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

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Contents

- You Can't Sue Your Mother-in-Law . . . But One Can Dream
- Co\$ts Again\$t a Children'\$ Aid \$ociety

You Can't Sue Your Mother-in-Law . . . But One Can Dream

Karatzoglou v. Commisso, 2023 CarswellOnt 17320 (C.A.) — Gillese, Benotto and Trotter J.J.A.

We commented on this case at the motion for security for costs of appeal stage (see the June 26, 2023 (2023-25) edition of *TWFL*: Can a Trust Claim be Weaponized? Still Constructively and Resultingly, "No."). This was the appeal proper.

The wife added her mother-in-law as a party to divorce proceedings, claiming that her mother-in-law held two properties in trust for her son, the husband, that should be included in his net family property and subject to equalization. The motion judge granted partial summary judgment dismissing the claims against the mother-in-law. The dismissal was the subject of the appeal.

The husband and wife were married in 1997 and separated in 2014. The wife claimed support and equalization of net family property. Neither the husband nor the wife actually had title to any real property, but the wife claimed that her mother-in-law held two properties in trust for her son: "Rainbow Valley" which the wife claimed was the matrimonial home, and "Bullock Drive" where the husband's business was located. The wife argued that these properties should be included in the husband's net family property and subject to equalization.

The Rainbow Valley property was purchased by the mother-in-law and her late husband. It was registered in both of their names. It was not their principal residence. At the time, the husband and wife were living in subsidized housing, unable to purchase a home of their own. At some point, the husband's parents allowed the husband and wife to live in the property. The husband signed a lease with his parents. The husband paid rent to his parents. The father-in-law later died.

The wife moved out of the home on separation in 2014, and the husband continued to live there until his mother sold the home in 2021 for \$1,000,000. On the sale, the husband's mother gifted him about \$500,000 as an advance on his inheritance, which the husband used as a down payment on another home.

The Bullock Drive property was purchased by the husband's parents in 1990. It was used by the father-in-law to operate a car repair business. When the father-in-law died, title to the property passed solely to the mother-in-law, and the husband took over running the car repair business. The husband did not pay rent for using the property, but he paid the property taxes, maintenance fees, and condo shop fees.

In 2022, the Case Management Judge directed a summary judgment motion to determine the wife's claim that the mother-in-law held title to both properties in trust for the husband.

The motion judge found no evidence of a trust of any sort — express, resulting, or constructive — with respect to either property; and he also found that the wife had no standing to pursue the trust claims against her mother-in-law. The motion judge dismissed the wife's claim against her mother-in-law (insert mother-in-law joke here).

In dismissing the wife's claim, the motion judge adopted the reasoning of Justice McGee in *Morris v. Nicolaidis*, 2021 CarswellOnt 6258 (S.C.J.) ("*Morris*"):

[38] A claim that a third person holds property in trust for a non-titled spouse, or that a non-titled spouse has a beneficial interest in property, or a monetary claim arising from the acquisition, maintenance or use of that property can only arise from the personal, direct deprivation of the non-titled spouse. An equalization claim is, at best, an indirect legal interest. It is therefore insufficient to confer standing to a person to make a trust claim on behalf of a non-titled spouse or former spouse.

The sole question for the Court of Appeal was whether the motion judge erred in his analysis.

The Court of Appeal concluded that the appeal failed for two reasons, each of which was independently fatal.

First, there was just no evidence of the husband's beneficial ownership of either property. There was **no evidence** of an express trust with respect to either property. There was **no evidence** that the husband contributed to the purchase of either property. There was **no evidence** the husband or wife made any other significant contribution to the properties to support a claim of unjust enrichment.

The wife's claim for unjust enrichment was entirely based on the fact that she contributed furniture, some uncertain amount of money for "renovations", cared for their child while the husband was able to work, and undertook ordinary domestic duties around the house. But none of these claims, even if true, amounted to enrichment of the mother-in-law.

Notably, the Rainbow Valley property was not even a matrimonial home because neither spouse held an interest in it at the time of separation, as required by s. 18(1) of the *Family Law Act*, R.S.O 1990, c.F3 ("*Family Law Act*").

So this was all a serious problem for the wife.

Second, and perhaps more interesting, according to the Court of Appeal, a person does not have standing to advance a trust claim "**on behalf of**" a former spouse for equalization purposes. While this is a correct statement of law, we do feel the statement itself, without careful analysis, could be taken to suggest that there is never *any* basis to force a spouse to consider the value of an available trust claim in their Net Family Property — even if there are clear facts to support it. So let's explore this a bit further, shall we?

The motion judge concluded that the wife lacked standing to advance a trust claim **on behalf of** the husband. That is, she could not force the husband to sue his mother. This is correct.

Pursuant to the Court of Appeal, *Morris* accurately set out the law. A person does not have standing to advance a trust claim against a third party "**on behalf of**" a former spouse for equalization purposes: paras. 32-33 and 36-40:

[32] At the heart of this motion is an interesting question. **Can a person advance a trust claim on behalf of a former spouse** in order to increase that spouse's net family property and consequently, benefit the person's claim for, or defense to an equalization payment?

[33] **A claim for a constructive trust is a claim in equity that is privately held. It is not a public interest claim.** The common law principle relating to private interest standing states that "one cannot sue upon an interest that one does not have." [citation omitted].

.....

[36] Can an equalization claim create a direct personal legal interest that confers standing to make a trust claim on behalf of a spouse or a former spouse?

[37] I find that it cannot. **An equalization payment cannot change the titled or beneficial ownership of property between spouses.** The equalization scheme in Ontario is not based upon a division of property, but rather, it recognizes a spouse's non-financial contributions to a marriage by equalizing the increase in value in each party's net family property between the date of marriage and the date of separation, subject to variation per section 5(6) of the *Family Law Act*.

[38] **A claim that a third person holds property in trust for a non-titled spouse, or that a non-titled spouse has a beneficial interest in property, or a monetary claim arising from the acquisition, maintenance or use of that property can only arise from the personal, direct deprivation of the non-titled spouse. An equalization claim is, at best, an indirect legal interest. It is therefore insufficient to confer standing to a person to make a trust claim *on behalf of* a non-titled spouse or former spouse.** [Note the "on behalf of" wording for later.]

[39] Even trust claims *between* married persons are exceptional because "[i]n the vast majority of cases any unjust enrichment that arises as a result of the marriage will be fully addressed through the operation of the equalization provisions of the *Family Law Act*," see *Martin v. Sansome*, 2014 CarswellOnt 759 (ONCA). Writing for a unanimous court, Justice Hoy envisions in *Martin*, that it will be a rare case in which monetary damages for unjust enrichment cannot be adequately addressed by an equalization payment; and in those cases, a variation of share per section 5(6) of the *Family Law Act*, should be invoked before consideration of a trust claim.

[40] **Although not in evidence here, there may be a situation in which a meritorious trust claim is not advanced by a non-titled spouse. In such a case, the other spouse cannot step into the non-titled spouse's shoes and advance the claim himself because he has no direct personal legal interest in the trust claim; but he could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act*.** [emphasis added]

That is, a spouse cannot assert a trust claim against a third party *on behalf of* [there's those words again] a spouse for equalization purposes.

As a result, the wife's appeal was dismissed.

This was not terribly surprising given that the idea of even *imposing* a trust interest on a spouse (a "reverse constructive trust") has not been looked upon favourably by the Courts. See, for example: *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. H.C.); *Amsterdam v. Amsterdam* (1991), 31 R.F.L. (3d) 153 (Gen. Div.); *Arshinoff v. Arshinoff*, 1993 CarswellOnt 1551 (Gen. Div.); *Arndt v. Arndt* (1993), 48 R.F.L. (3d) 353 (Ont. C.A.) ("*Arndt*"); *Serra v. Serra* (2007), 36 R.F.L. (6th) 66 (Ont. S.C.J.); and *Marshall v. Marshall*, 2017 CarswellOnt 10016 (S.C.J.) ("*Marshall*"), wherein the idea of a "reverse constructive trust" was soundly rejected.

The reasons for this were well-explained by Justice George (as he then was) in *Marshall*. Generally, courts were concerned that to allow such claims of "reverse trust" (be it resulting or constructive) would lead to every asset purchased during a relationship possibly being subject to such a claim — and that certainly did not lead to judicial economy. Further, as Justice Weiler found in *Arndt* (albeit dissenting on the application of trust principles to that specific case at all):

[6] The reverse constructive trust sits uncomfortably with trust principles. There is no real deprivation to the spouse who has put in work or money to the property. In fact it is this lack of deprivation that the titled spouse is complaining about. The deprivation to the titled spouse who has equally contributed work or money to the property does not arise as a result of the other spouse's actions but as a result of the fixed date chosen by the legislature for the calculation of the equalization payment.

However, let's have another look at paragraph 40 from *Morris*, adopted by the Court of Appeal:

[40] Although not in evidence here, there may be a situation in which a meritorious trust claim is not advanced by a non-titled spouse. In such a case, the other spouse cannot step into the non-titled spouse's shoes and advance the claim himself because he has no direct personal legal interest in the trust claim; but he could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act*.

This is the paragraph that, above, we suggest may require careful review.

Let's assume for a moment that there is "a situation in which a meritorious trust claim is not advanced by a non-titled spouse." In *Morris*, as adopted by the Court of Appeal in *Karatzoglou*, it is suggested that the only relief is resort to s. 5(6) of the *Family Law Act*. The problem with that is the incredibly high standard of unconscionability required to invoke s. 5(6): *Merklinger v. Merklinger* (1992), 43 R.F.L. (3d) 109 (Ont. Gen. Div.), aff'd (1996), 26 R.F.L. (4th) 7 (Ont. C.A.); *Roseneck v. Gowling* (2002), 35 R.F.L. (5th) 177 (Ont. C.A.); *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.); *MacDonald v. MacDonald* (1997), 33 R.F.L. (4th) 75 (Ont. C.A.). A general sense of outrage is not sufficient: *Cosentino v. Cosentino* (2015), 55 R.F.L. (7th) 117 (Ont. S.C.J.); *Frick v. Frick* (2016), 78 R.F.L. (7th) 430 (Ont. S.C.J.), rev'd (2016), 91 R.F.L. (7th) 129 (Ont. C.A.).

We wholly agree that a spouse should not be able to actually *claim against* a third party *on behalf of* a former spouse. But forcing a spouse to rely on s. 5(6) in such a situation is, in our view, inappropriate (we were tempted to say "unconscionable"). A spouse cannot join a third party for the purpose of forcing the other spouse to actually claim a trust interest against the third party, or otherwise force a former spouse to claim a trust interest or unjust enrichment against a third party. But surely a spouse can (or should be able to), with adequate factual support, claim that the other spouse has a claim in unjust enrichment or resulting trust in a property — a chose in action — the value of which should be included on the other's net family property.

By way of example, suppose in *Karatzoglou* there was factual support for the suggestion that the husband had a claim in resulting trust over the Rainbow Valley property because he contributed to the purchase price. Should the wife be limited to claiming an unequal division of Net Family Property under s. 5(6)? Or should the wife be allowed to argue that the husband has a valuable chose in action of which he was strategically choosing to not avail. We say the latter. And we think we're right.

Co\$ts Again\$ a Children'S Aid Society

CAS v. J.P. et al (2023), 87 R.F.L. (8th) 385 (Ont. S.C.J.) — Tweedie J.

Like far too many child protection cases, *J.P.* involved a young child who had spent his entire life in a system without the resources it needs to do the critical work it is tasked to do. We wanted to draw your attention to it because Justice Tweedie, who was an experienced child protection lawyer prior to her appointment to the Bench, decided that the deficiencies in the evidence that the Society put before her were sufficiently serious to meet the high threshold required for awarding costs against a children's aid society.

The mother was a member of the Qalipu Mi'kmaq First Nation. The father was black. The Society removed the child from the mother's care almost immediately after he was born. They initially placed him with M.B. and C.B. (the "Kin Caregivers"), who were white and Mennonites. The child was temporarily placed with his maternal grandmother from September 2018 to March 2019, but was then returned to the Kin Caregivers.

On July 30, 2019, a final order was made placing the child in the care of the Kin Caregivers, subject to supervision by the Society for six months. He also continued to have contact with both of his parents.

Further litigation ensued in 2021 as a result of concerns the father raised about the Kin Caregivers. At a Temporary Care Hearing in August 2021, the Kin Caregivers and the mother argued that the child should be placed with the Kin Caregivers, while the father and the Society argued that the child should be placed with the father. All parties, including the mother, agreed that the child could not be placed with the mother.

The presiding judge, Justice Walters, agreed with the father and the Society, and made a temporary order placing the child with the father without access to the Kin Caregivers. Among other things, her Honour was concerned that while the Kin Caregivers

supported the child's indigenous heritage, they did not do the same for his Black heritage, and did not support his relationship with the father. She also found that the father had not been given adequate support by the Society, and that the Society had not adequately considered his plan of care.

In January 2022, the child allegedly told the mother that the father had hit him, and in May 2022, the police received an anonymous report that the father was producing and trafficking in fentanyl at the home and was leaving the child unattended. The Society and the police investigated these concerns, but did not verify them or remove the child from the father's care until July 2022, when the police executed a search warrant at the father's house that resulted in the father being arrested and charged with multiple drug and weapons related offences.

As the father was denied bail, the child was temporarily placed in the care of the father's girlfriend (the "Girlfriend"). At that point, however, the mother brought a further motion asking that the child be placed with the Kin Caregivers. The Society opposed the mother's motion. Although the Society did not initially make its position clear until the motion started (it did not serve a formal cross-motion setting out the relief it was seeking, and it stated in its Factum that it was seeking an Order placing the child with the father, which was obviously impossible given that the father was still in jail), on the return date for the motion, the Society advised the court that it was seeking to have the child remain with the Girlfriend, subject to Society supervision.

The presiding judge, Justice Tweedie, had significant concerns about both parties' plans of care, but ultimately determined that the best option would be to make a temporary order placing the child with the Kin Caregivers under the supervision of the Society.

She also expressed concerns about how the case was being handled, and encouraged all parties to find a way to work together for the sake of the child:

[58] The relationship between the parties, including the Society, is severely fractured. There were several affidavits filed for this motion, many of which focused on showing why the other party is wrong. This does not benefit the child in any way. This plan will require the good faith of all parties, and a desire to set aside differences, acknowledge deficiencies and strengths of each participant, and work together to make the best plan for the child. I strongly encourage all parties, including the Society, to engage in mediation to mend the relationships and forge a way to work together in a respectful manner which acknowledges the positive contributions of each to the child's well-being.

After deciding the substantive issues, Justice Tweedie had to deal with the issue of costs.

Although costs are rarely ordered against children's aid societies, the mother argued that such an order was appropriate in this case because the Society had failed in its procedural obligations. She asked that she be awarded \$3,600 in costs, which was approximately 50% of the costs she had incurred on the motion.

In response to the request for costs, the Society filed voluminous cost submissions well in excess of the page limits set by Justice Tweedie, and did so without first seeking leave — never a good idea, but a particularly bad choice when responding to allegations of failing to follow proper procedures.

To determine the mother's request for costs, Justice Tweedie turned to the principles set out by Justice Chappel in the seminal case of *Children's Aid Society of Hamilton v. L. (K.)*, 2014 CarswellOnt 8154 (S.C.J.), which was approved and relied on by the Ontario Court of Appeal in *Children's Aid Society of the Region of Peel v. L.M.* (2022), 72 R.F.L. (8th) 1 (Ont. C.A.) (for further discussion of *L.M.*, see the May 30, 2022 (2022-19) edition of *TWFL*). As Justice Chappel explained in *K.L.*:

[14] The following general principles apply when a claim is advanced for costs against a child protection agency:

1. **Child protection agencies do not enjoy immunity** from costs awards.
2. However, the starting point in analyzing a claim for costs against a child protection agency is that **child welfare professionals should not be penalized for carrying out their statutory obligation** to protect children.

3. The approach to costs as against child welfare agencies must **balance the importance of encouraging child protection professionals to err on the side of protecting children and the need to ensure that those professionals exercise good faith, due diligence and reason** in carrying out their statutory mandate.
4. **The high threshold of "bad faith" is not the standard** by which to determine a claim for costs against a child protection agency.
5. **Costs will generally only be awarded against a Children's Aid Society in circumstances where the public at large would perceive that the Society has acted in a patently unfair and indefensible manner.**
6. **A Society should not be sanctioned through costs for an error in judgment**, or in cases where the nature of the case makes it very difficult to weigh and balance the evidence and predict the legal outcome.
7. **Important factors to consider in deciding whether costs against a Society are appropriate include the following:**
 - i. Has the Society conducted a **thorough investigation** of the issues in question?
 - ii. Has the Society remained **open minded** about possible versions of relevant events?
 - iii. Has the Society **reassessed its position** as more information became available?
 - iv. Has the Society been **respectful of the rights and dignity of the children and parents** involved in the case?
 - v. In cases involving procedural impropriety on the part of a Society, **the level of protection from costs may be lower if the irregularity is not clearly attributable to the Society's efforts to diligently carry out its statutory mandate of protecting children.** [emphasis added]

Although she had rejected the Society's position that the child should be placed with the Girlfriend, Justice Tweedie was not satisfied that the position had been "patently unfair and indefensible" for the purposes of awarding costs against the Society (see the fifth principle set out in *Children's Aid Society of Hamilton v. L. (K.)* set out above).

However, Justice Tweedie agreed with the mother that an order for costs against the Society was warranted because of a number of what she referred to as "procedural failings" during the course of its investigation and the litigation — a charitable way of saying that the Society had failed to conduct a proper investigation and provide the court with critical information. Among other things:

- Despite initially taking the position that the child should be placed with the father, and then subsequently clarifying that it wanted the child to be placed with the Girlfriend, the Society had not provided the court with details of the father's incarceration and potential for release.
- The Society had delegated its decision-making responsibility to another child protection agency, and had asked the court to rely on evidence from that agency that was clearly double hearsay.
- The Society did not adequately or independently assess its proposed plan to place the child with the Girlfriend.
- The Society had not disclosed the Girlfriend's historical involvement with child protection agencies, and had left it to the mother to bring a motion to obtain that information so that it could be available to the court.

In other words, the Society had not done its job. As a result, Justice Tweedie was satisfied that an order for costs against the Society was warranted, and ordered it to pay the mother the \$3,600 she had requested.

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