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— Franks & Zalev - This Week in Family Law

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Contents

Race, Culture, Heritage and Mobility — All at Once

AMLC v. BDC, 2023 CarswellAlta 774 (K.B.) — Bourque J.

The Supreme Court of Canada grappled with the issue of "race, culture and custody" in *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.). Essentially, in *Van de Perre*, the Supreme Court opined that if race and culture are made issues at trial — then they are issues for the trial judge to consider in the case — along with all other issues that impact on the best interests of a child.

In *AMLC*, these principles were brought to bear, where the Alberta Court of King's Bench set aside an arbitrator's award in a relocation case for failing to give proper weight to a child's Indigenous heritage and upbringing.

The parties married in 2016 and separated in 2020. They had a four-year-old child together for whom they shared parenting responsibilities.

In May 2021, the mother sent a Relocation Notice to the father pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), stating her desire to move with the child from Alberta to Warren, Manitoba, about 50km northwest of Winnipeg. The father objected. The matter went to arbitration, where the arbitrator found it would not be in the child's best interests to relocate to Manitoba.

The mother appealed to the Alberta Court of King's Bench, where she argued that the arbitrator erred in failing to conduct a "full and sensitive inquiry" into the relocation-specific considerations in s. 16.92 of the *Divorce Act*. For good measure, she also alleged a reasonable apprehension of bias, which did not go anywhere.

In the Alberta Court of King's Bench, Justice Bourque found in favour of the mother and set aside the arbitrator's decision regarding relocation. Justice Bourque found that the arbitrator had erred in the assessment of three of the best interest factors: the nature and strength of the child's relationship with each spouse; each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse; and the child's cultural, linguistic, religious and spiritual upbringing and heritage, including the child's Indigenous roots. In turn, these errors materially impacted the arbitrator's overall assessment of the best interest factors.

Before we get to the places the arbitrator was found to have erred — we pause for a moment to consider an area where the Court found the arbitrator did *not* err: s. 16(3)(a) — "a consideration of the child's needs, given the child's age and stage of development, such as the child's need for stability."

The mother argued that the arbitrator erred by extensively focusing her analysis on financial factors relating to each parent, concluding that both parties could provide a stable home for the child, which they had been able to do both as a married couple and as separated parents. The mother argued that the arbitrator was unfairly critical of her, and that she had failed to recognize improvements in the mother's finances or to recognize the long-term stability that would arguably be provided in Manitoba, with the benefit of family support.

Here, the arbitrator did not err. According to Justice Bourque:

> [31] In my view, the Arbitrator did not err. She was presented with financial information regarding both parties, considered it and made findings of fact available to her on the evidence. Moreover, I reject the [mother's] submission that the Arbitrator improperly assessed this factor by focusing on her financial stability since [the mother's] written submissions before the Arbitrator were focused almost exclusively on financial considerations and on [the mother's] submission that [the father] was unreliable as a co-parent. The [mother] cannot now complain that the Arbitrator improperly assessed the evidence pertaining to this factor when she focused her submissions on financial considerations.

So, let this be a lesson. Akin to that which the Supreme Court of Canada said in *Van de Perre* — if a party makes finances and financial ability a material issue in a mobility case, then the court is properly going to make that a material consideration in the best interests analysis. A party cannot focus on an issue — or on one specific part of the best interest factors — and then complain that the trial judge walked through the open door.

Now, back to the errors . . .

Pursuant to s. 16(3)(b), the arbitrator was to consider "the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life."

Here, the Court agreed that the arbitrator improperly focused on the fact that the mother focussed on her own strong family attachments instead of on the father's role in the child's upbringing. The mother was allowed to advance the facts to support her case and to advocate for her own position. Similarly, the Court was also critical of the arbitrator for faulting the mother's sister (in her affidavit) for not positively commenting on the father's relationship with the child. Clearly, the purpose of the mother's sister's affidavit was to support the mother's wish to relocate and to provide additional context (particularly as it related to the factor in s. 16(3)(f) with respect to Métis/francophone culture and heritage, discussed further below). The Court also noted that this was a very one-sided critique, as the arbitrator did not similarly comment on the fact that the father had offered no evidence on the importance of the child's relationship with the mother.

Pursuant to s. 16(3)(c), the arbitrator was to consider, "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse."

Here, again, the Court determined the arbitrator to have been unbalanced in commentary. The parenting plans of each spouse were similar in terms of time proposed to be spent with the other parent. However, whereas the arbitrator specifically noted that the *mother's* proposed parenting schedule time reduced the father's ability to be a "present, active participant" in the child's life — no similar comment was made with respect to the *father's* proposed parenting schedule with respect to the mother. In fact, the arbitrator specifically referenced the relocation application as a basis for finding that the mother was unwilling to support the child's relationship with the father. This, of course, was inappropriate and would render this factor nugatory, as the very fact of a relocation application would be viewed as negative. Here, in fact, neither proposed parenting plan was one-sided, it is just that one favoured frequency over duration of visits and the other favoured the opposite.

Finally, pursuant to s. 16(3)(f), the arbitrator was mandated to consider, "the child's cultural, linguistic, religious, and spiritual upbringing and heritage, including Indigenous upbringing and heritage."

The mother and child were francophone and Métis of the Red River Métis Nation in Manitoba. Neither party disputed that the Red River Métis Nation was distinct from other Métis nations. In addition, the mother had presented clear evidence as to

how these nations were distinct, and the arbitrator commented on the mother's extensive evidence as to the benefits of being raised in a Métis/Francophone culture in Manitoba, surrounded by family, friends, and a supportive community, as well as the importance of that heritage.

However, notwithstanding those comments, in considering the child's cultural, linguistic, and Indigenous upbringing and heritage — that of the Red River Métis Nation in Manitoba — the Award did not mention that Red River Métis and Alberta Métis are distinct and was, in fact, critical of the mother for not accepting exposure to Métis culture in Alberta as a reasonable "substitute."

While there is certainly nothing wrong with exposing a child to different cultures and heritages — as noted by Justice Bourque, s. 16(3)(f) specifically requires consideration of the child's cultural, linguistic, and Indigenous heritage and upbringing. Therefore, given the child's distinct culture, exposing him to Alberta Métis culture and heritage, while not inherently wrong, should not be considered a "substitute" for exposure to his own distinct Indigenous culture, heritage, and upbringing. Therefore, the mother's reluctance to have the child participate in Métis activities in Alberta had to be understood in that context.

This seeming oversight led Justice Bourque to believe that the arbitrator either forgot, ignored, or misconceived the evidence of the distinction between the Red River Métis and Alberta Métis in a way that affected her findings in a material way. Instead, the arbitrator was critical of the mother.

And, while the father was of Scottish heritage, the father himself acknowledged that his connection to his heritage was not as strong as the mother's connection to hers. And as the father provided little-to-no evidence of the importance he may attach to his Scottish heritage, it was clearly not something that the arbitrator should have spent much time considering. Again, if culture and heritage is an important factor in the case — signal that to the court by making it an important factor in the case. As the Supreme Court noted in *Van de Perre*:

> [43] In fact, in this Court, counsel for the respondents stated that "neither of the parties wanted to touch it, because it's so *politically incorrect* to say that race has any bearing" [emphasis in original]. This is an unacceptable reason for counsel to fail to raise evidence on a factor that he or she believes may impact the best interests of the child. Without evidence, it is not possible for any court, and certainly not the Court of Appeal, to make a decision based on the importance of race. . . .

As a result, Justice Bourque concluded that the arbitrator had erred and that the errors materially impacted the arbitrator's overall assessment of the relocation application. Accordingly, the award prohibiting the move was set aside, and the mother was given permission to renew her relocation application in the Court of King's Bench.

There's More than One Way to Skin the Validity of Marriage Cat . . . (And if We're Not Married — Can I Throw You Out of My House?)

Anthony v. Oqunbiyi, 2023 CarswellOnt 1216 (S.C.J.) — Shaw J.

In many provinces (mostly those east of Manitoba), there are still significant differences in rights and entitlement for married spouses as opposed to common law spouses. Therefore, whether or not the parties are parties to a valid marriage can make a significant difference with respect to property rights and, in this case, the right to be in possession of the "matrimonial" home: no "matrimony" . . . no matrimonial home.

Anthony claimed a declaration that the parties were not married. Oqunbiyi contested that claim on the basis that the parties participated in a religious ceremony at their church in which they were married on December 18, 2004. Ultimately, Anthony was seeking this declaration in an effort to have Oqunbiyi removed from the home on the grounds of trespass. Nice. The parties had two children, aged 17 and 14.

At the time of the ceremony, the parties were living together and Oqunbiyi was pregnant with their first child. Oh — and Anthony was still married to another woman from whom he was not divorced until August 16, 2005. D'oh!

Oqunbiyi relied on s. 31 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3 (the "*Marriage Act*") which states as follows (most provinces have the same deeming provisions):

> 31. If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as a married couple, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.

This provision is meant to overcome technical deficiencies in the formal validity of the marriage where the parties really intended to enter into a marriage in compliance with the *Marriage Act*, and subsequently lived together as a married couple.

Oqunbiyi arrived in Canada from Nigeria. She did not know the marriage laws in Ontario. She truly believed that she and Anthony were legally married. While she admitted that Anthony later told her that he was not yet divorced from his first spouse, she argued that the court could avail of s. 31 of the *Marriage Act* to deem their marriage to be valid.

In making her argument, Oqunbiyi ultimately relied on *Lalonde v. Agha* (2021), 62 R.F.L. (8th) 268 (Ont. C.A.), which interpreted s. 31 of the *Marriage Act*, and in which the Court of Appeal found that in considering whether to make an order deeming a *formally* invalid marriage to be valid, the court can consider the subjective good faith and intentions of the parties. [In *Lalonde*, the Court of Appeal also held that s. 31 can serve to validate a marriage performed outside of Ontario — something we were not terribly pleased with — see our comment in the 2022-07 (February 21, 2022) edition of *TWFL*. But we digress.]

Justice Shaw was of the (correct) view that s. 31 of the *Marriage Act* did not assist Oqunbiyi. As Anthony was party to a prior subsisting marriage at the time of the marriage to Oqunbiyi, he was not able to enter another marriage at the time. The marriage was void *ab initio* and s. 31 of the *Marriage Act* was of no assistance. The deeming provision in s. 31 of the *Marriage Act* cannot be used to fix a problem with the essential validity of a marriage, such as where a party, as Anthony, was under a legal disqualification: *Giron v. Giron*, 2017 CarswellOnt 9594 (S.C.J.). It did not matter that both parties *may* have intended the ceremony to be a marriage ceremony (which Anthony denied), or that they lived together for a number of years.

Justice Shaw then notes:

> [13] Having found that the parties are not married, **they are not spouses, as defined in s. 1(1) of the *Family Law Act***, R.S.O. 1990, c. F-3. I therefore declare that the property is not a matrimonial home . . . [emphasis added]

But s. 31 of the *Marriage Act* is not the end of the "validity of marriage" road; and the definition of "spouse" in s. 1(1) is, in fact, the start of *another* road to a declaration of marriage validity — a road Oqunbiyi did not seemingly opt to travel.

Section 1(1) of the Ontario *Family Law Act*, R.S.O. 1990, c. F-3 states:

> "spouse" means either of two persons who,
>
> (a) are married to each other, or
>
> (b) have together **entered into a marriage that is voidable *or void*, in good faith on the part of a person relying on this clause to assert any right.** [emphasis added]

From what we know of the facts, it appears that Oqunbiyi could have argued that she met the definition of "spouse" in s. 1(1) of the *Family Law Act*, having entered into a marriage in good faith, albeit void *ab initio*. From what we know, Oqunbiyi did not, at the time of the marriage, know that Anthony was party to a prior subsisting marriage. This is the very purpose of the "good faith marriage" provisions of the *Family Law Act*. Unfortunately, Oqunbiyi did not argue her case from that perspective.

In the meantime, Anthony was trying to have Oqunbiyi removed from his home as it was not a matrimonial home — and if it was not a matrimonial home, there was no right of possession. Anthony argued that *Anness v. Kovacs*, 2012 CarswellOnt 16463 (S.C.J.), in which the Court ordered the non-owner common law spouse to vacate the property, supported his position. However, in *Kovacs*, the non-owner spouse did not respond to the application.

Here, however, there was a fair amount of conflicting evidence regarding the purchase and sale of the property and what, if anything, Oqunbiyi had contributed.

In *Abdulaziz v. El Zahabi*, 2022 CarswellOnt 5825 (S.C.J.), Justice MacKinnon reviewed a number of cases where an owner common-law spouse was trying to evict the non-owner spouse. Notably, in many of those cases the non-owning spouse was claiming a trust interest in the property based on alleged contributions to the property. Of all the cases reviewed by Justice MacKinnon, only in *Kovacs* was the unmarried non-owner ordered to vacate the property. In the other cases, the non-owner was allowed to remain in the property on the basis that the trust claim may ultimately be proven meritorious from which a right to possession would flow.

This — a *bona fide* claim for an interest in the property — is certainly, we suggest, a valid reason for not evicting a common law spouse. It is a far stronger basis than that offered in some other cases. For example, in *Lewis v. Oriji*, 2009 CarswellOnt 297 (S.C.J.), the non-owner was allowed to remain in the home on an interim basis (despite there being no reasonable trust claim) because there was "lawful justification" for the non-owner spouse to continue to live there. And in *Abdulaziz*, while the Court found no reasonable claim for unjust enrichment or resulting trust, the non-owner spouse was allowed to remain in the home because "the balance of convenience" favoured her and the children remaining in the home pending sale. Respectfully, these are not strong justifications, no matter how unsavoury it may be to force a common law spouse to vacate. Respectfully, bad statutory law (no property rights for unmarried spouses) cannot be fixed with strained statutory interpretation.

In this case, again, there was conflicting evidence with respect to the financial contributions made by each party to the property. Oqunbiyi alleged that she had had been paying $580.98 every month for the mortgage on the property since October 2010. And there was some evidence to support that claim.

Although Oqunbiyi had not claimed unjust enrichment or a constructive trust — thinking she was entitled to equalization — Justice Shaw noted that she may seek leave to amend her Application to make those claims (although she could, we suppose, revisit the issue of her spousal status as noted above). And a bona fide trust claim is a means by which Oqunbiyi could argue to remain in the home until the matter is adjudicated.

While Justice Shaw picks up on the "lawful justification" language from *Lewis*, she also considered that Oqunbiyi had been living in the property since at least 2017 and that there had been some "acquiescence to [Oqunbiyi's] presence which seems at odds with a claim she is trespassing, particularly if she has been contributing to some degree to the carrying costs of the property." Interesting — perhaps another argument that non-owner common-law spouses can make in the future.

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