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— Franks & Zalev - This Week in Family Law

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Cases to Watch: A Claim for the Repayment of $400,000 of Historic Child Support

Unger v. Scott, 2023 CarswellAlta 2313 (K.B.) — Smart J.

Unger and Scott were in a short relationship in 2001. At the same time, Scott was also involved in a relationship with her then ex-boyfriend, Shakura.

Scott gave birth to a daughter on August 13, 2002.

Scott's evidence is that she had a pre-natal DNA (paternity) test completed by Paragon Genetics. The genetic material used was said to be that of Scott and Shakura. The result dated March 12, 2002, indicated a 0% chance that Shakura was the biological father. However, Scott did not actually provide a copy of the test results at the time.

Scott took the position that Unger was the father and, at the end of October 2002, Scott demanded child support from Unger.

Unger paid child support for many years, at times continuing to question the veracity of Scott's statements regarding parentage. From time to time over the years Scott invited Unger to get his own DNA testing while adamantly insisting he was the father. Unger did not do any testing. His evidence was that if he took steps to do testing, Scott would move to further restrict the limited time Unger had with the child. (Neither party disputes that Unger *never* stood *in loco parentis* to the child.)

In January 2020, Scott sought to increase the child support Unger was paying, and the Court granted a Consent Order increasing child support from $2,000 to $3,000. In March 2020, Unger requested a DNA test through counsel. Although initially resisted, the Consent Order was issued for the testing to be done.

Now — this is going to come as a huge surprise, but that testing (from a different lab) determined that there was a 0% probability that Unger was the biological father. And a still further test reported the probability of Shakura being the biological father as a virtual certainty.

Unger then went a step further; he obtained a report from a forensic biologist confirming that the sample allegedly provided by Shakura in 2002 and the sample from 2020 could not have come from the same person. And if that were not enough, the sample from the putative mother from the 2002 test was not from the biological mother of the child. Uh-oh.

Child support was terminated (by Order) on August 19, 2020.

Unger then sued Scott for recovery of the approximate $400,000 in child support payments he had paid over the years. This was Scott's motion that Unger's claim be summarily dismissed based on the 10-year ultimate limitation period provisions in s.

3(1)(b) of the *Limitations Act*, RSA 2000, c L-12. The initial payment for child support was made in 2002, and it continued for about 19 years.

Scott argued that the 10-year ultimate limitation had clearly passed. However, if Scott fraudulently concealed the fact that the 2002 DNA test was incorrect or false, Unger's claim would not necessarily be statute barred on account of the Doctrine of Fraudulent Concealment: *Ambrozic v. Burcevski* (2008), 53 R.F.L. (6th) 242 (Alta. C.A.). That is, Scott perpetrated a fraud; concealed a material fact; and Unger exercised reasonable diligence to discover the fraud.

In response to the suggestion of a limitation period issue, Unger reminded the Court that, "carelessness on the part of the victim has never been a defence to an action for fraud": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 CarswellAlta 186 (S.C.C.), 2002 SCC 19 at para. 70. And, continuing, there is no "rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of 'Ha, ha, your own fault, I fool you'."

Scott argued that she completed the first DNA test in 2002 properly and that she relied on the results. She relied on the report in good faith not knowing of any issues. She believed Unger was the father. Unger had doubts but did not do anything about it; so the claim ought to be statute barred.

While Scott made a compelling argument, Justice Smart was troubled by the expert evidence that concluded that the DNA material submitted in 2002 could not have come from Shakura and most probably not from Scott. Those facts would go some way to showing fraudulent concealment, and any questions of Unger's diligence were best determined at a trial.

There was also a further consideration: was Unger acting under "a continuous course of conduct or a series of related acts or omissions" such that the limitation period did not start until the last child support payment? Or might each successive child support payment have triggered a new limitation period? [See ss. 3(3)(a) and (b) of the *Limitations Act*.]

Justice Smart was of the view that the claim for the repayment of the $400,000 should proceed to trial. Given the factual matrix, his Honour was not satisfied he was able to make a fair and just determination on the paper record and conclude the claim lacked merit.

The motion for summary judgment was dismissed. And now this should get really interesting.

"Creativity Is Intelligence Having Fun." — Albert Einstein

Nairne v. Nairne, 2023 CarswellOnt 10502 (C.A.) — Roberts, Favreau and Copeland JJ.A.

So what's wrong with a little creativity?

The parties married in 1993 and separated in 2015 after a 21-year marriage. At the time of separation, Ms. Nairne was 61 years old and Mr. Nairne was 55, and their children were 19 and 20 years old. Following the separation, the children lived with Ms. Nairne in the matrimonial home during the summer and attended university out of town for the rest of the year.

Both parties were chartered accountants. At the time of separation, Ms. Nairne was earning employment income of $118,516 a year, and Mr. Nairne was earning employment income of $423,748.

The parties jointly-owned their matrimonial home valued at $1.8 million at the time of the trial in 2021. There was no mortgage. (The home is a focal point of the case.)

Mr. Nairne became an accountant in 1990, before marriage. By 2005, he was Vice-President, Accounting & Administration for a private equity firm, where he continued to work at the time of the trial. At the time of separation, Mr. Nairne's annual income was $464,442, which included employment income of $423,748. In 2021, at the time of the trial, it was estimated that his annual income for that year would be $316,000 plus a possible bonus of approximately $75,000.

At the time of the trial, Mr. Nairne was 60 years old, and he intended to retire at age 65. The trial judge found that his income from his investment plan after retirement would be between $105,775 and $115,209, and that it would steadily decline as his capital declined.

Ms. Nairne became a chartered accountant in 1999, which was during the marriage, and approximately five years after the couple's eldest child was born. Throughout her career, Ms. Nairne held positions involving the financial administration of hospitals and other health care organizations. At the time of their separation in 2015, Ms. Nairne was earning annual income of $169,206, $118,516.93 of which was employment income, and the rest was from RRSP withdrawals. At the time of the trial, in 2021, she was the Chief Financial Officer and the Director of a specialty hospital in Toronto, earning estimated annual income of $122,000. Ms. Nairne intended to retire at the age of 67. She anticipated that she would earn about $7,000 a month in retirement from her investments.

On December 1, 2020, Mr. Nairne started paying $4,000 a month to Ms. Nairne on a without prejudice basis and subject to offsetting this amount from any awards ultimately made at trial.

As the parties could not ultimately agree on spousal support or how to deal with the home (and some other smaller issues), off to trial they went.

At trial, Ms. Nairne claimed spousal support of $849,250 (from the date of separation to December 2021) based on a monthly amount of $10,750. She also claimed $13,438 a month prospectively on an indefinite basis.

Mr. Nairne did not see things the same way. He was of the view that he owed only $238,329 in "retroactive" spousal support (which he said equated to mid-range under the *Spousal Support Advisory Guidelines* after accounting for the $4,000 per month he had paid). He then proposed to pay spousal support at the low range of the *SSAGs* until he retired.

Here is where things get a bit interesting: Mr. Nairne also proposed to transfer the matrimonial home to Ms. Nairne, and to receive his share of the proceeds in the form of an interest-free mortgage to Ms. Nairne until she died, sold the home, or no longer lived in it. This proposal would allow Ms. Nairne and the children to stay in the home for an indeterminate time. At trial, Ms. Nairne agreed with this proposal.

The trial judge rejected the idea that Ms. Nairne was entitled to compensatory spousal support:

> Based on [Ms. Nairne's] evidence, which was accepted by [Mr. Nairne], I find that [Ms. Nairne] worked full-time through their marriage except for two periods of maternity leave that lasted six months. The children were in daycare from the age of six months. The parties employed a housekeeper for most of their marriage. The parties equally shared the responsibility of dropping off and picking up the children. Generally, [Mr. Nairne] dropped off the children in the morning and [Ms. Nairne] picked up the children in the afternoon. If [Ms. Nairne] had to work late, then they would switch roles. [Ms. Nairne] was primarily responsible for taking the children to their activities. She states that [Mr. Nairne] did "some" cooking, gardening, and repairs around the home. Starting in 2010, [Mr. Nairne] worked long hours and weekends. The parties became disengaged, as [Mr. Nairne] shopped and cooked for himself.
>
> [Ms. Nairne's] closing submission that she was the primary parent during the marriage is not supported by the evidence. Further, when asked in cross-examination, what sacrifices she made during the marriage, [Ms. Nairne] did not respond to the question, but instead described how she had reduced her household expenses after their separation.

The trial judge also questioned Ms. Nairne's entitlement to non-compensatory support. The trial judge compared her income against her expenses and considered the fact that Ms. Nairne had incurred post-separation debt. However, Ms. Nairne had inexplicably refused to produce some financial documents, such as bank statements, to show that her post-separation debts were not just related to the litigation. This was a strategic error by Ms. Nairne, as it left it open for the trial judge to draw an adverse inference that her post-separation debt had nothing to do with her claim for non-compensatory support.

The trial judge also considered that both parties were close to retirement and that their incomes in retirement would not be significantly different, especially given that Ms. Nairne had a guaranteed pension whereas Mr. Nairne would have to depend on his investment income and deplete his capital.

Ultimately, Ms. Nairne was awarded $2,500 in monthly spousal support to continue until Mr. Nairne retired from his current employment, which the trial judge justified on the basis that both parties intended to retire relatively soon, evidence was available about their circumstances upon retirement, and to avoid a motion for change. The trial judge also accepted Mr. Nairne's proposal (with which Ms. Nairne agreed) regarding the home, describing the benefit to Ms. Nairne as follows:

> Given that the matrimonial home was appraised to have a fair market value of $1.8 million, [Mr. Nairne's] offer is generous given that the amount of spousal support owed up to the date of trial is $239,329; the net amount of child support is $72,176.46 and that about seven payments of $4,000 per month have been made since trial . . . the mortgage given to [Mr. Nairne] would amount to about $561,000.00. This proposal would result in [Ms. Nairne] remaining the sole owner of the matrimonial home for the rest of her life if she wished. It also offers the potential for rental income from the self-contained unit in the matrimonial home. On the other hand, this proposal would deprive [Mr. Nairne] of access to his capital for potentially the rest of [Ms. Nairne's] life.

There can be no doubt that a $561,000 interest-free mortgage is of significant benefit, especially given what has happened with interest rates. At 5% with a 25-year amortization, this mortgage would otherwise carry at something in the range of $3,300 to $3,500 a month, *after tax*. Grossing up this figure, Ms. Nairne's total spousal support package would be closer to $8,500 or $9,000 per month gross. And this arrangement could be in place for the rest of Ms. Nairne's life.

Ms. Nairne appealed the amount and duration of spousal support. She argued that the trial judge failed to consider the significant disparity in the incomes of the parties and the different contributions they made throughout the marriage to raising the children and looking after the household.

While what the Court of Appeal had to say regarding spousal support is interesting, far more interesting are the seemingly critical comments with respect to the arrangements for the home.

Of course, the Court of Appeal started with the mandatory reference to *Hickey v. Hickey*, 1999 CarswellMan 254 (S.C.C.) and the *significant* deference afforded to support decisions. For very good reason, appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. We should all be able to repeat that phrase in our sleep. A support award could always be a bit lower or a bit higher, and a rigorous standard of review is required to make sure people don't just "try their luck" with an appeal.

Ultimately, on appeal, Ms. Nairne primarily argued that a support award of only $2,500 a month was too low and did not adequately address the role she played throughout the marriage. She argued that support in the range of $15,000 to $20,000 a month should have been awarded. She also argued that the trial judge erred in terminating spousal support upon Mr. Nairne's retirement from his current employment.

The Court of Appeal was not smitten with Ms. Nairne's submissions.

First, the Court of Appeal noted that the spousal support award could not be considered in isolation. One could not just ignore the financial benefit to Ms. Nairne from the interest-free mortgage on the home, potentially for the rest of her lifetime. Furthermore, Ms. Nairne had *agreed* with this proposal. While the trial judge did not specifically calculate the value of this benefit to Ms. Nairne, "there is no doubt that it is significant, even if it runs only to the point when and if Ms. Nairne no longer resides at the property fulltime or sells it." As we calculated above, the value could easily be in the range of $40,000 per year. Furthermore, as noted by the Court of Appeal, "the value of the interest-free loan will continue to accrue to Ms. Nairne after Mr. Nairne retires, at a time when the disparity between the parties' incomes will be much smaller." Nothing to see here . . .

What troubles us is the suggestion from the Court of Appeal that it did not "endorse" the trial judge's approach as appropriate in other circumstances:

> [29] This finding is not meant to endorse the trial judge's approach to the award of spousal support as appropriate in other circumstances. An interest-free mortgage is a benefit, but it is only a benefit until Ms. Nairne decides to sell or stop residing in the house, and it does not provide her with any additional monthly amounts for living and other expenses. However, this case presented the trial judge with unique circumstances. This included the fact that Ms. Nairne agreed to the proposal, but sought additional spousal support. It also included the trial judge's factual finding that Ms. Nairne had not made complete financial disclosure. Ultimately, the trial judge was best placed to take all circumstances into account, including the totality of payments made between the parties . . .

Now, we are not by any means suggesting that this kind of arrangement, or other creative "out-of-the-box" arrangements, are appropriate for all — or even many — cases. But, here, the trial judge was presented with an opportunity to creatively resolve the issue of spousal support in a way that both parties accepted. And there is nothing wrong with the Court in such an instance seizing on the opportunity to creatively solve a problem. Surely Ms. Nairne could not accept the benefit of a significant interest-free mortgage and expect that it would *not* factor into the support calculus? And if she did not have designs on staying in the home for a meaningful amount of time, query why she would have accepted the proposal? So where is the problem? The trial judge certainly would not have ordered this resolution absent the consent of both parties — and query whether such a creative solution could be imposed without consent from both sides. (A trial judge can award a period of exclusive possession and/or the transfer of property — see ss. 24(1)(b) and (2) and s. 34(1)(c) of the *Family Law Act*, R.S.O. 1990, c. F.3 — but certainly cannot force one party to give an interest-free mortgage. But could a trial judge award a period of exclusive possession or transfer a property as a way to reduce monthly spousal support? Interesting . . . but probably not. The Courts are not in the expropriation business.)

The Court of Appeal was also careful to "not endorse" all parts of the trial judge's approach to assessing Ms. Nairne's entitlement to spousal support:

> [30] . . . The trial judge arguably took a narrow approach in his assessment of the evidence regarding the parties' respective roles during the marriage and needs following the marriage, and in reaching the conclusion that Ms. Nairne had not established any compensatory entitlement and only "questionable" needs based entitlement. Ms. Nairne only became a chartered accountant five years after their first child was born and, throughout her career, she worked in the public sector earning far less than Mr. Nairne. In addition, while the trial judge recognized that Mr. Nairne retreated from the relationship in 2010, approximately five years before the separation, **he appears to have given little to no weight to Ms. Nairne's primary role in looking after the children during this time**. In determining entitlement to spousal support on the basis of compensation and need, the trial judge was required to step back and weigh the overall circumstances of the parties, rather than requiring, to the extent he may have done so, Ms. Nairne to prove in detail the role she played prior to the marriage breakdown and her financial needs after the breakdown: *Moge v. Moge*, [1992] 3 S.C.R. 813, at pp. 866-70; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 36. [**emphasis** added]

But, as noted above, taking the interest-free mortgage into account, the gross spousal support award here was in the range of $8,500 a month. Given the findings, based on Ms. Nairne's own evidence, that she worked full time through the marriage except for two periods of maternity leave that lasted six months — does an award of $8,500 a month (gross) really not sufficiently recognize the roles assumed during marriage (compensatory) and the circumstances of the parties (non-compensatory) — especially when Ms. Nairne refused to provide the disclosure that would have shown that any financial need was related to the marriage breakdown? And if not, why did the Court of Appeal *not* find an error in principle or that the support award was clearly wrong? The Court of Appeal is really saying, "we don't like it, but we can't really find anything wrong with it."

Ms. Nairne also argued that it was an error for the trial judge to order that support would terminate when Mr. Nairne retired from his *current* employer. The Court of Appeal saw no error here given that Ms. Nairne would continue to benefit from the interest-free mortgage thereafter. This is a bit curious — the continued interest-free mortgage was an important consideration

with respect to the termination of support; but not so important with respect to the amount of support? (Mr. Nairne conceded that the Order should be modified to remove the specific reference to his current employer in the event Mr. Nairne works for a different employer before he retired. Good concession.)

Appeal dismissed. Nothing creative about it.

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