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

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What to do with the Proceeds of Sale???

Mammolit v. Smutniak, 2022 CarswellOnt 16505 (S.C.J.) — Piccoli J.

This is an interesting case (at least for those in Ontario) because it deals with the partition and sale of a jointly-owned property and division of proceeds where the parties are not married, such that s. 10 of the *Family Law Act*, R.S.O. 1990, c. F.3, has no application.

The parties had lived together in a common law relationship from July 2012 to October 2019.

The Applicant had two adult children from a previous relationship, and the Respondent had two children from her previous marriage.

The Applicant earned about \$180,000 a year and the Respondent earned about \$119,000.

The Applicant had been asking that the home be sold since separation. The Respondent and her two children had been living in the home since separation — the Applicant moved out when he was accused of assaulting the Respondent.

Both parties alleged family violence by the other. The contradictory materials did not assist in that determination and there had been no questioning.

The only property issue between the parties related to the home which was held by the parties as tenants in common. The Applicant claimed that the Respondent was holding her 50% interest in the home on resulting trust for him because she made no contribution to the purchase or ongoing upkeep and maintenance of the home. The Applicant was claiming the return of his down payment of about \$302,000.

The Respondent did not agree with the Applicant's claimed trust interest. She argued that she had contributed to the home financially and in other ways. She also claimed that she was owed retroactive child support and some nature of credit for her alleged contribution towards the home. The Respondent said that she paid the utilities and had been primarily responsible for "maintaining" the home — but she did not provide any details. The parties could not agree as to who paid property taxes.

There was no dispute that the Applicant had been paying the mortgage and line of credit, totalling to over \$5,000 a month. As a result of increasing interest rates, the cost of the monthly mortgage had recently increased by \$400.

The Applicant wanted the home sold immediately and the proceeds of sale held in trust pending further order or agreement. He was also gratuitously prepared to pay the Respondent uncharacterized support of \$2,439 a month on a without prejudice basis following the closing (based on his income and Table support for two children).

While the Respondent agreed to the sale, her agreement was based on conditions. First, she did not want the closing to be before June 30, 2023, as she did not want to move the children during school. And she wanted to receive half of the proceeds of sale. She argued that she could not purchase a new home or even afford to rent new accommodations without "her" 50% of the equity.

Section 10 of the *Family Law Act* is the usual section of resort where there is a claim for the sale of a matrimonial home:

Determination of questions of title between spouses

10 (1) A person may apply to the court for the determination of a question between that person and his or her spouse or former spouse as to the ownership or right to possession of particular property, other than a question arising out of an equalization of net family properties under section 5, and the court may,

- (a) declare the ownership or right to possession;
- (b) if the property has been disposed of, order payment in compensation for the interest of either party;
- (c) **order that the property be partitioned or sold** for the purpose of realizing the interests in it; and
- (d) order that either or both spouses give security, including a charge on property, for the performance of an obligation imposed by the order,

and may make ancillary orders or give ancillary directions. [**emphasis added**]

However, as noted above, Part I of the *Family Law Act* (in which s. 10 is cozily nestled) has no application here because the parties were not married, and Part I of the *Family Law Act* specifically only applies to married spouses.

The obvious answer is s. 2 of the *Partition Act*, R.S.O. 1990, c. P.4, which also gives the court the jurisdiction to order the partition and sale of jointly owned property. But there is nothing in the *Partition Act* that speaks to the payment of net proceeds of sale. Hmmm . . . keep reading . . .

It did not take much for her Honour to determine that the home should be sold. In the seminal case of *Davis v. Davis*, 1953 CarswellOnt 106 (C.A.), the Ontario Court of Appeal stated:

There continues to be a *prima facie* right of a joint tenant to partition or sale of lands. There is a corresponding obligation on a joint tenant to permit partition or sale, and finally the Court should compel such partition or sale if no sufficient reason appears why such an order should not be made.

And in *Latcham v. Latcham* (2002), 27 R.F.L. (5th) 358 (Ont. C.A.), the Court of Appeal confirmed that partition and sale will only be denied where there was evidence of malicious, vexatious or oppressive conduct.

In the 2020-26 (July 6, 2020) edition of *TWFL*, we commented on *Dhaliwal v. Dhaliwal* (2020), 42 R.F.L. (8th) 321 (Ont. S.C.J.), where (at paragraph 16) Justice Pazaratz provided a handy summary of the legal principles governing a motion for the sale of real property in the context of a family law case:

- a. The *Partition Act* provides a *prima facie* right to an order for partition and sale.
- b. A court is required to make such an order unless there is demonstrated reason not to do so.
- c. The onus is on the party opposing the sale to establish that there is sufficient reason to refuse a sale.

- d. The party opposing the sale must, generally, show malicious, vexatious, or oppressive conduct.
- e. Meaningful disputes related to the property should be resolved before a sale order is made.
- f. A sale should not be ordered if there is a legitimate family law basis or where a family law claim would be unfairly prejudiced.
- g. The court should consider the prejudice to both parties and a sale should be ordered where a sale would likely be inevitable at trial. This is especially the case where a trial is not imminent.
- h. A sale should be ordered where current carrying costs are unsustainable.
- i. The court should consider the impact of a proposed sale on vulnerable parties, including children (with consideration given to academic progress or other evidence impacting a child's wellbeing).
- j. The potential for unhappiness or dissatisfaction experienced by a party or by children is not enough to prevent a sale.

Although the Respondent argued that a sale would adversely impact the children, the Applicant noted there was no independent evidence that the sale would negatively impact the children. More than just bare statements about harm to the children is required in these situations as the presence of children alone will not result in refusal of sale: *Barker v. Barker* (2002), 27 R.F.L. (5th) 231 (B.C. C.A.); nor will the simple "desire" to wait for kids to finish current school year: *Coffey v. Coffey*, 2007 CarswellOnt 8639 (S.C.J.). And although "hardship" can include hardship to children [*Kaing v. Shaw* (2017), 94 R.F.L. (7th) 396 (Ont. S.C.J.)], to suggest that a sale should be prevented or delayed on account of alleged harm to the children, a robust record of likely harm to the children will be required: *Petit v. Petit*, 2016 CarswellOnt 1565 (S.C.J.). General "upset", including moving away from friends and school, will generally not suffice: *Gainer v. Gainer* (2006), 24 R.F.L. (6th) 18 (Ont. S.C.J.); *Chrobok v. Chrobok*, 2006 CarswellOnt 4890 (S.C.J.); *Peterson v. Peterson*, 2018 CarswellOnt 15466 (S.C.J.); *Delongte v. Delongte*, 2019 CarswellOnt 20274 (S.C.J.).

The Respondent also admitted that the Applicant's wish to sell the home was not vexatious or oppressive — big, likely fatal, admission.

It was a foregone conclusion that the home was going to have to be sold. The current carrying costs were not sustainable by the Applicant and the Respondent had not offered to assume those costs. In *Chateauvert v. Chateauvert*, 2019 CarswellOnt 681 (S.C.J.) at para. 114, it was determined that one party having to pay carrying costs amounted to prejudice.

But what was to happen with the proceeds; and where is the Court's jurisdiction to order the division of what was likely to be about \$450,000 in net proceeds of sale? The sale was ordered under the *Partition Act* — but that *Act* is silent as to the division of proceeds; and as noted above, s. 10 of the *Family Law Act* does not apply to common law spouses.

In this situation it is Rule 66.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 that applies:

66.03 All money realized in a partition proceeding from sale of land shall forthwith be paid into court, unless the parties agree otherwise, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee.

Therefore, the starting point is that all proceeds are paid into Court subject to the agreement of the parties or an order of the Court.

The Applicant would only agree to release \$50,000 to each party. The Respondent wanted 50% of the proceeds.

Curiously, there are not many cases that specifically deal with the distribution of proceeds of sale of a property owned by common law spouses. In fact, many cases seem to simply treat the matter as a question under the *Family Law Act* as the division of proceeds of sale of a "matrimonial home." See, for example, *Creasey v. Chretien*, 2009 CarswellOnt 1997 (S.C.J.) at para. 2. But common law spouses do not have a "matrimonial home."

When dealing with the distribution of proceeds under the *Family Law Act* (which, again, is *not* the case here), there appears to be a presumption that a joint owner is entitled to 50% of the net proceeds of sale, and where a party resists the release of funds, that party has the onus to show why the funds should be preserved: *Godfrey v. Godfrey*, 2019 CarswellOnt 8500 (S.C.J.) at para. 15; *Afshar v. Mahmoodi*, 2016 CarswellOnt 6765 (S.C.J.) at para. 31; *Creasey v. Chretien*, 2009 CarswellOnt 1997 (S.C.J.) at para. 56.

On the flip side, there is the idea that parties cannot assume they are entitled to 50% of the proceeds of sale, even if they are joint owners: *Monk v. Lamb*, 2012 CarswellOnt 1528 (S.C.J.).

In *Curtis v. Curtis*, 2019 CarswellOnt 3337 (S.C.J.), Justice Raikes was of the following view:

[41] In my view, the principles that apply to whether to order a sale apply with necessary modification to any order made regarding distribution of the proceeds of the sale; *viz.* there is a *prima facie* right to an order for distribution in accordance with the title holding which is subject to the exercise of the court's discretion. The exercise of that discretion requires a contextual analysis on a case-by-case basis to determine whether the applicant has clean hands, whether there is oppression or hardship, whether the proceeding is vexatious and whether the moving party is using the Act to avoid contractual obligations.

...

[47] . . . Where the partition application is but a piece of a larger litigation puzzle, and the issues extant in the broader litigation are intertwined with the property in question, the court should exercise caution so as not to give one side an unfair advantage in the litigation or prejudice the other party in that litigation.

And in *Urness v. McDonald*, 2022 CarswellOnt 3275 (S.C.J.), Justice Chown was of the view (at para. 60) that, "[w]here parties cannot agree on how much should be distributed from trust, courts will order an amount that is reasonable bearing all factors in need including possible equalization payment."

Ultimately, the issue with respect to the contributions of the parties was going to have to be sorted out at trial.

On the incomplete evidence before her, Justice Piccoli found:

1. If none of the proceeds were distributed, the Respondent would suffer hardship as she would be unable to secure alternate accommodations. That could result in oppression.
2. The equity of sharing proceeds equally is intertwined with the outcome of the other financial claims made.
3. It could be unfair to both sides were the Court, at this stage, to accept the position of the other.

Therefore, Her Honour determined it reasonable to release \$150,000 of the proceeds to each party — to be accounted for in the litigation — with the remainder of the net proceeds to be held in trust pending further Order or agreement.

We Said it Before. We Said it Again. We'll Say it One More Time. You can Rely on Otherwise Settlement Privileged Communications to Prove an Agreement. And Watch Out for Those Ancient Statutes.

SC v. JC (2022), 72 R.F.L. (8th) 361 (Alta. Q.B.) — Feasby J.

This decision is ever-so-slightly dated, but we provide it to our friends in Ontario who have only just had the possibility of Binding Judicial Dispute Resolution processes made available to them. (And we should try them on for size. See our comment on *M.D. v. C.S.*, 2022 CarswellOnt 17077 (S.C.J.) in the 2022-47 (December 19, 2022) edition of *TWFL*, where we discuss the first reported use of the procedure by Justice Madsen.)

Here, the parties negotiated a child support settlement at an Early Intervention Case Conference ("EICC"). The parties then tried to convert the agreement into a formal order, and things went terribly sideways. Rather than work together and make compromises to negotiate the terms of the order or seek an appointment with the EICC judge to settle the order, the parties simply reverted to their pre-EICC positions and booked the original child support matter to be heard in special chambers, as if the EICC agreement never happened. Importantly, the respondent was unrepresented.

Then things took another twist: Justice Feasby found that the EICC agreement was valid and binding, and that the parties could not just ignore the agreement even though it was not yet converted into a formal order.

His Honour considered Rule 1.3(2) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, which, along with the Court's inherent jurisdiction to control its process, provided jurisdiction to enforce the EICC agreement *whether or not it was claimed in the action*. His Honour was of the view that in a situation where the parties had no reason to look out for the public interest (or no interest in doing so) — the Court *could* (and here, *would*) control its process to ensure the appropriate use of Court resources.

Justice Feasby also emphasized that, as a general rule, what happens at an EICC is privileged, much like the Judicial Dispute Resolution (JDR) process: *Kurian v. Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2007 CarswellAlta 1375 (C.A.) at para. 4; *Hiles v. Hiles*, 2021 CarswellAlta 286 (C.A.) at para. 7. However, again, as an exception to settlement privilege, otherwise privileged communications may be disclosed to prove the existence of a settlement: Rule 4.20(4) provides that the general rule against using materials prepared for the purpose of a judicial mediation are privileged and may not be presented as evidence does not prevent the use of statements made or documents generated for or in the judicial dispute resolution process to prove the fact that a settlement was reached or the terms of a settlement. See also *Association de médiation familiale du Québec v. Bouvier* (2021), 64 R.F.L. (8th) 1 (S.C.C.); *Bombardier inc. c. Union Carbide Canada inc.*, 2014 CarswellQue 3600 (S.C.C.) at paras. 35-36. That is, you can use the deal to prove the deal.

Here, the parties would have also directly and intentionally waived any settlement privilege as they *both* referred to what happened at the EICC in their court materials. Recall that as settlement privilege belongs to *both* parties, it can only be waived by *both* parties: *Hallman v. Pure Spousal Trust (Trustee of)*, 2009 CarswellOnt 5527 (S.C.J.); *Ross River Dena Council v. Canada (Attorney General)*, 2009 CarswellYukon 2 (S.C.); *Leonardis v. Leonardis* (2003), 43 R.F.L. (5th) 144 (Alta. Q.B.); *Mahe v. Boulianne* (2010), 81 R.F.L. (6th) 4 (Alta. C.A.); *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 CarswellAlta 76 (C.A.); *Newell v. Newell* (2007), 43 R.F.L. (6th) 55 (Alta. C.A.) at para. 9. (Parties purporting to "unilaterally" waive settlement privilege is a bit of a pet peeve of ours.)

Along the same lines, the Court also found that the Application was contrary to the requirements of the administration of justice and an abuse of process because: (a) it sought to relitigate issues settled by agreement *in a judicial mediation process*; and (b) it was not an effective use of publicly-funded Court resources.

Here, the Court found an enforceable agreement was reached at the EICC, memorialized in the report of the EICC judge. The parties intended to contract. The essential terms of the contract were settled. And the terms were sufficiently certain.

A question arose as to whether the EICC agreement met the requirements of s. 4 of the *Statute of Frauds* (1677), 29 Car. II, c 3. (While there is not a "Doctrine of Decrepidness" that applies to old statutes, it's a crazy to see that the Court is concerned with compliance with a 350 year-old statute that spells "be" as "bee" and "unless" as "unlesse." Perhaps it might be time for a "looke" at the *Statute of Frauds*?)

In any case, s. 4 of the *Statute of Frauds* applies because the agreement set out in the EICC Report could not be performed within one year (as it is premised on a child completing a four-year degree).

To satisfy the requirement in s. 4 of the *Statute of Frauds*, a memorandum or note must disclose the essential terms of the agreement: *McKenzie v. Walsh*, 1920 CarswellNS 53 (S.C.C.). As noted above, the EICC Report set out the essential terms of the agreement between the parties. And while s. 4 of the *Statute of Frauds* requires that the memorandum or note memorializing the agreement be signed, it need not be signed by the parties — an agent's signature will suffice. Here, the Court found that

the Justice that had signed the EICC Report was "some other person thereunto by him lawfully authorized" by virtue of the parties having participated in the EICC process.

Rather than send the matter back to the EICC judge to settle the terms of the Order (which his Honour also found would be a waste of Court resources), his Honour settled the terms of the Order himself.

Mic drop. Thanks for coming out. Be respectful of Court resources. And . . . bu-bye.

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