

FAMLNWS 2025-04

Family Law Newsletters

February 03, 2025

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

Aaron Franks & Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

- **Alphabet Soup: RESPs, RDSPs, and ODSP . . . OMG!**
- **Horton Hears an Exclusive Jurisdiction Clause**

Alphabet Soup: RESPs, RDSPs, and ODSP . . . OMG!

Lagtapon v. Lagtapon (2024), 7 R.F.L. (9th) 356 (Ont. S.C.J.) — Petersen J.

Lagtapon dealt with a host of child support issues, but the one that is of particular interest for this comment is its analysis of how to deal with a variety of issues relating to child support for a disabled adult child, including multiple types of registered savings accounts, and the interplay between child support and government assistance programs.

The parties separated in 2021 after a lengthy marriage. They had two children together: a 19-year-old daughter, D.E., who was attending university away from home; and a 22-year-old son, X.E., who had a serious developmental disability that prevented him from being able to live independently or support himself.

The parties opened Registered Education Savings Plans ("RESPs") for the children when they were each very young, but converted them to a joint RESP for both children when they realized it was unlikely that X.E. would be able to attend post-secondary education.

[For a detailed discussion about RESPs in the family law context, see Justice Faieta's comprehensive decision about the topic in *L. v. L.* (2022), 79 R.F.L. (8th) 484 (Ont. S.C.J.), and our comment on that case in the September 12, 2022 (2022-33) edition of *TWFL* — "Everything You Ever Wanted to Know About RESPs . . . And Then Some".]

The parties also opened a Registered Disability Savings Plan ("RDSP") for X.E. As Justice Petersen explained in her decision:

A RDSP is designed to assist individuals with disabilities to save for their long-term financial security. Similar to a RESP, **government grants are deposited to the RDSP based on the account holder's contributions** (and the beneficiary's family net income). A maximum of \$3,500 in matching government grants can be made in any given year, up to \$70,000 over the beneficiary's lifetime. **Contributions can be made to the plan up to the point where the beneficiary is 59 years old. Regular withdrawals from the plan must begin in the year that the beneficiary turns 60.** If money is withdrawn sooner, some of the government grants may have to be repaid. [emphasis added]

[For more information about RDSPs, see "RC4460 Registered Disability Savings Plan" that is published by the CRA, and available on the CRA's website at <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4460/registered-disability-savings-plan.html>.]

When the parties separated in 2021, the RESP was valued at approximately \$78,000, and the RDSP was valued at approximately \$25,000. For reasons that are not explained in the decision, both the RESP and RDSP were opened in the father's sole name, and remained in his sole name throughout the marriage and after separation.

After the mother and father separated, they were unable to agree on how to use the funds in the RESP and RDSP, or who should be in charge of administering the funds.

The father thought it might eventually be possible for X.E. to enrol in a vocational school or apprenticeship. Accordingly, he wanted to limit D.E.'s withdrawals from the joint RESP to \$12,500 a year. This would ensure that at least part of the funds in the RESP would remain to cover the potential cost of an educational or training program for X.E. Furthermore, if it turned out that X.E. was unable to obtain further education or training, the remaining funds in the RESP could be rolled into his RDSP, which can be done without penalty after 30 years from the date that the RESP was opened.

The mother did not think that X.E. would ever be able to obtain further education or training. Accordingly, she wanted to use the entire joint RESP to pay for D.E.'s school expenses, which she said were approximately twice as much as the \$12,500 the father was proposing to use from the RESP for D.E. each year.

Following Justice Faieta's decision in *L. v. L.*, Justice Petersen determined that while the father was the legal owner of both the RESP and RDSP (as he was named as the subscriber on both accounts), this did not necessarily mean he was the beneficial owner of either account. Accordingly, to determine beneficial ownership, her Honour determined that she had to assess whether the three certainties of a valid trust had been met, which (as you will certainly recall from law school) are: (1) certainty of **intention** to create a trust; (2) certainty of the **subject** matter (the property to be held in trust); and (3) certainty of **object** (the identity of the beneficiary or beneficiaries): *Corvello v. Colucci*, 2022 CarswellOnt 1931 (Ont. C.A.) at para. 7.

After considering the evidence, Justice Petersen was satisfied that the three certainties had, in fact, been met with respect to both the RESP and RDSP. Therefore, the children were joint beneficial owners of the RESP, and X.E. was the sole beneficial owner of the RDSP:

[20] These three certainties have been established in this case. The parties discussed the purpose of the joint RESP when they created it. [The father], as the account holder, had a clear settled intention to use the money exclusively for the children's benefit, to finance their post — secondary education, to the extent possible. The property in the trust is readily ascertainable; it consists of the money in the account. The beneficiaries are explicitly identified as X.E. and D.E. The RESP account is therefore held by [the father] in trust for the children. They are the true (beneficial) owners of the funds in the account.

[21] Similarly, the RDSP account is held by [the father] in trust for X.E.'s benefit. The account was created with the sole purpose of providing for X.E.'s long term financial security. [The father] has clearly expressed a settled intention to use the funds exclusively for that purpose. X.E. is the true (beneficial) owner of the savings in the RDSP account.

Having found that both the RESP and RDSP were being held in trust, Justice Petersen turned her attention to what she called the real dispute between the parties, which was who "would be the most suitable trustee to administer the accounts" based on the court's inherent jurisdiction to remove trustees: *Ocean Man Trust, Re*, 1993 CarswellSask 88 (C.A.) at paras. 7-10; and *Evans v. Gonder*, 2010 CarswellOnt 1240 (C.A.) at para. 26.

To this we would add that provincial legislation in most provinces provides Superior Courts with express statutory authority to remove and replace a trustee in appropriate circumstances. For example, in Ontario, s. 5(1) of the *Trustee Act*, R.S.O. 1990, c T.23 authorizes the Superior Court to "make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee."

In this case, Justice Petersen was satisfied the father should continue to have control over both the RESP and the RDSP, as he had a far better understanding than the mother of how the accounts worked and how to maximize the available government

grants. He had also shown a commitment to ensuring that the funds in the joint RESP were used equitably for the benefit of both children, instead of favouring one child over the other.

In contrast, the mother's plan to use up the RESP to pay for D.E.'s education would have privileged D.E. at the expense of X.E. It also would have benefitted the mother instead of X.E. by reducing the amount of money she had to contribute to D.E.'s s. 7 expenses out of pocket — that certainly did not go unnoticed.

However, to make sure there was complete transparency with respect to the RESP and RDSP, Justice Petersen directed the father to keep the mother apprised of any deposits or withdrawals, and to provide her with annual statements for both accounts.

Since Justice Petersen declined to remove the father as trustee, she did not have to decide or address what test applies when dealing with a request to remove one parent as a trustee on an RESP or RDSP, and replace them with the other parent.

In the estate context, the test for removing a trustee is *extremely* high, and can only be done in "the clearest of evidence that there is no other course to follow": See e.g. *Meuse v. Taylor*, 2022 CarswellOnt 2664 (S.C.J.) at paras. 11-15.

What remains unclear, however, is whether a similarly high threshold applies in the family law context, or whether a lower threshold such as a "best interests test" applies when dealing with a request by one parent to remove and replace the other spouse as the trustee of an RESP or RDSP.

For example, had the court disagreed with the father's position on how to use the RESP in this case, would mere disagreement have been sufficient to justify his removal as trustee? It is doubtful that would be the case as long as the father was acting in a financially responsible way.

If not, could the court nevertheless have ordered the father to exercise his discretion as a trustee in a certain way (or ways), or would that have amounted to improper interference with a trustee's discretion, which a court will typically only do if "(1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion": *Walters v. Walters*, 2022 CarswellOnt 445 (C.A.) at para. 47.

Or, alternatively, could the court avoid the issue of potentially fettering a trustee's discretion by simply ordering the father to pay for 100% of the D.E.'s post-secondary expenses up to the value of the RESP, and then leaving it up to the father to decide how to pay for them (whether from the RESP or from other sources)?

These are all interesting questions that will have to wait for another case to be answered.

After finding the father's income totalled \$281,000 a year and the mother's totalled \$181,000, Justice Petersen had to decide how to calculate the amount of monthly support and s. 7 expenses, if any, that the father should be paying.

The caselaw in Ontario is clear that the usual "Guidelines approach" in s. 3(2)(a) of the *Child Support Guidelines* (Table amount plus s. 7 expenses) is generally *inappropriate* when dealing with a disabled adult children, and that courts should calculate support in these cases under s. 3(2)(b) of the *Guidelines*, which requires it to consider "the condition, means, needs and other circumstances of the child and the financial ability of each parent or spouse to contribute to the support of the child": *Senos v. Karcz* (2014), 45 R.F.L. (7th) 97 (Ont. C.A.) at paras. 58 and 64; *Weber v. Weber* (2020), 45 R.F.L. (8th) 196 (Ont. S.C.J.) at paras. 78-79; *Pulyk v. Bucknell*, 2020 CarswellOnt 18670 (S.C.J.) at para. 19; *Auliffe v. Neely*, 2020 ONSC 1615 at paras. 141-142; *Morden v. Kelly* (2019), 30 R.F.L. (8th) 131 (Ont. S.C.J.), at para. 55; and *Schultz v. Lassiter*, 2022 CarswellOnt 319 (S.C.J.) at para. 22.

The same is also true in most other Canadian jurisdictions, including, for example, New Brunswick (see *C.M. v. G.M.* (2020), 38 R.F.L. (8th) 303 (N.B. C.A.)), Saskatchewan (*Wetsch v. Kuski* (2017), 1 R.F.L. (8th) 290 (Sask. C.A.)), Manitoba (*Rémillard v. Rémillard* (2014), 52 R.F.L. (7th) 299 (Man. C.A.)), Alberta (*M. (B.G.) v. M. (P.G.)* (2013), 36 R.F.L. (7th) 146 (Alta. Q.B.)), and B.C. (*Kollmuss v. Kollmuss* (2015), 62 R.F.L. (7th) 42 (B.C. S.C.)). See also: *C. (C.L.) v. C. (B.T.)* (2012), 22 R.F.L. (7th)

144 (B.C. S.C.); *BGM v. PGM* (2013), 36 R.F.L. (7th) 146 (Alta. Q.B.); *Briard v. Briard* (2010), 81 R.F.L. (6th) 223 (B.C. S.C.), aff'd (2010), 94 R.F.L. (6th) 33 (B.C. C.A.); *Steidinger v. Morrell* (2013), 33 R.F.L. (7th) 129 (Man. Q.B.); *Wetsch v. Kuski* (2017), 1 R.F.L. (8th) 290 (Sask. C.A.).

This, of course, makes sense as the further the situation departs from the "usual" situation of a child under the age of majority, living primarily in one home, without independent resources — the more likely the "Guidelines" approach" will be found to be "inappropriate." [*Rebenchuk v. Rebenchuk* (2007), 35 R.F.L. (6th) 239 (Man. C.A.); *Phillips v. Phillips*, 2024 CarswellOnt 18068 (S.C.J.)]

The mother submitted that X.E. needed a total of \$2,370 a month to meet his expenses, while the father submitted that he really only needed a total of \$1,582. After reviewing the evidence about X.E.'s expenses, Justice Petersen concluded that X.E. needed \$1,807 a month to meet his reasonable expenses. After deducting the \$995 a month that he was receiving from the Ontario Disability Support Program, his shortfall totalled \$812 a month.

As the father was earning 61% of the parties' total income, Justice Petersen ordered the father to pay the mother 61% of the \$812 monthly shortfall, for a total of \$495 a month. She also ordered the father to pay for 61% of X.E.'s 7 expenses, including day programming, summer camp, speech therapy, and mental health therapy (after deduction of any available tax credits).

All in all, a very rational decision; alphabet soup no more.

Horton Hears an Exclusive Jurisdiction Clause

Yegre EB Ltd. v. Seguin, 2024 CarswellBC 3236 (C.A.) — Horsman, Skolrood and Winteringham JJ.A.

This is not a family law case, but it does offer some interesting comments on forum selection clauses and how carefully they must be drafted to achieve the desired effect. And given that many family law matters involve some form of domestic contract — be they Cohabitation Agreements, Marriage Contracts or Separation Agreements — the decision could prove important for some.

In *Seguin*, the British Columbia Court of Appeal found that a forum selection clause using the words "submit" or "attorn" does not, on its own, grant exclusive jurisdiction to a forum. To achieve the desired outcome, the contract must include *clear and express* language granting exclusive jurisdiction, rather than just suggesting submission or attornment to a jurisdiction.

In 2015, the parties entered into a property purchase agreement whereby the appellant would purchase five industrial properties from the respondents. The Purchase Agreement included a forum selection clause committing the parties to "submit" to the jurisdiction of the Alberta courts "for all purposes arising in connection with this Agreement." Specifically:

7.4 Applicable Law

This Agreement shall be construed and enforced in accordance with the laws of the Province of Alberta and the laws of Canada applicable thereto and shall be treated in all respects as an Alberta contract. **The parties hereto hereby submit to the jurisdiction of the Alberta courts for all purposes arising in connection with this Agreement.** [emphasis added]

When things went South (or in this case, West), the appellant filed a claim in British Columbia claiming damages for breach of contract, fraudulent and negligent misrepresentation, and conspiracy in connection with the purchase. The respondents filed a jurisdictional response asking to stay the B.C. application because the forum selection clause required the action to proceed in Alberta.

The B.C. Supreme Court judge of first instance agreed with the respondents. It held that the "forum selection clause" should be interpreted as an "exclusive jurisdiction clause" requiring the action to proceed in Alberta. In doing so, it found that "submit" and "attorn" have different meanings.

The B.C. Court of Appeal saw things differently and allowed the appeal. It held that the lower court erred in drawing a distinction between the terms "submit" and "attorn", and that the clause in question lacked the "clear and express language" necessary to grant exclusive jurisdiction to the courts of Alberta.

The legal principles that govern the interpretation and enforcement of forum selection clauses were set out by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 CarswellNat 1031 (S.C.C.) ("*Pompey*") and *Douez v. Facebook, Inc.*, 2017 CarswellBC 1663 (S.C.C.) ("*Douez v. Facebook, Inc.*, 2017 CarswellBC 1663 (S.C.C.)"). Courts will generally hold parties to the terms of a forum selection clause when it is the product of negotiation between sophisticated parties, albeit most often in commercial contracts. However, because forum selection clauses may encroach on an area of public adjudication, they are not enforced the same way as other contractual clauses: *Douez* at paras. 26-27.

Instead, the courts follow the two-step approach set out in *Pompey*, and restated in *Douez*:

(a) At the **first step**, the onus is on the applicant seeking the stay to establish, applying ordinary principles of contract law, that the forum selection clause is valid, clear and enforceable, and that it applies to the cause of action before the court.

(b) At the **second step**, once the clause is found to be valid, clear and enforceable, the onus shifts to the plaintiff to show strong reasons why the court should not enforce the clause. In exercising its discretion at this step, the court must consider all circumstances, including the convenience of the parties, fairness between the parties, and the interests of justice, as well as any relevant public policy considerations.

Ultimately, the Court of Appeal rephrased the test as follows:

[28] **Clear and express language is required** to confer exclusive jurisdiction. **If the forum selection clause is ambiguous, in the sense that it is open to more than one reasonable interpretation, it will not be construed to assign exclusive jurisdiction . . .** While there is no requirement that a forum selection clause contain the word "exclusive" in order to confer exclusive jurisdiction, **there must be language that unambiguously signals the parties' intention to select the chosen forum to the exclusion of any other form.**

[29] **If the court concludes that the forum selection clause is valid, clear, and enforceable, and that there are not strong reasons not to enforce the clause, then a stay of the proceeding will be granted.** [emphasis added]

Here, the Court of Appeal had issues with the first part of the test being satisfied.

The Court of Appeal was of the view that the court below erred in finding a significant distinction between "submit" and "attorn", those terms often being used interchangeably in the context of forum selection clauses. Furthermore, an agreement to "submit" or "attorn" to a court's jurisdiction, without more, typically signals non-exclusivity; as drafted, the clause was permissive, not mandatory: *Sleep Number Corporation v. Maher Sign*, 2020 CarswellOnt 1456 (C.A.) at para. 7. To grant *exclusive* jurisdiction, clear and express language is required. And this was not that. The language of the forum selection clause here did not reflect a "clear and express intention" to grant exclusive jurisdiction to the Alberta courts. Where reasonable alternative interpretations exist, a forum selection clause cannot be considered exclusive. Here, neither the wording of the clause nor the other provisions in the agreement reflected a clear and express intention to make the clause exclusive. As noted by the Court of Appeal:

[53] The question is whether this language **clearly, expressly, and unambiguously** reflects the parties' intention to assign exclusive jurisdiction to the Alberta courts. **If there is a reasonable alternative interpretation** that the words, read in context, can bear, then the Clause will not be interpreted as an exclusive jurisdiction clause. [emphasis added]

Therefore, on the theory that you should say what you mean, and mean what you say — if you're aiming for exclusivity, make it clear: "The parties agree that the Courts of Alberta will have exclusive jurisdiction to determine any issue that arises under this Agreement."

Or, to borrow from *Horton Hears a Who!*:

We meant what we said;

And we said what we meant:

Alberta's exclusive 100%.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.