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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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Liberty, Justice and Experts for All!

Sundberg v. Sundberg, 2023 CarswellOnt 15059 (S.C.J.) — Madsen J.

The Ontario *Family Law Rules*, O. Reg. 114/99 were revised in 2019 to provide jurisdiction for the parties and the court to retain/appoint joint litigation experts. While certainly not every case calls for a joint expert — and in some cases a joint expert would actually be contraindicated — we think many would agree that the ability to do so is underutilised. Rule 20.2 reads in part:

> **Motion for directions**
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> (9) If parties who wish or are required to engage a joint litigation expert do not agree on a matter relating to the engagement, any one of them may make a motion for directions.
>
> **Order re joint litigation expert**
>
> (10) The court may, on motion under subrule (9) or otherwise, make an order engaging a joint litigation expert for two or more parties.
>
> **Same**
>
> (11) In making an order under subrule (10), the court shall ensure that the matters listed in subrule 20.3 (2) [details of appointment] are either set out in the order or are otherwise addressed by the order.
>
> **Cooperation**
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> (12) Parties who engage a joint litigation expert, or for whom a joint litigation expert is engaged, shall cooperate fully with the expert and make full and timely disclosure of all relevant information and documents to the expert, and the court may draw any inference it considers reasonable from a party's failure to do so.
>
> **Restriction on experts on same issue**
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> (13) If a joint litigation expert provides opinion evidence on an issue for a party, no other litigation expert may present opinion evidence on that issue for that party, unless the court orders otherwise.

In this motion, the Wife requested an order that a qualified business valuator be appointed to quantify the Husband's income for support purposes. The matter was set for the trial sittings to commence in about five weeks, and, on the facts before her, Justice Madsen granted the requested relief.

There was no question that clarity of the Husband's income for support purposes was required for a fair and accurate determination of his support obligations. And the Husband's income was not entirely clear. His income comprised employment income; income from rental of real estate holdings; and corporate income from a solely held corporation, and it was necessary for the Court to understand the Husband's rental income and corporate income and the expenses the Husband deducted. An income report would clarify the Husband's income for support purposes, and thereby assist the trial judge in making a fair and just determination regarding support.

To date, the Husband's responses to requests for financial information and documentation about his business expenses had been inadequate, and some of the claimed expenses certainly appeared to have a personal component.

At this point, it is trite that the property owner and the income earner bears the burden of establishing the value of his or her assets and the amount of his or her income: *Virc v. Blair* (2017), 95 R.F.L. (7th) 289 (Ont. C.A.); *Hevey v. Hevey* (2021), 63 R.F.L. (8th) 24 (Ont. C.A.). In *some* cases, this obligation will actually extend to the production of a formal written expert report, including an income analysis: *Tonogai v. Tonogai* (2021), 53 R.F.L. (8th) 330 (Ont. S.C.J.) at 22-25; *Michi v. Michi*, 2008 CarswellOnt 118 (S.C.J.) at 55; *Meeser v. Meeser*, 2011 CarswellOnt 13969 (S.C.J.) at 62; *Kraemer v. Kraemer*, 2019 CarswellOnt 2924 (S.C.J.); *Caskie v. Caskie*, 2020 CarswellOnt 16830 (S.C.J.).

As noted above, Rule 20.2(10) provides that the court may order the retention of a joint litigation expert for two or more parties. Rule 20.2(12) then requires that the parties cooperate in providing the information reasonably requested by the expert: *Zantingh v. Zantingh* (2021), 68 R.F.L. (8th) 233 (Ont. S.C.J.) at paras. 72-76.

Because the matter was on the trial list for the following month, there was not sufficient time for the Husband to get an expert report and for the Wife to then retain her own expert to critique the Husband's expert report. Therefore, trial economy and respect for judicial resources also militated in favour of the Court appointing a joint expert. The primary objective of the *Family Law Rules* (ensuring a fair procedure, saving time and expense and dealing with cases justly and in a manner appropriate to their complexity and importance) was best served by the appointment of an expert on a joint basis as permitted by the *Rules*.

The Wife also proposed that the expert be retained on a joint basis, such that the cost be paid from funds held in trust and that the apportionment of those fees be left in the ultimate discretion of the trial judge.

Ultimately, her Honour accepted that, in the absence of full disclosure, "we don't know what we don't know," and the retainer of a CBV would provide needed clarity.

While the Wife here was successful, there was another option available to her. A self-employed person or business owner has the onus of clearly demonstrating the basis of net income; an inherent obligation to put forward not only adequate, but *comprehensive* records of income and expenses, failing which the Court may draw an adverse inference: *Wilson v. Wilson* (2011), 2 R.F.L. (7th) 233 (Ont. C.J.); *Whelan v. O'Connor* (2006), 28 R.F.L. (6th) 433 (Ont. S.C.J.); *Meade v. Meade* (2002), 31 R.F.L. (5th) 88 (Ont. S.C.J.); *Colivas v. Colivas*, 2013 CarswellOnt 193 (S.C.J.); *Roseberry v. Roseberry* (2015), 57 R.F.L. (7th) 162 (Alta. Q.B.); *Mah v. Lewis*, 2017 CarswellOnt 3776 (C.J.); *Lachance v. Campbell*, 2016 CarswellOnt 16348 (S.C.J.); *J.H. v. R.H.* (2023), 90 R.F.L. (8th) 295 (N.S. S.C.); *Kaushal v. Kaushal* (2023), 89 R.F.L. (8th) 279 (Alta. C.A.); *Durfey v. Durfey*, 2017 CarswellAlta 952 (C.A.); *Caracciolo v. Ruberto*, 2010 CarswellOnt 305 (S.C.J.); *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *Conway v. Conway* (2005), 16 R.F.L. (6th) 23 (Ont. S.C.J.).

And sometimes — just sometimes — the "alternative facts" available by way of adverse inference are better than the truth. Just ask Donald Trump.

A Slightly New Bent on Occupation Rent

Chhom v. Green, 2023 CarswellOnt 16111 (C.A.) — Harvison Young, Thorburn and Favreau JJ.A.

The law of occupation rent has changed significantly over the past few decades.

Ouster is no longer a requirement: *Foffano v. Foffano* (1996), 24 R.F.L. (4th) 398 (Ont. Gen. Div.); *Higgins v. Higgins* (2001), 19 R.F.L. (5th) 300 (Ont. S.C.J.); *Carmichael v. Carmichael*, 2005 CarswellNS 597 (S.C.); *Casey v. Casey* (2013), 32 R.F.L. (7th) 1 (Sask. C.A.); and *Hubley v. Fitzpatrick*, 2019 CarswellOnt 1434 (S.C.J.); *Virc v. Blair* (2016), 80 R.F.L. (7th) 124 (Ont. S.C.J.); *Holloway v. Devinish*, 2009 CarswellOnt 7235 (S.C.J.).

Occupation rent can now be an offensive claim rather than just a defence to an owner in possession claiming an accounting for (and contribution to) property expenses.

But courts have historically been, and continue to be, "slow" to award occupation rent in family law cases. Occupation rent in family law cases has been considered an "exceptional" award to be ordered "cautiously": *Foffano v. Foffano* (1996), 24 R.F.L. (4th) 398 (Ont. Gen. Div.); *Malesh v. Malesh*, 2008 CarswellOnt 3258 (S.C.J.); *Morrison v. Barclay-Morrison*, 2008 CarswellOnt 6956 (S.C.J.); *Guillemette v. Guillemette* (2008), 2008 CarswellOnt 434 (S.C.J.); *Kazmierczak v. Kazmierczak* (2003), 45 R.F.L. (5th) 373 (Alta. C.A.); aff'd 45 R.F.L. (5th) 373; *Kozun v. Kozun* (2001), 18 R.F.L. (5th) 115 (Sask. Q.B.); *McColl v. McColl* (1995), 13 R.F.L. (4th) 449 (Ont. Gen. Div.); *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Gen. Div.); *Seeman v. Seeman* (2010), 79 R.F.L. (6th) 396 (Alta. Q.B.).

And when occupation rent is ordered, it tends to be to just "even things up a bit": *Shen v. Tong* (2013), 40 R.F.L. (7th) 257 (B.C. C.A.); *McManus v. McManus*, 2019 CarswellBC 175 (S.C.); *Stasiewski v. Stasiewski*, 2007 CarswellBC 654 (C.A.); *G. (J.D.) v. V. (J.J.)*, 2016 CarswellBC 3643 (S.C.).

No more, it would seem.

Along with the Court of Appeal for Newfoundland and Labrador (*Gosse v. Sorensen-Gosse* (2011), 12 R.F.L. (7th) 1 (N.L. C.A.)), in *Chhom v. Green*, the Ontario Court of Appeal makes it clear that, in a family law case, while an award of occupation rent must be *reasonable*, it need not be exceptional. (In fact, in *Sorensen-Gosse*, the Newfoundland Court of Appeal held that the resisting party would have to show exceptional circumstances for an award of occupation rent to not be made).

In *Chhom*, the wife appealed a number of orders made following a half-day trial. The issues were straightforward: spousal support; equalization; and the disposition of the matrimonial home. This was a second marriage, there were no children of the marriage and the parties cohabited for 19 years. The main assets were the matrimonial home and the husband's McMaster University pension.

The Court ordered that the husband pay spousal support of $4,295 per month from December 1, 2022 to March 31, 2024, his retirement date, and $780 per month thereafter. He was also ordered to pay about $240,000 in equalization, most of this being on account of his pension.

The matrimonial home was owned jointly, and the wife had enjoyed exclusive possession since the parties' separation in July 2017. For that reason, the trial judge ordered that the wife pay the husband $31,500 in occupation rent.

The wife argued that the trial judge erred in ordering her to pay occupation rent. She argued that the trial judge erred in not noting the requirement that an award of occupation rent be "exceptional." The Court of Appeal did not agree:

> [8] . . . We disagree. While it is settled law in Ontario that an order for occupation rent be reasonable, **it need not be exceptional**: *Griffiths v. Zambosco*, (2001) 54 O.R. (3d) 397. The appellant was unable to refer us to any Ontario authority in support of the argument to the contrary. [**emphasis** added]
>
> [9] In addition, the trial judge's reasons concerning the occupation rent were adequate. The relevant factors to be considered when occupation rent is in issue in a family law context are: the timing of the claim for occupation rent; the duration of

> the occupancy; the inability of the non-resident spouse to realize on their equity in the property; any reasonable credits to be set off against occupation rent; and any other competing claims in the litigation: *Griffiths v. Zambosco*, at para. 49.

The Court of Appeal was comfortable that the trial judge considered the relevant factors in concluding that an order for occupation rent was reasonable. Nothing to see here.

As a result of *Sorensen-Gosse* and *Chhom*, it should now be clear that an award of occupation rent is not exceptional. The claim (and award) must be grounded in the evidence and be reasonable.

Aren't those mine?

CPC Networks Corp. v. McDougall Gauley LLP, 2023 CarswellSask 392 (C.A.), 2023 SKCA 90 — Richards C.J.S., Tholl J.A., and Kalmakoff J.A.

Who owns the contents of a lawyer's file?

We had always thought that a lawyer's notes and working papers belong to the lawyer, while the rest of the file belongs to the client. However, based on the Saskatchewan Court of Appeal's recent decision in *CPC Networks Corp.*, it looks like we may not have been as right as we could have been, and that the answer is far more complicated and nuanced. Although the decision doesn't arise from a family law case, given the tendency for some family law clients to regularly change lawyers, it is an important decision for family law lawyers to know about.

The defendant law firms, McDougall Gauley LLP ("MG") and Robertson Stromberg LLP ("RS") provided legal services to the plaintiff company, CPC Networks Corp. ("CPC" or the "company"). A dispute arose between the company and the law firms, and the company started a claim against the firms and asked them to turn over their files. The lawyers initially declined to comply with this request for complicated reasons that are not important for our purposes. However, after a number of court attendances, including a trip to the Saskatchewan Court of Appeal in 2021, they were ultimately ordered to deliver their files to the company: 2021 CarswellSask 555 (C.A.) at para. 9.

RS delivered its entire physical file to the company. MG, however, only turned over part of its file, withholding what it referred to as "solicitor's notes and inter-office memoranda", and claiming these documents belonged to the firm, and not the company.

The company filed an Application seeking an Order requiring MG to deliver "all solicitors' notes, witness statements and memoranda resulting from meetings or telephone attendances, with representatives of [the company] or other persons pertaining to the files for which [MG] was retained and for which [the company] was billed."

The Chambers judge found that MG's notes and working papers belonged to the law firm, and dismissed the company's Application.

The company appealed.

After thoroughly reviewing the law about ownership of a lawyer's file, including a number of leading Canadian cases and several cases from England and Australia, the Court of Appeal concluded that there is no bright line rule for determining whether a client is entitled to obtain a lawyer's notes and working papers. Instead, it determined that ownership of documents in a lawyer's file must be determined on a case-by-case and item-by-item basis, having regard to the following principles:

> [37] . . . (a) **Documents in existence prior to the retainer and provided by the client to the lawyer remain, in the absence of some proof to the contrary, the property of the client**.
>
> (b) **Documents prepared by a lawyer for the benefit of the client belong to the client.** This would include, for instance: legal research memoranda; pleadings, briefs and other documents filed in court; witness statements; and notes of conversations with the client, other counsel or third parties concerning matters that relate to the substance of the file or to the business of advancing the file toward a conclusion.

(c) **Documents prepared by a lawyer for their own benefit or protection belong to the lawyer.** This would include, by way of example, things such as accounting records, conflict searches, time entry records, and financial administration records like draft statements of account and cheque requisitions. Internal communications and notes concerning administrative matters such as the role that various lawyers and staff will play on the file may also fall into this category.

(d) **That said, documents will often be prepared for, or will serve, more than one purpose.** For example, a file note setting out instructions received from a client will both benefit the client by helping to ensure that their wishes are clearly understood and benefit the lawyer by memorializing the mandate received from the client. **In such circumstances, the predominant purpose should be controlling. Any doubt about the predominant purpose should be resolved in favour of the client with the result being that "documents prepared for the benefit of the lawyer" is likely to be quite a narrow class of material in most files.** In this regard, one helpful way to assess if a document belongs to the client may be to ask whether, when it was created, a new lawyer taking over the file at that time would have wanted to have had the document in order to properly and efficiently manage the file and advance the client's interests. If the answer is "yes", and particularly if the client paid for the time involved in generating the document, then it should be seen as belonging to the client.

(e) **The fact that the client has been billed for the time involved in preparing a document will be a significant factor, but not necessarily a decisive one**, weighing in favour of the conclusion that the document belongs to the client. In this regard, it is difficult to see how a document prepared for the benefit of the client and for which the client was billed would not be the property of the client. However, that said, I doubt that the same is true with respect to documents prepared for the benefit or protection of the lawyer. For example, and without endorsing this sort of billing practice, if the lawyer happens to record and charge out the time involved in doing a conflict of interest check to confirm that they can act for the client, the document reflecting the result of that conflict of interest check would nonetheless belong to the lawyer.

(f) **The burden of showing that a document in a file is the property of the lawyer should rest with the lawyer.** They will understand the circumstances in which the document came to be created and will be in possession of the information about who it was intended to benefit. [**emphasis**added]

Since the record before the Court of Appeal was insufficient to allow it to apply these principles, it ordered MG to review the documents it had not turned over to the company "through the lens of the principles identified in [its] decision", and deliver the additional documents, if any, that belonged to the company. It also ordered the company to prepare a list of the documents it claimed were its property, and provide a reason for withholding them with specificity so that a judge could decide any disputes that might arise.

The Court of Appeal also reminded MG to bear in mind that even if it *owned* a particular document, it might still be required to *produce* that document during the course of the discovery process. This raises an important **practice point** that you should always keep in mind. Even if you might not have to give your client your entire file on request, you probably will have to produce the entire file if your client decides to sue you, because the threshold for relevance for the purposes for discovery is quite low. So if you feel the need to vent to your colleagues about a frustrating client, difficult opposing counsel, or about anyone or anything else, either don't do it in writing, or if you do, any and all such notes should be kept in a separate file labelled, "lawyer personal notes for lawyer use only."

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