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

Aaron Franks & Michael Zalev

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Contents

- Yo-Yo's and Turning Tables in the Court of Appeal
- All Roads Lead to Repayment
- If You Don't Want the Court to Order Lump Sum Spousal Support Don't Give the Court a Reason to Do it

Yo-Yo's and Turning Tables in the Court of Appeal

Tovmasyan v. Petrosian (2022), 76 R.F.L. (8th) 1 (Ont. C.A.) — Brown J.A.

The parties had twins together, who were almost nine years old by the time of the motion before Justice Brown.

The parties separated in 2018. After separation, the children lived primarily and spent the vast majority of their time with the mother. The father had some, albeit limited, parenting time, much of which had to be supervised due to concerns of family violence.

In June 2022, after a five-day trial in the Superior Court, Justice O'Brien allowed the mother to relocate to California with the children pursuant to the relocation provisions of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"). In her decision, she made the following findings of fact:

- It would be in the children's best interests to be able to relocate to California with the mother;
- The children had a stronger bond with the mother than the father;
- The father had only had limited unsupervised parenting time since separation, and there was a history of family violence;
- The children would be "devastated" if their mother stopped being their primary caregiver;
- The move to California would have a positive impact on the children; and
- The mother's plan to move to California was reasonable, and included significant parenting time for the father.

After the trial decision was released, the mother moved to California without the children so she could start the process of obtaining citizenship in the United States, while the children temporarily remained in Ontario with the father.

The father appealed Justice O'Brien's Order to the Ontario Court of Appeal, and challenged the trial judge's findings of fact and mixed fact and law. He did not, however, allege that the trial judge had made any legal errors, or take steps to expedite his appeal to ensure it would be heard as quickly as possible.

The father also brought a motion for a stay pending his appeal to try to prevent the mother from moving the children to California until the appeal had been decided.

The three-part test for a stay of a parenting Order pending an appeal is well-known. As Justice van Rensburg recently explained in *D.C. v. T.B.*, [2021 CarswellOnt 11173](#) (C.A.):

[9] Custody and access orders remain in effect pending an appeal to this court unless the court has ordered otherwise. In determining whether to stay an order involving the parenting of a child, the courts must consider: (1) **whether, on a preliminary assessment, the appeal raises a serious question** (recognizing that this is a low threshold); [(2)] **whether the child will suffer irreparable harm** if a stay is refused; and (3) the **balance of convenience: namely whether there would be greater harm from the granting or refusal of a stay** pending a decision on the merits of the appeal. **The overriding consideration, again, is the best interests of the child.** In other words, the court must be satisfied that it is in the child's best interests to grant a stay: *K.K. v. M.M.*, 2021 ONCA 407, at para. 17 and *Lefebvre v. Lefebvre*, 167 O.A.C. 85 (C.A.), at para. 6. [**emphasis added**]

The "serious question" part of the test for a stay is usually stated to be a "low threshold" that only requires the moving party to show that the appeal has *some* merit — that it is not frivolous or vexatious. However, primarily drawing on non-family cases where a stay pending appeal is sought, Justice Brown notes that where, as in this case, "as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, this court may give significantly more weight to the strength of the merits of the appeal: *Toronto (City) v. Ontario (Attorney General)*, [2018 CarswellOnt 15251](#) (C.A.), at para. 10." (See also *Samama v. Gaskovski* (2021), [63 R.F.L. \(8th\) 370](#) (Ont. S.C.J.), where Justice Monahan applied the higher threshold established in *Toronto (City) v. Ontario (Attorney General)* in the family law context.)

In our view, this is a proper and appropriate consideration. Granting a stay would have meant that the children would have remained in Toronto pending the appeal. In many relocation cases, this would be a strong factor weighing in favour of granting a stay on the theory that it is best to limit the number of times the children may have to move, and that allowing the move pending the appeal and then requiring the children to return if the appeal is granted would only make an already difficult situation even worse. (For further discussion about this issue, see "A Tale of Two Stays . . . Well . . . Sort of . . ." in the 2021-47 (December 6, 2021) edition of *TWFL*.)

Justice Brown, however, found that in this particular case, the more important consideration was the fact that the mother had been the children's primary caregiver for many years. As a stay would have interfered with the children's ability to remain in their mother's primary care, and would have made their father their primary caregiver for the foreseeable future while the appeal process played out, the relief sought by the father would have resulted in a "radical change to the children's living arrangements." Of course, this assumed that the mother would remain in California.

Although not noted by Justice Brown, many cases have also commented on the fact that children are "resilient" and that the possibility of a move and then move back (the "yo-yo effect") is but one consideration: *S. (C.L.) v. S. (B.R.)* (2013), [37 R.F.L. \(7th\) 112](#) (Alta. C.A.); *G. (E.) v. Alberta (Director of Child and Family Services)*, [2014 CarswellAlta 1183](#) (C.A.).

Given the impact that a stay would have on the rights of the parties (and the best interests of the children), Justice Brown determined it would be appropriate in this case "to require the father to demonstrate, through trial-based evidence, that his appeal has more merit than simply not being frivolous or vexatious." How the tables were turned. This created a significant problem for the father, who filed only a very short Affidavit for the motion that "paints a different picture of family life over the past number of years from that found by the trial judge in her detailed reasons," but did not refer to any evidence from the trial to explain how he could overcome the highly deferential standard of review that appellate Courts apply to appeals from parenting Orders (see *Barendregt v. Grebliunas* (2022), [71 R.F.L. \(8th\) 1](#) (S.C.C.); see also our discussion of *B.J.T. v. J.D.*, [2022 CarswellPEI 31](#) (S.C.C.) in the 2022-21 (June 13, 2022) edition of *TWFL*).

Given the trial judge's lengthy and meticulously organised reasons, Justice Brown determined that the father's "bald assertion in his notice of appeal that the trial judge committed errors, along with further assertions in his affidavit that the facts of the

parties' family life were different than those found by the trial judge" were inadequate to show that there was a serious issue for the appeal. Based on Justice Brown's description of the father's evidence, we also suspect that the father's bald allegations of factual errors would not even have been sufficient to establish that the appeal was not frivolous or vexatious.

Justice Brown was also not persuaded that the children would suffer irreparable harm if a stay was not granted. The trial judge had granted the father significant parenting time in Toronto and additional time in California. The trial judge had also found the relocation would be in the children's best interest, and the father had not led adequate evidence to suggest she had made any palpable and overriding errors that would warrant appellate intervention.

Having found that the father had not established a serious issue or irreparable harm, Justice Brown had no difficulty finding that the balance of convenience weighed in favour of the mother. Removing the children from the mother's primary care pending the appeal, which would likely take months or more to be heard and decided, was not be in the children's best interests.

As a result, Justice Brown dismissed the father's motion for a stay.

The lesson here? Do not take for granted the "serious issue" stage of the test for a stay pending appeal. In the materials, the party moving for a stay should address the trial evidence, the alleged errors and how a permitted move is actually not in the best interests of the children.

All Roads Lead to Repayment

Ginther v. Gaulton (2022), 78 R.F.L. (8th) 26 (N.L. C.A.) — Welsh, Goodridge and Butler JJ.A.

This appeal concerned a question as old as the earth itself: was it a gift; or was it a loan?

Although the parties were in a common law relationship from approximately May 2004 to March 2007 (just short of 3 years), Ginther's claim for the recovery of loaned funds was not pled (or argued) based on family law principles. Rather, her case was argued on the basis of gift vs. loan and unjust enrichment.

During their cohabitation, the parties usually lived in properties owned or rented by Gaulton. In the Fall of 2005, Ginther sold the home she owned (in which the parties lived for a short time) for about \$54,000 in net proceeds. At the same time, Gaulton bought a property. Ginther's evidence was that she advanced Gaulton a \$40,000 loan for the down payment for the purchase of the property. Gaulton claimed that the \$40,000 was a gift.

Finding that the \$40,000 advance was made without any form of acknowledgement of debt or any form of security, the court below found that the advance was not a loan.

This finding is hard to understand given that the presumption of resulting trust is alive and well in Newfoundland.

Gaulton conceded that \$35,000 of the \$40,000 from Ginther was for the down payment for the house he bought. He could not remember the reason for the \$5,000 advanced a week later. However, the Court of Appeal was of the view that the evidence supported the inference that the \$5,000 was also for the purpose of the purchase.

The trial judge approached the decision from the perspective of mutual contributions of the parties during their cohabitation. Based on these considerations, the judge concluded that, "in the context of this relationship . . . I cannot find authority upon which I could base a specific stand-alone transaction permitting separate relief."

There is certainly authority for the proposition that the court need not consider the minutiae and the give-and-take of mutual contributions over the daily life of a cohabitation: *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.); *Junker v. Hughes* (2016), 76 R.F.L. (7th) 297 (Ont. C.A.); *Farkas v. Bedic* (2016), 72 R.F.L. (7th) 5 (Ont. C.A.); *Gionet v. Pingue* (2018), 22 R.F.L. (8th) 55 (Ont. C.A.). The breakdown of a relationship is not a general call for a forensic accounting of all financial events in the history of the relationship: *Geishardt v. Ahmed* (2018), 17 R.F.L. (8th) 466 (Ont. S.C.J.).

However, here, the Court of Appeal determined that the trial judge erred in his approach because he relied on family law principles regarding the sharing of property by cohabiting parties. But those principles did not apply to a determination of a claim in debt or unjust enrichment as pleaded in this case and as argued by the parties. The evidence necessary to determine a division of property based on family law principles was not adduced by either party.

In this case, as noted above, the trial judge did not find that the \$40,000 was a loan. But he also did not find that the advance was intended as a gift. He found that additional information would be required in order to find that Ginther intended to give Gaulton a gift of \$40,000. But, again, is that not the function of the presumption of resulting trust? The law assumes loans and/or trusts and not gifts: *Barber v. Magee*, 2017 CarswellOnt 9971 (C.A.). If the evidence of gift was not there — that should have been the end of it. In the absence of any evidence of donative intent at the time of the advance (as here), the law presumes a loan or a resulting trust: *Reiter v. Hollub* (2017), 96 R.F.L. (7th) 96 (Ont. C.A.).

However, rather than just deal with the issue based on the legal presumption of loans or the presumption of resulting trust, since the trial judge erred in applying family law principles when the case was not presented that way, and because the trial judge did not find that the \$40,000 payment was a loan or a gift, the Court of Appeal thought it was necessary to consider whether the equitable principle of unjust enrichment was engaged on the facts of the case. That is, rather than proceed by way of the presumption of resulting trust, the Court of Appeal undertook the more circuitous unjust enrichment analysis.

Let's all recite the elements of unjust enrichment: an enrichment; a deprivation and no juristic reason: *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.).

Here, the Court of Appeal found evidence of the enrichment of Gaulton at Ginther's expense: Ginther advanced the \$40,000 to Gaulton, and a benefit could be restored to Ginther by repayment of the money.

So, on to the lack of juristic reason: was there a reason in law or justice for the retention of the benefit?

The first step was to consider the established categories of juristic reasons. Established categories of juristic reasons include contract, donative intent, or "other valid common law, equitable or statutory obligations": *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) at para. 43.

Absent a justification from an established category, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied: *Garland v. Consumers' Gas Co.*, 2004 CarswellOnt 1558 (S.C.C.). If no established category is identified, the second step permits the court to take into account the legitimate expectations of the parties and "moral and policy-based arguments about whether particular enrichments are unjust": *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) at para. 43.

The Court of Appeal was satisfied that no juristic reason has been established to deny recovery to Ginther of the \$40,000 advance. There was no dispute that Ginther had advanced the \$40,000. And the Court of Appeal noted that the \$40,000 payment amounted to a significant portion of the proceeds of approximately \$54,000 that she received from the sale of her house. Again, interesting, but irrelevant in a resulting trust analysis, where the Court of Appeal could have simply stopped at "no evidence of intention to gift."

It would have been far more simple for Ginther to have brought her action based on resulting trust.

Curiously, the Court of Appeal also noted that, "Mr. Gaulton did not adduce evidence that would challenge the basis of that action by claiming distribution of assets according to family law principles that would engage consideration of the contribution of the parties to their relationship." But, respectfully, there were no family law principles to apply here with respect to the distribution of assets, as the parties were not married, and in Newfoundland, the equalization provision of the *Act* only apply to married spouses.

As a result, the Court of Appeal was satisfied that Ginther made out her claim in unjust enrichment, and she was entitled to her \$40,000 back. It just took a more circuitous route to get there.

If You Don't Want the Court to Order Lump Sum Spousal Support Don't Give the Court a Reason to Do it

Kahsai v. Hagos (2022), 77 R.F.L. (8th) 1 (Ont. C.A.) — Tulloch, Lauwers and Paciocco JJ.A.

We have selected this case to discuss because of what the Court of Appeal has to say about lump sum support, and the appellant's argument that this was not a proper case in which to award lump sum support.

The appellant also argued that the trial judge's management of the trial was unfair and favoured the respondent. These arguments did not go anywhere.

While a trial judge must be open to persuasion and must treat both parties fairly during the hearing, the management of a trial is otherwise left to the trial judge. The Court of Appeal will not micromanage a trial with 20/20 hindsight and will not conduct a post-mortem on a trial: *R. v. Samaniego*, 2020 CarswellOnt 9146 (C.A.), aff'd, 2022 CarswellOnt 3617 (S.C.C.). Here, the trial judge was found to be very patient with the parties and counsel, allowing the trial to go far longer than anticipated, and the Court of Appeal was not interested in criticizing her reasonable and balanced efforts to corral counsel.

It has become common to include an allegation of bias in an appeal. But such claims should not be *de rigueur*. They should be reserved for situations where there are real and articulable concerns that the parties were not treated fairly and that can overcome the presumption of impartiality and integrity: *R. v. Arnaout*, 2015 CarswellOnt 14643 (C.A.); *R. v. S. (R.D.)*, 1997 CarswellINS 301 (S.C.C.); *Bizon v. Bizon*, 2014 CarswellAlta 812 (C.A.); *Fraser-Tabak v. Tabak* (2016), 78 R.F.L. (7th) 77 (Alta. C.A.).

It is also not judicial error or evidence of bias that the trial judge found the evidence of one party to be more credible. It is the purview of the trial judge to make credibility assessments of the parties and witnesses. And here, the trial judge had several reasons to discount the appellant's evidence.

The parties' relationship began in 1978, in Eritrea. Their oldest child was born in Eritrea in 1980. In 1984, the family immigrated to Canada, settling in our nation's capital. The parties separated in 1985 and divorced in 1987. After separation, the child lived primarily with her mother, the respondent. In September 1990, the parties resumed cohabitation and lived together until September 2013, when the respondent moved out of the family home to Toronto. During this second period of cohabitation, the parties had two more children.

Despite this evidence, the appellant asserted that the parties had *never* been in a committed relationship — not before 1985 or after 1990. But this did not at all jive with the fact that they had a child in 1980, moved to Canada as a family in 1984, or their resumed cohabitation from 1990 to 2013 — or their clear life together as a family. The appellant's position in argument was also contradicted by his own pleadings and affidavit, in which he admitted that the parties had been married.

On top of that, the evidence of *both* experts was that the financial information provided by the appellant was "unreliable" and impossible to reconcile. Getting a true picture of the appellant's finances proved elusive, because, as found by the trial judge, the appellant was motivated by a wish to avoid a support obligation.

Parties with incredible evidence should not later complain that their evidence was found to be . . . well . . . incredible. In the end, the trial judge found that imputing an income to the appellant of \$100,000 per year was warranted and reasonable, and awarded the respondent lump sum spousal support.

The appellant argued that the calculation of the lump sum payment in lieu of periodic spousal support was erroneously calculated by the trial judge on a monthly base of about \$1,800, rather than the interim amount of \$1,000 fixed earlier on an interim motion. However, the \$1,800 used by the trial judge was based on her decision to set support based on the high range of the SSAGs rather than the middle range. Of course, this decision was entitled to deference: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.). And the decision to do so was based on the strong compensatory claim: a long-term relationship, caring for the children, the ages of the parties, and the economic consequences that flowed from their relationship which were overwhelmingly in the respondent's favour.

The appellants' main substantive claim was that this was not a proper case in which to order lump sum spousal support. While this argument may have had wings in the day of *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.), motion for leave to appeal to SCC refused (1994), 3 R.F.L. (4th) 290 (note) (S.C.C.), where the Ontario Court of Appeal suggested that such lump sum awards should be "rare" — the availability of lump sum awards was expanded very significantly by the Ontario Court of Appeal in *Davis v. Crawford* (2011), 95 R.F.L. (6th) 257 (Ont. C.A.). Now, to make a lump sum support order, a court need only consider the perceived advantages (terminating ongoing contact or ties; providing capital; ensuring support is paid, etc.) against any presenting disadvantages (no future ability to vary; difficulties in calculating), along with the ability to pay a lump sum award: *Davis v. Crawford* (2011), 95 R.F.L. (6th) 257 (Ont. C.A.); *Litzenberger v. Litzenberger*, 2012 CarswellSask 213 (Q.B.); *Racco v. Racco* (2014), 44 R.F.L. (7th) 348 (Ont. C.A.); *Mwanri v. Mwanri* (2015), 72 R.F.L. (7th) 25 (Ont. C.A.); *Beck v. Beckett* (2011), 4 R.F.L. (7th) 48 (Ont. C.A.); *Hathway v. Hathway*, 2017 CarswellOnt 8992 (S.C.J.). (Both *Beckett* and *Hathway* offer a good summary of advantages and disadvantages.)

Here, the trial judge considered the following factors in support of the lump sum award: the length of the relationship, the parties' ages, the roles adopted during the relationship, the relationship's economic consequences, and the respondent's strong compensatory claim. The trial judge also noted that a lump sum would provide the respondent with an immediate capital payment to address her immediate needs. And, the trial judge clearly wanted to see the parties disengage from each other and to put an end to the litigation and the appellant's conduct within it. The Court of Appeal took no issue whatsoever with these considerations.

The most interesting argument put forward by the appellant was that a lump sum award would effectively deprive him of a future motion to vary, which was prejudicial to him given he was 67 years old. It is true that an award of lump sum support will deprive a payor from varying support in the future. Money paid is money paid. And, it is also true that, in some jurisdictions, such as Ontario for example, it may be possible for a recipient to vary a lump sum award: *Tierney-Hynes v. Hynes*, 2005 CarswellOnt 2632 (C.A.). But ultimately, these arguments go to the calculation of the award and the appropriate time value and risk discount to be applied, not the initial question as to whether a lump sum should be paid in a particular case.

In this case, as noted by the Court of Appeal, it was precisely such ongoing engagement that the trial judge was looking to end. In the words of the trial judge:

Throughout [the appellant's] testimony, he took credit for all of the family's successes and blamed [the respondent] for all of its challenges . . .

In his evidence, [the appellant] was motivated to present himself as a saviour, while [the respondent] was the villain. [The appellant] was consistent in attacking [the respondent's] character from every possible angle. In [the appellant's] view, [the respondent] was stupid, uneducated, financially irresponsible, promiscuous, had a poor reputation, had no friends, did not contribute anything to the family, was a parasite, and was a bad and neglectful parent.

The Court of Appeal found absolutely no basis for the appellant's argument as to the approach the trial judge took regarding spousal support.