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

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Contents

And so it begins . . .

***Bayat v. Mavedati*, 2024 CarswellBC 1034 (S.C.) — Associate Judge Nielsen**

Issues: British Columbia — Property — Companion Animals — Possession

Earlier this year, the British Columbia legislature amended the B.C. *Family Law Act*, S.B.C. 2011, c. 25 (the "*Family Law Act*") to provide for the court determining ownership and rights to possession of companion animals — an animal that is kept primarily for the purpose of companionship.

Like or hate the legislation, there had to be a first case.

This is it.

This was an application by the claimant for an order in relation to the family dog, Stella the Golden Retriever. The claimant was seeking an order for exclusive care of Stella.

The parties began living together on April 1, 2020. They separated on February 9, 2023.

Stella was purchased on August 21, 2020. There was a dispute concerning ownership. The purchase receipt was in the name of the respondent. But there was evidence of an e-transfer from the claimant to the respondent, for precisely half the value of Stella that was made at the time of Stella's purchase. It was the claimant's evidence that she equally shared the cost of purchasing Stella.

Section 97 of the *Family Law Act* was amended to include ss. 4.1, which provides:

> (4.1) In determining whether to make an order under subsection (1) respecting a companion animal, the Supreme Court must consider the following factors:
>
> (a) the circumstances in which the companion animal was acquired;
>
> (b) the extent to which each spouse cared for the companion animal;
>
> (c) any history of family violence;
>
> (d) the risk of family violence;
>
> (e) a spouse's cruelty, or threat of cruelty, toward an animal;

(f) the relationship that a child has with the companion animal;

(g) the willingness and ability of each spouse to care for the basic needs of the companion animal;

(h) any other circumstances the court considers relevant.

The claimant submitted the reason she was not on Stella's "birth certificate" was because she did not know she could be included — the respondent had supposedly advised her there could only be one name on the certificate.

The claimant also gave evidence, accepted by the court, that she had financially contributed to Stella's care for a number of years. *Critically* — the claimant had also created an Instagram page for Stella.

The claimant alleged that the respondent (a veterinarian) had been neglectful and cruel to Stella. The court did not accept that evidence.

There were allegations that the respondent was abusive to Stella: that he was not diligent in having Stella spayed or vaccinated; that he allowed Stella to socialize with other dogs when it was unsafe to do so; and that Stella contracted . . . ugh . . . worms on his watch. None of these complaints went very far.

The claimant also suggested that a lump on Stella's elbow was due to Stella not having a proper bed and spending too much time on the floor in the respondent's office. Again — this did not go terribly far.

Both the claimant and the respondent are busy professionals. Both, in the eyes of the court, clearly loved Stella, as evidenced by the considerable legal fees and multiple court applications devoted to considerations of Stella's best interests.

Associate Judge Nielsen found that both parties had shown such deep concern about Stella's well-being that the "custody" of Stella should be shared on an interim without prejudice basis, week-on/week-off.

The court also ordered . . . now don't laugh . . . shared decision-making responsibility.

No costs.

We note that ss. 97(4.2) of the *Family Law Act* provides that "[a]n order respecting a companion animal **must not** (a) declare that the spouses jointly own the companion animal, or (b) **require the spouses to share possession of the companion animal**" [emphasis added]. Based on the wording of this subsection, it would seem the court did not have the authority to make the Order it did.

But perhaps that does not matter because Stella is happy. Maybe.

Interim Sale of a Jointly-Owned Home — By the End of This You will Know What "Moiety" Means

***Kolenosky v. Kolenosky* (2023), 96 R.F.L. (8th) 388 (Sask. K.B.) — Brown J.**

Issues: Saskatchewan — Property — Sale of Jointly Owned Property

Unlike most other Canadian jurisdictions, Saskatchewan has yet to enact its own legislation to deal with the sale of jointly owned property (as, for example, has Ontario in the form of the *Partition Act*, R.S.O. 1990, c. P.4; Manitoba in the *The Law of Property Act*, R.S.M. 1987, c. L90; and Nova Scotia in the *Partition Act*, R.S.N.S. 1989, c. 333). Instead, Saskatchewan still relies on an old (and we mean *old*) British statute — the *Partition Act*, 1868 (31 and 32 Vict.), c. 40 (the "*Partition Act* of 1868") — that first became part of the law of the territory that is now known as Saskatchewan in 1876 when the Government of Canada enacted *The Northwest Territories Act*, R.S.C. 1886, c. 50. It then became part of the law of Saskatchewan when that province was first created in 1905 with the enactment of *The Saskatchewan Act*, S.C. 1905, c. 42. It would seem that the "Land of Living Skies" is a bit stuck in the dark ages with respect to partition and sale legislation.

In what can best be described as the best (or worst) run on sentence we've seen in years (and as a reminder as to the importance of the lowly period), s. 4 of the *Partition Act* of 1868 states as follows (we know people sometimes skip block quotes, but try to read this one and see if you can figure out what it means . . .):

> In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if the Party or Parties interested, individually or collectively, to the Extent of One Moiety or upwards in the Property to which the Suit relates, request the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court shall, unless it sees good Reason to the contrary, direct a Sale of the Property accordingly, and give all necessary or proper consequential Directions.

Clear. As. Day.

For those of you who do not know what a "Moiety" is — shame on you. Quite obviously (at least according to Google) it is "each of two parts into which a thing is or can be divided." In any event, notwithstanding the tortured wording in s. 4, the legal principles that apply to applications for the sale of jointly owned property in Saskatchewan are essentially identical to those that apply throughout the rest of Canada, including that:

- "A joint tenant has a *prima facie* right to partition or sale and the court will compel such partition or sale unless justice requires that such an order should not be made": *Coburn v. Coburn*, 1984 CarswellSask 445 (Sask. Q.B.) at para. 3; *Matovich v. Matovich*, 2013 CarswellSask 358 (Q.B.) at para. 24; and *Stubbings v. Stubbings*, 2018 CarswellSask 12 (Q.B.) at para. 39.

- The discretion to refuse partition is "severely limited", and generally restricted to cases where "an applicant is motivated by malice or a desire to be vexatious or the outcome is economically oppressive": *Reitsma v. Reitsma* (1974), 17 R.F.L. 292 (B.C. S.C.), as cited in *Reed v. Reed*, 1985 CarswellSask 147 (Q.B.) at para. 18; *Matovich v. Matovich*, 2013 CarswellSask 358 (Q.B.) at para. 25; and *Porterfield v. Pirot*, 2017 CarswellSask 253 (Q.B.) at para. 19.

But what is less clear — or at least it was before Justice Brown released his decision in *Kolenosky* — was whether the *Partition Act* of 1868 applied to family law cases where one of the parties was seeking relief under *The Family Property Act*, S.S. 1997, c. F-6.3 (the "*FPA*") and, if so, whether different or additional considerations ought to apply.

The basic facts in *Kolenosky* were as follows:

- The parties were married and had two children together.

- After they separated, the husband continued living in the jointly owned family home and continued operating his business from the home.

- The wife moved out of the family home and secured separate accommodations.

- The children spent time with both parties.

- The wife started a proceeding and brought a motion for interim sale of the family home pursuant to the *FPA*. However, her motion was dismissed.

- Just a few months before the trial of the family law case was scheduled to start, the wife brought a further motion for sale of the family home, but she asked for this relief under the *Partition Act* of 1868 instead of the *FPA*.

- The husband opposed the wife's request for interim sale and argued that the wife was trying to do "an end run" around the family law case, and a do-over of her previous request for interim sale under the *FPA*.

- The husband also argued that the *Partition Act* of 1868 did not even apply, as the case was governed solely by the *FPA*.

Justice Brown was unable to locate any cases from Saskatchewan that addressed the legislative intersection between the *Partition Act* of 1868 and the *FPA*. But after considering the issue, he concluded that there was no conflict between the two statutes, and that the court could order interim sale under either statute in appropriate circumstances. However, he also determined that the court had "enhanced discretion" when dealing with applications under the *Partition Act* of 1868 in the family law context, and that "[t]he *Partition Act* right to sale does not trump considerations pursuant to the *FPA*."

With respect to how this "enhanced discretion" should be exercised, Justice Brown turned to the leading authorities from Ontario, including *R.L. v. M.F.* (2022), 71 R.F.L. (8th) 398 (Ont. S.C.J.), which we discussed (along with other cases) in the June 20, 2022 (2022-2) edition of *TWFL*. He also reviewed a recent decision from the Alberta Court of King's Bench in *Burns v. Burns*, 2023 CarswellAlta 762 (Alta. K.B.), where Justice Marion summarized the principles that apply to motions for interim sale in Alberta, including that:

> • "There is no firm rule on when to do so, as each case must be weighed on its own merits, considering all relevant factors and weighing the costs and benefits to each party in making the order[.]"
>
> • "Factors militating against the sale of the matrimonial home include where there are significant other financial matters still to be resolved, where one of the parties may have sufficient assets to buy out the other's interest in the home, or where there is no pressing need to sell the home[.]"
>
> • "Factors supporting the sale of matrimonial home include situations of urgency, for example where the home is at risk of foreclosure or waste, where the *status quo* is unsustainable, or where there is no realistic hope that one of the parties can refinance the home to buy out the other party[.]"
>
> • " . . . in some cases, sale of the home may simplify the outstanding financial matters or disputes between the parties and facilitate resolution", particularly where "there is expected to be a lengthy period between separation and final resolution of matters and there are likely to be complex and difficult occupation rent, dissipation or other arguments on property distribution relating to the ongoing use, maintenance and debt servicing relating to the home[.]"
>
> • " . . . another factor supporting the sale of a matrimonial home, is the agreement of the parties to sell the home, either outside the court process or, even more so, as reflected in a consent order that has not been appealed or varied[.]"

After considering these authorities, Justice Brown ultimately concluded that the test for interim sale in Saskatchewan is highly discretionary, requiring the court to consider all relevant factors:

> [41] In the context of an interim application such as this, the approach is to consider the merits of a sale, the interests of each party pursuant to both statutes and any children who may be affected. **The task is to balance any prejudice either party may suffer against the benefits to the various outcomes available.** The advantages of sale must be weighed as against the disadvantages of sale. **This balancing must occur with reference to the timing of the request, the stage of the family property proceedings at which the request is made, and the potential impact an order of sale would have on the parties and the proceedings.** Causing delay and inefficiency with respect to the family property proceeding would not normally justify ordering a sale. [emphasis added]

Based on the particular facts of this case, it is not surprising that Justice Brown did not grant the wife's motion. The wife had already brought a motion for interim sale, the husband needed the home from which to operate his business, ordering sale would potentially prejudice the husband's claims at trial, and, most importantly, the trial was only two months away. However, instead of dismissing the motion, he adjourned it *sine die* in case the trial did not proceed in a timely manner.

We absolutely agree with Justice Brown's decision not to order the sale given the imminent trial date, particularly since this was the wife's second attempt to have the home sold and there is nothing in the decision to indicate that there was any urgent need to sell the property. [With limited exceptions, a trial on the horizon will result in the dismissal of an interim motion for sale. See, for example: *Dombrowski v. Dombrowski*, 2021 CarswellOnt 2080 (S.C.J.) at 34-42; *Punit v. Punit* (2014), 43 R.F.L. (7th)

84 (Ont. Div. Ct.); *Kolenosky v. Kolenosky* (2023), 96 R.F.L. (8th) 388 (Sask. K.B.); *Ludmer v. Ludmer* (2012), 25 R.F.L. (7th) 397 (Ont. S.C.J.); *Mignella v. Federico*, 2012 CarswellOnt 12347 (S.C.J.); *Lall v. Lall*, 2012 CarswellOnt 12826 (S.C.J.).]

That being said, we are not sure it was necessary for the court to find that judges have "enhanced discretion" when dealing with requests for interim sale.

Not too long ago, the legal landscape was such that parties clearly understood that if a motion for interim sale was brought, it would almost certainly be granted. However, as we discussed in the June 20, 2022 (2022-2) edition of *TWFL*, in more recent years, the outcome of these types of motions has become far less certain, far less predictable, and far more discretionary. This change, combined with systemic problems that are making it increasingly difficult to get cases to trial within a reasonable period time, have created a situation where it is far too easy for one spouse, to use the words of the Ontario Court of Appeal in *Silva v. Silva* (1990), 30 R.F.L. (3d) 117 (Ont. C.A.), to "hold the house hostage" for tactical reasons or because of unrealistic expectations and/or an unreasonable attachment to a particular property. And making it easier for a spouse to be able to hold the house hostage often makes it far more difficult to settle a case than it otherwise would be. As noted by Justice McGee in *Goldman v. Kudeyla* (2011), 5 R.F.L. (7th) 149 (Ont. S.C.J.) at para. 20, while the interim sale of property should not be made as a matter of course, the sale of the matrimonial home is often the most appropriate catalyst to effect the equal division of family assets and establish post separation parenting patterns — that is, to get the settlement process rolling.

So instead of an "enhanced discretion" test that requires each individual judge to consider and weigh all of facts in each particular case, we suggest a much more simple test: a request for interim sale ***shall*** be granted (perhaps on terms) unless there is a really, really, really good reason not to.

Now, if you'll excuse us, we're going to go fight over Moietyization of a cheeseburger.

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