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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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If a Reconciliation Terminates a Separation Agreement at Common Law . . . Does Reconciliation Terminate a Cohabitation Agreement? Place Your Bets.

Krebs v. Cote (2021), 57 R.F.L. (8th) 279 (Ont. C.A.) — Tulloch, Pardu, and Roberts JJ.A.

In the 2020-20 (May 25, 2020) edition of *TWFL*, we discussed *Miaskowski v. MacIntyre* (2020), 35 R.F.L. (8th) 253 (Ont. C.A.), where the Ontario Court of Appeal considered the impact of reconciliation on a prior separation agreement and property division. While we voiced some concern about the result in *Miaskowski* based on the facts and the specific wording of the agreement, there is no doubt that, at common law, reconciliation terminates a separation agreement unless it is clear from the agreement or the circumstances that the parties intended all or part of it to survive the resumption of cohabitation: *Bailey v. Bailey* (1982), 26 R.F.L. (2d) 209 (Ont. C.A.); *Sydor v. Sydor* (2003), 44 R.F.L. (5th) 445 (Ont. C.A.); *Ernikos v. Ernikos* (2017), 98 R.F.L. (7th) 261 (Ont. C.A.).

But what is the effect of reconciliation on a cohabitation agreement?

The parties were involved in an "on-again-off-again" relationship from 2006 to 2019. For much of the relationship, the parties lived in Mr. Krebs' home.

The parties first separated in the fall of 2012, when Ms. Cote moved out of Mr. Krebs' home and into a home that her mother bought for her.

In January 2013, the parties reconciled and resumed cohabiting at Mr. Krebs' home. At that point, they entered into a Cohabitation Agreement. It included waivers of property rights, equalization and spousal support, and provided that on separation Mr. Krebs would pay Ms. Cote a lump sum of $5,000, and Ms. Cote would leave the home. It also provided that if the parties got married, the Cohabitation Agreement would automatically become a Marriage Contract.

Later in 2013, the parties separated again. Mr. Krebs paid Ms. Cote the $5,000, and she left the home.

In 2014, the parties reconciled and got married.

In 2016, the parties had discussions about Mr. Krebs transferring title to the matrimonial home into the parties' joint names.

In 2019, the parties separated for the final time.

The motion judge was asked to determine whether, as a matter of law, the separation followed by reconciliation had terminated the Cohabitation Agreement.

The motion judge determined that the Cohabitation Agreement was of no force and effect for three reasons:

> 1. The motion judge determined that the common law principle that reconciliation terminates a separation agreement also applies to cohabitation agreements.
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> 2. The motion judge found that the discussion about transferring the matrimonial home showed the parties did not subjectively intend the Cohabitation Agreement to continue to apply if they separated again.
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> 3. Once Mr. Krebs paid Ms. Cote the $5,000, the terms of the Cohabitation Agreement were "exhausted", and it was of no further force and effect.

That is, although the Notice of Motion was confined to a question of law, the motion judge made findings about the subjective intentions of the parties and interpreted the Cohabitation Agreement. Oddly, this was not the subject of comment by the Court of Appeal. The subjective intentions of a party have no place at the contractual interpretation table: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.); *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 CarswellAlta 13 (C.A.).

Although the interpretation of a contract is a matter of mixed fact and law (*Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.)), both parties asked the Court of Appeal to interpret the Cohabitation Agreement, rather than send them back for a new hearing. The Court of Appeal obliged, and reversed the motion judge.

The Court of Appeal determined, for good reason, that the common law rule regarding separation agreements does ***not*** apply to cohabitation agreements.

Curiously, the court also noted that the common law rule had been established in the past when views about marriage, relationships, and cohabitation were very different than they are today. While this consideration was not applied in *Miaskowski* with respect to separation agreements, the court did suggest that the common law rule regarding separation agreements continues to make "some sense", and offered the following rationale: The reason a separation agreement exists is the parties' separation. But if they reconcile, the foundation for the separation agreement dissolves. But this does not apply to a cohabitation agreement. If parties reconcile, the basis for the cohabitation agreement (i.e. their cohabitation) remains — in that the parties have returned to the very state contemplated by the cohabitation agreement.

This was also the logic in *Langdon v. Langdon*, 2015 CarswellMan 526 (Q.B.), where the court was not certain that reconciliation should affect a cohabitation agreement as it does a separation agreement:

> [138] . . . I do not think it a proper inference or presumption to say that a resumption of cohabitation nullifies [a cohabitation agreement] concerning a property and support regime. Renewed cohabitation in that context is more reflective of an intention to return to a relationship where one's rights were formerly delineated by the agreement. It does not seem to me to be at all reflective of an intention to enhance one party's rights or to impose greater obligations on the other, something that will inevitably result when the cohabitation agreement no longer exists.
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> [139] It seems to me that if there is to be an inference or a presumption at all it ought to be (barring other evidence of intention) that the resumption of cohabitation returns you to the position you held in the relationship to which you have now chosen to return. Presuming the termination of the cohabitation agreement on resumption of cohabitation could lead to strategic separations and reconciliations designed to nullify cohabitation agreements. It also results in a policy requiring redocumentation on resumption of cohabitation.
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> [140] I do not regard the first as good policy; the second is impracticable and is not in keeping with the way people typically lead their lives.

Hard to argue with that logic.

We just don't love the dichotomy in the impact of reconciliation on the two different kinds of agreements. It is a recipe for confusion.

However, the Court of Appeal declined to follow the suggestion that a cohabitation agreement is *presumed* to be valid following reconciliation. Instead, it determined that each situation will be governed by the agreement itself and the circumstances of the parties.

The Court of Appeal then considered the Cohabitation Agreement in issue in this case, which notably did not say what would happen if the parties separated and then reconciled. It only contemplated that it would apply in the event of the parties' separation, one of their deaths, or in the event of a marriage. There was nothing that restricted its application to cohabitation at a defined time, or restricted the broad language to cohabitation before separation followed by reconciliation. Had the parties intended that result, then they should have written it into their agreement. The court also noted that the parties had a history of multiple separations and reconciliations, so the idea that it might happen in the future was certainly within their "reasonable contemplation."

While we agree that a reconciliation should not terminate a cohabitation agreement (subject to specific wording to the contrary), we would have preferred that the Court of Appeal did not rely on the fact of previous separations as an interpretive tool. That is simply inviting parties to distinguish this case in the future as surely most parties who enter into cohabitation agreements do not do so having separated previously, and do not do so contemplating multiple separations and reconciliations. "We agree that if we separate and reconcile multiple times, this Agreement will continue to apply?" Very romantic.

Respectfully, there *should* be a rebuttable presumption that a cohabitation agreement remains valid after reconciliation. To paraphrase that which Justice Little said in *Langdon*, it is more in keeping with how people live their lives — and the concerns of "strategic separations" are very real.

In any case, the Court of Appeal found that the Cohabitation Agreement here was not terminated and would continue to apply:

> [33] Reading the contract as a whole, in the context of the relationship of the parties at the time it was signed, I conclude that it was intended to apply despite a separation and subsequent reconciliation, preceding the final separation.

The court then considered whether the Cohabitation Agreement had been "exhausted." Nothing in the Cohabitation Agreement indicated that it came to an end once Mr. Krebs paid the $5,000 to Ms. Cote.

Counsel for Ms. Cote analogized a cohabitation agreement to an employment contract that calls for payment to an employee upon termination. If the employee returns to work, Ms. Cote argued, they could not rely on the old contract; there had to be a new one. The Court of Appeal rejected this analogy. An employment contract will often have clauses that continue to govern after payment to the employee, such as releases and non-compete clauses. An employer would certainly enforce that portion of the contract if it were breached in the future. Furthermore, employment is always a contractual relationship. Cohabitation? Not necessarily. A contract comes to an end "when there is nothing left to bind the parties." Contracts do not become "exhausted" — but are completed in accordance with their terms.

In this case, there was nothing in the Cohabitation Agreement to indicate that the contract would come to an end once Mr. Krebs paid Ms. Cote the $5,000.

The moral of the story? To be safe, a cohabitation agreement (and by extension a marriage contract) should *specify* what is to happen should the parties reconcile after a separation.

If Income Can Be Imputed While Incarcerated, Then Can Income Be Imputed for Not Being Vaccinated?

Lyons v. Lyons, 2022 CarswellSask 151 (Q.B.) — Richmond J.

We know we said "no more COVID-19 cases". But since *Lyons* is *really* about imputing income, we're going to bend the rules just a bit.

The parties lived together for 32 years (they were married for 27 of those years) and had adult children together. They separated in 2017.

The husband was the primary income-earner during the relationship. The wife stayed home to raise the children until 2008, when she got a job with Canada Post.

The husband initially paid support voluntarily, but he stopped paying support in December 2021. He claimed he could not afford to continue paying, and the wife had refused to sign an agreement that would permit him to deduct the payments for tax purposes.

After the husband stopped paying, the wife brought a motion for interim support. In her evidence, the wife disclosed that although she had been earning approximately $50,000 a year from her job with Canada Post, she had been forced to go on leave without pay in November 2021, because she refused to get vaccinated against COVID-19. (The wife initially tried to claim that she was "put on leave without pay due to not providing private medical information", but subsequently acknowledged that she had not been vaccinated or complied with Canada Post's vaccination policies. That's what we call "spin.")

Given the length of the relationship and the fact that the parties had children together, Justice Richmond had no difficulty finding that the wife was entitled to interim spousal support. This left the question of . . . how much support?

The wife argued that support should be calculated based on her current income of $0. The husband, on the other hand, argued that the wife was intentionally underemployed, and should be imputed with an income of $53,399 based on her 2020 Notice of Assessment.

The test for intentional underemployment in the child support context is well known. Pursuant to s. 19(1)(a) of the *Child Support Guidelines*:

> 19. (1) The court may impute such amount of income to a parent or spouse as it considers appropriate in the circumstances, which circumstances include,
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> > (a) the parent or spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse;

And, as the Ontario Court of Appeal explained in *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.), which is still the seminal decision about s. 19(1)(a), and which has been followed by courts across Canada with the exception of Alberta (at least for now — see below):

> [28] Read in context and given its ordinary meaning, "intentionally" means a voluntary act. **The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning.** That parent is intentionally unemployed when he or she chooses not to work when capable of earning an income. **The word "intentionally" makes it clear that the section does not apply to situations in which, through no fault or act of their own, spouses are laid off, terminated or given reduced hours of work.**
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> . . .
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> [36] A plain reading of s. 19.(1)(a), done in a contextual and purposive fashion, leads me to conclude that the provision is unambiguous. **There is no bad faith requirement.** [emphasis added]

[For further discussion about the state of the law of intentional un/underemployment in Alberta, see our discussion of *Peters v. Atchooay*, 2021 CarswellAlta 1574 (C.A.) in the 2021-28 (July 26, 2021) edition of *TWFL*. The decision of the five-member panel in *Peters* is still under reserve.]

Furthermore, as the Saskatchewan Court of Appeal noted in *Frank v. Linn* (2014), 48 R.F.L. (7th) 34 (Sask. C.A.) at para. 96, "a person is expected to take ***reasonable steps*** to obtain employment commensurate with such factors as age, health, education, skills and work history." [emphasis added]

The *Divorce Act* does not contain any equivalent provisions to s. 19(1)(a) of the *Child Support Guidelines*, and although the legal basis for ordering child support and spousal support can be quite different, most courts have accepted that the provisions of the *Child Support Guidelines* that deal with calculating income for support purposes, including s. 19(1)(a), also apply in the spousal support context. See, for example, *Marquez v. Zapiola* (2013), 36 R.F.L. (7th) 22 (B.C. C.A.) at paras. 36-38.

The SSAGs themselves also indicate that the courts should be considering s. 19(1) of the *Child Support Guidelines* in the spousal support context. As Professors Carol Rogerson and Rollie Thompson explained in the Spousal Support Advisory Guidelines: The Revised User's Guide:

> **Section 19 of the *Child Support Guidelines* is often the basis for these imputing claims.** It is worth remembering that s. 19 is a mixture of two kinds of "imputing": a number of clauses that can be described more accurately as "attributing" income to the payor, income that the payor actually receives in some form, as contrasted to s. 19(1)(a), for example, where a court can truly "impute" income to the payor, even if he or she is unemployed or underemployed. Most of s. 19(1) focusses upon attributing income to a spouse, in an effort to treat various types of income and situations so as to put the spouse on an equal footing with a wage or salary earning employee, i.e. s. 19(1)(b) to (e) and (g) to (i). True imputing takes place under s. 19(1)(a) (and possibly under s. 19(1)(f)), where a court must determine the hypothetical income a spouse might earn.
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> There must be an evidentiary basis to attribute or impute income under s. 19(1). Where a spouse is not employed, but should be working part-time or full-time under s. 19(1)(a), it is straightforward to impute a minimum wage income, as a court can take judicial notice of the minimum wage in the jurisdiction. To prove that a spouse could earn more than the minimum, evidence will be needed. **The case law under s. 19(1)(a) will be helpful, e.g. *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (Ont.C.A.).** [emphasis added]

[As an aside, if you have not read the Revised User's Guide, you really must. You will not be able to properly apply the SSAGs without it. It can be found online at https://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/toc-tdm.html.]

The wife in *Lyons* was clearly capable of earning more than $50,000 a year, but was currently earning nothing because of her refusal to be vaccinated. Accordingly, the question Justice Richmond had to decide was whether the wife's refusal to comply with her employer's vaccination policies was reasonable in the circumstances.

Although the wife tried to argue she could not be vaccinated for medical reasons, she did not adduce any evidence to substantiate this claim. She also tried to claim that her medical information was private. Obviously, the failure to produce medical evidence to substantiate her claims was a significant problem for the wife's case. (That being said, if the wife actually had a persuasive medical reason for not being vaccinated, this issue would probably never have arisen because Canada Post would presumably not have been able to put her on leave without pay in the first place.)

Not surprisingly, therefore, Justice Richmond had no difficulty imputing the wife with an income of $53,399, as that is what she had earned before she went on unpaid leave. While the wife was free to choose not to get vaccinated and to refuse to disclose her medical information, her Honour was not persuaded that the husband should be required to subsidize these choices by calculating support as though the wife was incapable of earning anything:

> [23] [The wife] has chosen not to get vaccinated and has chosen not to share medical information that would justify her refusal to be vaccinated. That is her choice, but she should not expect [the husband] to pay for that choice. She has also

> failed to explain what efforts she has made to find alternate employment or alternate sources of income that would permit her to exercise her beliefs and still earn a reasonable income. She cannot expect [the husband] to be financially responsible for her lack of employment income when it was solely due to her choices which, given her financial circumstances and on the evidence, do not appear to be reasonable.

After calculating the parties' incomes, Justice Richmond applied the SSAGs. The SSAGs produced a range of support between $1,514.03 and $1,996.47 a month, and Justice Richmond determined that the low end of the range was appropriate in this case on account of the additional taxes the husband had been forced to pay because of the wife's refusal to let him deduct his prior support payments for tax purposes.

You Can't Have Your Cake and Eat it Too: Thanks for the Memories

Pennington v. Pennington, 2022 CarswellOnt 6012 (S.C.J.) — Scott J.

In *Pennington*, Justice Scott considered the husband's claims for equalization and resulting trust with respect to the matrimonial home. There were also some not-terribly-interesting child support and date-of-separation issues (the wife argued that separation was in 2008, and the husband argued they had separated in 2012).

The husband's application was issued in 2018.

The husband had filed for bankruptcy in October of 2009. This will be important.

At the beginning of the trial, the husband chose to withdraw his claim for an equalization payment. While the husband indicated that it was because the claim was "minimal" in value, the court noted that as the equalization claim was beyond the six-year limitation period in s. 7(3)(b) of the Ontario *Family Law Act*, R.S.O. 1990, c. L.15, the concession "did not really amount to much."

The wife argued that the husband was *also* out of time to claim a beneficial interest in the matrimonial home because a six-year limitation period also applied to such a claim. But that is not so. Pursuant to the Ontario Court of Appeal's decision in *McConnell v. Huxtable* (2014), 42 R.F.L. (7th) 157 (Ont. C.A.), the 10-year limitation period in s. 4 of the *Real Property Limitations Act*, R.S.O. c. L15 applies to a claim for a beneficial interest in real property. The expiration of the limitation period for claiming an equalization payment did not mean that the time to bring a trust claim with respect to real property had also expired. As the Court of Appeal noted in *Bakhsh v. Merdad* (2022), 70 R.F.L. (8th) 33 (Ont. C.A.):

> [14] . . . And it does not follow that the expiration of time to bring an equalization claim entails the expiration of a constructive or remedial trust claim. Equalization claims and equitable trust claims remain distinct.

The court then considered the husband's claim for a beneficial interest in the matrimonial home by way of resulting trust. (The wife claimed that the property was *not* a matrimonial home because she was the sole owner and because the parties "were not happy together when they lived there." Unfortunate — perhaps; relevant — not at all. It was a matrimonial home.)

The parties had jointly owned their previous matrimonial home. They decided to purchase the current matrimonial home before they could sell the former home. Therefore, they required bridge financing. In order to get the best possible interest rate, the parties followed the advice of their mortgage broker and put most of their debt into the husband's name, thereby improving the wife's credit rating. Consequently, the mortgage and the house went into the wife's name. Justice Scott was clear that this was not done to avoid creditors or for any improper reason. Nor was there any evidence to support a gift from the husband to the wife.

However, there was the small problem of the husband's intervening bankruptcy in 2009 — in which bankruptcy the husband did *not* declare an interest in the matrimonial home. And this was a problem.

The husband's lawyer cleverly tried to rely on a combination of s. 67(1)(b) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*") and s. 2(2) of the *Execution Act*, R.S.O. 1990, c. E.24, to avoid the problem of not having declared the beneficial interest in the home in his bankruptcy.

Section 67(1)(b) of the *BIA* sets out that any property that as against a bankrupt is exempt from execution or seizure in the province where the property is situated, and within which the bankrupt resides, is not property divisible to the creditors. Pursuant to s. 2(2) of the *Execution Act*, the principal residence of a debtor is exempt from execution if the value of the debtor's equity in the principal residence does not exceed the prescribed amount, which was $10,783.

There were two problems with this argument: (1) the husband's equity in the home was far in excess of the prescribed amount; and (2) in 2009, a principal residence was not listed as an exemption under the *Execution Act* — it was added sometime later.

Therefore, there was no excuse for the husband not to have declared his alleged interest in the home in his bankruptcy. Furthermore, any property owned by the husband on his bankruptcy would have vested in his trustee. Justice Scott found that the husband's failure to disclose this interest at the time of his bankruptcy was fatal to his current claim for a beneficial interest in the property.

Of course, this makes perfect sense, and accords with the principle that one cannot take one position for some purposes and another position for family law purposes. This follows *Black v. Black* (1988), 18 R.F.L. (3d) 303 (Ont. H.C.) and a myriad of similar cases since then, including: *Dubois v. Dubois*, 2015 CarswellMan 11 (Q.B.); *F. (V.J.) v. W. (S.K.)* (2016), 77 R.F.L. (7th) 1 (B.C. C.A.); *Fehr v. Fehr* (2003), 40 R.F.L. (5th) 71 (Man. C.A.); *Este v. Esteghamat-Ardakani* (2018), 12 R.F.L. (8th) 120 (B.C. C.A.). There are a few notable exceptions to this principle, one such notable exception being *Holtby v. Draper* (2017), 3 R.F.L. (8th) 367 (Ont. C.A.), where yours truly (and we mean both of us, the "Royal" yours truly), somehow managed to lose on this issue in the Ontario Court of Appeal. And we then lost our "slam dunk" application for leave to appeal to the Supreme Court of Canada. Thanks for the memories.

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