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

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Contents

NOTE: We'll be off for next week, but will be back with the next edition of *TWFL* on Monday, August 7th.

"Not-So-Breaking" News re RESPs

Managing RESPs post-separation has just become a bit easier.

Under the previous CRA rules, only spouses or common law partners could jointly open an RESP. If a joint RESP was opened by parents *prior* to their divorce or separation, the plan could be *maintained*, but the parents were not permitted to open a *new* joint account with a different promoter.

However, effective March 28, 2023, divorced or separated parents may open joint RESPs for one or more of their children, or to move an existing joint RESP to another promoter.

So that's helpful.

Now, if we could only get CRA to clearly allow spouses in shared parenting situations to each claim the eligible dependent deduction without having to each send the other a child support cheque. Ah . . . dare to dream . . .

Unusual Circumstances; Unusual Result

Hall v. Galbraith, 2023 CarswellOnt 6024 (S.C.J.) — Akazaki J.

This case deals with interim decision-making authority and interim support in somewhat unusual circumstances, and with a somewhat unusual result.

The parties were married in 2008 and separated in 2018 or 2019 (there was a dispute between them, a common theme it would appear). There were two children of the marriage, a 13-year-old son and a 12-year-old daughter. The Father also had two university-aged children from a previous marriage.

The parties enjoyed an affluent lifestyle. They had multiple homes, club memberships and luxury cars. The Father worked in upper management at the Toronto offices of an international bank. At one time, the Mother had run a business renovating and flipping houses with her brother, but she gave that up to be a stay-at-home mother. The Father was earning approximately $900,000 at the date of separation. While they had enjoyed all the trappings of wealth, his Honour suggested that they had been, in fact, living only "several paycheques away from starting to lose it all, if anything were to happen to the father or his job."

The trouble began when the "anything" happened. After separation, the bank told the Father it was selling its Canadian operations. The Father then had the choice of taking a severance package or moving to New York for a new position where he could earn slightly more after taking into account his salary and bonuses. Justice Akazaki spent a considerable amount of time in his decision setting out the difficulty of the Father's position — if he chose to remain in Toronto, then the Mother would seek to impute income to him based on what he could have earned in New York. On the other hand, if he chose to take the job in New York, then she would accuse him of abandoning his children.

In fact, the Father chose to go to New York for the new position — and the Mother then accused him of abandoning his children.

The Father rented an apartment in Toronto and spent several weekends a month in Toronto with the children. He paid the Mother $15,000 per month in uncharacterized support payments, though he would not have been able to get a deduction regardless of having an agreement or not due to the fact that he was residing and earning income in the United States. (Recall that Mr. Trump effected a change in the U.S. Tax Code such that post December 31, 2018, spousal support in the U.S. is no longer taxable and deductible.)

In the meantime, the Mother had started a new business, a club in Vaughan where people could shoot at targets with air guns. She had not earned any income from the business.

The Mother brought a motion for three things:

1. She sought an Order for sole interim decision-making authority that would allow her to enroll the parties' son in private school;

2. She sought an Order for an increase in the uncharacterized support to $40,000 per month; and

3. She sought an Order that the Father produce text messages he had exchanged with the Mother's ex-boyfriend whom she claimed had abused her.

The Mother argued that she needed to have sole interim decision-making authority so that she could enroll the parties' son in private school. The Mother had previously unilaterally enrolled the parties' daughter in the same private school. The Father had, as a result, refused to contribute to the cost of the private school.

The Mother spent a significant amount of time criticizing the Father in her materials. She claimed the Father had abandoned the children. She pointed out that the Father had paid for private school for his older children (although failed to mention that the private school was a specialized school to help children with dyslexia). Finally, she claimed that the Father had reneged on an agreement to pay for the children's private school.

However, just a few hours before the motion, it was revealed that the son had not actually been accepted to the select private school. In fact, the officials at the school had voiced concerns that the son would not actually be able to be successful at the school. Justice Akazaki determined that the Mother wanted the son to attend the school for her own prestige, and not for his own best interests. She was a former alumna, and Justice Akazaki found that this was the real reason she pushed so hard for the children to attend.

As the Father was not claiming an order for interim sole-decision making authority, Justice Akazaki determined that it was in the children's best interest that he dismiss this part of the Mother's motion.

With respect to interim support, the Father argued that the $15,000 per month payments should continue and that he would share a portion of his bonus when it was received. The Mother, on the other hand, sought interim support in the amount of $40,000 per month.

In considering interim support, Justice Akazaki reviewed *Halliwell v. Halliwell* (2017), 90 R.F.L. (7th) 253 (Ont. C.A.), *Hopkinson v. Hopkinson*, 2023 CarswellOnt 4085 (S.C.J.), and *Plese v. Herjavec* (2020), 49 R.F.L. (8th) 28 (Ont. C.A.), and he opens his discussion with a few paragraphs that some will love and that some — well — not so much:

> [45] The daily docket of this court consists of disputes among a wide cross-section of Ontario's socio-economic strata. Every case must be considered on its own facts. Despite the development of tables and guides for making court orders more consistent and efficient, the fact that the rich can usually afford to spend on commodities and services the poor can only dream about does not allow the court to assume a high-income earner has unlimited means. **While the means of a low-income family confine the court's ability to squeeze blood out of the stone in the interests of shielding the children from the economic consequences of marital breakup, the court does not have *carte blanche* to use the higher earner's paycheque to shield the other spouse altogether from the consequences of marital breakup.** The father has not condemned his Toronto family to life in a slum, even if the mother likes to think so.
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> [46] In this regard, I am guided by the recent decision in *Hopkinson v. Hopkinson*, 2023 ONSC 1583 (CanLII), at paras. 44-64, regarding the scope of discretion to award support when the payor's income exceeds $150,000 for the CSG table and $350,000 for the SSAG. Applying the individualized approach stated in the Court of Appeal's decision in *Plese v. Herjavec*, 2020 ONCA 810, 49 R.F.L. (8th) 28, at para. 57, the court in *Hopkinson* considered the payor spouse's ability to support the post-separation family's pre-separation lifestyle by imagining income and expense operating in tandem, i.e. as a budget. Thus, a naïve approach to the father's million-dollar annual income might lead the mother to consider it fair to seek a support order of $478,000 per annum and unfair that he only sends $180,000. **A more responsible approach would be to protect the children's lifestyle without teaching them the false lesson that marital breakup is a victimless transaction.** [**emphasis** added]

The Father provided a number of calculations to argue that the monthly $15,000 represented child support and spousal support at the mid-range (taking the non-taxable/non-deductible regime into account). According to his Honour, $15,000 net was closer to $20,000 gross.

Justice Akazaki took considerable umbrage with the Mother's conduct in the motion. While the Father had prioritized the family by moving to New York to earn the income necessary to support them, the Mother then blamed the Father for abandoning the children. At the same time, the Mother had not generated any income. She had not altered her lifestyle. And in many cases she had actually *increased* her spending from what it was during the marriage — trading in her Dodge Durango for a high-end Tesla at three times the monthly payment for example. The Mother claimed that she had to sell her platinum Raptors season tickets, just to make ends meet.

The Mother's arguments about financial hardship did little to persuade Justice Akazaki. Instead, the Court criticized her failure to even remotely moderate her lifestyle after separation.

Justice Akazaki determined that the $15,000 per month provided a sufficient lifestyle for the Mother and children pending trial. Then, in what was quite frankly a surprising turn, Justice Akazaki *declined* to order that the Father maintain these payments, stating that his counsel would warn him about the consequences of failing to pay.

Justice Akazaki then went even further and declined to order the sharing of the Father's bonus that the *Father himself had proposed* (apologies for the long quote, but this highly unusual determination requires the underlying rationale):

> [52] The father's annual bonuses have been split in two, with one payable in the applicable employment year and the other deferred at the discretion of the employer. This is an element of uncertainty to his income beyond the USD $400,000 and $100,000 salary and living allowance amounts. His expense budget reveals that after paying taxes, necessaries and support, his million-dollar budget allows him virtually no discretionary spending power. He is maintaining three households, including one in Toronto for exercising his parenting schedule. If the court were to accede to the mother's demands, he could only cut the New York-Toronto travel allowance and sell the Toronto apartment that enable him to exercise family time with his children. **Making it more difficult for the father to come to Toronto is not in their best interests.**

> [53] The figures presented at the hearing by both sides entailed multiple scenarios and a wide variance, between employment income of over CAD $1,400,000 and as low as $1,108,490 . . .
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> [54] The father's financial statement showed $1,108,490 in income, including the immediate portion of his annual bonuses, against $1,014,011 in expenses. The mother contended that this showed a sizeable surplus. It happens to be much less than the deficit in the budget disclosed in her financial statement. Accounting for the missing entry for the HTS fees and uniform, her operating budget is over $140,000 in the red. If her deficit exceeded his surplus, most people would see this state of affairs as reason for one or both of the parties to curtail spending. Much of the father's budgeted expenses consist of support payments for the mother and the four children. Shifting part of the HTS bills over to the father would not solve the lack of sustainability of this family.
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> [55] **The father's budget shows that precarity can visit even a high-earning person, although few in society at large would likely sympathize.** The parties can play with various inputs to arrive at different results, but the evidence is clear that satisfaction of the mother's financial demands would render unsustainable the father's ability to support the family from New York. The Court of Appeal's approach in *Halliwell v. Halliwell*, 2017 ONCA 349, 138 O.R. (3d) 671, as clarified by *Plese v. Herjavec*, 2020 ONCA 810 (CanLII), at para 57, are instructive in an interim relief motion where **so much depends on the court's discretion to apply what appears to be fair**. It is logically wrong to engage in a forensic *ex post* examination of income due to the very contingent nature of interim support. If my analysis turns out to be out of line after the trial, **I fail to see the hardship in requiring the Toronto spouse to see to the needs of the children and herself on an after-tax monthly budget of $15,000. A court order that pulls the financial rug from under the father in these circumstances risks the relative comfort enjoyed by the three members of the family he left behind**. An *ex ante* or predictive analysis is appropriate, because the court is providing for the family's financial stability, especially with regard to the children's needs, for the several months before the matter is ready for trial.
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> [56] The uncertain part of the equation is the split bonus element of the father's compensation package. **I am not prepared to order a percentage of the father's bonus as spousal support, because spousal support is intended to be support and not income splitting.** I am also not persuaded that an additional interim spousal support amount is warranted under s. 15.2 of the *Divorce Act*. **If a spousal support order is intended to recognize financial consequences of marriage and its breakdown, to apportion financial consequences of child care, relieving hardship from the breakdown and to promote economic self-sufficiency of the supported spouse, it is best for the court not to disturb the $15,000 monthly payments.** [**emphasis** added]

Justice Akazaki noted that if he was incorrect such that support should be higher, it could be adjusted at trial. He was more concerned about not crippling the Father financially by setting support too high at the interim stage.

The final portion of the Mother's motion, which dealt with the Father's text messages, was added at the last moment, and would prove to be a tactical error on her part (as if complaining about having to sell her platinum Raptors season tickets was not enough). The Mother had been involved with an individual whom she claimed had been physically abusive towards her. This person had been charged criminally, and that criminal proceeding was ongoing. The Mother was aware that the Father and her ex-boyfriend had exchanged text messages after the arrest.

The Mother argued that she required copies of those text messages to provide to the Crown. When it was pointed out that this would violate the Deemed Undertaking Rule, counsel for the Mother then argued that she needed production of the text messages in connection with her claim for decision-making authority. The Mother argued that she could not trust the Father and he and her ex-boyfriend were colluding to invent claims about her parenting.

This claim did not get terribly far. Justice Akazaki determined that there would be prejudice in producing these text messages, as they would be "misinterpreted" and used to "fan the flames" of conflict. There was also a concern that it would potentially impact the ex-boyfriend's privacy when he was not present at the motion. This part of the Mother's motion was also dismissed.

All-in-all, not a great day for the Mother. And the Father should buy a lottery ticket.

Being an Electrician Does Not Necessarily Make Your Case "Shocking"

Wright v. Wright, 2022 CarswellMan 342 (Q.B.) — Leven J.

In the early days of the COVID-19 pandemic, we expected to see an increase in the number of parties seeking an unequal division of property due to wholly unforeseen post-separation decreases in the value of their businesses. While there were not as many of these cases as we initially expected, when they do come along, they serve as a helpful reminder of just how hard it is to obtain an unequal division of family property.

In *Wright*, the parties were married in 1995 and separated in 2018. The husband, who himself was an electrician, owned an electrical contracting services business in Brandon, Manitoba. The business was very successful during the marriage.

The wife filed her Petition in January 2019, in which she sought an equal division of family property. The husband filed his Answer a few weeks later, and he agreed to an equal division of family property. However, the husband sought leave to amend his Answer in October 2021, to seek an *unequal* division of family property due to the post-separation decrease in the value of his business — it had been worth about $195,000 at the time of the separation, but had failed after the separation. The Court granted him leave to amend (2022 CarswellMan 184 (Q.B.)).

Unlike Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, Manitoba's *Family Property Act*, R.S.M. 1987, c. M45 (the "*FPA*") creates two different standards for granting an unequal division based on the nature of the asset in dispute. If the asset is a "family asset", the discretion of the court to order an unequal division is reserved for cases where an equal division would be "grossly unfair or unconscionable", which, according to the Manitoba Court of Appeal, emphasizes the interests of certainty and predictability over those of flexibility (*Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.) at para. 61):

> **Discretion to vary equal division of family assets**
>
> 14(1) The court upon application of either spouse . . . may order that, **with respect to the family assets** of the spouses . . . , the amount shown by an accounting . . . to be payable by one spouse . . . to the other be altered if the court is satisfied that equalization would be **grossly unfair or unconscionable** having regard to any extraordinary financial or other circumstances of the spouses . . . or the extraordinary nature or value of any of their assets. [**emphasis** added]

The language of s. 14(1) of the *FPA* is similar to that of s. 5(6) of Ontario's *Family Law Act*, which provides that a court may order an unequal division if the court is of the opinion that an equal division would be "unconscionable." The Ontario Court of Appeal has, time-and-time again, interpreted this "unconscionable" threshold to mean that a court will only order an unequal division where an equal division would produce a result that would "shock the conscience of the court," that is "shocking and oppressive" and that is exceptionally high. [See *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.) at para. 47; *Scheel v. Henkelman* (2001), 11 R.F.L. (5th) 376 (Ont. C.A.); and *Symmons v. Symmons* (2012), 29 R.F.L. (7th) 187 (Ont. C.A.).] The standard of unconscionability is meant to be exceptionally high in an effort to avoid more flexible standards like "unfair" or "inequitable." The more flexible the adjective, the more litigation is to be expected. In fact, the Ontario Court of Appeal has *generally* made sure to not allow the standard of "unconscionability" to be watered down at all: *Ward v. Ward* (2012), 26 R.F.L. (7th) 358 (Ont. C.A.) — "unconscionable" is not "unfair, inequitable or unreasonable" or "unfair, harsh or unjust". Descriptors like inequitable, unfair, grossly unfair, grossly unjust, or unjust are just not sufficient: *Koughan v. Dow* (2015), 59 R.F.L. (7th) 1 (P.E.I. C.A.).

In contrast, if the asset is a "commercial asset", as was the case in *Wright*, the discretion of the court to order an unequal division is broader as the legislation uses the "clearly inequitable" threshold:

> **Discretion to vary equal division of commercial assets**
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> 14(2) The court upon the application of either spouse . . . may order that, **with respect to the commercial assets** of the spouses . . . , the amount shown by an accounting . . . to be payable by one spouse . . . to the other be altered if the court is

> satisfied that equalization would be **clearly inequitable** having regard to any circumstances the court deems relevant . . . [**emphasis** added]

However, the Manitoba Court of Appeal confirmed in *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.), that the court's discretion under s. 14(2) of the *FPA* is not unfettered, and that the legislative presumption of an equal sharing of a commercial asset should not be departed from lightly absent a *compelling* inequity that is clear from the record.

In *Horch*, the Manitoba Court of Appeal explained that, when considering whether to exercise its discretion under s. 14(2) of the *FPA* to order an unequal division of commercial assets, the court is to consider three factors:

> 1. First, the court is to consider the change in the value of the asset. The change in value must be *substantial* in order to meet the threshold of "clearly inequitable." (*Horch* at para. 83)
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> 2. Second, the court is to consider the liquidity of the asset and whether the owner of the asset had the ability to dispose of it post-separation. If there was a realistic market for the asset, the court may have little sympathy for a claim that the asset substantially decreased in value post-separation because of a risk its owner voluntarily assumed. (*Horch* at paras. 84-85)
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> 3. Third, the court is to consider whether the overall result is "just, fair and equitable in the circumstances." (*Horch* at para. 86)

In *Wright*, the husband argued that an equal division of his business would be "clearly inequitable", due to the decrease in the value of the business from $195,000 at the time of separation to $0 at the time of trial, and that the court should order an unequal division.

The husband testified that his business had been negatively affected by a number of factors, including the COVID-19 pandemic, as it was not able to do as much work in restaurants or in private homes during the pandemic. He had cashed in his RRSPs and incurred significant debt in an attempt to save the business and, when his attempts failed, he resorted to selling business assets to pay his creditors.

The husband's luck had not improved by the time of the trial. He was not working (having signed a draconian non-compete agreement with another electrical company, and then been laid off by that company), he was having difficulty making his mortgage payments, and he was obtaining some of his food from a charitable source.

Justice Leven sympathized with the husband for the bad luck he had encountered since the separation but, alas, "sympathy" is not a recognized test for unequal division.

Justice Leven was not satisfied that the husband had met the high threshold of proving that an equal division of his business would be "clearly inequitable" under s. 14(2) of the *FPA*, and ordered an equal division. Justice Leven did, however, allow the husband to pay the equalization payment of about $103,000 over the span of a couple of years.

We suspect that we are not seeing more of these cases, where parties are seeking an unequal division of family property due to the negative impacts of the pandemic on businesses, for two main reasons. First, courts have been very clear that these claims will be very, very hard to prove, and that most will not be successful. These types of claims are the exception, not the rule, and we ought to keep that in mind.

The second reason is that the majority of businesses have, at least partially, recovered from the impact of the pandemic. Justice Jarvis was alive to this possibility in *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052 (S.C.J.), when considering the wife's claim for an unequal division of net family property due to the decrease in the value of her business due to the pandemic. His Honour was not persuaded that the wife had met the "exceptionally high evidentiary onus for unconscionability" in part because "the temporary or long-term consequences" of the pandemic could not be "reliably predicted at this time."

Not good for the husband; but perhaps good for the Manitoba property regime . . .

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