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

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Warning: Adult Children and Latin Ahead

J.F.R. v. K.L.L., 2024 CarswellOnt 9774 (C.A.) — Hourigan, Roberts and Coroza JJ.A.

Issues: Ontario — Parenting Order for Child of the Marriage Over the Age of Majority

In *J.F.R. v. K.L.L.*, the Ontario Court of Appeal addresses the interesting (and important) question of how the court is to approach a request for a parenting order under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "*Divorce Act*") for an "adult child" (the oxymoron of all family law oxymorons) with a disability but who is presumed to be capable.

This appeal involved M., a 26-year-old adult living with Down Syndrome. M. cannot live independently and has always lived with his parents. He is financially dependent on them.

The parties to this proceeding are M.'s parents. They separated in 2012 and subsequently implemented a shared parenting schedule for M. and his sister. Both M. and his sister were minors at the time.

The parties continued to follow the shared parenting schedule until the onset of the COVID-19 pandemic in March 2020, when they decided that M. should temporarily live with the mother to minimize the risk of exposure to the virus. In October 2020, the father sought to return to the shared parenting schedule that had previously been in place, but the mother refused the father's request, and M. continued to live primarily with the mother.

As a result of the mother's refusal, the father commenced an application to reinstate the shared parenting schedule, and he brought a motion for the same relief. M. was not named as a party to the proceeding or formally served with notice of the proceeding, and he did not have the opportunity to make submissions on the father's motion. M. was 24-years-old at the time of the father's motion.

The motion judge found she had jurisdiction to make a temporary parenting order with respect to M. under s. 16.1 of the *Divorce Act*, as she was satisfied that he met the definition of a "child of the marriage" under s. 2(1) of the *Act*. The relevant portions of the *Divorce Act* are as follows:

> **2(1)** in this Act,
>
> ***child of the marriage*** means a child of two spouses or former spouses who, at the material time,

. . . . .

(b) **is the age of majority or over and under their charge but unable, by reason of** illness,**disability**, or other cause, **to withdraw from their charge or to obtain the necessaries of life**;

. . . . .

16.1(1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

(a) either or both spouses; or

(b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

Interim order

(2) The court may, on application by a person described in subsection (1), make an interim parenting order in respect of the child, pending the determination of an application made under that subsection. [**emphasis** added]

The motion judge determined that M. met the definition of a "child of the marriage" because he remained under his parents' charge and could not withdraw from their charge due to his cognitive disability.

The motion judge ultimately found that there was no evidence, aside from the mother's own assertions, that the shared parenting schedule had ever been, or would be, detrimental to M.'s physical, emotional and psychological safety, security and well-being, and ordered the parties to restore a shared parenting schedule. The motion judge also ordered the parties to retain a social worker or psychologist to interview M. and attempt to elicit his views and preferences within six months, before the Order would become "final."

The mother appealed to the Ontario Court of Appeal. While the father did not contest the Court of Appeal's jurisdiction, the court agreed with the mother that the motion judge's determination that M. was a child of the marriage was a final order, as it established jurisdiction to make a parenting order for M. (Generally an order determining jurisdiction is a final order: *M.J. Jones Inc. v. Kingsway General Insurance Co.*, 2003 CarswellOnt 4594 (C.A.); *Abbott v. Collins*, 2002 CarswellOnt 3487 (C.A.); *Manos Foods v. Coca-Cola Ltd.*, 1999 CarswellOnt 3088 (C.A.); *Smith v. National Money Mart Co.*, 2006 CarswellOnt 2774 (C.A.); *Winsa v. Henderson* (2016), 81 R.F.L. (7th) 74 (Ont. Div. Ct.); *Hopkins v. Kay*, 2015 CarswellOnt 2232 (C.A.).)

M. was independently represented by counsel for the appeal, pursuant to an earlier order of the Court of Appeal.

The primary issue the mother raised on appeal involved M.'s right to be heard on any matter that materially affects his interests, including on the issue of his ability to withdraw from parental control in the context of the residential schedule.

While the motion judge's order that M.'s views and preferences be ascertained through a social worker or psychologist before a final order was made recognized the need to hear from M. with respect to the residential schedule, it was no substitution for M.'s participation, as M. was *presumed* to be a capable adult in the proceedings. M.'s lack of participation in the proceeding could not be remedied by simply ascertaining his views and preferences prior to making a final order under s. 16.1 of the *Divorce Act*.

The right to be heard — or the principle of *audi alteram partem*, for those who prefer Latin (and who doesn't, really) — is a rule of natural justice that requires courts to provide an opportunity to be heard to persons who are affected by a court's decision. The Court of Appeal stressed that the right to be heard is particularly important in cases like this one that involve persons living with a disability who may, as a result of the disability, be dependent on others to ensure their interests are protected and their views are made known to the court. That dependence on others or incapacity in some or all areas of decision making does not eliminate the right to be heard.

The right to be heard along with the right to retain independent counsel protects the presumption of capacity and the right to make one's own decision. The presumption of capacity is only rebuttable under precise conditions and with clear evidence [*Ohenhen (Re)*, 2018 CarswellOnt 800 (C.A.) at para. 82; *Royal Bank of Canada v. FTVRB2 Inc.*, 2016 CarswellOnt 931 (C.A.) at para. 18]. Those requirements are necessary to protect the autonomy of the person whose capacity is in issue.

The Court of Appeal stressed that the question of capacity is nuanced, and it is not simply a question of whether a person has capacity or not:

> [28] . . . the question of capacity is nuanced. **There are varying levels of capacity — a person can be capable of making a basic decision and not capable of making a complex decision or capable of making decisions about personal matters such as where or with whom to live and not decisions regarding financial matters.** In other words, the fact that a person is incapable of making decisions regarding property does not mean that they are incapable of making decisions regarding personal care. Further, a person may be capable of making decisions regarding some aspects of property and personal care, for example, one's residence, but not others. **In sum, capacity is on a spectrum and is not "an all-or-nothing proposition".** [**emphasis** added]

The Court of Appeal noted that issues of capacity for dependent adults living with disabilities are commonly decided in proceedings brought for guardianship orders under the *Substitute Decisions Act*, *1992*, S.O. 1992, c. 30. However, the Court of Appeal saw no reason to treat issues of capacity that arise under the *Divorce Act* any differently. As a result, the Court of Appeal held that s. 2(1)(b) of the *Divorce Act* must be interpreted and applied in the context of the common law presumption of capacity and the high burden of proof required to displace it.

Once a child has reached the age of majority, he or she is no longer presumptively a "child of the marriage." The onus of proof that an adult child remains a "child of the marriage" under s. 2(1)(b) of the *Divorce Act* rests on the party alleging that the adult child is unable to withdraw from parental charge or to obtain the necessaries of life. In *Ross v. Ross* (2004), 2 R.F.L. (6th) 200 (B.C. C.A.) at para. 22, the British Columbia Court of Appeal explained that the analysis begins from the presumption that the adult child is presumed capable of decision-making and that presumption of capacity can only be rebutted on sufficient evidence. Stated alternatively, compelling evidence is required to prove incapacity: *Evans v. Evans* (2017), 96 R.F.L. (7th) 300 (Ont. S.C.J.).

The Court of Appeal in *J.F.R.* determined that, since capacity is context-specific, the phrase "withdrawal from parental charge" in s. 2(1)(b) of the *Divorce Act* should also be context-specific. That is, an adult child may be able to withdraw from parental charge for one purpose, but not for another purpose, and the court's focus should be on whether they are able to withdraw from parental charge *in relation to the particular order sought*. (Some will be concerned this represents the final nail in the "payor as wallet" coffin, allowing a child over the age of majority to "withdraw" from parental charge for the purpose of seeing a parent, but not for the purpose of being supported by that parent. That is a debate for another time.)

The Court of Appeal concluded that, in the absence of a prior capacity determination relevant to the order sought under the *Divorce Act*, "**an adult who is presumed to be capable and who is potentially affected by the order in question should be served with notice of the proceeding and afforded the opportunity to obtain separate legal representation and to participate fully, including in the adjudication of any capacity issue**." This is a very important point, and we will return to it below.

The Court of Appeal ultimately concluded that M. was denied the opportunity to participate in the proceeding and was not afforded the presumption of capacity to make his own decisions about his residential arrangements. While it was established that M. could not live independently and required financial and other support, it was not established that he was unable to withdraw from parental charge to the extent of being capable of making his own choices regarding his residence from the various options that may be available to him.

As an adult who is presumed capable of choosing his residence until proven otherwise, M. had the right to representation and to make submissions on the threshold question of whether; for the purpose of determining where, when and with whom he lives; he remained a "child of the marriage" as that term is defined under s. 2(1)(b) of the *Divorce Act*.

The Court of Appeal allowed the appeal and set aside the temporary order with respect to M.'s residence. The court directed that, if either party wished to pursue an order under the *Divorce Act* determining M.'s residence, he was to be added as a party and the order for his representation by counsel was to continue.

Before we leave you to your ruminations on this one, we want to return to the Court of Appeal's holding that "an adult who is presumed to be capable and who is potentially affected by the order in question should be **served with notice of the proceeding and afforded the opportunity to obtain separate legal representation separate legal representation and to participate fully, including in the adjudication of any capacity issue**." This is an interesting statement.

This certainly seems to suggest that, in any case where a party is seeking an order with respect to a "child of the marriage" as defined under s. 2(1)(b) of the *Divorce Act*, that party will be expected — if not *required* — to serve the adult child with notice of the proceeding. This arguably applies not only in cases where a party is seeking a parenting order (as was the case in *J.F.R.*), but also in cases where a party is seeking a child support order with respect to an adult child of the marriage under s. 2(1)(b) of the *Divorce Act* and s. 3(2) of the *Federal Child Support Guidelines*, SOR/97-175. While we expect this will be more closely monitored and enforced in cases where a party is seeking an order that arguably infringes on the autonomy of the child, it is certainly something we should be keeping in mind in all cases where s. 2(1)(b) of the *Divorce Act* is engaged.

Anyone Want to Buy a House?

Rastkar v. Soltani, 2024 CarswellOnt 3236 (S.C.J.) — Somji J.

Issues: Ontario — Sale of the Matrimonial Home — Co-Owner's Participation in the Bidding Process

This ordinary motion about the sale of a matrimonial home raised some interesting issues about the listing, bidding and sale process — specifically whether, and if so, how, one of the co-owners could fairly participate in the bidding process.

The parties separated on July 30, 2020. The Wife and the two children continued to live at the home.

In mid-May 2023, the parties completed a trial. In August 10, 2023, the trial judge ordered that the home be listed for sale no later than September 9, 2023.

The ordered terms of sale included a minimum listing price of $630,000.

After the date the home was to be listed, the Wife informed the Husband that repairs were required before the home could be sold. The Husband argued that the Wife was trying to delay the sale to extend her time of residence there; and the Wife argued that the Husband wanted to avoid what she called "necessary repairs" in an effort to reduce the value of the home so as to be able to buy it himself.

The home was listed on October 2, 2023, for $799,000. The parties agreed to a closed bidding process for the sale that would take place on October 17, 2023.

On October 17, 2023, the closed bidding proceeded, and the only offer received was that of the Husband for $650,000. While the Husband's offer was above the minimum listing price of $630,000, it was under a previous valuation of the home at $799,000.

The Wife refused the Husband's offer.

On October 18, 2023, the Husband served a Notice of Motion on the Wife and the listing agent. The Husband wanted the sale to be suspended pending the outcome of the motion. There was an open house on October 21, 2023, and the parties received an offer for $680,000. The Husband rejected that offer and countered at $789,000 — *the following day*.

The first question was whether the Husband was entitled to bid on the property and, if so, whether the Wife obstructed that right.

It has been trite law since *Martin v. Martin* (1992), 38 R.F.L. (3d) 217 (Ont. C.A.) that once a court makes an order that a jointly owned matrimonial home is to be sold, each spouse is entitled to receive a fair market value for their interest.

But what exactly does that mean in practice?

When one spouse wants to purchase a jointly-owned property, it is often assumed that they can "wait and see" the third party offers that are received and then simply outbid the third party offer. But that actually distorts the market as one party clearly has "inside information" (i.e. knowledge of the other offers). And that sort of market distortion does not produce fair market value. It actually provides a significant advantage to the spouse-in-waiting who need not actually "compete" in a blind bidding process.

As stated by Justice Somji:

> [16] In other words, if either [the Husband] or [the Wife] wish to purchase the matrimonial home from the other, **each must compete with other interested purchasers and do so without any inside information as to the other offers made.** The caselaw makes clear that **the owner must participate in the bidding process and comply with all the formalities of that process as would any other third party bidder and the home should be sold to whoever makes the highest offer within that fair process**. [**emphasis** added]

This is precisely what the court also held in *Howard v. Howard* (2022), 83 R.F.L. (8th) 191 (Ont. S.C.J.) at para. 50.

However, courts have also held that one joint owner can be compelled to accept a buyout where the joint owner is frustrating an already ordered sale: *Jeffrey v. McNab* (2019), 35 R.F.L. (8th) 135 (Ont. S.C.J.) — a somewhat different situation.

It has also been held that *where parties have already agreed* on the value of a property, then one party can be ordered to sell to the other at that price as there is then no market distortion and no opportunity for prejudice. See, for example: *Silver v. Clow*, 2014 CarswellOnt 8555 (S.C.J.).

Nor can one spouse just "lie in wait" for the other spouse to make an offer and then marginally best it. Generally, a court will order that owners accept the first reasonable offer, and an only marginally better offer does not supplant that rule: *Murchison v. Sheriff*, 2011 CarswellOnt 11501 (S.C.J.).

Here, Justice Somji agreed with the Husband that the parties had agreed to a closed bidding process and that the Husband had competed in good faith with any other potential bidders. We are not sure we agree with that statement as the Husband waited until the closed bidding process ended and then chose to make a counter offer the following day. That allowed the Husband to bid with the benefit of inside information.

However, Justice Somji then notes that while the Husband was entitled to participate in the bidding process, the Wife was not actually obliged to *accept* his offer. There was no agreement or order that any specific offer had to be accepted, and if so, within what price point of the listing price. As a joint owner, the Wife was entitled to hold out for the highest fair market value of the property available. Just because the Husband made an offer to purchase above the minimum price of $630,000 did not oblige the Wife to accept that price.

This, of course, left the parties in a bit of a stalemate.

The Wife argued that the Husband should not be entitled to bid on the home. There was no law to support that position. The Husband had not done anything improper so as to warrant his exclusion from the sale process.

Justice Somji ordered that the home be re-listed for sale at $750,000, and that every 30 days the listing price be automatically reduced by at least $20,000 unless the parties agreed otherwise, until the home was sold. And if either party wanted to bid on the house, they could do so any time at the then listing price.

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