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

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South West Terminal Ltd. v. Achter Land & Cattle Ltd., 2023 CarswellSask 300 (K.B.) — Keene J.

Here's a method of contract acceptance and formation they never taught in law school:



In *Achter Land*, the Court concluded that a thumbs-up emoji constituted acceptance of contractual terms and the formation of a contract — in this case, to sell 87 tonnes of flax.

Pretty much every legal publication has picked up this story, and we did not want to be left out. And while it is in many ways a "novelty" story, there is an important lesson to be learned: historic conduct can inform current obligations.

Here, after discussing a contract for the purchase and sale of flax over the phone, the buyer sent a text to the seller *with a photo* of the contract, asking him to "confirm the flax contract."

The seller texted back the (now deadly) thumbs-up emoji, which the buyer understood to be acceptance of the contract. The seller thought otherwise.

The seller argued that there had never been a binding contract at all. He insisted the emoji he texted was simply to confirm receipt of the contract — not the acceptance of its terms. He said he expected a written contract to follow and that he would never have agreed to the sale without first reviewing its terms and conditions in full.

A critical detail in this case was that the parties had a longstanding business relationship, and these parties had historically entered into similar contracts (albeit for the sale of durum wheat — not flax) with a photo of the contract sent by text, which the seller had always accepted by text message using short affirmative phrases such as: "Looks good," "OK," and "Yup."

The Court "readily acknowledged" that a thumbs-up emoji is a non-traditional way to accept a contract. But given the facts of the case, here, this was a valid way to convey the two purposes of a "signature": (1) to identify the signator (with a unique cell phone number) and (2) to convey acceptance of the flax contract. Applying the "objective reasonable bystander" test, the Court concluded there was a contract based on historic conduct.

The Court also noted that this aligned with more modern law, specifically with respect to affirming acceptance of electronic contracts, where contract acceptance can be signified in historically unconventional — but fully legal ways — for example by way of electronic signature or by clicking an icon on a designated spot on a computer screen. This situation was really no different.

The Court further confirmed:

I agree that this case is novel (at least in Saskatchewan) but nevertheless this Court cannot (nor should it) attempt to stem the tide of technology and common usage — this appears to be the new reality in Canadian society and courts will have to be ready to meet the new challenges that may arise from the use of emojis and the like.

As a result, if your separating clients are engaged in a contract to buy/sell wheat or flax from each other, this case should be of particular importance to you.

However, even absent contracts for the sale and purchase of grain, this case — or at least what it stands for — could prove important in other ways, especially in jurisdictions with a small family law bar or those where certain lawyers are in the habit of dealing with each other very regularly, where informality and colloquialism comes into play. Words can hurt and, apparently, emojis can bind.

Why Half a Story Costs More than a Full Story

Kaur v. Singh, 2023 CarswellOnt 4678 (S.C.J.) — McGee J.

The *Family Law Rules* have been in effect in parts of Ontario since 1999, and throughout Ontario since 2004. So it should be common knowledge that family law litigants in Ontario **cannot** bring motions before a Case Conference unless there is a situation of true urgency, such as an abduction, threats of harm, or dire financial circumstances: *Rosen v. Rosen*, 2005 CarswellOnt 68 (S.C.J.) at para. 5.

The reasons behind the urgency requirement should also be well known. As Justice McGee explained in *Clemente v. O'Brien*, 2020 CarswellOnt 7438 (S.C.J.):

[25] *Rosen v. Rosen* is familiar territory for the family court practitioner. In 2005 Justice Wildman wrote her seminal decision that succinctly transformed "walked-in," often without notice motions into outliers in a reimagined, redesigned family court system that not only encouraged, but incentivized negotiation before litigation. **There were to be no more races to the courthouse. Parties were to first reason with one another, make proposals for a resolution with or without assistance, and only then come to court.**

[26] **And for the matters that did come to Family Court, the first event was not to be marked by impassioned arguments on "nasty affidavits" but conducted as a judge led Case Conference** that identified the issues, resolved as much as possible, and then organized the evidence and processes necessary to determine the balance of the conflict.

[30] **Real crises — harm to a child, threats to personal security and the risk of financial ruin must have immediate access to the court.** They are urgent as plainly understood by the definition of the word referenced at paragraph 4 of *Rosen*:

[Counsel] says there is very little reported caselaw on the issue of what constitutes "urgency". He refers me to the Webster Dictionary definition of "urgent", which is "Pressing; necessitating or calling for immediate action; earnestly insistent; importunate".

[31] **All other motions must first comply with a series of steps: to ascertain whether a Case Conference date is first available, to engage in settlement discussions and to develop positive options.** I emphasize the step of settlement discussions because it is critical to best outcomes for families and essential to an effective court system. [emphasis added]

But based on what happened in *Kaur v. Singh*, perhaps a brief reminder of these basic principles is in order.

The parties in *Kaur* were married in 2017 and had a three-year-old daughter together. They separated in June 2022, when the father was charged with assaulting the mother.

After they separated, the mother and child moved into a shelter in Brampton run by the Salvation Army. The mother started receiving social assistance, and the father started paying child support based on his income of approximately \$30,000 a year.

The parties retained counsel and agreed that the father could resume having parenting time. As the father's recognizance prevented him from having contact with the mother, the parties' agreement provided that parenting exchanges would take place at the child's daycare during the week, and that a family member would facilitate any weekend exchanges. The agreement also provided that the mother would not relocate the child outside of Peel Region without the father's consent or a court Order.

On February 27, 2023, the mother advised the father through counsel that she had been approved for subsidized housing in Scarborough, and would be moving there imminently. She had already been in the shelter for far longer than she should have been, she had not been able to find subsidized housing closer to Brampton despite having made significant efforts, and she had no other option but to accept the offer of housing in Scarborough. The mother also proposed various adjustments to the schedule and the terms of the exchanges to ensure the father would be able to continue having regular parenting time with the child.

For reasons that are not explained in the decision, the father's lawyer did not tell the father about the mother's imminent move to Scarborough, or her proposed adjustments to the schedule. As a result, when the father arrived to pick up the child from daycare on March 10, 2023, he was shocked to learn that the child had not been there all week. At that point, he contacted his lawyer, and learned about the mother's move and proposal.

Although the mother readily agreed to a new parenting schedule for the following week, and despite having been informed of the mother and child's circumstances, the father jumped to the conclusion that the mother was trying to "alienate" the child from him. So instead of trying to deal with the situation through discussion and negotiation, or accepting the mother's suggestion of an early Case Conference before a judge, the father brought an urgent motion to compel the mother to return to Brampton, and for a police enforcement clause, and sought leave to have the motion heard prior to a Case Conference.

The father's materials presented a completely one sided view of the situation. His materials omitted key facts — including that the mother's lawyer had advised him through counsel about her plan to move to Brampton several weeks earlier, that the mother had been trying to negotiate alternative arrangements to ensure the child would be able to continue seeing the father, and that she had suggested scheduling an early Case Conference as an alternative to a motion.

Based on her review of the father's one-sided materials, which was all that was available to her at that point, Justice McGee concluded the situation was urgent, agreed to hear the motion, and established a timetable for the mother to respond. Unsurprisingly, her Honour's view of the world materially changed upon a review of the mother's responding materials, which explained why she had to accept the offer of subsidized housing in Scarborough and her efforts to try and deal with the situation through negotiations. Once that information was disclosed, it became clear that the father's motion was *not* urgent, and that leave to bring the motion would never have been granted had the father complied with his obligation to provide full and frank disclosure of all relevant facts: *Schulz v. Schulz* (2007), 45 R.F.L. (6th) 122 (N.S. S.C.); *Derochie v. Derochie*, 2003 CarswellAlta 924 (Q.B.); *P. (P.D.) v. W. (D.T.)*, 2014 CarswellNS 1079 (Fam. Ct.); *Belajac v. Belajac*, 2008 CarswellOnt 1489 (S.C.J.); *Stuyt v. Stuyt* (2010), 75 R.F.L. (6th) 237 (Ont. C.A.); *Misir v. Misir*, 2017 CarswellOnt 13341 (C.A.); *De Silva v. De Silva* (2016), 78 R.F.L. (7th) 130 (Ont. S.C.J.); *Maharaj v. Fazio-Morris* (2021), 52 R.F.L. (8th) 495 (Ont. C.J.); *Little v. Cooper*, 2020 CarswellOnt 4595 (S.C.J.) at 9.

Nothing — *absolutely nothing* — will incur the ire of a judge more, or do more damage to your reputation, than having important information buried, or left out, of materials when the other side will not have a chance to comment.

Furthermore, while the father was technically correct that the parties' agreement prohibited the mother from moving the child out of Peel Region without the father's consent or a court Order, as her Honour explained in her decision, "consent in such an Agreement is predicated on consent not being unreasonably withheld." Based on the record before her, Justice McGee was of the view that it was obvious that the father's consent ought to have been forthcoming in the circumstances. And, although the mother should have brought a motion for an Order permitting the move in advance, her "breach of the Agreement does not create a situation of urgency for the child sufficient to permit [the father's] Motion before a Case Conference."

As a result, Justice McGee dismissed the father's motion, and ordered him to pay the mother's costs on a full recovery basis (\$2,500 plus HST) to "discourage and sanction" the father's attempt to bring a non-urgent motion before a Case Conference, and to "discourage the less-than-full candour of the father's materials."

The lesson(s) from all of this? We would suggest that there are two. **First**, family law litigants *must* make serious efforts to try and solve their own problems before asking the court to make a decision for them. Had the lawyers in this case simply picked up the phone and had a candid discussion about how to resolve the situation, it is hard to believe they would not have been able to come up with a temporary solution to the problem. Or, at the very least, surely they may have been able to agree on a more sensible, efficient and less expensive process.

Second, when advocating for a client, address your demons; you cannot just ignore the bad facts that do not help your case. If you don't, rest assured the other party will raise them in the most unflattering way possible. And, if you can't figure out a good way to deal with bad facts, consider if that is a sign that a different strategy is warranted. Using this case as an example, had the father turned his mind to trying to explain in his materials why he objected to the mother's move, and why the situation was urgent even though her lawyer had told his lawyer about the move weeks in advance, and had suggested various alternatives to an urgent motion, it would have become apparent that his plan to bring an urgent motion was ill-conceived.

Live, litigate and learn.

The Planning Act. Ugh.

Falsetto v. Falsetto (2023), 85 R.F.L. (8th) 85 (Ont. S.C.J.) — Ryan Bell J.

In 2011, Albert, who was married to Paula at the time, decided to purchase an investment property in Ottawa with his father, Luigi. Albert handled the negotiations and dealt with the bank.

The original plan was for Albert to take title to the property in his sole name. However, shortly before the scheduled closing date, Albert and Luigi's lawyer advised them that because Albert already owned the adjacent property in his sole name, by operation of the *Planning Act*, R.S.O. 1990, c. P.13, the two properties would merge if he took title to the new property in his name alone, such that he would lose the benefit of having two separate properties. As Albert didn't want the properties to merge, he tried to arrange to have Luigi added to title and the mortgage. However, most unfortunately, he wasn't able to do so because the bank did not have enough time to approve Luigi for financing prior to the closing. As a result, Alberta arranged to add Paula's name to the title and the mortgage instead. The rest of this practically writes itself . . .

Albert and Luigi paid the down payment equally without contribution from Paula. And, after the sale closed, Paula did not make any contributions whatsoever towards the mortgage or other expenses associated with the property.

Years later, Albert and Paula separated, and a dispute arose over whether Paula was holding her interest in the property in trust for Luigi.

Luigi argued that this was a clear case of a purchase money resulting trust, which as the Supreme Court of Canada explained in *Nishi v. Rascal Trucking Ltd.*, 2013 CarswellBC 1716 (S.C.C.), "arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property." In those circumstances, "the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution."

Furthermore, while prior to 2007 there was a serious question in law about whether the presumption of advancement should apply where, as in this case, a parent makes a gratuitous transfer to a child, in *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.), the Supreme Court of Canada definitively determined that the presumption of advancement does *not* apply when dealing with transfers between a parent and an independent adult child:

[36] . . . First, **given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children.** As Heeney J. noted in *McLear* [*v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.)], at para. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. **There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.** [emphasis added]

What could be more clear than that?

Paula, on the other hand, argued that the registration in her name was *not* gratuitous because pledging credit (by going on the mortgage) constituted consideration. She also argued that since her name was put on title to avoid merger under the *Planning Act*, and as the only way merger could have been avoided was to *give* her both **legal and beneficial** title, Luigi must have intended to gift a beneficial interest in the property to her. The Ontario Court of Appeal dealt with a similar situation in *Holtby v. Draper*, 2017 ONCA 932 at paras. 68-69, where the Court of Appeal found that an intention to avoid merger under the *Planning Act* can be evidence that the transferor intended to gift beneficial ownership to the transferee. In fact, Paula argued that *Holtby v. Draper* offered a complete answer to Luigi's argument that he was the beneficial owner of the property. The plan to avoid merger under the *Planning Act* could not co-exist with a resulting trust in favour of Luigi, as Luigi and Albert, argued Paula, could not have it both ways. And, indeed, it is generally found that one cannot take one position for corporate, tax, trust, or other legal purpose and then try to take a different position for family law purposes. To do so is generally determined to be an abuse of process. See, for example: *Black v. Black* (1988), 18 R.F.L. (3d) 303 (Ont. H.C.); *Doucette v. Hache* (2010), 88 R.F.L. (6th) 115 (N.S. S.C.); *Wu v. Sun* (2010), 91 R.F.L. (6th) 24 (B.C. C.A.); *Rosenthal v. Rosenthal* (1986), 3 R.F.L. (3d) 126 (Ont. H.C.); *Battye v. Battye* (1989), 22 R.F.L. (3d) 427 (Ont. H.C.); *Dalgleish v. Dalgleish*, 2003 CarswellOnt 2758 (S.C.J.); *Fehr v. Fehr* (2003), 40 R.F.L. (5th) 71 (Man. C.A.); *Dillon v. Dillon* (2015), 65 R.F.L. (7th) 385 (Man. Q.B.); *Hu v. Li*, 2016 CarswellBC 3201 (S.C.); *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.); *Schroeder v. Schroeder* (2002), 23 R.F.L. (5th) 361 (Man. C.A.); *Este v. Esteghamat-Ardakani* (2018), 12 R.F.L. (8th) 120 (B.C. C.A.).

So where does that leave us?

After considering both parties' arguments, Justice Ryan Bell agreed with Paula. Since Luigi's intention **at the time of the purchase** (which is *the only time that matters* when determining intention with respect to a resulting trust) (see *Nishi* at para. 30 and *Pecore* at para. 59), was to avoid merger under the *Planning Act*, the only logical conclusion that could be drawn was that Luigi had intended to give Paula both legal and beneficial title to the property:

[33] I reject this submission. On the whole of the evidence, **I find that Luigi and Albert's intentions were one and the same: to avoid merger under the *Planning Act* with a neighbouring property owned by Albert.** Luigi and Albert discussed the purchase of 415 Lisgar together. Luigi was aware of the *Planning Act* issue, having received advice from [the real estate lawyer], through Albert, that a second party was needed on title to avoid merger with an adjoining property. Albert's evidence is that he discussed adding Paula to title with Luigi and they agreed that they were "stuck" and "had no choice because there wasn't enough time to get [Luigi] approved." **The bank's internal notes confirm that Paula was added to title to deal with the merger issue.**

...

[38] In this case, **I find that Luigi intended to pass beneficial ownership in 415 Lisgar to Paula in order to avoid a legal consequence under the *Planning Act*. Accordingly, no purchase money resulting trust arose in Luigi's favour.** [emphasis added]

As a result, Justice Ryan Bell dismissed Luigi's claim for a beneficial interest in the property. She also concluded that she did not need to decide whether Paula's agreement to go on the mortgage constituted sufficient consideration to defeat Luigi's resulting trust claim. But this being a full service Newsletter, in case you need to deal with this issue at some point in the future, you should be aware that the case law on this issue is most *entirely* inconsistent. For example, in *Banihashemi v. Behshad*, [2021 CarswellOnt 1668](#) (S.C.J.) at para. 44, Justice Nishikawa held that "a pledging of credit constitutes consideration such that a presumption of resulting trust will not arise." On the other, hand, Justice Kumaranayake held in *Bouffard v. Bouffard*, [2020 CarswellOnt 7066](#) (S.C.J.) at paras. 163-169 that a resulting trust can still be established "where a party is on title for the purpose of obtaining financing and remains liable on the mortgage with no contribution to the mortgage payments or the upkeep of the property." [See also: *Zajko v. Knight*, [2006 CarswellOnt 4858](#) (S.C.J.); *Andrade v. Andrade*, [2016 CarswellOnt 7727](#) (C.A.); *Engelage v. Engelage*, [1994 CarswellBC 1648](#) (S.C.); *Martiniak v. Riley* (1988), [14 R.F.L. \(3d\) 40](#) (B.C. S.C.); *J. (M.) v. W. (M.)* (2016), [80 R.F.L. \(7th\) 334](#) (B.C. S.C.)].

Ultimately, there can be no hard and fast rule as to whether going on a mortgage is sufficient consideration so as to defeat a claim of resulting trust. The correct approach, we suggest, was set out by the British Columbia Court of Appeal in *Bajwa v. Pannu*, [2007 CarswellBC 1143](#) (C.A.) at paras. 13-16, where it held that "if it is found as a fact that the person whose equitable interest is challenged did give value, there can be no resulting trust", but that "[w]hether value was given is a question of fact to be determined on the evidence in each case."

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