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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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**While They're at It . . . Maybe They Can Fix that Matrimonial Home Deduction Thing Too?**

*Bradford Estate v. Kingdon* (2022), 81 R.F.L. (8th) 165 (Ont. S.C.J.) — Labrosse J.

There are a number of problems with Ontario's *Family Law Act* that can lead to grossly inequitable results. As but one example: the inability to deduct a property as a date of marriage asset if the property is a matrimonial home on the date of separation. For reasons that continue to escape us, in that situation, the titled spouse has to share the entire date of separation value of the home, instead of just its growth in value during the marriage as s/he would with any other asset owned on the date of marriage.

A perhaps less known, but equally inequitable (and dangerous) problem is found in ss. 5 and 7 of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Act*") which deal with whether and when a spouse or the estate of a deceased spouse can claim an equalization payment. If you're not already familiar with the problem (which we'll refer to as the "*Bradford Problem*"), see if you can figure it out by reading the following provisions of the *Act*. And here's a hint: remember we're discussing an estates case:

**Divorce, etc.**

5(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (1).

**Death of spouse**

5(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (2).

.....

**Application to court**

7(1) The court may, on the application of a spouse, former spouse or deceased spouse's personal representative, determine any matter respecting the spouses' entitlement under section 5.

7(2) Entitlement under subsections 5 (1), (2) and (3) is personal as between the spouses but,

- (a) an application based on subsection 5 (1) or (3) and commenced before a spouse's death may be continued by or against the deceased spouse's estate; and

(b) an application based on subsection 5(2) may be made by or against a deceased spouse's estate.

Do you see it? If so, well done. If not, you're not alone — because in our experience, many lawyers and judges don't know about it either. But you will definitely know about the *Bradford* Problem after reading Justice Labrosse's decision in *Bradford Estate* (and, in the meantime, here's another hint — the Court of Appeal discussed the problem, albeit primarily in the bankruptcy context, in *Rusinek & Associates Inc. v. Arachchilage* (2021), 51 R.F.L. (8th) 253 (Ont. C.A.), and we briefly discussed it in our comment on *Rusinek* in the 2021-20 (May 24, 2021) edition of *TWFL*). It is a "deadly" trap for the unwary.

The husband and wife in *Bradford Estate* were married in 2015 and separated in 2018. During the marriage, they purchased a home together and took title as joint tenants. The husband retired from his employment and, as he had a pension, the wife became entitled to a survivor pension when he retired.

After the husband and wife separated, they both retained counsel, and started trying to resolve their family law issues. However, during the negotiations, and before either party started litigation, the husband became seriously ill. He was hospitalized twice in April 2020, and he died on May 7, 2020.

As the husband and wife owned the matrimonial home as joint tenants, the wife became its sole owner upon the husband's death by right of survivorship. She also presumably started receiving monthly payments from her survivor pension, although this is not entirely clear from Justice Labrosse's decision.

In October 2020, the husband's estate commenced an Application against the wife for an equalization payment under the *Family Law Act* . . .

See the problem? The wife (or at least her lawyer) certainly did, because she responded to the estate's Application by moving to have the claim summarily dismissed. She argued that while ss. 5 and 7 of *Family Law Act* permit a deceased spouse's estate trustee to *continue* a claim for an equalization payment that was started prior to the spouse's death, those sections do not allow an estate to *commence* a claim for an equalization payment. And, since no such claim was started before the husband died, according to the wife, that was the end of the matter.

Despite some creative arguments by the estate (including that it would have been incredibly difficult for the husband to start the claim when he first became ill in April 2020, since the courts were largely closed because of COVID), Justice Labrosse agreed with the wife (and the clear wording of the *Act*), and dismissed the claim for an equalization payment entirely. In doing so, his Honour provided an excellent roadmap for understanding why the provisions of ss. 5 and 7 of the *Act* preclude an estate from commencing a claim for an equalization payment:

[34] . . . a. **The right to equalization was a personal right between [the husband] and [the wife].**

b. Section 5(1) of the FLA permitted either [the husband] or [the wife] to claim an equalization payment from the other. In that case, the valuation date would have been the date of separation, being August 14, [2018].

c. **Section 5(2) specifies that when [the husband] died, only [the wife] was entitled to an equalization of net family property if her NFP was lower than [the husband]'s NFP.** In that case, the valuation date would have been the date before his death as per the definition of "valuation date" at s. 4 of the FLA. **There is no corresponding entitlement for the Estate to claim equalization under s. 5(2).**

d. There is logic behind the right to equalization being limited to the surviving spouse given the provisions of s. 6 of the FLA where only a surviving spouse has the right to elect under the will or to claim equalization under s. 5 of the FLA.

e. Turning to s. 7 of the FLA, which deals with applications to the court: **Had [the husband] started his application for equalization under ss. 5(1) or 5(3) of the FLA before his death, either his estate or the [wife] could have continued that claim** under s. 7(2)(a).

f. Pursuant to s. 7(2)(b) of the FLA, the application under s. 5(2) (being the right of [the wife] to claim equalization) may be made against the Estate. This section is clear in the context of [the wife's] right to make a claim under s. 5(2) of the FLA.

g. However, the words "may be made by or against a deceased spouse's estate" opens the door to a claim under s. 5(2) being made by the Estate. I am unable to rationalize a circumstance whereby the Estate would make a claim for [the wife] to receive an equalization given that the right under s. 5(2) is limited to the surviving spouse. Counsel were unable to present me with such a situation. While I appreciate that the wording of s. 7(2)(b) leaves that possibility open, it has no application in the present case. Here, **the application for equalization is clearly made with the Estate of [the husband] seeking an equalization payment from [the wife]. Such a claim is not permitted under s. 5(2) of the FLA.**

h. Finally, when looking at the wording of s. 6 of the FLA, this interpretation of ss. 5 and 7 of the FLA allows for a harmonious application of s. 6 in so far as:

- i. Only the surviving spouse may elect equalization; and,
- ii. Even if the surviving spouse does not make the election, he/she is deemed to have elected to take under the will or receive the entitlement under the Succession Law Reform Act, R.S.O. 1990, c. S.26, or both, as the case may be.

**As such, there is no scenario whereby a new claim for equalization can be forced upon a surviving spouse. [emphasis added]**

Justice Labrosse's interpretation of these provisions of the statute is entirely correct — a trap for the unwary — but entirely correct. Furthermore, while this is not the first time this specific issue has been considered by a court since the *Family Law Act* came into force in 1986 (e.g. the Court of Appeal discussed it briefly *in obiter* in *Rusinek*), his Honour's decision contains the clearest analysis of the issue, by far, that we've seen to date.

Therefore, the *Bradford* Problem, (as you've now no doubt figured out), is that while the *Family Law Act* gives spouses six years from separation or two years from divorce to commence a claim for an equalization payment, and although the statute allows these limitation periods to be extended in certain circumstances, death is an **absolute bar** to a claim for an equalization payment. If a party dies before a claim is commenced, that is the end of it. Call your insurer. The claim is done, and there is literally nothing that can be done to revive it (although as discussed further below, depending on the facts, there *may* be ways to try and mitigate the problem).

To paraphrase what we said in our comment on *Rusinek*, the time has come to seriously consider whether s. 7(2) of the *FLA* needs to be amended to fix the *Bradford* Problem. There is no logical reason to allow an estate trustee to **continue** a claim that was started a day before the spouse died, but to impose an absolute bar against the same estate commencing a claim the day after the spouse dies. All this does is encourage separated spouses to commence litigation to avoid their estate being later barred from starting a claim if they die.

That being said, all may not be lost for the estate in this case, as it is presumably still open to it to start a new claim for unjust enrichment based on *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.), and/or for an order confirming that the joint tenancy for the matrimonial home was severed by conduct based on *Hansen Estate v. Hansen* (2012), 9 R.F.L. (7th) 251 (Ont. C.A.); *Davison v. Davison Estate*, 2009 CarswellMan 462 (C.A.). While these claims are far more discretionary than a claim for an equalization payment, a court might be more inclined to exercise its discretion in favour of the estate in this case (and similar such cases) to at least partially compensate it for the equalization payment that it would have otherwise received but for the *Bradford* Problem.

So what does all of this mean in terms of the advice you should be giving your clients? When dealing with either an elderly client or a client who is unwell, you must have a serious discussion with them about the *Bradford* Problem, and the fact that their estate will **not** be able to claim an equalization payment if the claim is not started while they are still alive. You should also mention the same is also true for their former spouse, and that this could result in a windfall in their favour depending on the facts of their

particular case. That way, they can make an informed decision about how to proceed. And, of course, be sure to memorialize your discussion and instructions in writing so as to avoid getting successfully sued by the disappointed beneficiaries of the out-of-luck estate: *Meier v. Rose*, 2012 CarswellAlta 185 (Q.B.); *Graham v. Bonnycastle*, 2004 CarswellAlta 1098 (C.A.); *Byrn v. Farris, Vaughan, Wills & Murphy LLP*, 2017 CarswellBC 3724 (C.A.); *Hall v. Bennett Estate*, 2003 CarswellOnt 1730 (C.A.).

Careful and defensive counsel should also add the *Bradford* Problem to the list of issues discussed with clients during initial consultations (along with limitation periods, severing joint tenancies, changing beneficiary designations, etc.).

Hopefully the *Bradford* Problem will be addressed by the Ontario Legislature. And while they're at it, maybe they can also fix that little matrimonial home problem too? Hope springs eternal.

### Be Careful What You Wish For in Friendly Manitoba

*Esler v. Busch* (2022), 75 R.F.L. (8th) 18 (Man. Q.B.), reversing, (2022), 72 R.F.L. (8th) 462 (Man. Q.B.) — Leven J.

This case deals with the application of Rule 24.02(1) of Manitoba's *Court of King's Bench Rules*, Man. Reg. 553/88 (the "*Rules*"), known as the "Drop-Dead" Rule, in the context of a family proceeding. Go figure: "Friendly Manitoba" has a "Drop-Dead" Rule enforced by "Masters."

The parties lived together from July 2011 to September 2015. Mr. Esler filed a Petition shortly after the parties separated in September 2015, requesting a variety of relief, including parenting and child support orders related to the parties' son, and an equal division of family property. Ms. Busch filed an Answer in December 2016 seeking, among other things, spousal support from Mr. Esler. Ms. Busch agreed to an equal division of family property.

In 2017 and 2018, the Court made a few interim orders relating to parenting matters, including a consent order dated August 30, 2018.

From August 30, 2018 to September 9, 2021, there was no significant activity on the file. On September 9, 2021, Mr. Esler filed a motion under Rule 24.02(1) of the *Rules* for an Order dismissing Ms. Busch's Answer for delay (in the alternative, he sought an Order dismissing the relief set out in his Petition and in Ms. Busch's Answer for division of family property). Ms. Busch then filed her own motion to dismiss Mr. Esler's motion to dismiss.

Rule 24.02(1) of the *Rules* provides as follows:

#### **24.02(1) Dismissal for long delay**

If three or more years have passed without a significant advance *in an action*, the court *must*, on motion, *dismiss the action* unless

- (a) all parties have expressly agreed to the delay;
- (b) the action has been stayed or adjourned pursuant to an order;
- (c) an order has been made extending the time for a significant advance in the action to occur;
- (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
- (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing. [*emphasis added*]

As the Manitoba Court of Appeal explained in *Buhr v. Buhr*, 2021 CarswellMan 229 (C.A.), Rule 24.02 is part of an overhaul of the *Rules* "intended to expedite and bring finality to civil proceedings." It is "a drop-dead rule that provides for dismissal when there has been three or more years of inactivity on a case. The rationale for the rule is to weed out inactive cases, and address complacency in advancing civil actions."

The Master hearing the motions first considered whether Ms. Busch's Answer constituted an "action" for the purposes of Mr. Esler's motion. The Master noted that the definition of "action" in Rule 1.03 of the *Rules*, which refers to counterclaims and petitions, does not explicitly mention "answers":

"**action**" means a civil proceeding, other than an application, that is commenced in the court by,

- (a) a statement of claim,
- (b) a counterclaim,
- (c) a crossclaim,
- (d) a third or subsequent party claim, or
- (e) a petition;

The Master concluded that the portions of Ms. Busch's Answer that raised a new issue or fresh claim for relief represented a "counterclaim" for the purposes of Mr. Esler's motion. As Ms. Busch's request in her Answer for spousal support was a "new issue or fresh claim", it could properly be considered a counterclaim for the purposes of Mr. Esler's motion.

The Master was not satisfied that there was a significant advance on Ms. Busch's part in relation to her spousal support counterclaim, and did not find that any of the statutory exceptions were available to Ms. Busch. As a result, the Master dismissed Ms. Busch's spousal support counterclaim under Rule 24.02(1) of the *Rules*.

The Master ruled that the parties' claims relating to the division of family property could continue, as Mr. Esler had claimed an equal division of family property in his Petition, and Ms. Busch had simply repeated what had already been claimed by Mr. Esler in her Answer.

Ms. Busch appealed.

Justice Leven of the Manitoba Court of Queen's Bench started by noting that the application of the Drop-Dead Rule in civil litigation is straightforward — the plaintiff files a Statement of Claim, which outlines a claim, the defendant then files a Statement of Defence or a Counterclaim, and if nothing significant happens for three years, and one of the parties makes a motion, the court terminates the litigation *in its entirety*, with the result being that the plaintiff owes nothing to the defendant and the defendant owes nothing to the plaintiff. As Justice Leven noted, even if the plaintiff brought the motion to dismiss, it would be unfair for the court to terminate the Counterclaim while leaving the Statement of Claim intact. The only fair outcome is to terminate both the Statement of Claim and the Counterclaim — to terminate the litigation *in its entirety*.

Justice Leven observed that, in family proceedings, a Petition is analogous to a Statement of Claim, and an Answer is at least partly analogous to a Statement of Defence.

After considering the purpose of a Petition and of an Answer, and the purpose of Rule 24.02(1) of the *Rules*, Justice Leven applied the Rule and dismissed Ms. Busch's Answer in its entirety *and Mr. Esler's Petition*:

[47] I agree with [Mr. Esler's] counsel that the Rules are sometimes a bit "clunky" when they are applied to family proceedings. It makes perfect sense that the Rules define an "action" as a proceeding "commenced" by a statement of claim or by a petition. It also makes sense that the definition includes counterclaims. When we think carefully about how an Answer usually functions, it also makes sense that this definition does not explicitly mentions Answers. An Answer is a unique pleading that looks a little like a Statement of Defence and a little like a counterclaim. However, it would be a stretch to say that an Answer "commences" a proceeding in the same way that a counterclaim does. It would be more accurate to say that, in relation to a proceeding that was commenced by a Petition, an Answer sometimes better defines the parameters of the existing proceeding.

[48] If we look at the purpose of the drop-dead Rule, as eloquently explained by the Court of Appeal in *WRE [Development Ltd. v. Lafarge Canada Inc., 2022 CarswellMan 26 (C.A.)]*, it makes sense that, **just as the drop-dead Rule puts an end to all the litigation commenced by the Statement of Claim and by any counterclaim, in family litigation the Rule puts an end to all of the litigation outlined in both the Petition and the Answer.** As the court said in *WRE*, the Rule brings finality to civil proceedings.

[49] It makes no difference that the Petitioner [Mr. Esler] (not the Respondent [Ms. Busch]) is the party asking that both the Petition and the Answer be dismissed. The Rule could easily have said that, in family proceedings, only a Respondent can make a motion to invoke the drop-dead Rule. There is no such wording. [**emphasis added**]

In other words, the Master erred in dismissing *only* Ms. Busch's spousal support counterclaim and not dismissing the proceeding *in its entirety*.

Justice Leven dismissed Mr. Esler's Petition and Ms. Busch's Answer due to the three years of unexplained inaction, but noted that either party could start fresh litigation in order to protect the best interests of their son, if those interests were ever threatened.

We're not entirely sure this is what Mr. Esler contemplated when he brought his motion to dismiss Ms. Busch's Answer, or what Ms. Busch contemplated when she appealed the lower court's decision — but this is a lesson to parties in Manitoba to be mindful of the "Drop-Dead" Rule and to proceed with caution when bringing a motion seeking dismissal for delay.

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