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

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Note: We'll be taking next week off. We'll be back with the next edition of *TWFL* the week of April 7, 2025.

Partial Summary Judgment — For Every Thing There is a Season

***Le v. Norris* (2024), 6 R.F.L. (9th) 253 (Ont. C.A.) — Miller, Harvison Young, and Gomery JJ.A.**

***Reichert v. Bandola* (2024), 7 R.F.L. (9th) 219 (Ont. S.C.J.) — Kraft J.**

Issues: Ontario — Summary Judgment

In both *Le v. Norris* and *Reichert v. Bandola* motion judges had to decide motions for partial summary judgment to dismiss a spousal support claim in the context of a common law relationship, based on the claimant's alleged failure to meet the definition of a "spouse" under the spousal support provisions of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*"). While the result differed to some extent, the takeaway remains the same: partial summary judgment is sometimes a viable process in family law cases - and sometimes it is not.

A Brief Refresher

It's been just over a decade since the Supreme Court of Canada delivered its landmark, paradigm-shifting, culture-changing, thought-provoking, compound-word causing decision in *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.), which today remains the leading authority on summary judgment in Canada. As you may recall, the court held that:

> 1) The Ontario Court of Appeal erred in concluding that judges hearing summary judgment motions should refrain from exercising their fact-finding powers unless the evidentiary record enabled them to "achieve the 'full appreciation' of the evidence and issues required to make dispositive findings on a motion", which would generally be unfeasible in "cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record[.]"
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> 2) Rather than applying the "full appreciation" test, courts should be able to decide contested factual issues through summary judgment, provided that the process "allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."

However, *Hryniak* left several important questions unresolved, including when it is appropriate to use a motion for summary judgment to decide some, but not all, of the issues in a case. The Supreme Court discussed some the potential risks and benefits associated with "partial summary judgment" — such as the ability to "significantly advance access to justice, and be the most proportionate, timely and cost effective approach" in some circumstances — but also the potential for "duplicative proceedings

or inconsistent findings of fact" in others. However, it offered little guidance on how to decide which cases are suitable for partial summary judgment, and which are not.

To assist, in a number of cases since *Hryniak*, several courts across Canada, particularly in Ontario, have offered comments as to the applicability of motions for partial summary judgment in some instances. Some concerns include the potential for significant delays, increased costs, and the waste of limited judicial resources. Additionally, because the record on a motion for partial summary judgment may be narrower (or at least different) than the record before the trial judge, there is a risk that such motions could lead to inconsistent findings between the motion judge's decision and the trial judge's eventual ruling. See, for example, *Butera v. Chown, Cairns LLP*, 2017 CarswellOnt 15856 (C.A.) at paras. 29-35; *Babin v. C.J.M. Dieppe Investments Ltd. and TG 378 Gauvin Ltd. and Sood*, 2019 CarswellNB 260 (C.A.) at paras. 39-41; *A.C. Forestry Ltd. v. Big River First Nation*, 2023 CarswellSask 404 (C.A.) at paras. 35-42; and *Kudzin v. APM Construction Services Inc*, 2023 CarswellAlta 1975 (K.B.) at paras. 181-183. However, in a variety of cases, a motion for partial summary judgment can do the opposite: it can save time and cost and reduce the length of trials without any material risk of inconsistent findings.

To address these concerns, in *Malik v. Attia*, 2020 CarswellOnt 18294 (C.A.) at para. 62, the Ontario Court of Appeal clarified that parties seeking partial summary judgment should be prepared to:

- "Demonstrate that dividing the determination of this case into several parts will prove cheaper for the parties[.]"
- "Show how partial summary judgment will get the parties' case in and out of the court system more quickly[.]"
- "Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case."

In *Truscott v. Co-Operators General Insurance Company*, 2023 CarswellOnt 5619 (C.A.), the Ontario Court of Appeal confirmed that partial summary judgment should be "reserved for an issue or issues that may be readily bifurcated from those in the main action, and that may be dealt with expeditiously and in a cost-effective manner", and should only be granted "if doing so does not give rise to any of the associated risks of delay, expense, inefficiency, and inconsistent findings."

Le v. Norris

Ms. Le and Mr. Norris started dating in 2014, and enjoyed (or suffered — depending on one's point of view) an on-again off-again relationship until they separated for the final time in September 2019. During their relationship, Ms. Le became pregnant, and gave birth to a child in February 2017.

Mr. Norris initially paid child support to Ms. Le voluntarily. However, in the summer of 2021, a DNA test revealed that he was **not** the child's biological father. Following this, Mr. Norris severed all contact with the child and stopped paying support.

Despite the negative DNA test, Ms. Le decided to file an Application against Mr. Norris for both child and spousal support. She also sought damages from him for the costs she claimed to have incurred related to a home the parties had initially planned to purchase together, but which was ultimately bought solely by Mr. Norris.

Mr. Norris opposed Ms. Le's claims and counterclaimed for damages related to the home, for intentional infliction of emotional distress, and for an order requiring Ms. Le to return the engagement ring he had given her before they separated.

After the close of pleadings, Mr. Norris filed a motion for partial summary judgment to have Ms. Le's support claims dismissed. He also sought summary judgment on his claim for damages related to the home. He did not, however, seek summary judgment on the remaining issues in the proceeding, including his claim for damages for emotional distress and return of the engagement ring. Accordingly, even if Mr. Norris' motion had been granted in its entirety, the case would not have been fully resolved.

The motion judge granted Mr. Norris' motion for summary judgment regarding the spousal support claim, as she accepted that Ms. Le did not meet the statutory definition of "spouse" under s. 29 of the *Family Law Act* (more on this below). As a result, the spousal support claim could not raise a genuine issue requiring a trial.

In brief reasons, the motion judge also dismissed both parties' claims for damages related to the home. However, she declined to dismiss Ms. Le's claim for child support. Despite Mr. Norris not being the child's biological father, the record raised a genuine issue requiring a trial as to whether Mr. Norris qualified as a "parent" under s. 1 of the *Family Law Act* — that is, someone who, though not a biological parent, has "demonstrated a settled intention to treat a child as a child of his or her family".

Ms. Le appealed, arguing that the motion judge had erred in granting partial summary judgment and in concluding that her claims for spousal support and damages did not raise genuine issues requiring a trial.

The Court of Appeal began its analysis by addressing the issue of spousal support. While the court agreed with Ms. Le that there is often significant overlap between child and spousal support claims, it concluded that this case was different. The outcome hinged on the narrow, threshold issue of whether Ms. Le met the statutory definition of a "spouse" for the purposes of Part III of the *Family Law Act*, which governs support claims for individuals who are not married.

To succeed on a claim for spousal support under Part III of the *Family Law Act*, a claimant must demonstrate that they are a "spouse", which the statute defines as including unmarried individuals who have cohabited "continuously for a period of not less than three years", or who have cohabited "in a relationship of some permanence, if they are the parents of a child as set out in s. 4 of the *Children's Law Reform Act*[.]"

In *Le*, there was no dispute that the parties had not cohabited for at least three years. Therefore, the only way Ms. Le could qualify as a spouse was by establishing that the parties had cohabited in a relationship of some permanence and were the parents of a child, as defined in s. 4 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*").

Section 4 of the *CLRA* contains a broad definition of "parent", including biological parents, birth parents, individuals who were living in a conjugal relationship with the child's birth parent before the child's birth (if the child was born within 300 days after the relationship ended), and those who have certified the child's birth as a parent of the child, under the *Vital Statistics Act*, R.S.O. 1990, c. V.4 or a similar statute in another Canadian jurisdiction. However, it does **not** include a person who may stand in *loco parentis*. This is a distinction with a difference.

Since Mr. Norris was not the child's biological parent and did not qualify as a parent under any other provisions of s. 4 of the *CLRA*, the Court of Appeal concluded that partial summary judgment was an appropriate method of disposing of the spousal support issue:

> [27] I am satisfied that an order of partial summary judgment was appropriate in this case for two principal reasons. First, **the costs of litigating this matter have been high and disproportionate**. For example, Ms. Le filed 882 pages of exhibits to her affidavit. As the motion judge noted, "[c]ourts do not have the resources to weed through such excessive material in order to glean what is and what is not necessary and relevant." Second, **the issue of spousal support involves the application of statutory language to uncontested facts. There is no risk of inconsistent findings or outcomes because**, as I will explain, **the legal definitions of spouse and parent are distinct and serve different purposes.** The resolution of the damage claims arising from the property dispute on summary judgment is problematic for other reasons. They are also, however, independent of the child and spousal support issues. [emphasis added]

That being said, the court agreed with Ms. Le that the motion judge had erred in granting summary judgment on the parties' respective claims for damages, as the motion judge had failed to make the necessary findings of fact or apply the law to those facts. As a result, the Court of Appeal sent the matter back to the Superior Court to decide both parties' claims for damages, as well as Ms. Le's claim for child support.

Reichert v. Bandola

The parties in *Reichert* were in a relationship from August 2018 to January 2022, but never married. When they began dating in 2018, Ms. Bandola was living in London, Ontario, while Mr. Reichert lived over 150 km away in Oakville. However, in

June 2019, Ms. Bandola moved into Mr. Reichert's home in Oakville, and it was undisputed that they lived together until their separation in January 2020, two years and seven months later.

After their separation, Ms. Bandola commenced an Application for spousal support against Mr. Reichert. Although the parties had only lived in Mr. Reichert's home for two years and seven months, Ms. Bandola argued that she qualified as a spouse because they had begun living together in a conjugal relationship months before she formally moved into the home. (After all, as the Ontario Court explained in *Climans v. Latner* (2020), 45 R.F.L. (8th) 283 (Ont. C.A.), "[l]ack of a shared residence is not determinative of the issue of cohabitation.").

Ms. Bandola also made claims for unjust enrichment, as well as damages for assault and intentional infliction of emotional distress. In response, Mr. Reichert moved for partial summary judgment to have Ms. Bandola's claim for spousal support dismissed, arguing that they had not cohabited for the required three years, such that the claim for spousal support did not raise a genuine issue requiring a trial.

After considering *Malik v. Attia*, Justice Kraft determined that this was not an appropriate case for partial summary judgment, because all of the issues were too intertwined, thereby creating a serious risk of inconsistent findings:

> [23] I am not persuaded by Mr. Reichert's arguments. **I find that this case is not appropriate for partial summary judgment.** The issues that will need to be determined at trial in this matter include, whether the parties' are spouses as defined in s. 29 of the *FLA*, Ms. Bandola's spousal support entitlement, Mr. Reichert's income, the quantum and duration of Ms. Bandola's spousal support (if entitlement is found), whether Ms. Bandola can prove her unjust enrichment claims and ought to receive a monetary benefit or a constructive interest in any of the three homes owned by Mr. Reichert; and whether or not Ms. Bandola is entitled to damages for assault, intentional infliction of emotional distress, since the tort of family violence sought by Ms. Bandola in her Answer and Claim may not be available. **All of Ms. Bandola's claims rest on the same set of facts that are before me on this partial summary judgment motion.**
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> [24] **Of greatest concern is that there will be inconsistent findings by more than one judge if I grant partial summary judgment**. If, for example, I find that there is no genuine issue for trial as to whether the parties qualify as "spouses" under s. 29 of the *FLA*, and that the parties' relationship did not have sufficient indicia of cohabitation, another judge may not properly consider Ms. Bandola's unjust enrichment claim. Alternatively, another judge may consider the evidence in the enrichment/deprivation stage of the unjust enrichment test and come to very different findings.
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> [26] As a result, **I am not persuaded that hiving off this one issue will be more efficient for the parties than having one trial**, with *viva voce* evidence since all issues are intermingled and ought to be determined at the same time. Granting partial summary judgment at this stage could, in essence, result in two different sets of determinations based on the same facts. [**emphasis** added]

Justice Kraft also found that even if this had been an appropriate case for partial summary judgment, the nuanced issue of whether Mr. Reichert and Ms. Bandola had cohabited continuously for three years raised a genuine issue requiring a trial, as it involved multiple questions of fact and credibility that could only be properly decided with *viva voce* evidence.

Final Thoughts

We agree with both the Court of Appeal's decision in *Le*, and Justice Kraft's decision in *Reichert*, albeit for different reasons.

Starting with *Le*, the end result — that the mother was not a "spouse" for the purposes of Part III of the *Family Law Act* — was clearly correct in the circumstances of the case given there was no dispute that the parties had not cohabitated for three years, and as Mr. Norris was not a "parent" as that term is defined under s. 4 of the *CLRA*. There was no need for the forensic machinery of a trial. Accordingly, once the motion for summary judgment had been brought and landed on the motion judge's

docket, we certainly understand why they decided to dismiss Ms. Le's claim for spousal support, and why the Court of Appeal saw fit to uphold that part of the decision.

As for *Reichert*, we agree with the outcome, but not with some of the reasoning. While we certainly agree with the second reason for not granting partial summary judgment in the case — that whether or not the cohabitation was for at least a three-year period; we do not entirely agree with the first justification, being the risk of inconsistent findings. Whether or not the parties met the definition of "spouses" should have no impact on a claim for unjust enrichment as a person need not be a spouse — or be cohabiting — to successfully advance a claim for unjust enrichment. We do not see any risk of inconsistent findings.

There are many issues in family law cases that are clear candidates for motions for summary judgment or partial summary judgment. For example, the validity or invalidity of a domestic contract — especially the property provisions of a marriage contract — are often very suitable candidates. For a recent example, see *Singh v. Khalill*, 2024 CarswellOnt 19477 (C.A.). This is because, even where a marriage contract is upheld, a claim for support in the face of a valid contract can proceed pursuant to *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), and an early determination that the marriage contract is to be upheld or set aside will not risk conflicting findings and will likely encourage settlement.

That being said, when dealing with these types of motions, it will always be important to consider and weigh the potential benefits of bringing the motion against the risk that it might lead to delay and costs.

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