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— Franks & Zalev - This Week in Family Law

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How to Not Give Independent Legal Advice

Martin v. Giesbrecht Griffin Funk & Irvine LLP and Lavergne (2022), 71 R.F.L. (8th) 374 (Ont. S.C.J.) — Gibson J.

Marriage Contracts are serious documents.

For most people who have a Marriage Contract in place, it will be one of the most — if not *the* most — significant documents they will ever sign. And, when a Marriage Contract goes wrong, the consequences can be dire, and messy, and expensive — not just for the clients, but also for the lawyers who represented them. *Martin v. Giesbrecht* provides a stark reminder about just how significant those consequences can be.

If the facts seem familiar, it is because the plaintiff in *Martin v. Giesbrecht* was also the applicant in *Martin v. Sansome* (2014), 43 R.F.L. (7th) 306 (Ont. C.A.), which is frequently cited for the proposition that claims for constructive trust are rarely necessary or appropriate in property cases involving married spouses. As Philip Epstein explained in his comment on *Martin v. Sansome* in the 2014-05 (February 4, 2014) edition of *TWFL*:

> As Justice Hoy points out, **there will be a rare case where monetary damages for unjust enrichment cannot be adequately addressed by the equalization provisions of the *Family Law Act*** and we will have to see, over the course of time, when that fact situation actually arises. Certainly it will not be because the value of the matrimonial home has risen since valuation date or dropped for that matter.
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> **There may be cases where a monetary award would be insufficient given the nature of the property in issue but that will be a rare case indeed, and this case is a message that married parties should confine their claims to the equalization provisions of the *Family Law Act*.** It may well be that section 5(6) of the *Family Law Act* which provides for unequal division of net family property may be resorted to and that that might be the remedy with respect to specific property when it would otherwise be the case that there would be no significant equalization payment. For example, the husband might own significant property but still have a zero net family property, thereby giving rise to a claim for unequal division in order to address the unjust enrichment that would otherwise have arisen. [emphasis added]

But *Martin v. Sansome* also dealt with a number of other issues. Ms. Sansome had also claimed to set aside a Marriage Contract that purported to permit Mr. Martin to exclude a valuable farm property that had been in his family for over a century. And it is that Marriage Contract that formed the basis for the claim that Mr. Martin ultimately brought against the defendant lawyer in *Martin v. Giesbrecht*.

The basic facts were as follows:

> • Mr. Martin started living with Ms. Sansome in 1988. They had a child together in 1989, and were married in 1996.
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> • In 2000, Mr. Martin and Ms. Sansome arranged to purchase a farm from his parents that had been in their family for over 180 years. Approximately $300,000 of the $500,000 purchase price was going to be paid for with gifts and/or advances from Mr. Martin's parents, and the remaining balance was going to be financed by borrowing $200,000 from a third party.
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> • Before the closing, Ms. Sansome decided that she did not want to contribute to the purchase or participate in borrowing the necessary funds. As a result, Mr. Martin made arrangements to complete the purchase on his own. Mr. Martin's lawyer also prepared a Marriage Contract for Mr. Martin and Ms. Sansome that would have excluded Mr. Martin's interest in the farm from his net family property if they ever separated.

What could possibly . . . go . . . wrong . . .

While the Marriage Contract itself may have been relatively straightforward, the circumstances leading up to its execution were, for lack of a better word, egregious. As but a few examples:

> • Ms. Sansome never saw the Marriage Contract before she signed it (neither did Mr. Martin).
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> • The defendant lawyer who acted for Mr. Martin on the Marriage Contract had previously acted for Ms. Sansome on other matters. However, Ms. Sansome did not learn that the defendant lawyer would not be acting for her and protecting her interests with respect to the Marriage Contract until the morning she signed it.
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> • On the morning the Marriage Contract was signed, the defendant lawyer sent Ms. Sansome to get independent legal advice from a nearby lawyer who could not actually read the Contract because she was visually impaired. The lawyer only met with Ms. Sansome for 20 minutes, and she did not actually review the Marriage Contract with Ms. Sansome before she signed it.

Mr. Martin and Ms. Sansome separated in 2007.

After almost six years of litigation, and an 11-day trial in 2013, the trial judge in the family law case, Justice Campbell, set aside the Marriage Contract pursuant to s. 56(4)(b) of the *Family Law Act*, R.S.O. 1990, c. F.3, which allows a court to "set aside a domestic contract or a provision in it . . . (b) if a party did not understand the nature or consequences of the domestic contract". He also awarded Ms. Sansome a 50% interest in the farm property by way of constructive trust, and ordered Mr. Martin to pay Ms. Sansome $73,000 in costs.

Mr. Martin appealed the trial judge's decision to the Ontario Court of Appeal. The Court of Appeal upheld the trial judge's decision to set aside the Marriage Contract, but set aside the trial judge's decision to award Ms. Sansome a 50% beneficial interest in the farm for the reasons that are discussed above. And, instead of awarding Ms. Sansome a beneficial interest in the farm, the Court of Appeal ordered Mr. Martin to pay her an equalization payment of $390,000 (rounded). The Court of Appeal also awarded Ms. Sansome another $25,000 in costs.

Around the same time the appeal was heard, Mr. Martin started a civil lawsuit against the lawyer who acted for him on the Marriage Contract for negligence, breach of contract, and breach of fiduciary duty. Almost eight years later, the civil lawsuit went to trial before Justice Gibson. It took ten days to complete.

While Mr. Martin and the defendant lawyer did not agree about a number of issues, there was no real question that the defendant had not met the standard of care, and had breached his fiduciary duties by acting for Mr. Martin notwithstanding his ongoing solicitor-client relationship with Ms. Sansome. As Justice Gibson noted in his reasons:

> [59] [The defendant lawyer] acknowledged that he was incompetent to accept the mandate because of his inexperience and lack of expertise in family law. He was in a conflict of interest — he owed fiduciary duties to both [Mr. Martin] and [Ms. Sansome]. He caused the "colossal mess" which arose from the events of April 13, 2000 because he was rushed, he did not show the couple the Marriage Contract before 9 a.m. on that day, he had not read the Marriage Contract drafted by [his associate] and did not explain it to the couple, he made a last-minute and essentially useless referral to [another lawyer] at 11:30 a.m. as a hurriedly-contrived band-aid, and the Marriage Contract was signed within three hours of the parties first seeing it.
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> [60] [The defendant lawyer] failed in his fiduciary duty to disclose material facts. He did not disclose that he was not competent to accept the mandate. He did not disclose that he was in a conflict of interest and could not act for either party. He did not disclose to [Mr. Martin] that the enforceability of the Marriage Contract was compromised, and that the 14 April closing date ought to be deferred so that the parties would have time to properly review the Marriage Contract and understand its nature and consequences.

The trial judge also rejected the defendant lawyer's various arguments about causation, mitigation, and damages, and ultimately granted judgment to Mr. Martin for **$945,000** (rounded) in damages for the equalization payment he was required to pay Ms. Sansome, the legal fees he incurred in the family law case, the costs he was ordered to pay Ms. Sansome for the trial and the appeal, and the interest on the money he had borrowed to pay Ms. Sansome the money he owed her.

To repeat what we said at the outset, "for most people who have a Marriage Contract in place, it will be the most significant document they will sign in their lives." Accordingly, when you are advising a client about a Marriage Contract, you need to give the matter the serious time, consideration and attention it deserves. Obviously, this includes giving your client a chance to read the Contract ahead of time, and ensure that you carefully review it with them before they sign it.

But your obligations when advising a client on a Marriage Contract (or any family law agreement for that matter), extend much further than just reviewing the agreement with the client. You must be sure to actually understand the client and their circumstances well enough so as to be able to advise them about what they might be giving up, what impact the agreement might have depending on how their future unfolds (e.g. do the parties end up having children, how long does the marriage last, etc.), and whether they want to request any changes to the agreement or any additional disclosure. As Justice Backhouse concisely put it in *LeVan v. LeVan* (2006), 32 R.F.L. (6th) 291 (Ont. S.C.J.) at para. 224, one of the leading cases about setting aside Marriage Contracts, "a lawyer cannot give proper independent legal advice when he or she does not understand the client's situation."

As neither Mr. Martin nor Ms. Sansome's lawyers did any of these basic things, they were *both* clearly negligent. And the consequences for both of them were significant.

Mr. Martin's lawyer had to spend about *13 years* dealing with the matter and having it hang over his head. He had to pay his insurance deductible (and likely higher premiums as well), and effectively acknowledge in open court that he had been negligent. His insurer also had to cut a cheque to Mr. Martin for almost $1,000,000 in damages, and will likely be on the hook to Mr. Martin for costs (in addition to its own costs).

As for Ms. Sansome's lawyer, she was fortunate that Ms. Sansome was able to mitigate at least most of her damages by having the Marriage Contract set aside, and recovering almost $100,000 of the legal costs she incurred from Mr. Martin. However, had Ms. Sansome not been successful, she would have almost certainly had a good claim for damages against her lawyer.

As a result, Ms. Sansome's lawyer had to live with the possibility of a claim hanging over her head for years while the family law case wound its way through the court system. She likely had to report the matter to her insurer and may have had to pay her deductible. She also had to testify as a witness during the family law trial, and acknowledge in open court that she had not dealt with the matter properly. Furthermore, although it does not appear that Ms. Sansome's lawyer had to testify in the negligence trial, she presumably did not find out she was not going to have to do so until shortly before trial started. And for many people, the mere possibility of having to testify in court is incredibly stressful.

Some family lawyers, we understand, choose to mitigate their risk by simply refusing to draft or give advice on marriage contracts (or cohabitation agreements). That, we suggest, is not the answer. Every province in Canada allows for such domestic contracts, and it is not fair that the public not be able to easily find lawyers to do them. It is part of a family lawyer's job. But it is also part of the job to advise fully and properly. There is no such thing as "perfunctory" or "one hour" independent legal advice. If that's what the client wants, or if that is all you have time for — then make Nancy Regan proud, and "just say no." A client looking to protect significant assets, or a client being asked for advice on being asked to waive significant claims, must understand that this work takes time and that there will be a cost. But if you do not do your job properly, the cost will be yours.

Life is too short to have this type of situation hanging over you for years or more. If you are going to act on Marriage Contracts, make sure you either know what you're doing, or refer the matter out.

At Least Willie Nelson Benefitted

Big Throat v. Fox, 2022 CarswellAlta 1545 (C.A.) — Wakeling, Schutz, and Strekaf, JJ.A.

This was an appeal after a one-day summary trial dealing with the division of matrimonial property.

The appellant/husband, Mr. Fox, argued that the court below erred by:

- finding that he had no interest in the matrimonial home;
- finding that an in-trust claim was not divisible matrimonial property;
- finding that the respondent/wife, Ms. Big Throat, did not dissipate parts of the in-trust claim; and
- not giving him credit for the gifts that Ms. Big Throat made to third parties after separation from matrimonial property.

The Alberta Court of Appeal started off by noting that it had emphasized "time and again" the well-established principle that the division of matrimonial property is a question of mixed fact and law. Accordingly, it may only be set aside if it is clearly wrong or subject to a palpable and overriding error: *Graham v. Graham* (2021), 62 R.F.L. (8th) 257 (Alta. C.A.) at para. 20. This is certainly not what an appellant wants to see in the first paragraph of an appellate court's reasons.

The parties began cohabiting in 1988, married in 2008, and separated in 2016.

Ms. Big Throat had children from a previous relationship, one of whom — S — was injured in a car accident in 2002. Since the accident, S had been a dependent adult requiring around-the-clock care that was provided by Ms. Big Throat. Mr. Fox worked to support the family.

Ms. Big Throat settled the personal injury claim on S's behalf. The settlement also provided Ms. Big Throat with $335,000 as an "in-trust" claim to recognize the care she had provided to S over the years.

Mr. Fox subsequently quit his job, and remained unemployed until the parties separated some 31 months later.

In the meantime, the parties used S's settlement to pay off the mortgage for a home they had purchased that was suitable for S's needs. On separation in 2016, only $24,413.87 remained from the initial sum.

After separation, Ms. Big Throat and S left the matrimonial home, and stayed with friends and in hotels. In February 2017, Ms. Big Throat obtained an order for exclusive possession of the home that had been purchased for S.

In 2018, Ms. Big Throat received reimbursement of $173,711.61 for amounts she had spent on S's care, which was returned to her "in-trust" account. Of this, $31,000 remained as of February 2021.

In the court below, Justice Miller concluded that S was a child of the marriage, and that Mr. Fox stood *in loco parentis*. However, child support was not required because S was adequately provided for through the settlement proceeds and monthly payments.

Justice Miller also determined that Ms. Big Throat was entitled to spousal support. However, as she was receiving payments for her full-time caregiving for S that were possibly greater than Mr. Fox's income, no spousal support was awarded. However, Justice Miller held that Ms. Big Throat could apply for spousal support in the future if she stopped being paid for her work as S's caregiver.

With respect to family property, Justice Miller decided that the parties' home properly belonged to S, as the parties used litigation loans to pay the mortgage and then funds from S's settlement to pay off the balance. Justice Miller rejected Mr. Fox's argument that Ms. Big Throat had dissipated $59,000 of the funds she received in 2018 as part of her in-trust claim by spending it on a car for S and various items and gifts for family members. According to Justice Miller, these funds would have been exempt from distribution under s.7(2)(d) of the *Family Property Act*, R.S.A. 2000, c. F-4.7 as "an award or settlement for damages in tort in favour of a spouse."

The $31,000 remaining from the 2018 in-trust payment was exempt from division for the same reason.

On appeal, Mr. Fox argued that he should receive half of the equity in the matrimonial home at the time the mortgage was paid off. He argued it would be unfair to find he had no interest in the home when there was no evidence that litigation loans were used to make mortgage payments apart from his own evidence, and that even if so, it was the same as S paying rent for living there.

The Court of Appeal was not interested in re-trying the case. Justice Miller had concluded that, while there was no real evidence of contribution by the parties, there was *clear* evidence that the entire mortgage had been paid off by S, and that litigation loans had been obtained during the time the property was purchased and prior. Therefore, there was an evidentiary basis to find that S was the beneficial owner of the home and that it should be transferred to S's name in trust.

In support of his claim for 50% of the remaining $31,004.39 from the 2018 in-trust payment, Mr. Fox argued that the two payments Ms. Big Throat received — $335,120.10 in March 2014 and $173,711.61 in July 2018 — were essentially income replacement for when Ms. Big Throat took care of S instead of working, and as such were not exempt from matrimonial property division under s. 7(2)(d).

According to the Court of Appeal, this claim was related to Mr. Fox's claim that Ms. Big Throat dissipated $51,000 from the sum she received in 2018 to purchase a vehicle that was suited to S's needs. The trial judge had rejected Mr. Fox's claim that this expenditure constituted dissipation, noting that,

> . . . for someone who quit his job for no reason, and went on a 2 and-a-half year spending spree, which included two concerts in Texas to see Willie Nelson, . . . it is a bit rich to criticize . . . [Ms. Big Throat] for using funds as she did.

Accordingly, the appeal was dismissed.

The Moving Finger, Having Writ, Moves On . . .

MacDonell v. MacDonell (2021), 65 R.F.L. (8th) 251 (B.C. C.A.) — Harris J.A.

This was an application for leave to appeal. The husband was seeking leave to appeal an order granting interim exclusive occupancy of the family residence to the wife.

The parties married in August 1992 and separated in December 2019. They had two children, aged 20 and 22.

After separation, the parties agreed to live under the same roof as a separated couple in the home. The husband moved into the basement, and the wife lived upstairs with the children. The husband did not always abide by their agreement and would often come upstairs, leaving the wife anxious and afraid.

The husband then brought four applications for exclusive occupancy (each one unsuccessful), and successfully sought to adjourn the trial three times based on his alleged health issues. While a number of judges and Masters had expressed skepticism of the husband's claims that his medical issues required adjournment of the trial, adjournments were nonetheless granted.

Justice Gaul heard the husband's fourth application for exclusive occupancy, and found there was no material change in circumstances — shared use of the home was not a practical impossibility, and the balance of convenience did not favour the husband. In fact, according to Justice Gaul, in the event of an order for exclusive occupancy, the wife, not the husband was the "preferred occupant".

And that is eventually what happened. The wife was granted leave to bring an application for interim occupancy, and was ultimately successful, in large part because of the affidavits she put forward detailing the intolerable situation in the home. In fact, both parties agreed cohabitation was a practical impossibility.

And this brings us to the import of this case, which is not the well-known test for interim exclusive occupancy in British Columbia. Rather, the importance of this case is that the B.C. Court of Appeal has emphasized that, in general, appeals from interim discretionary decisions are to be discouraged:

> [18] The proposed appeal is of an interim order pending trial. It is a discretionary order, although, of course, discretion must be exercised on a principled basis. It is well recognised that interim orders in family matters work "rough justice" to create a workable temporary resolution of issues dividing parties until they can properly be resolved at trial on the basis of admissible evidence. As a result, this Court rarely entertains appeals from interim orders. The focus of the parties' efforts needs to be on getting to trial, not continuing their conflict in a different forum.
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> [19] While the general test for leave to appeal applies to these cases, and need not be repeated here, **in the family law context such applications will only succeed "in the most extreme circumstances":** *Hammond v. Hammond*, 2020 BCCA 314 at para. 56. **This Court's jurisdiction to vary interim family orders is "extremely limited" and it will only interfere "in exceptional circumstances" and "where there is a 'clear reason' to do so":** *Hammond* at para. 57. [emphasis added]

(See also, the Ontario Divisional Court's decision in *Lokhandwala v. Khan* (2019), 34 R.F.L. (8th) 139 (Ont. Div. Ct.), and Philip Epstein's discussion of that decision in the 2019-46 (November 18, 2019) edition of *TWFL*.)

The general principles governing interim exclusive occupancy are well settled. On an application for exclusive occupancy, the applicant must show: (1) the shared use of the residence is a practical impossibility; and (2) the applicant is the preferred occupant on a balance of convenience: *Bateman v. Bateman*, 2013 CarswellBC 3386 (S.C.) at para. 44. Therefore, a proposed appeal would not engage any broad principles, and an appeal would certainly not be of significance to the practice.

We all lose interim motions we think we should have won. But not every loss needs to be appealed — especially an interim loss that can be corrected at trial. Sometimes, it is best to just press on.

"The Moving Finger writes; and, having writ, Moves on: nor all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all your Tears wash out a Word of it." — Omar Khayyám

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