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

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Breaking News: Court of King's Bench of Manitoba Issues Practice Direction Regarding the Use of Artificial Intelligence in Court Materials

Even if you have not used ChatGPT yourself, you have likely heard about it in the news — it is an AI bot that follows an instruction in a prompt and provides a detailed response. If you ask ChatGPT to draft a friendly break-up email to your significant other, it will generate such a well-written, heartfelt message that all you will need to do is insert your (soon to be ex-) significant other's name and press send. No editing required.

You likely heard about the case in the United States that made the news a month or so ago, in which a lawyer used ChatGPT for legal research, and unbeknownst to the lawyer, ChatGPT cited at least six cases that did not exist — ChatGPT just made them up completely. (In AI speak, it's called a "hallucination"; and not the good kind.) The lawyer then cited and relied on these decisions in his court filing. The Court ultimately imposed sanctions on the two lawyers who submitted the court filing that included the fictitious case citations generated by ChatGPT, and found that they acted in bad faith.

In an attempt to avoid something similar happening in Manitoba, on June 23, 2023, the Court of King's Bench of Manitoba issued a Practice Direction on the "Use of Artificial Intelligence in Court Submissions", which states:

> With the still novel but rapid development of artificial intelligence, it is apparent that artificial intelligence might be used in court submissions. While it is impossible at this time to completely and accurately predict how artificial intelligence may develop or how to exactly define the responsible use of artificial intelligence in court cases, there are legitimate concerns about the reliability and accuracy of the information generated from the use of artificial intelligence. **To address these concerns, when artificial intelligence has been used in the preparation of materials filed with the court, the materials must indicate how artificial intelligence was used.** [emphasis added]

The Practice Direction comes into effect immediately.

We expect the courts in the other provinces and territories will follow Manitoba's lead. In the meantime, we stress that lawyers should proceed with *extreme* caution when using AI in their practice. While there is nothing inherently improper about lawyers using a reliable AI tool for assistance, they cannot abandon their obligation to ensure the information contained within their court materials is accurate. If they fail to do so, they may face a similar fate to the lawyers in the recent case in the United States. Those that recklessly rely on artificial intelligence show a different sort of intelligence — intelligence that is lacking altogether.

Now, I just have to get back to that really nice email from my significant other . . .

Don't Put the Joint Family Venture Cart Before the Unjust Enrichment Horse

Dimitrova v. Dimitrov, 2023 CarswellAlta 1100 (K.B.) — Sidnell J.

This case dealt with a claim of unjust enrichment over two condominium properties in Calgary.

The parties were married in Bulgaria in 2011, and they separated in 2017. Across the six-year marriage the parties lived in Canada, Bulgaria, Dubai and Iraq.

The parties were litigating the majority of the issues relating to the breakdown of their relationship in Bulgaria, but they agreed that Alberta had jurisdiction over the two condominium properties registered to the husband, both of which were purchased by the husband prior to the marriage. The parties lived in one as their matrimonial home (for a period of time), and the other was either occupied by the husband's adult son from a previous relationship or rented out.

The wife made a claim for an interest in the condominium properties on the basis of unjust enrichment arising from a joint family venture. Both parties submitted that the analysis should *begin* with a determination of whether there was a joint family venture and, if there was one, a determination of whether there has been any unjust enrichment.

This causes us great upset.

We have said it before. We will say it again: "Joint Family Venture" is not a cause of action. Nor is it a first step in an unjust enrichment analysis. If you don't believe us, believe the Ontario Court of Appeal in *Reiter v. Hollub* (2017), 96 R.F.L. (7th) 96 (Ont. C.A.): the joint family venture inquiry concerns *remedy*. One must consider unjust enrichment before joint family venture as a finding of joint family venture simply allows the court to award monetary relief on a "value survived" basis (as opposed to a "value received" basis) *after* a finding of unjust enrichment. A joint family venture is not a stand-alone category of unjust enrichment entitlement: *Wawzonek v. Page* (2015), 63 R.F.L. (7th) 317 (Ont. S.C.J.); *Cline v. Moran* (2016), 82 R.F.L. (7th) 207 (Ont. S.C.J.).

And if you don't believe us or the Ontario Court of Appeal, how about Justice Cromwell, the author of *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.):

> [194] . . . As set out earlier in my reasons, **for Ms. Kerr to show an entitlement to a proportionate share of the wealth accumulated during the relationship**, she must establish that Mr. Baranow has been unjustly enriched at her expense, **that their relationship constituted a joint family venture**, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. [emphasis added]

Clearly, Justice Cromwell did not put the "joint family venture" cart before the "unjust enrichment horse." Neither should we.

In any case, to the extent cases suggest that a joint family venture is just a "category" of unjust enrichment (and we're not naming names), those cases, very respectfully, are not as right as they could be.

And the law is no different in Alberta: *Buchner v. Long*, 2016 CarswellAlta 1835 (Q.B.), aff'd, 2017 CarswellAlta 2398 (C.A.); *Ernst v. Martins*, 2019 CarswellAlta 1152 (C.A.) at paras. 32 to 34.

Justice Sidnell did not fall into this trap. Instead, her Honour set out — and followed — the framework for an unjust enrichment analysis established in *Kerr*.

First, the court is to determine whether the elements of unjust enrichment, being enrichment and a corresponding deprivation in the absence of a juristic reason, have been made out. If they have, the court is then to determine whether monetary damages will suffice to address the unjust enrichment.

If monetary damages will suffice, then the court is to determine whether the monetary damages should be quantified on a fee-for-service basis or a joint family venture basis. In *Kerr*, Justice Cromwell summarized when a party will be entitled to a monetary remedy on a joint family venture basis:

> [100] 1. The monetary remedy for unjust enrichment is not restricted to an award based on a fee-for-services ["value received"] approach.
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> 2. **Where the unjust enrichment is most realistically characterized as one party retaining a disproportionate share of assets resulting from a joint family venture, *and* a monetary award is appropriate, it should be calculated on the basis of the share of those assets proportionate to the claimant's contributions** [the "value survived" approach].
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> 3. **To be entitled to a monetary remedy of this nature**, the claimant must show both (a) that there was, in fact, a **joint family venture**, and (b) that there is a link between his or her contributions to it and the accumulation of assets and/or wealth.
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> 4. Whether there was a joint family venture is a question of fact and may be assessed by having regard to all of the relevant circumstances, including factors relating to (a) mutual effort, (b) economic integration, (c) actual intent and (d) priority of the family. [emphasis added]

See also *Martin v. Sansome* (2014), 43 R.F.L. (7th) 306 (Ont. C.A.) at para. 51.

This case was complicated by where each of the parties was living at any given time. The wife had a PhD in virology and prior to marriage worked at the National Centre of Infectious and Parasitic Diseases in Bulgaria. The husband was originally from Bulgaria and worked in Calgary in the mining industry. The husband and wife had a "brief courtship" of a few months before getting married. As determined by Justice Sidnell, of particular importance was the fact that the parties both wanted children.

Justice Sidnell summarized the six phases of the parties' relationship as follows (this is the sort of detailed analysis that is sometimes required in these cases — see also the *Vanesse* appeal in (2011), 93 R.F.L. (6th) 1 (S.C.C.)):—

Phase	Residential Status	Start Date	End Date	Duration (months)	Description of Arrangement
1	Apart	October 26, 2011	November 28, 2013	25	The husband resided in the matrimonial home and applied to Immigration Canada to sponsor the wife, who resided in Bulgaria
2	Together	November 28, 2013	September 10, 2014	9.5	They lived in the matrimonial home once the wife obtained her immigration status
3	Apart	September 10, 2014	March 28, 2015	6.5	The wife travelled to Bulgaria to participate in an *in vitro* fertilization program and the husband stayed in Calgary in the matrimonial home; during this time, the parties communicated daily by video
4	Together	March 28, 2015	July 28, 2016	16	The husband took a position in Iraq, with living arrangements in Dubai in a company-supplied apartment and the wife moved to Dubai
5	Together	July 28, 2016	October 26, 2017	15	The husband's work contract changed, and the parties moved to reside in Bulgaria while the husband worked in Iraq 28 days on and 28 days off
6	Apart	October 26, 2017	March 28, 2023	65	Separation to trial: the parties lived apart

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Justice Sidnell found that the husband had been enriched by the wife, that the wife had suffered a corresponding deprivation, and that there was no juristic reason for the enrichment and deprivation.

Having found that the husband had been unjustly enriched during the marriage, Justice Sidnell then turned to the remedy stage of the analysis. The wife had conceded that she was looking for a monetary remedy, and not a proprietary remedy, such that the next question for Justice Sidnell to determine was whether the monetary remedy should be calculated on a fee-for-service basis or a joint family venture basis.

Her Honour determined that the parties had been engaged in a joint family venture on the following basis:

> • The parties were working together towards a common goal, including living together as a family in Canada and having children. The wife was focused on the parties' home life. The fact that she took on the majority of the domestic duties freed the husband from those responsibilities and allowed him to focus on his career.
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> • The wife had left a prestigious and well-paying job in Bulgaria to move to Canada to be with the husband. While she had obtained a similar position at the time of separation, her career would have advanced further — had she not left her position to support the husband's career.
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> • The wife followed the husband in several international moves, including living in Dubai for a little over a year in "Phase 4".

While Justice Sidnell found a joint family venture existed, her Honour felt there was insufficient evidence to show that the joint family venture extended to the rental property. As the basis for relief upon a finding of unjust enrichment and a joint family venture is that one party would otherwise retain a *disproportionate share* of assets *resulting from a joint family venture*, if the rental property was determined to not be part of the joint family venture, then it was not "in play."

While there are some cases that suggest that a joint family venture must apply to the accumulation of all assets and wealth during the course of a relationship and/or that one party cannot "cherry-pick" which assets are to be part of the joint family venture (see, for example, the concurring reasons in *Ibbotson v. Fung* (2013), 27 R.F.L. (7th) 280 (B.C. C.A.) and *Gray v. Brathwaite*, 2017 CarswellOnt 4106 (S.C.J.)), in our view, *Kerr* is clear that the analysis is to focus on assets that *result* from the joint family venture, meaning that the claim can relate to only specific assets. We believe that Justice Garson expresses the view best in her reasons in *Ibbotson v. Fung* (cite above):

> [61] In my view, **the joint family venture was created, at least in part, to avoid the all or nothing outcome of either a constructive trust or the unsatisfactory (in many cases) fee-for-services award**. In many cases the contributions of one party lacked the required link to a specific asset, (necessary for a constructive trust) giving rise to the need to link the contributions with the general accumulation of assets, although that is not the case here. The discussion crafting this remedy in *Kerr* was premised heavily on the need for flexibility and the uniqueness of individual relationships (see for example para. 84). Given these observations, **I do not read *Kerr* as standing for the inflexible proposition that all assets must fall under the umbrella of the joint enterprise or that a joint family venture can never support a proprietary or monetary remedy over a specific asset.** While Cromwell J. may have viewed the joint family venture as mainly a vehicle for unjust enrichment claims over the general estate, **the reasons do not exclude a claim for something more limited.**
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> . . . . .
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> [63] Finally, a joint family venture over specific property does not foreclose any opportunity to consider the assets globally. This may be done at the analysis of mutual benefits. While in this case the trial judge found that the equities offset, in many cases, a trial judge could undertake an analysis of the mutual benefits and rebalance the proportionate share of the value survived of a single asset in accordance with the equitable and legal set-off analysis in *Wilson* (at paras. 65-66; 73, 80-88). [emphasis added]

Here, the husband brought the rental condominium into the relationship, and it was excluded from the analysis. It is worth remembering that a joint family venture need not capture all the assets of the relationship.

Justice Sidnell determined that the husband would be unjustly enriched unless the wife received 50% of the growth in the value of the matrimonial home during the marriage.

Of particular interest is the fact that neither party offered evidence as to the law of Bulgaria — the last common habitual residence — regarding property division. Both agreed that property had not yet been divided, but neither had provided evidence as to *how* that division would take place. Where foreign law is not proven, it is assumed to be the same as the local jurisdiction (or the *lex fori* for you Latin lovers): *Canadian National Steamships Co. v. Watson*, 1938 CarswellQue 41 (S.C.C.); *Old North State Brewing Co. v. Newlands Services Inc.*, 1998 CarswellBC 2294 (C.A.); *Corlett v. Hoelker* (2012), 13 R.F.L. (7th) 400 (B.C. S.C.), aff'd, (2012), 27 R.F.L. (7th) 253 (B.C. C.A.); *Guarantee Co. of North America v. Mercedes-Benz Canada Inc.*, 2005 CarswellOnt 8925 (S.C.J.), aff'd, 2006 CarswellOnt 3638 (C.A.); *Chan v. Chow* (2001), 15 R.F.L. (5th) 274 (B.C. C.A.); and *Unger v. Unger* (2016), 88 R.F.L. (7th) 64 (Ont. S.C.J.), aff'd, (2017), 88 R.F.L. (7th) 86 (Ont. C.A.).

As a consequence, the Court presumed that the law of Bulgaria mirrored the Alberta property division scheme. As a result, the Court determined that the husband would have an interest in the wife's property in Bulgaria, which was a further anchor for the unjust enrichment finding in Wild Rose Country.

What is the Cost of a Wasted Settlement Conference? $18,000 Apparently

Mitchell v. Mitchell, 2023 CarswellOnt 6449 (S.C.J.) — Kraft J.

In Ontario, Rule 17(18) of the *Family Law Rules*, O. Reg. 114/99 (the "*Rules*"), provides that, while parties will generally bear their own costs for Case Conferences, Settlement Conferences, and Trial Management Conferences, costs ***shall*** be awarded against a party if s/he was not adequately prepared for the attendance:

> 17(18) Costs **shall** not be awarded at a conference unless a party to the conference was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules, **in which case the judge shall**, despite subrule 24 (10),
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> > (a) **order the party to pay the costs of the conference immediately;**
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> > (b) decide the amount of the costs; and
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> > (c) give any directions that are needed. [emphasis added]

Even though Rule 17(18) is mandatory, historically, it has not been regularly invoked to sanction those that that are not prepared for a conference, especially a Settlement Conference.

Until now, perhaps.

In *Mitchell*, Justice Kraft relied on Rule 17(18) to send a clear message to the husband in the case, and other litigants, that not being prepared for court is simply unacceptable, and will not be tolerated.

Hopefully, instead of being an outlier, *Mitchell* will be the start of a trend. A wasted conference deprives other parties of court time that could be used to settle cases, and should rarely be tolerated.

The facts in *Mitchell* were straightforward. The husband was not prepared for a Settlement Conference that took place on March 29, 2023. Among other things, he had not complied with two disclosure orders (one of which was over a year old), and he did not comply with his obligations under the *Rules* to serve an updated sworn Financial Statement, a Net Family Property Statement, and his expert report(s) before the Settlement Conference. His previous Financial Statements were also clearly inaccurate as they omitted significant assets.

As a result of the husband's failure to comply with multiple court Orders and his obligations under the *Rules*, about an hour before the Conference started, the wife served a Bill of Costs. She then asked Justice Kraft to order costs against husband — and her Honour agreed to receive submissions from both parties about the issue.

After the Conference, the wife served an updated Bill of Costs for $34,500 (rounded), which represented 60% of the costs she had incurred since the first disclosure order was made back in February 2022 (with which the husband had still not complied).

The husband conceded that the wife was entitled to costs, but argued that the costs she was seeking were excessive, and included a significant amount work that was unrelated to the Conference.

After reviewing the leading Ontario cases about costs in family law matters, including *Mattina v. Mattina*, 2018 CarswellOnt 17838 (C.A.) and *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.), Justice Kraft concluded that Rule 17(18) allowed her to award costs not just for the time spent on the Conference itself, but also for work that was done in relation to "the [husband's] failure to provide disclosure in accordance with the *FLRs* and the court-ordered disclosure which are directly related to Rule 17(18)." In other words, she accepted the wife's argument that the Court could use Rule 17(18) to award the wife more than just her costs wasted at the actual Settlement Conference.

In the circumstances, Justice Kraft determined it would be fair and reasonable for the husband to pay the wife $18,000 in costs. And, she ordered that the costs be paid within 10 days. Not in 30 days; not as determined by a later Conference judge; but in *10 days*. If this does not encourage recalcitrant litigants to show up prepared and to comply with court orders, we do not know what will.

We hope to see more of these decisions, in appropriate circumstances. As noted, court time — especially at Conferences designed to settle matters and narrow issues — is a precious resource.

We also want to offer two suggestions for counsel when dealing with these types of situations. First, include the request for costs, and a Bill of Costs, in your Conference Brief, along with a list of everything that the other party has not done in your materials. That way, it will be clear to both the court and the other party exactly what you are seeking and why, and thus increase the chances that the presiding judge will be willing and able to fix the amount of costs at the conference (instead of having to give the other side a further opportunity to file written submissions, as happened in *Mitchell*).

Second, ask the conference judge to make it clear in his or her Endorsement that the costs Order is without prejudice to your client's right to seek further indemnification for any portion of the costs claimed but not awarded for the Conference at a later date. For example, in *Mitchell*, the wife's actual costs for the period in question totalled $57,500 (rounded). Since she only requested $34,500 (rounded) in costs on a partial recovery basis, and was only awarded $18,000, it should still be open to her to ask for some or all of the remaining $39,500 she actually incurred should circumstances warrant it, especially if the initial $18,000 award doesn't cause the husband to change his behaviour.