nova Scotia Business Development Corp. v. Wandlyn Inn Ltd.*, 1999 CarswellNS 449 (S.C. [In Chambers]).

When monies are garnished, a debtor loses the ability to allocate payments to specific debts. When a creditor seizes money from third parties, the debtor does not have the right to choose how the money will be apportioned or allocated: *Crescent Petroleum Ltd. v. Portserv Ltd.*, 1997 CarswellBC 2464 (S.C.).

Justice McGee further confirmed that the Principle of Apportionment applies to family law cases. The Principle of Apportionment states that when a debtor makes an undifferentiated payment, or has money seized from them, the creditor may allocate the monies received to maximize their recovery.

Therefore, in this case, the wife had the right to allocate the $277,069 that was successfully garnished to the property awards within the global sum owing to her. She had the discretion to make such a decision in order to maximize her recovery in the event that the husband declared bankruptcy in the future or in the event of the husband's death and his estate having other creditors.

Even though it was learned during the trial that one of the writs of garnishment prepared by a court clerk during the enforcement process had stated that the monies were being collected for "spousal support", Justice McGee found this did not change the result because neither the husband nor the wife had directed that those words be added to the writ.

As a result, Justice McGee ordered the following:

- The arrears of Table child support of $8,853 plus post-judgment interest would be enforced by the FRO;

- A support deduction order would issue for the $480,000 attributable to lump sum spousal support as of September 3, 2010. The FRO would calculate and enforce post judgment interest at 2% per annum, compounded annually; and

- The balance of the property payment, being $33,886 remained owing. Justice McGee set the interest owing on this amount at $20,000. The balance and interest would be enforced by garnishments as contemplated in the original final order.

While the Principle of Apportionment may not arise every day in a family law file, it may certainly come in handy when bankruptcy concerns arise. The lesson for creditors? Keep things vague and do not specify the debts that are to be repaid by any specific amount. The lesson for debtors? Be as specific as possible.

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