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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Contents

Anyone Else Remember This from Property 101?

Flock Estate v. Flock, 2022 CarswellAlta 1602 (C.A.) — Veldhuis, Crighton, and Kirker, JJ.A.

Joint tenancy: so easy when parties are living in harmony, yet so dangerous when things go sideways. Sometimes people forget to consider severing their joint tenancies upon separation (and sometimes lawyers forget to have that discussion). And when that happens, parties (or more often possibly disappointed beneficiaries) must hope that the "course of dealings" between the parties was sufficient to sever the joint tenancy. This is one such case.

As we will all remember from first year property, the three ways to sever a joint tenancy pursuant to *Williams v. Hensman* (1861), 70 E.R. 862 (Eng. V.-C.) (alright — maybe we didn't exactly remember the *Williams v. Hensman* part) can be summarized as follows:

> **Rule 1:** Unilaterally acting on one's own share, such as selling or encumbering it.
>
> **Rule 2:** A mutual agreement between the co-owners to sever the joint tenancy.
>
> **Rule 3:** Any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. (It was this Rule that was at issue in this case.)

In any of these ways, the "four unities" — title, time, interest, and possession — are disrupted so as to sever the joint tenancy: *Keith v. Keith Estate*, 2015 CarswellAlta 1186 (Q.B.) at para. 17.

This appeal arose from an order severing a joint tenancy in a residential property held by the appellant (the "husband") and his former spouse (the "wife"), prior to the wife's death, based on the course of dealings between the parties between the date of separation in 1994 and the wife's death in 2014.

The parties were married in 1982. They purchased a home in 1993 as joint tenants. They separated the following year, and the husband moved out of the home. They were divorced in 1999. That same year, the wife's new partner moved into the home. From the time he moved in, the new partner contributed financially to the home, including to the cost of the mortgage, insurance, maintenance, and utilities. The wife married her new partner in 2009, and they lived in the home until the wife died in 2014. The new partner then continued to live in the home and paid all of the expenses, including the mortgage.

In the years after separation, the husband and the wife tried to resolve the issue of their respective interests in the home through litigation and arbitration. All attempts were unsuccessful, and the issue remained unresolved at the time of the wife's death, at which time title to the home was still in joint tenancy.

Anyone that can't see the problem has not been paying attention — and it could have been avoided with a simple self-transfer by either party.

After the wife's death, the husband tried to have the wife's name removed from title by filing a Survivorship Application. However, the document could not be registered to change title because of a Certificate of Pending Litigation registered on title.

The wife's estate then filed an application for an order severing the joint tenancy and transferring the wife's 50% interest to the estate as tenants in common with the husband. The estate also sought an order that the husband sell his 50% interest to the estate at fair market value. The husband cross-applied for a declaration that he was the sole owner of the home by right of survivorship.

The estate claimed that the parties had demonstrated an intention to sever the joint tenancy and to hold the property as tenants in common through their actions (and "course of dealings") after the separation. The lower court cited the following as evidence of the husband and the wife's intentions:

> • The husband had vacated the home after the separation in 1994, whereupon he stopped making any financial contribution to the home. He resumed paying property taxes for the home in 2018 — *after* the estate had filed the application to sever the joint tenancy.
>
> • The wife, along with her new partner, lived in the home until she died, during which time they together contributed over $230,000 to the expenses of the home and an additional $145,000 for renovations — none of which were consented to by the husband.
>
> • The wife and her new partner were purposeful in having the new partner contribute financially to the home so as to ensure there was a record of his contributions given the ongoing contentious litigation between the parties.
>
> • The husband and the wife were engaged in contentious litigation for over two decades. They were divorced but continued to litigate — and at the heart of the various actions was the division of matrimonial property, including the home.
>
> • After the wife's death, her new partner continued paying all of the home expenses.

The husband argued that, to sever the joint tenancy, the application would have had to be made *prior* to the wife's death. He argued that the right to apply to sever the joint tenancy had been extinguished by the wife's death, or that it had been extinguished even earlier pursuant to the Alberta *Limitations Act*, R.S.A. 2000, c. L-12.

These arguments were not accepted in the court below. Rather, given the lengthy and historic dispute between the parties, the court found it "difficult to believe that they would have wanted the law of survivorship to apply," and that the joint tenancy had been severed by their mutual course of conduct in the years since separation. Furthermore, these arguments ran counter to previous persuasive authorities where severance was found to have occurred notwithstanding, and following, the death of a joint tenant: *Obradovic Estate v. Obradovic*, 2013 CarswellAlta 1461 (Q.B.); *Hansen Estate v. Hansen* (2012), 9 R.F.L. (7th) 251 (Ont. C.A.).

Notably, the court below then ordered an appraisal of the home so the estate could pay the husband the value of his interest.

The husband appealed, essentially making the same arguments as he did in the court below.

In arguing that once the wife died, the right of survivorship extinguished any rights she (or her estate) may have in the property, the husband missed the point. The issue was whether severance should operate in equity to prevent the husband from asserting any right of survivorship: *Hansen* at para. 35. The question was whether the parties, by their course of dealings *before the wife's death*, treated their interests in the home as constituting interests held by tenants in common. And here, according to the court below, they did.

The Court of Appeal was also not taken with the limitations argument. Not only was the claim actually started in time, but the declaratory relief sought by the estate was not subject to the general limitation period in s. 3 of the *Limitations Act*, which excluded "a declaration of rights and duties, legal relations or personal status": s. 1(i)(i). [For the interplay between the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B., and declarations, see *Kyle v. Atwill* (2020), 42 R.F.L. (8th) 251 (Ont. C.A.).]

It must also be remembered that, for the purposes of the third ground for severance, mutuality of intention can be *inferred* from the course of dealing between the parties and does not require proof of explicit intention or evidence of an agreement: *Hansen* at para. 36.

With respect to the specific "course of dealings" in this case, the Court of Appeal was certainly not going to re-weigh the evidence or allow the husband to re-argue the case: *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.) at para. 104; *Nissen v. Nissen* (2020), 35 R.F.L. (8th) 1 (Alta. C.A.) at para. 17. Nothing like getting whacked over the head with a recent case from the Supreme Court of Canada.

Appeal dismissed.

Required Notice in Writing Should Be . . . in Writing!

S.F. v. D.R. (2022), 70 R.F.L. (8th) 298 (Ont. S.C.J.) — Fregeau J.

S.F. v. D.R. is a decision about interim relocation.

The parties were married from 2003 to 2009. They had two children together, D and L, who were 16 and 14 years old respectively at the time of the motion. During the marriage, the family lived in London, Ontario.

The parties signed a Separation Agreement, and they were divorced. The Separation Agreement provided for joint custody of the children. The Agreement also provided that if either party wanted to relocate from London with the children, s/he would give the other party 120 days notice, and would "be at liberty to change the residence of the child at the expiration of that period of time unless the parties have agreed to the contrary or the [other] parent has obtained an Order of a Court of competent jurisdiction in Ontario preventing the change."

Although the Separation Agreement provided for both children to reside primarily with the mother, D eventually started living primarily with the father, while L remained primarily with the mother.

In late April/early May 2021, the mother *verbally* advised the father that she wanted to move to Nova Scotia with L (and that D could remain in London with the father). According to the mother, the father *verbally* agreed to her request to relocate. Based on the parties' verbal agreement, the mother had her lawyer draft an Amending Agreement that incorporated the terms of the alleged verbal agreement, and provided it to the father in early June 2021. She also gave up her rented home in London, purchased a home in Nova Scotia, registered L in school in Nova Scotia for September 2021, and verbally told the father that she and L were planning to leave for Nova Scotia on July 28, 2021.

On July 13, 2021, the father's lawyer sent the mother's lawyer comments about the draft Amending Agreement, but did not object to any of the terms that dealt with the mother's plan to relocate to Nova Scotia with L at the end of the month. However, instead of signing the Amending Agreement, and less than a week before the mother's scheduled departure date, the father told the mother and L that he did not consent to the move. As the mother had already given up her home in London, the mother and L were forced to move in with her parents. This was problematic for the mother, as she had a difficult relationship with her parents, and they disapproved of her decision to re-partner with another woman after she separated from the father. It was also problematic for L, who had come out to his mother as transgender, as he did not want to tell his grandparents that he was transitioning.

On November 9, 2021, the mother started an Application in London, and requested an Order permitting her to move to Nova Scotia with L. The father opposed the mother's request to relocate.

Despite having commenced an Application to relocate, on December 8, 2021, the mother unilaterally moved to Nova Scotia with L, because the living situation with her parents had become an "extremely toxic environment" for both her and L. However, she did not explain why she did not bring a motion to authorize her to move pending trial — another example of preferring to beg forgiveness than ask permission.

The mother argued that she had not acted unilaterally, and claimed she had complied with the relocation provisions of the Separation Agreement, because she had told the father about her plan to move in late April/early May 2021, and the father had not obtained an order prohibiting her from doing so within the 120-day period set out in the Agreement. Somewhat surprisingly, at least to us, Justice Fregeau accepted this argument:

> [66] I conclude that the mother, in her capacity as the custodial parent of [L], has complied with the notice of relocation terms of the parties' 2009 separation agreement. The father has not, during the lengthy notice period provided for in the separation agreement, moved to secure an order preventing the move. To the contrary, for a period of approximately 90 days after having received notice of the mother's intention to relocate with [L], the father led the mother to believe that he was not opposed to the move. This resulted in the mother undertaking certain irreversible actions in furtherance of her intentions.

Respectfully, *having started* a proceeding for an Order authorizing her to move to Nova Scotia with L, it should not have been open to the mother to then just pick up and move without prior judicial authorization (or the father's consent). As Justice Danyliuk said in *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.), "having released the custody genie from the procedural bottle, [a party] cannot unilaterally seek to shove it back inside." For further discussion about this issue, see "Letting the 'Custody Genie' out of the 'Procedural Bottle'" in the 2020-14 (April 13, 2020) edition of *TWFL*. One cannot invoke the jurisdiction of the court only to then ignore it and engage in self-help.

In any event, as Justice Fregeau recognized that he might be wrong about the Separation Agreement, he then went on, quite correctly in our view, to consider whether the move to Nova Scotia would actually be in L's best interests under the applicable legislation.

As the parties were divorced, but no order had been made for corollary relief, Justice Fregeau determined that the matter was governed by Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"). While it is true that the *CLRA* applied in this case, we note that as long as the parties were divorced in Canada, which is unclear from the reasons, the Court could have also dealt with the matter under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). As Justice Maczko explained in *Low v. Henderson* (2001), 17 R.F.L. (5th) 111 (B.C. S.C. [In Chambers]):

> [18] . . . **There is always jurisdiction to grant corollary relief after granting of a decree nisi**: *Hughes v. Hughes* (1976), 30 R.F.L. 199, 1 B.C.L.R. 234 (B.C. C.A.). **The fact that the decree of divorce is silent as to support does not make the subsequent application a variation application under the *Divorce Act*, rather it is an originating application**: *Farquar v. Farquar* (1983), 35 R.F.L. (2d) 287 (Ont. C.A.). *Currie v. Currie* (1987), 6 R.F.L. (3d) 40 (Man. Q.B.) per Carr J. is to the same effect: a variation proceeding is only appropriate where the a party is seeking to vary an order that specifically provides for support; **where the decree nisi is silent on this point, the application should be classed as a corollary relief proceeding under the *Divorce Act*** (at pp. 43-44). [emphasis added]

Although these comments were made with respect to spousal support, they are equally applicable to claims for parenting orders. The strict "Occupies the Field" Doctrine of paramountcy has long been replaced by the "Operational Incompatibility" Doctrine: *Kolupanowicz v. Cunnison* (2009), 68 R.F.L. (6th) 84 (Ont. S.C.J.); *Multiple Access Ltd. v. McCutcheon*, 1982 CarswellOnt 128 (S.C.C.); *Huazarik v. Fairfield* (2004), 48 R.F.L. (5th) 275 (Ont. S.C.J.); *Cheng v. Liu*, 2016 CarswellOnt 11183 (S.C.J.), var'd (2017), 94 R.F.L. (7th) 23 (Ont. C.A.).

Under the *CLRA*'s relocation provisions, which are found in ss. 39.1 to 39.4 and largely (but not entirely) mirror the relocation provisions of the *Divorce Act*, the mother was supposed to have provided the father with at least 60 days ***written*** notice of her request to relocate, along with the information set out in s. 39.3(2) of the *CLRA* (including the expected date of the proposed

relocation, the address of the new residence and contact information of the person or child, and a proposal for how decision-making responsibility, parenting time or contact could be exercised):

> **Relocation**
>
> 39.3 (1) A person who has decision-making responsibility or parenting time with respect to a child and who intends a relocation **shall**, at least 60 days before the expected date of the proposed relocation, notify any other person who has decision-making responsibility, parenting time or contact under a contact order with respect to the child of the intention. 2020, c. 25, Sched. 1, s. 15.
>
> **Notice requirements**
>
> (2) **The notice shall be in the form prescribed by the regulations** or, if no form is prescribed, **shall be in writing** and shall set out,
>
> (a) the expected date of the proposed relocation;
>
> (b) the address of the new residence and contact information of the person or child, as the case may be;
>
> (c) a proposal as to how decision-making responsibility, parenting time or contact, as the case may be, could be exercised; and
>
> (d) any other information that may be prescribed by the regulations. 2020, c. 25, Sched. 1, s. 15.
>
> **Exception**
>
> (3) On application, the court may in any circumstance provide that subsections (1) and (2) or anything prescribed by the regulations for the purposes of subsection (2) do not apply, or apply with any changes the court specifies, if the court is of the opinion that it is appropriate to do so, including if there is a risk of family violence. 2020, c. 25, Sched. 1, s. 15. [emphasis added]

Upon receiving written notice from the mother, the father would have then had 30 days to provide ***written*** notice that he objected to the move, along with the information set out in ss. 39.3(5) and 39.3(6) (including his reasons for objecting, and his views about the mother's proposal). If the father failed to object in writing within the 30 day notice period, the mother would have been authorized to relocate pursuant to s. 39.4(2)(b), which provides that "[a] person who has given notice of a proposed relocation in accordance with section 39.3 and who intends to relocate a child may do so as of the date referred to in the notice if, . . . (b) no objection to the relocation is made in accordance with subsection 39.3(5) and there is no order prohibiting the relocation." Again, to quote the statute:

> **Objection**
>
> (5) A person with decision-making responsibility or parenting time who receives notice of the proposed relocation under subsection (1) may, no later than 30 days after receiving the notice, object to the relocation by,
>
> (a) notifying the person who gave the notice of proposed relocation of the objection to the relocation; or
>
> (b) making an application under section 21. 2020, c. 25, Sched. 1, s. 15.
>
> **Notice requirements**
>
> (6) A notice under clause (5) (a) **shall be in writing** and shall set out,
>
> (a) a statement that the person objects to the relocation;

(b) the reasons for the objection;

(c) the person's views on the proposal referred to in clause (2) (c); and

(d) any other information that may be prescribed by the regulations. 2020, c. 25, Sched. 1, s. 15. [emphasis added]

There was no dispute in this case that the mother had not complied with s. 39.3(2) of the *CLRA*. But that was not the end of the matter, because s. 39.3(3) of the *CLRA* gives the court authority to dispense with the notice requirements "if the court is of the opinion that it is appropriate to do so". Furthermore, s. 39.4(3) of the *CLRA*, which lists the factors that courts are required to consider when determining whether to authorize a relocation, includes the following provision:

> 39.4(3) . . . (d) whether the person who intends to relocate the child has complied with any applicable notice requirement under section 39.3 and any applicable Act, regulation, order, family arbitration award and agreement;

This makes it clear that failure to comply with the notice requirements is not a complete bar to being able to relocate (as otherwise there would have been no need to include s. 39.4(3)(d) in the statute).

That said, the *CLRA* (and the *Divorce Act* for that matter) very clearly requires that the original notice and any notice of objection be *in writing*. Surely, this is to ensure there is a written record of the relocation request and to avoid precisely the sort of situation that arose in this case. For this reason, in our view, the written notice requirements should be waived only in rare cases (cases with serious family violence, for example.)

Relying on these provisions, Justice Fregeau concluded that the mother's failure to comply with the formal notice requirements of the *CLRA* did ***not*** prohibit him from authorizing the move, and that the mother's verbal notice to the father was sufficient in the circumstances:

> [72] For the purposes of the motions before the court, and in the unique circumstances of this case, I conclude that it is appropriate to apply the provisions of s. 39.3(3) of the *CLRA* and waive the requirement that the mother provide *written* notice of the proposed relocation to the father. In my opinion, it is appropriate in the circumstances of this case to treat the mother's late April/early May 2021 verbal notice of her intention to relocate to the Maritimes as proper notice to the father. In the alternative, the mother's June 2021 verbal notice of her intention to relocate specifically to Springhill serves as proper notice to the father. [emphasis in original]

After considering the rest of the factors set out in s. 39.4(3) of the *CLRA*, including that L, who was already 14 years old, wanted to stay in Nova Scotia and was doing well there, Justice Fregeau granted the mother's motion, and ordered that L was to continue living with the mother in Nova Scotia pending trial. He also determined that, as the mother was the successful party, she was presumptively entitled to costs.

While the decision to let L remain in Nova Scotia may have been reasonable on the particular facts of the case, and although the father's conduct was also problematic, we would have preferred to see the Court criticize how the mother handled the matter. This entire situation could have been avoided if the mother had simply complied with the statutory notice requirements, and the mother absolutely should have brought a motion to allow her to move to Nova Scotia instead of just acting unilaterally. This result will only encourage this sort of conduct in the future. What we permit, we promote: *Benarroch v. Abitbol et al*, 2017 CarswellOnt 12968 (S.C.J.).

It is, in our view, essential for courts to send a clear message that the notice requirements in the provincial acts and in the *Divorce Act* are to be followed in relocation cases, and that self-help will absolutely not be tolerated. To that end, while costs have not yet been adjudicated, we hope the Court will consider whether awarding the mother significant costs would send an inappropriate message to other litigants in relocation cases, and hope that the Court will consider Rule 24(4) of Ontario's *Family Law Rules*, O. Reg. 114/99, which provides that "a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs."

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