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

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Contents

Breaking News

We reported on the Ontario Court of Appeal's decision in *Mehralian v. Dunmore* (2023), 94 R.F.L. (8th) 255 (Ont. C.A.), in the February 26, 2024 (2024-07) edition of *TWFL*. As a reminder, the Court of Appeal dismissed the father's appeal from an order dismissing his motion seeking the return of the parties' child to Oman, and dismissed the mother's appeal from an order recognizing the validity of the parties' Omani divorce. The father sought leave to appeal to the Supreme Court of Canada and, on June 13, 2024, the court granted leave (it does not appear that the mother sought leave). While we have not reviewed the father's leave materials, we expect that one of the issues the Supreme Court of Canada will want to address on the appeal is whether its decision in *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) dealing with habitual residence under the *Hague Convention* applies equally in non-*Hague* cases.

With the Supreme Court's decision to grant leave to appeal in *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.), and now its decision to grant leave in *Mehralian*, 2024 is shaping up to be a busy year for family law at the Supreme Court!

How to Punish a Recalcitrant Spouse: Give Them Half a House?

***Cohen v. Cohen* (2024), 99 R.F.L. (8th) 288 (Ont. C.A.) — Nordheimer, Copeland and Dawe JJ.A.**

Issues: Ontario — Uncontested Trial — Entitlement to Equalization Payment

Disclosure: Epstein Cole was involved in this matter.

The parties separated in August 2021, at which time the Husband effectively "disappeared". The Wife slowly began to piece together that the Husband was involved in something problematic, and likely illegal.

The Wife commenced proceedings in February 2022. Although granted every indulgence, the Husband did not file responding materials. He also did not produce *any* disclosure.

The Wife, as it turns out, did not know much about the Husband's true finances, just as she had no idea he was allegedly the mastermind behind a Ponzi scheme that ultimately saw him arrested for fraud in April 2022.

So far, all just par for the course in a family law file.

In August 2022, the Wife brought a motion seeking to proceed with an uncontested trial and allowing her to sell the matrimonial home (that was in her sole name, but was nevertheless a matrimonial home), without the Husband's consent. The Wife's motion was granted, allowing her to proceed to an uncontested trial and to sell the matrimonial home — but she had to hold the net proceeds of sale in trust pending further directions from the court.

The Wife filed her materials for the uncontested trial in December 2022. She sold the matrimonial home a few months later. The sale of the matrimonial home closed in August 2023. On closing, all the net proceeds of sale, totalling over $1 million, were held in trust per the court's Order and pending the decision on the uncontested trial.

The Wife was mostly successful on the uncontested trial. She was granted sole-decision making authority for the three children of the marriage and child support based on an imputed income for the Husband. But, then, things took a serious left turn: the trial judge ordered that, while there would be no "further" equalization, half of the net proceeds from the sale of the matrimonial home (approximately $500,000) was to be held in trust with the Wife's real estate lawyer and used as a fund from which to pay the Husband's child support obligation (to the extent he did not pay it directly). As the home was owned solely by the Wife, this effectively meant that the Wife would be paying herself child support with her own capital. It was also very problematic for the Wife who was then left without adequate funds to rehouse herself and the children. Finally, it meant that the Wife's real estate lawyer would have to hold the funds in trust for the Husband indefinitely (and for *at least* 11 years, if the funds were paid out monthly to the Wife as "child support").

Notwithstanding the absence of any financial disclosure by the Husband, the trial judge found that the Husband was "likely" indebted. And based on that assumption, the trial judge must have concluded that the Husband's net family property was zero and, therefore, determined that the Wife owed an equalization payment to the Husband. Accordingly, the trial judge decided to "equalize" one asset (the Wife's most significant asset, the matrimonial home) and based on a value two years post-separation (remember, in Ontario, the value of property to be divided is fixed as of the date of separation).

As we said — a serious left turn. The Wife appealed.

The Court of Appeal held that there would be no equalization payment owing between the parties and that the remaining proceeds from the sale of the matrimonial home (that were being held in trust for the Husband) were to be released to the Wife immediately.

The Court of Appeal agreed with the Wife that the trial judge had erred in ordering an equalization payment to the Husband given there was a "wholly inadequate factual basis" on which to assess the Husband's net family property (as he had not provided any disclosure). The court commented that it was unfair for the Wife to have been ordered to pay an equalization payment to the Husband where he had failed to make any disclosure and where there was evidence that the Wife was "in the dark" about the Husband's financial situation during the marriage. The court further held that ordering otherwise would create incentives that are contrary to both the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") and the *Family Law Rules*, O. Reg. 114/99, by giving a non-disclosing spouse the benefit of a finding in his favour, as opposed to an adverse inference.

Interestingly, the Court of Appeal did not address the Wife's claim that it was also inappropriate to order equalization based on the value of only one asset and at a date after the date of separation. Perhaps it was not necessary to do so given the determination that it was an error to award anything at all to the Husband by way of equalization.

The one finding in this decision we find troubling is that the Court of Appeal did not accept the Wife's argument that the trial judge erred by considering the issue of equalization at all, notwithstanding: (1) the Husband had not claimed equalization (or made any claims whatsoever as he did not file an Answer); and (2) at the uncontested trial, the Wife did not seek an equalization payment, but an order that there be no equalization (or, in the alternative, that there be an unequal division of net family property in her favour). Rejecting the Wife's argument on this point, the Court of Appeal found that, given that the Wife had claimed equalization in her original Application — before she knew that the Husband would not file an Answer or provide any disclosure — the trial judge did not err in considering the issue of equalization.

Although we don't like it, this result is probably borne out by ss. 5(1) and 7 of the *FLA* which suggest that upon separation, one spouse is entitled to an equalization of net family property if either spouse claims it:

> **Equalization of net family properties**
>
> **Divorce, etc.**
>
> 5 (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.
>
> **Application to court**
>
> 7 (1) The court may, **on the application of a spouse**, former spouse or deceased spouse's personal representative, **determine any matter respecting the spouses' entitlement under s. 5**. R.S.O. 1990, c. F.3, s. 7 (1). [emphasis added]

Notably, s. 7(1) is not limited by saying that on the application of a spouse, the court may determine any matter respecting **that** spouse's entitlement under s. 5.

So . . . the lesson here is that a claim for equalization is a two-way street: once one party claims equalization, either party can receive an equalization payment — so be careful what you wish for. And, ironically, this also means that even where one party is in default, the other party cannot just withdraw a claim for equalization without notice — as that is changing the landscape of the claim.

Although the Court of Appeal did not need to address the Wife's argument about how the trial judge's decision could have foreseeably resulted in the real estate lawyer being responsible for holding the funds in trust for many years, the court did note that absent a request from the parties, a lawyer should not ordinarily be ordered to administer funds over a period of years.

Money is Great Security — Unless There's No Money

***Anand v. Anand* (2024), 99 R.F.L. (8th) 8 (Alta. C.A.) — Antonio J.A.**

Issues: Alberta — Stay Pending Appeal

In some provinces, like Ontario, a money judgement (save for a support order) is automatically stayed upon the delivery of a Notice of Appeal and a motion to lift the automatic stay is necessary to effect payment pending appeal.

In other provinces — like Alberta — a money judgment is not automatically stayed pending appeal such that a stay pending appeal is necessary to prevent payment of a money judgment being enforced pending appeal.

Different strokes for different folks — but in either case, the general test to either get a stay pending appeal, or to lift an automatic stay pending appeal, follows the general three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120 (S.C.C.) at 334:

> a. Is there a serious question to be tried;
>
> b. Will there be irreparable harm if the stay is not granted/lifted; and
>
> c. Whether the balance of convenience favours granting/lifting the stay.

Here, the Applicant was applying for a stay pending appeal of an order releasing $223,726.50 to the Respondent, from the net proceeds of the sale of their family home.

Below, the Chambers Judge ordered that $223,726.50 would be paid to the Respondent. The Applicant appealed and was here applying to have the order stayed.

An appeal presents a serious issue if it is not frivolous or vexatious — it is a relatively low test: *Polansky Electronics Ltd. v. AGT Limited*, 2000 CarswellAlta 109 (C.A.) at para. 11; *Circuit World Corp. v. Lesperance*, 1997 CarswellOnt 1840 (C.A. [In Chambers]); *Ontario v. Shehrazad*, 2007 CarswellOnt 2113 (C.A. [In Chambers]); *McNeil v. Barrett*, 9 R.F.L. (8th) 122 (Div. Ct.). Sometimes a "serious issue" is used to describe an appeal "that has a reasonable prospect of success": *Fiala Estate v. Hamilton*, 2008 CarswellOnt 6870 (C.A.); *Buccilli v. Pillitteri*, 2013 CarswellOnt 16731 (C.A.). Here, no matter how it was described, this part of the test was not a difficult hurdle for the Applicant to jump.

Interestingly, whereas (as noted above) some provincial Rules of Procedure provide for an automatic stay of a money judgment upon service of a Notice of Appeal, in Alberta, courts are generally reluctant to grant stays for money judgments: *Barron v. Warkentin*, 2005 CarswellAlta 593 (C.A.) at para. 3.

On the question of "irreparable harm", while it is often the case that money can satisfy any possible harm — here, Justice Antonio makes the point that harm which is in theory reparable by money is actually irreparable, if there never will be money available to repair it. Good point; nice soundbite. And supported by *Pyne v. Alberta (Workers' Compensation Board)*, 2006 CarswellAlta 1593 (C.A.) at para. 10. An applicant for a stay must establish a reasonable prospect that the respondent will not, or will not be able to, repay any amount ordered on appeal: *Moses v. Weninger*, 2006 CarswellAlta 177 (C.A.) at para. 21; *Edmonton (City) v. Westinghouse Canada Inc.*, 1996 CarswellAlta 666 (C.A.) at para. 10.

Here, the Applicant argued that the Respondent had few assets and was likely to dissipate any funds distributed to him — such that he would not be able to repay any amount ordered on appeal, resulting in irreparable harm to her were a stay not granted.

In response, the Respondent argued that he would not spend the entirety of the funds and that he had assets, apart from the disputed funds, sufficient to cover any award that may be made in the Applicant's favour. However, at the same time, the Respondent argued that he needed the funds to pay for his legal fees, basic necessities, and other living expenses. However, there was not much evidence regarding these "other assets" in terms of value or liquidity.

This was enough to convince Justice Antonio of a reasonable prospect that the Respondent would not be able to repay any amount ordered on appeal.

With respect to the balance of convenience, the court was persuaded that it would be most fair to order a stay pending appeal with respect to a portion of the funds in dispute.

Call us biased — but we like the system in Ontario whereby a money judgment (save for a support order) is automatically stayed pending appeal. We think it a common concern that an unsuccessful respondent in appeal might not have funds available to pay a successful appellant; so why not just have a stay pending appeal be automatic, forcing the respondent to bring a motion to lift the stay, and in the process establish that they will be able to satisfy any judgment on appeal.

If You Still Get "Mortgagor" and "Mortgagee" Confused . . . Remember that the "Mortgagee" Has the Money

***Alkahlout v. Abbood*, 2024 CarswellOnt 5368 (Ont. S.C.J.) — Mitrow J.**

Issues: Ontario — Property — Matrimonial Home — Default in Mortgage Payments

This was an urgent motion by the wife for exclusive possession of the matrimonial home, an order vesting title of the matrimonial home in her name, an order that she be able to sell the matrimonial home without the husband's involvement or consent, and an order that she be at liberty to pay the mortgage to the bank directly. It is this last request that is most interesting, as it invokes s. 22 — a rarely used section of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, ("*FLA*"), dealing with rights of redemption under a mortgage.

The parties were married in 2019. There was one child born in 2021, soon to be three-years-old.

The parties separated in July 2023 following an incident that saw the husband being charged with assault. The conditions of release included non-association and communication with the wife and a requirement that he remain a certain distance from her. As a result, the wife and child had been in the matrimonial home since the date of separation.

Following the separation, the husband stopped paying the mortgage on the matrimonial home. Banks don't like that. He also did not pay any child support. Courts don't like *that*.

The matrimonial home was registered solely in the husband's name.

The monthly mortgage obligation was $1,718.41, and as of February 1, 2024, the mortgage was about $11,500 in arrears. The bank served a Notice of Sale on February 21, 2024, demanding payment of all amounts secured by the mortgage, inclusive of costs, in the total amount of $518,173.02 to be paid by March 29, 2024.

The parties agreed that the home should be listed and sold.

Justice Mitrow considered the factors in s. 24(3) of the *FLA* in relation to the wife's claim for excusive possession. His Honour determined that the child's best interests favoured the order being made. An important consideration was that the husband was not paying child support and that the wife swore to having had to sell household items to make ends meet. Also, the wife had no financial ability to secure other accommodations. His Honour also took the criminal charges into account.

The husband had not put any information about his financial position before the court, even though it was relevant to the motion for exclusive possession: *FLA* s. 24(3)(c). There was also a suggestion that the husband had been evading service.

As a result, his Honour was persuaded that the wife should have interim exclusive possession of the matrimonial home.

With respect to the wife's claim for a vesting order, while there is unquestionably authority to make a vesting order on an interim basis pursuant to s. 100 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and s. 9(1)(d) of the *FLA* — and while the court's power to grant a vesting order is very elastic [*Lynch v. Segal* (2006), 33 R.F.L. (6th) 279 (Ont. C.A.)] — a court cannot make such an order without evidence. And, at this very early stage in the proceeding, the evidence to justify a vesting order just was not there.

For example, there was no evidence as to the amount of any potential equalization payment that might be owing or any evidence as to what the child support or spousal support obligations might be. Therefore, the rationale in cases like *Segat v. Segat*, 2015 CarswellOnt 201 (C.A.) and *Sharma v. Sharma*, 2016 CarswellOnt 6734 (C.A.) at paras. 11-16 did not apply.

The wife also argued that she needed a vesting order to deal with the bank — she deposed that she had attended at the bank several times to pay the mortgage, and that the bank would not allow her to do so because she was not on title.

This is where s. 22 of the *FLA* comes in:

> **Right of redemption and to notice**
>
> 22 (1) When a person proceeds to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a matrimonial home, the spouse who has a right of possession under s. 19 has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice respecting the claim and its enforcement or realization.
>
> . . . . .
>
> **Idem: power of sale**

(3) When a person exercises a power of sale against property that is a matrimonial home, sections 33 and 34 of the *Mortgages Act* apply and subsection (2) does not apply.

Payments by spouse

(4) If a spouse makes a payment in exercise of the right conferred by subsection (1), the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture.

Section 22 of the *FLA* gave the wife the same right of redemption and relief against forfeiture as the husband in relation to the matrimonial home, and the wife was allowed to make payments in exercise of that right and have those payments applied to the mortgage.

Furthermore, the wife's rights in s. 22 of the *FLA* included the right given to a mortgagor in s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40, to place the mortgage in good standing by paying the outstanding mortgage payments and expenses necessarily incurred by the mortgagee, and would also include the right to require a written statement from the mortgagee as to the amounts owing for principal, interest and expenses: ss. 22(1) and 22(2) of the *Mortgages Act*.

Ultimately, Justice Mitrow ordered the husband to do that what was necessary to reinstate the mortgage including paying all current arrears. He made this order because the husband did not provide *any* evidence explaining why he stopped making the mortgage payments or any evidence as to his income, assets, liabilities or access to funds. The husband also did not deny the wife's evidence that, prior to separation, it was his responsibility to make the mortgage payments. One could see the adverse inference coming a mile away.

Therefore, in addition to the order for excusive possession and an order for sale on consent (with specific terms as set out by his Honour), Justice Mitrow ordered that the husband immediately reinstate the mortgage on the matrimonial home by (1) paying all amounts owing on the charge totalling $11,536.11, plus any further amounts that had accrued; and (2) that he take any other steps as may be required to reinstate the mortgage.

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