FAMLNWS 2023-18
Family Law Newsletters
May 8, 2023

— Franks & Zalev - This Week in Family Law

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Being a Grandparent Is Not All Fun and Games

S.L.L. v. D.B.L. (2022), 82 R.F.L. (8th) 379 (Sask. K.B.) — Brown J.

S.L.L. involved a claim for child support by the children's grandmother against their grandfather, and reminds us that although s. 5 of the *Child Support Guidelines* is most commonly used to claim child support from a step-parent, in appropriate circumstances, it can also be used to claim child support from other caregivers.

The basic facts are straightforward. In 2012, the local child protection agency removed the two children from the care of their parents, and placed the children with their grandparents. The decision does not indicate the ages of the children, but it appears they were both quite young when they were removed from their parents' care.

The parents were not involved with the children after they were placed with the grandparents. Nor did the parents provide any financial support for them.

The grandparents separated in 2019. After they separated, the children lived primarily with the grandmother.

In 2021, the grandmother started a claim for child support against the grandfather for both children. The grandfather opposed the grandmother's claim on the basis that he was not the children's parent, and was only a foster caregiver.

When dealing with a claim for child support between *married* spouses, s. 2(2)(a) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) provides that a child includes "any child for whom [the spouses] both **stand in the place of parents**."

As an aside, s. 2 of Saskatchewan's *Family Maintenance Act, 1997*, S.S. 1997, c. F-6.2 uses different wording than s. 2(2)(a) of the *Divorce Act*, and provides that a parent includes "a person who has demonstrated a **settled intention** to treat a child as a child of his or her family, other than a person who is providing foster care services as defined in *The Child and Family Services Act*." However, as neither party argued that different tests applied under each statute, and as the grandmother had claimed relief under both statutes in any event, Justice Brown proceeded on the assumption that the test under both statutes was the same.

However, this was a questionable way to proceed. Many cases suggest that the *Divorce Act* test for "*in loco parentis*" is strictly *objective* whereas the "**settled intention**" test in the *Family Maintenance Act* (and other similarly worded provincial acts) is *subjective*. That is, there is authority that to have a "settled intention" the person in question must have the subjective intention to assume a parental obligation before child support can be ordered against them. See, for example: *R.C. v. C.W.* (2003), 49 R.F.L. (5th) 11 (Ont. S.C.J.); *W. (T.) v. L. (S.)* (2017), 92 R.F.L. (7th) 130 (Sask. Q.B.); *A. (T.) v. A. (R.C.)* (1999), 48 R.F.L. (4th) 205 (B.C. S.C. [In Chambers]); *R.N.H. v. G.C.-B.* (2004), 24 R.F.L. (6th) 459 (Sask. Q.B.); *L.S. v. C.S.*, 2002 CarswellOnt 1684 (C.J.); and *B. (K.L.) v. M. (J.)* (2005), 14 R.F.L. (6th) 1 (Ont. C.J.). That said, we point out that these cases tend to be "wrongful

paternity" cases where a mother falsely asserts the identity of the biological father. Therefore, it *may* be that the different tests would not support different outcomes on the facts of the case. But that is far from given.

Justice Brown started his analysis by reviewing the principles that the Supreme Court of Canada established almost 25 years ago in *Chartier v. Chartier* (1999), 43 R.F.L. (4th) 1 (S.C.C.) (under the *Divorce Act*), including the following:

> 1. "Once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult." [para. 32]
>
> 2. "The existence of the parental relationship under s. 2(2)(b) of the *Divorce Act* must however be determined as of the time the family functioned as a unit." [para. 36]
>
> 3. "Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship." [para. 39]
>
> 4. "The Court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention from actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, i.e., a child of the marriage." [para. 39]
>
> 5. The relevant factors the court should consider include, but are not limited to, the following:
>
> > . . . whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent." [para. 39]
>
> 6. "Once it is shown that the child is to be considered, in fact, a 'child of the marriage', the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the application of the *Divorce Act*." [para. 39]
>
> 7. " . . . not every adult-child relationship will be determined to be one where the adult stands in the place of a parent. Every case must be determined on its own facts and it must be established from the evidence that the adult acted so as to stand in the place of a parent to the child." [para. 40]

Justice Brown also reviewed Justice Baynton's decision in *Major v. Major*, 1998 CarswellSask 822 (Q.B.), where his Honour set out the following additional factors for courts to consider when assessing whether a person stood in place of a parent for child support purposes:

> [26] . . .
>
> • changing the child's name to that of the respondent
>
> • discussing the possibility of adopting the child
>
> • the child's reference to the respondent as "Dad" or "Mom"
>
> • the child's perception of the respondent as a father or mother figure
>
> • the age of the child
>
> • the duration of the child's relationship with the respondent

- whether the respondent participates in disciplining the child
- whether the respondent provided financial support for the child
- whether the application is for interim or final support
- whether there has been any intention to terminate the relationship
- whether the child has a relationship with the non-custodial biological parent
- whether any other person is obligated to support the child
- whether the respondent spends time personally with the child
- whether the respondent is a "psychological parent"
- whether the respondent has ever sought custody of or access to the child
- the nature of the post separation conduct of the applicant or the respondent, such as a denial by the applicant of access to the child by the respondent.

As the Court was only being asked to decide the issue on an interim basis, the grandmother only needed establish a *prima facie* case for relief: *Bodner v. Huckerby*, 2013 CarswellSask 173 (Q.B.) at para. 10. And, on the record before the Court, there was no question that the grandmother had met her onus given that the grandfather had "cared for and raised the boys for ten years", and he and the grandmother had been "for all intents and purposes [the children's] parents, even though they are simultaneously their grandparents."

The more difficult question was what amount of child support, if any, the grandfather should be required to pay pending trial pursuant to s. 5 of the *Child Support Guidelines*, which states as follows:

> 5. Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

[See also s. 3(2) of the *Family Maintenance Regulations, 1998*, R.R.S. c. F-6.2 Reg. 1, which provides that "a reference to 'spouse' in the *Child Support Guidelines* is to be read as a reference to parent as defined in s. 2 or 4 of the *Act*, or to another person bringing an application in accordance with s. 12 of the Act, as the case may require."]

After finding that the grandfather's income for support purposes totalled $51,303 a year, which would have resulted in Table child support of $708 a month for the two children, Justice Brown found that it would be appropriate to reduce the monthly child support payments by 15% (to $602 a month). He did this because the evidence showed that the grandfather was responsible for carrying many of the debts the parties incurred during the relationship, and because TD Bank had recently obtained a civil judgment against him.

The grandfather also tried to argue that his support obligations should be reduced further because the children's biological parents had the ability to help support them. However, he did not adduce any admissible evidence to support this argument, and he had also not named the biological parents as parties to the proceeding or made a separate claim against them. Justice Brown dealt with this issue by directing that if the grandfather wanted to pursue this argument at trial, he would first need to "bring an application against the biological parents after this order should he truly believe that to be the case." [This is basically what the B.C. Court of Appeal suggested was appropriate — to have the natural parents before the Court — in *H. (U.V.) v. H. (M.W.)* (2008), 59 R.F.L. (6th) 25 (B.C. C.A.). The primary obligation is on the natural parents.]

While it would have been useful for our purposes had the decision contained some further analysis about how to *calculate* the appropriate level of child support that should be paid in these types of cases, the result is certainly reasonable enough in the circumstances, and provides, to use the words of Justice Zuber in *Sypher v. Sypher* (1986), 2 R.F.L. (3d) 413 (Ont. C.A.), "a reasonably acceptable solution to a difficult problem until trial."

Leaving No *Stone* Unturned

Ontario Securities Commission v. Camerlengo Holdings Inc., 2023 CarswellOnt 1537 (C.A.) — Huscroft, Miller and Nordheimer JJ.A.

Astute readers will notice that this is not a family law case. But it could be very useful for family law litigants as creative counsel might consider using it to further extend the reach of *Stone v. Stone* (2001), 18 R.F.L. (5th) 365 (Ont. C.A.), wherein the Ontario Court of Appeal considered the applicability of the Ontario *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*") where one spouse disposed of or transferred assets prior to separation and when his death was imminent.

By way of reminder, in *Stone*, the parties had been married for about 25 years. It was a second marriage for both parties and each had children from their first marriage.

Mr. Stone's death was imminent. In April 1995, without Ms. Stone's knowledge, Mr. Stone transferred most of his wealth to his two children from his previous marriage. Mr. Stone then died shortly later, in July 1995, and there was little left in his estate.

Ms. Stone elected to claim her equalization entitlement rather than under Mr. Stone's will. However, as Mr. Stone had given away the vast majority of his wealth to his children, Ms. Stone sought to void those transfers under the *FCA*.

The question was whether Ms. Stone qualified as a "creditor or other" under s. 2 of the *FCA*:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud **creditors or others** of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. [**emphasis** added]

According to the Court of Appeal, in order to qualify as a "creditor or other," Ms. Stone had to have had:

> [25] . . . ***an existing claim*** against her husband at the time of the impugned conveyances, that is a right which she could have asserted in an action. [***emphasis*** added]

That is, for the transfer to be a fraudulent conveyance, Ms. Stone would have had to have a current right to equalization.

Furthermore, according to the Court of Appeal, there was no continuous running "debtor and creditor" account or relationship between spouses — so for a conveyance to be fraudulent, it would have had to take place on the occurrence of a "triggering event" under s. 5 of the *Family Law Act*, R.S.O. 1990, c. F.3:

> **Equalization of net family properties**
>
> **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**
>
> (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).

> **Improvident depletion of spouse's net family property**
>
> (3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation. R.S.O. 1990, c. F.3, s. 5 (3).

Therefore, because the Stones had *not separated* at the time of Mr. Stone's death, *and* because the Court of Appeal held that spouses are *not in a continual debtor-creditor relationship*, for Ms. Stone to be a creditor, she had to bring herself within s. 5(3) and show that Mr. Stone was improvidently depleting his assets. The problem, of course, was that, as Ms. Stone did not know that Mr. Stone was depleting his assets, how could she have brought an application under s. 5(3) to stop it?

To get themselves out of a slight jurisprudential corner, the Court of Appeal reasoned:

> [30] **Because Mr. Stone's death was known by all to be imminent, Mrs. Stone's claim to a right to equalization was also imminent** and would have been triggered by his death. One of the effects of s. 5(3) of the *Act* is to provide a remedy to a spouse in those circumstances where the other spouse seeks to divest himself or herself of his or her property in anticipation of death and in order to defeat the spouse's claim to equalization. **Had Mrs. Stone exercised that remedy by commencing an application, she would have been a "creditor or other"** of Mr. Stone within the meaning of s. 2 of the *Fraudulent Conveyances Act* on the date she commenced the application.
>
> [31] The trial judge made the following finding on the issue:
>
> . . . It is clear to me that Mrs. Stone may well have resorted to this provision and was at least entitled to the chance but of course **Mr. Stone kept the full extent and nature of his dealings a secret from her**. [citation omitted]
>
> [32] That finding is fully supported by the evidence including Mrs. Stone's stated intention to contest the will and, of course, by this litigation. I agree with the trial judge that **Mr. Stone and his children could not, by deliberate non-disclosure, deprive Mrs. Stone of her ability to establish the legal status of "creditor or other". Because she had the right to apply for equalization at the time of the transfers, but was deprived of her ability to exercise that right by the actions of Mr. Stone and his children, the parties to the transfers, she was a "creditor or other" within the meaning of the *Fraudulent Conveyances Act***. [**emphasis** added]

Respectfully, it would have been simple — and "cleaner" — for the Court of Appeal to have accepted the proposition (put forward by the trial judge) that spouses — at least in an equalization province are, in fact, in (at least a quasi) continuous debtor-creditor relationship. And this is why *Camerlengo* is interesting.

In *Camerlengo*, the Ontario Court of Appeal held that it is not necessary for a creditor to actually be in existence — or even known — to the debtor at the time of an alleged fraudulent conveyance. Rather, it is sufficient that the debtor *perceived* the risk of a claim *from a general class of possible future creditors*, and conveyed property with the intention to evade such creditors — if they later arose.

A short recitation of the facts will suffice to show how *Camerlengo* may be useful in the hands of skilled family law counsel, or courts looking to do justice between parties.

Mr. Camerlengo was a retired electrician. He was the sole director of Camerlengo Holdings Inc. In 1996, Mr. Camerlengo transferred his interest in the matrimonial home to his wife, Ms. Camerlengo, for no consideration.

The plaintiff alleged that, at the time the property was transferred, Mr. Camerlengo was worried about exposure to personal liability from running his business, such that the transfer of the home was made with the intent of defeating present and future creditors.

Of course, by 2011, Mr. Camerlengo was in financial trouble (otherwise, this would not be much of a story). It was later discovered that one of Mr. Camerlengo's associates had defrauded many of his clients with a fraudulent investment scheme. To make a long story short, the plaintiff claimed that the transfer of Mr. Camerlongo's interest in the home was a fraudulent conveyance and sought to set it aside.

The motion judge dismissed the motion, concluding that the plaintiff was not within the class of people contemplated by s. 2 of the *FCA* because it was not a "creditors or others" at the time of the transfer of the home in 1996. Relying on *Wilfert v. McCallum*, 2017 CarswellOnt 18192 (C.A.), the motion judge concluded that a fraudulent conveyance claim must include particulars such as details of the creditors at the time of the transfer and/or of an impending risky financial venture.

The Court of Appeal overturned the motion judge:

> [11] We agree that the motion judge did not correctly interpret or apply s. 2 of the *FCA*. The case law interpreting s. 2 of the *FCA* is clear that a subsequent creditor — that is, a claimant who was not a creditor at the time of the transfer — can attack a transfer if the transfer was made with the intention to "defraud creditors generally, **whether present or future**.": *IAMGOLD Ltd. v. Rosenfeld*, [1998] O.J. No. 4690, at para. 11; see also *McGuire v. Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44. An intent to defraud creditors generally can be made manifest by taking steps to judgment proof oneself **in anticipation of starting a new business venture**. To plead a fraudulent conveyance on this basis, **it is not necessary that a claimant be able to identify a particular, ascertainable creditor that the debtor sought to defeat at the time of the conveyance**. It is enough, on the case law, to plead facts that support the allegation that **at the time of the conveyance the settlor perceived a risk of claims from a general class of future creditors** and conveyed the property **with the intention of defeating such creditors *should they arise*** . . . [all sorts of ***emphasis*** added]

The Court of Appeal found that the plaintiff had pleaded sufficient "badges of fraud" to support an *inference* of an intention to defraud future creditors so as to allow the fraudulent conveyance claim to at least continue to trial.

If the law is now "clear" that a claimant that was not a creditor at the time of a transfer can subsequently attack a transfer if the transfer was made with the intention to defraud creditors generally — *whether present or future* — might it now be possible to argue that a spouse in the position of Ms. Stone would be a "creditor or other" and able to move against the conveyance without having to resort to s. 5(3)? In our opinion, that would make a great deal of sense. Time will tell.

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