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— Franks & Zalev - This Week in Family Law

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Contents

In B.C., the Dead Tell No Tales . . . But They Can Claim a Division of Family Property

Weaver Estate v. Weaver (2022), 68 R.F.L. (8th) 1 (B.C. C.A.) — Frankel, DeWitt-Van Oosten, and Voith, JJ.A.

The husband and the wife married in 1993 and separated in 2005. They never divorced. Neither ever commenced proceedings. They did not settle their affairs by way of agreement. No one did nuthin'.

The wife died in July 2020, some 15 years after separation. Prior to her death, she consulted family law counsel with a view to dividing family property and securing a divorce, but a court process was never initiated.

After the wife's death, the question arose: could her personal representative claim property division? Or was property division a right granted only to a living spouse? Well, it seems the answer to that question depends on where you live.

The Administrator of the wife's estate issued a Notice of Family Claim in November 2020, claiming an equal division of family property and family debts under British Columbia's *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*").

The husband argued that the Administrator did not have standing to bring the claim, and he moved to strike it. He also argued that s. 150 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 (the "*WESA*") barred the claim. The motion judge dismissed the husband's motion, finding that the Administrator of the estate of a deceased spouse *could* bring a claim for division of property under s. 198 of the *FLA*, and that s. 150 of *WESA* preserved the claim for property division on behalf of the deceased wife, as long as the time limits under s. 198 of the *FLA* had not expired.

The husband appealed, arguing that, as defined in the *FLA*, a dead spouse was not a "spouse." He argued that the fact the wife was dead was "fatal" to the Administrator's claim. (Sorry.)

The Court of Appeal found that a purposive reading of the statutory provisions, as a whole, clarified that, in British Columbia (unlike some other provinces), the Administrator of an estate of a separated and deceased spouse may *commence* (not just *continue*) a claim for division of family property after the spouse's death. One of the purposes of the *FLA* was to expand protection for spouses and to make family property law clear and easy to understand. And the policy basis supporting s. 150 of the *WESA* was that "valid claims should not be barred by the death of the deceased".

Section 150 of the *WESA* provides:

> 150 (1) Subject to this section, a cause of action or a proceeding is not annulled by reason only of the death of

> (a) **a person who had the cause of action**, or
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> (b) a person who is or may be named as a party to the proceeding.
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> 150 (2) Subject to this section, **the personal representative of a deceased person may commence** or continue **a proceeding the deceased person could have commenced** or continued, with the same rights and remedies to which the deceased person would have been entitled, if living. [emphasis added]

There is no language in the *FLA* excluding the application of s. 150 of the *WESA*. While s. 150 excluded certain claims, it did not exclude family property/debt claims. And, because s. 150 came into force *after* the enactment of the *FLA*, the legislature was presumed to have been aware of *FLA* entitlements. Therefore, the *FLA* claims survived death and were preserved by s. 150 of the *WESA*.

The Court of Appeal also suggested that the husband's interpretation would result in an injustice: a separated and surviving spouse could seek division of family property against the estate of a deceased, but the estate could not avail itself of the same relief: *Gibbons v. Livingston* (2018), 16 R.F.L. (8th) 261 (B.C. C.A.).

Notably, this "injustice" is the current (statutory) state of the law in Ontario. In Ontario, the personal representative of a surviving spouse *cannot* commence an equalization claim: *Rondberg Estate v. Rondberg Estate* (1989), 22 R.F.L. (3d) 27 (Ont. C.A.) — but pursuant to s. 7(2)(a) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, an estate can *continue* a claim. In Saskatchewan, on the other hand, an estate might be able to "piggy back" an equalization claim on the equalization claim of the surviving spouse: *Boychuk v. Boychuk Estate* (1993), 1 R.F.L. (4th) 78 (Sask. C.A.).

The Court of Appeal found that if the legislature had intended that the legislation only apply to *living* spouses, it could easily have included language to that effect. For example, in Manitoba, the legislation specifically provides that the personal representative of a deceased spouse *cannot* make a claim. And in Ontario, as noted above, s. 7(2) of the *Family Law Act* is clear that such property claims are "personal as between the spouses."

We wonder why some provinces continue to bar an estate from *commencing* a claim for property division. Why can a claim be commenced *against* an estate, or *continued by* an estate, but not *commenced* by an estate? Aside from some ancient law embodied by the *actio personalis* rule (the notion that a personal cause of action died with the person), there does not seem to be much by way of present day justification. So in our view, the British Columbia Court of Appeal got this one right.

"Recognizing that Absolutism Is Often Not Entirely Realistic in the Challenging Pantheon of Family Law . . . "

The Minister of Social Development v. M.M. and K.B. (2022), 70 R.F.L. (8th) 420 (N.B. Q.B.) — Petrie J.

In *New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1999), 50 R.F.L. (4th) 63 (S.C.C.), the Supreme Court of Canada determined that, in child protection cases, parents have a constitutional right to state funded counsel in certain circumstances. And, as the New Brunswick Court of Appeal recently explained in *Province of New Brunswick, as represented by the Minister of Justice v. J.F.* (2021), 66 R.F.L. (8th) 300 (N.B. C.A.):

> [15] In the child protection context, following the "*G.*" decision, it has generally been accepted that, **when the state removes a child from parental care and is seeking custody or permanent guardianship, custodial parents are entitled to legal representation and should not be required to represent themselves, if they can satisfy certain criteria**. If legal aid has been requested and rejected, and the appeal process has been exhausted, the parent may apply to the court for an order requiring the appointment of state-funded counsel. Judges who render these decisions have historically been guided by the reasons set out in the "*G.*" decision. [emphasis added]

In *G. (J.)*, the Supreme Court explained (at paragraphs 103 and 104) that when a parent has exhausted all possible avenues of obtaining state funding, the court can Order the government to provide the parent with state-funded counsel if it is satisfied that

the parent would not otherwise be able to receive a fair hearing, having regard to the "the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent."

In *M.M.*, the Minister of Social Development (the "Minister") applied for guardianship of the parties' child. Although the mother was able to obtain a lawyer through Legal Aid, the father's request for Legal Aid funding was denied.

The father brought an Application for state funded counsel based on *G. (J.)*. Justice Petrie was satisfied that the father had exhausted all avenues for obtaining funding through Legal Aid, and did not have the means to pay for a lawyer on his own. He was also satisfied that the matter was complex, the father would have difficulty conducting the trial without a lawyer, and that the interests at stake were clearly serious. The father also had joint custody of the child pursuant to a 2017 consent Order.

So far so good.

But there was a ***significant*** problem. Although the father had been very involved in the child's life for many years and had an Order for joint custody in his favour, by the time the Minister commenced the application, the father had not had ***any*** contact with the child for several years, and had actually been in prison since mid-2021. As the New Brunswick Court of Appeal noted in *M. (C.) v. New Brunswick (Minister of Justice & Consumer Affairs)* (2012), 19 R.F.L. (7th) 253 (N.B. C.A.), "an individual seeking state-funded counsel to challenge state intervention in child protection cases of this nature must have been exercising custody, care and control of the child at the heart of the application."

This is to say that legal custody without more is insufficient for the purposes of obtaining state-funded counsel under the *Charter*. Rather, a person seeking state-funded counsel must play a significant role in the child's life, and vice-versa, before s. 7 will be engaged:

> [34] I believe it is clear **the Supreme Court in "*G.*" was not contemplating custody in this sense, but rather a notion of custody which reflected the realities of a child's day to day life.** What adult was responsible for the child's well-being? With whom did the child reside? Who was expected to provide the child with the necessities of life? The answers to these questions provide a much more fulsome picture of custody, and are of critical importance to meeting the threshold for conducting a s. 7 *Charter* analysis pursuant to "*G*".
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> . . . . .
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> [37] Recognizing that absolutism is often not entirely realistic in the challenging pantheon of family law, I accept **there may be exceptional circumstances which could extend entitlement to state-funded counsel under the rubric of s. 7 of the *Charter* beyond the custodial individual or individuals with whom the child resides**. Such cases would be rare. **For example, a parent who sees his or her child on a regular basis, who spends considerable time with the child, who provides aspects of care and control whilst with the child, who perhaps participates in the making of significant decisions with respect to the child's health and/or education, and whose life is unquestionably interwoven with that of the child, may well qualify**. Such is not the case with either of the respondents in this matter. If the child plays no significant and meaningful role in the life of the applicant, and the applicant plays no significant and meaningful role in the life of the child, s. 7 is not engaged and the application for state-funded counsel must fail. [emphasis added]

Given the father's prolonged absence from the child's life, Justice Petrie really had no choice but to deny the father's request for state funded counsel:

> [35] The evidence in this case establishes that the child, H.M.B., was taken into care by the Minister while in the mother's custody, care and control. That was the child's reality at the time. It cannot be reasonably concluded that [the father] was in a custodial care relationship, as that term has been treated, with the child at the time of the Minister's intervention.
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> . . . . .

> [44] On some level, every parent who might lose a child to guardianship will suffer some grief, distress or guilt. Where there is no, even remotely recent, exercise of a meaningful parental role with respect to a child, I am of the reluctant view that section 7 of the *Charter* is not engaged and the request for state-funded counsel will fail.

Sometimes it Is Better to Ask Permission than to Beg Forgiveness

Bhadauria v. Cote, 2022 CarswellOnt 7870 (S.C.J.) — Shelston J.

As you all know, the *Divorce Act* and many provincial family law statutes were amended last year to require courts to consider an expansive definition of "family violence" when deciding what parenting arrangements are in a child's best interests. Although the amendments have not been in force for long, we have already seen a large number of cases that have considered them, including several that we have discussed in this *Newsletter* (see e.g. our recent comments on *Heimlick v. Longley* (2022), 71 R.F.L. (8th) 454 (Sask. Q.B.) and *A.J.K. v. J.P.B.* (2022), 71 R.F.L. (8th) 418 (Man. Q.B.) in the 2022-22 (June 13, 2022) and 2022-26 (July 11, 2022) editions of *TWFL*).

Bhadauria is another case involving allegations of family violence. It required Justice Shelston to decide whether the mother's allegations of family violence justified her decision to relocate the parties' very young child from Ottawa to France without the father's knowledge or consent — and without a court Order authorizing her to do so.

The parties were not married. They started living together in 2019, and had a child together in December 2020. They separated in late July/early August 2021.

After they separated, the mother severely restricted the father's time with the child, and she insisted that all exchanges be supervised by a third party of her choosing.

The parties attended several mediation sessions to try to work out a parenting plan, and ultimately agreed that the father would have parenting time every Wednesday from 8:30 a.m. to 4:00 p.m., and every Saturday from 9:00 a.m. to 4:00 p.m. Although the agreement did not expressly require supervision, the mother took the position that the exchanges had to be supervised, and the father ultimately relented.

In late December 2021/early January 2022, a dispute arose between the parties about whether the supervised exchanges should continue. The father was prepared to have the exchanges take place in a public place and/or in the presence of a third party, but refused to agree to a professional supervisor. The mother, however, insisted on having the exchanges supervised by a professional supervisor. As neither party was willing to compromise or concede, the father was not able to have any further contact with the child. (Obviously, this was not a good decision by the father, who should have taken whatever time with the child he could get, while also giving serious thought to starting a court proceeding to deal with the situation.)

Unbeknownst to the father at the time, on March 8, 2022, the mother took the child to France, moved into her parents' home in southern France, and planned to keep the child in France indefinitely.

On March 13, 2022, the father learned that the mother had listed her house in Ottawa for sale. He sent the mother several emails asking her to contact him. When she did not respond, he called the police.

The police contacted the mother, and she told them that she had moved to France with the child. When the father learned what the mother had done, he started a court proceeding in Ontario, and brought an urgent motion to require the mother to return the child to Ottawa.

The mother conceded that Ottawa was the child's habitual residence and that the Ontario court had jurisdiction. However, instead of returning with the child, she responded with a cross-motion to allow her to stay in France with the child pending trial.

While the mother acknowledged that it would have been better for her to have notified the father of her plan to move to France with the child, she claimed that she had not done so because of concerns about family violence, including the "father's threats, harassment, control, intimidation, and lack of good faith to negotiate[.]"

The mother also claimed that it would be in the child's best interests to stay in France with her and her parents for a variety of reasons, including that the father had not seen the child since December 2021 (this is why we say the father should have agreed to supervision and started a claim; he essentially handed the mother this argument), and argued that if she returned, she would be "subject to psychological abuse amounting to family violence[.]" She also argued that she could not work in Canada because she had already given up her professional licence, and she had already sold her home.

The father vigorously denied the mother's allegations of family violence.

As the parties were not married, the case was governed by the Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"). Section 39.3 of the *CLRA*, which is similar to the *Divorce Act*'s relocation provisions, requires a person who seeks to relocate with a child to "notify any other person who has decision making-responsibility, parenting time or contact under a contact order", and to do so in writing. However, it also allows a court to dispense with the notice requirements "if the court is of the opinion that it is appropriate to do so, including if there is a risk of family violence."

Accordingly, in order to decide the matter, Justice Shelston had to determine whether the mother had established, on a balance of probabilities, that there had been family violence that was sufficient to justify her unilateral decision to move to France with the child without giving notice to the father or getting the father's consent, and without a court Order permitting her to relocate. As his Honour explained in his decision:

> [52] The mother did not have the right to remove the child from Ottawa and move to France because she did not have the consent of the father, or a court order permitting such a move. However, if the mother can prove, on the balance of probabilities, that it was appropriate for her to move based on certain factors including the existence of family violence against the mother and or the child, the court may permit such a move.

While this is certainly the correct "sentiment" in s. 39.3(3) of the *CLRA*, we are concerned that this paragraph makes it sound as if it is generally sound strategy to "beg forgiveness rather than ask permission" — or to "move first and ask permission later." But it is not, and it should not be remotely encouraged. Section 39.3(3) is clear that on application, the court may dispense with the notice requirement if, in the court's opinion it is appropriate to do so, including if there is a risk of family violence. Section 39.3(4) then clarifies that an application to dispense with notice under s. 39.3(3) may be made without notice. This clearly suggests that any such motion to dispense with notice to move should be made *before* the move, not after. Yes, the court can permit a move without notice; but a party wanting to move without giving notice should ask permission — either on notice or *ex parte* — *before* the move, not after. For the court to suggest it is a viable option to move first and ask permission later is a dangerous suggestion. In *YZVM v. DTT* (2022), 69 R.F.L. (8th) 249 (Alta. C.A.), the Alberta Court of Appeal specifically noted that the purpose of the notice requirements was to help protect children's relationships with enumerated parties, to ensure the status quo pending a proper hearing, and to deter "self-help."

In the same decision, the Alberta Court of Appeal, in approving the chambers judge's order that the children be returned, found that it was reasonable for the court to be concerned about delay, and whether allowing the children to stay in the new location would "put the children on a particular path" such that it would then be "harder for the court to reverse the decision." Respectfully, it should be notice (or motion to dispense with notice) first; move later.

Justice Shelston noted that courts **must** be cautious when dealing with allegations of family violence based on untested affidavit evidence:

> [61] The court must be cautious in making findings of family violence where the evidence is based on untested affidavits with no opportunity for *viva voce* evidence. The court should seek documentary evidence such as emails or text messages

> or some other type of corroborative evidence to allow the court to make at least an initial finding regarding these very serious allegations.

This is a very important point to keep in mind when dealing with these types of motions. Without objective evidence (e.g. documents and/or evidence from reliable third parties with first-hand knowledge), and without cross-examination, it is unlikely that a motion judge will be able to make the necessary findings of fact. See e.g. *Ierullo v. Ierullo* (2006), 32 R.F.L. (6th) 246 (Ont. C.A.) at para. 18.

Accordingly, when preparing for these types of motions (and for any motions where you will be asking a judge to make findings based on competing evidence without cross-examination), you should always ask yourself the following questions:

> 1. Who bears the burden of proof? (In this case, the mother bore the onus of establishing that there had been family violence, and that it would be in the child's best interests to remain in France pending trial.)
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> 2. What evidence is required to prove the client's case, bearing in mind that: (a) it is difficult for courts to make findings about significant matters in dispute based only on a paper record; (b) the other side will undoubtedly have a different story to tell; and (c) the other side will presumably ask the court to draw adverse inferences with respect to any inconsistencies, omissions, or gaps in your client's evidence. (As discussed further below, the mother failed to provide documentary evidence or evidence from third parties with firsthand knowledge to substantiate her claims, and failed to disclose important information that she clearly should have been provided.)

Although the mother's motion materials were voluminous and included affidavits from four of her friends, she did not produce ***any*** documentary evidence to substantiate her claims of family violence. Furthermore, the third party evidence from her friends was based on hearsay from the mother, as none of them had actually seen or heard the father do anything that could realistically rise to the level of family violence. Furthermore, all four of the mother's friends made it clear that they did not like the father, which raised doubts about the neutrality and objectivity of their evidence.

The mother also did not file evidence to substantiate her claim that "her decision to fly to France on March 8, 2022, was a desperate act done at the last minute", or to explain why she had not started a court proceeding in Ontario and sought urgent relief (instead of engaging in self-help). As the mother had substantial financial resources (e.g. she had apparently sold her house in Ottawa for $1,250,000, and had been earning $450,000 a year before she moved to France), and as the mother could have easily adduced evidence to corroborate her claim that the move to France had been a last minute decision (e.g. whether she quit her job, gave up her professional licence, listed her house for sale, etc., *before* or *after* she had moved to France), these were very significant omissions.

It also does not appear that the mother ever asked to cross-examine the father, or offered herself up for cross-examination prior to the motion.

Based on the record before him, it was clear to Justice Shelston that the mother had not met her onus of establishing that the unilateral relocation was justified, or that it would be in the child's best interests to remain in France pending trial.

> [62] I do not find that the mother has met her burden of proof to show on the balance of probabilities that she was a victim of family violence being primarily psychological abuse and financial abuse. . . .
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> [66] The parties separated on August 4, 2021. The child was living in the primary care of the mother. The father had limited parenting time with the child. The parties could not agree on the need for supervisor for the exchanges with the child. The parties seem to have reached an impasse where they were not returning to mediation and the father has not seen the child because of the mother's insistence on the need for the supervisor. There was no pending court proceeding. There was no interaction between the father and the mother except by emails. The mother was employed, owned a home and the child was living with her in Ontario. It was the mother who acted unilaterally to sell her house, quit her job, and remove the

> child from daycare. She cannot make these decisions and now say that she cannot return to Ottawa because she has no place to live, no job and no daycare for the child.

Justice Shelston ordered the mother to return the child to Ottawa immediately, restrained her from removing the child from Ottawa absent a written agreement signed by the father or further court Order, and ordered her to turn over the child's passports to the Clerk of the Superior Court.

This was not a surprising result based on the facts, and it is a good case to keep in mind when dealing with claims of family violence, especially when they involve relocation issues.

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