

FAMLNWS 2025-17

Family Law Newsletters

May 12, 2025

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

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Correction

In last week's edition of *TWFL*, in "Opposite Ends of the Motions for Temporary Relief Spectrum", we reproduced Justice Agarwal's endorsement in *Richard v. Plavcic*. We inadvertently left out the last paragraph of the endorsement, which reads as follows:

[6] That said, there is no need to wait for September for a conference. The conference can proceed with a DRO on March 7, 2024, at 930am (to be scheduled by the applicant's lawyer using Calendly).

What the Hell is a "Matrimonial Consortium" Anyway?

***Kassabian v. Marcarian*, 2025 CarswellOnt 4365 (Ont. C.A.) — Nordheimer, Madsen and Pomerance JJ.A.**

Issues: Ontario — Date of Separation

In every Canadian province, the date of separation matters. Sometimes, determining the date of separation is no problem at all. But other times . . .

Justice Charney offered this clever analogy in *Cheng v. Sze* (2020), 38 R.F.L. (8th) 165 (Ont. S.C.J.) at para. 3, aff'd (2021), 56 R.F.L. (8th) 264 (Ont. C.A.):

[3] Marriages are like balloons. Sometimes they deflate immediately with a single puncture. But often the air escapes slowly as one or both parties withdraw physically, emotionally and financially. In these latter situations, separation is a process rather than an event, and it is difficult to assign a single date as the "date of separation". Nevertheless, the law requires that a date be chosen for the purposes of valuation and equalization of net family property.

And since time immemorial (which for many of us means the 1990s — sorry older folks) part of the test to determine the date of separation has been where "one party withdraws from the matrimonial obligation with the intent of destroying the matrimonial consortium." See for example, *Oswell v. Oswell* (1990), 28 R.F.L. (3d) 10 (Ont. H.C.), aff'd (1992), 43 R.F.L. (3d) 180 (Ont. C.A.). In fact, *Oswell* is one of the most cited cases on the issue of date of separation.

But what is the matrimonial consortium? Well, we don't really know. And let's face it — no one has ever really known. But on account of the decision in *Kassabian*, no one really has to care anymore. In *Kassabian*, Justice Madsen offers a "restatement" and modernization of the law with respect to the date of separation. And she manages to do so without using the word "consortium."

The sole issue in this two-day trial was the parties' date of separation. The trial judge determined that the parties' date of separation was May 16, 2021, as asserted by the wife, rather than December 10, 2014, as argued by the husband. A mere seven-year difference.

The husband appealed. He lost. That is not important; but the discussion about the date of separation is.

The parties married on September 6, 1998. The appellant/husband is a doctor. The respondent/wife is a dentist. There were two children of the marriage, now adults.

The marriage was not a particularly happy one.

The husband argued that the parties separated on December 10, 2014, when they ceased sharing a bedroom, and that their conduct thereafter was consistent with having separated. The husband explained that they only attended social occasions together to maintain appearances within their traditional culture.

The wife's position was that while the marriage was unhappy, it nonetheless remained a marriage until May 16, 2021, when she told the husband that she wanted to separate and took concrete steps in that direction.

At the trial of the single issue, the trial judge noted that, were the husband successful, the wife would be outside the statutory six-year limitation period for claiming an equalization payment (were it not judicially extended).

Ultimately, the trial judge accepted the wife's date of separation, noting that, "like many couples, the parties were content to have a different marriage than the one that they had hoped for," and that while it was "not a marriage that fulfilled expectations," it was nonetheless a marriage that continued until May 16, 2021.

Justice Madsen noted that, in Ontario, there are at least three contexts in which the date of separation matters: to grant a divorce under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.); to determine spousal support under the *Divorce Act* or the *Family Law Act*; and to determine the "valuation date" for the purpose of equalization under the *Family Law Act*. She further notes that the date of separation under the *Divorce Act* and the valuation date under the *Family Law Act* are frequently — but not necessarily — the same date. This is because under s. 8(1) of the *Divorce Act*, the "divorce clock" starts to tick upon a "breakdown of their marriage," which may, under s. 8(2)(a), be evidenced by the parties having lived "separate and apart" for one year with the "intention" to live separate and apart [s. 8(3)].

Therefore, a determination under either (or both) statutes, by necessary implication, requires a determination of when cohabitation started [*Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) at para. 16 ("*Molodowich*") and the date of separation [*Al-Sajee v. Tawfic* (2019), 27 R.F.L. (8th) 269 (Ont. S.C.J.), at para. 3 ("*Al-Sajee*")].

Then, for the purposes of property division, the date of separation is key as it becomes the valuation date. This date is statutorily defined in s. 4(1) to mean the earliest of several dates, including "the date the spouses separate and there is no reasonable prospect that they will resume cohabitation."

Therefore, the determination of the date of separation requires consideration of not only when the parties started to live "separate and apart" — but when there no longer existed a reasonable prospect of resuming cohabitation. This additional requirement in fixing the "valuation date" allows for the possibility that parties may be separated under the *Divorce Act*, but not yet separated for the property division purposes of the *Family Law Act*: *Taylor v. Taylor* (1999), 5 R.F.L. (5th) 162 (Ont. S.C.J.) at para. 9 ("*Taylor*"); *Strobele v. Strobele* (2005), 34 R.F.L. (6th) 111 (Ont. S.C.J.) at para. 29; *Al-Sajee* at paras. 32-40.

There is also the fact that pursuant to s. 8(3)(b)(ii) of the *Divorce Act*, the period of separation will not be considered to have been interrupted by reason only that the spouses have resumed cohabitation for no more than 90 days (or periods totaling 90 days) with reconciliation as its primary purpose. While this cohabitation would not interrupt separation under the *Divorce Act*, it would most certainly reset the date of separation under the *Family Law Act*.

Therefore, determining when there is no reasonable prospect of resuming cohabitation is a crucial determination in the date of separation calculus. Determining when there is no reasonable prospect of resuming cohabitation requires a careful and objective weighing of a range of factors, including the intentions of the parties as demonstrated by their statements and actions. The central question is whether a reasonable person, knowing all the circumstances, would reasonably believe that the parties had a prospect of resuming cohabitation: *Warren v. Warren*, 2019 CarswellOnt 4106 (Ont. S.C.J.) at para. 6; *Al-Fatlawi v. Al-Bajawi*, 2019 CarswellOnt 21615 (Ont. S.C.J.) at para. 5. The court is to identify the date, "when the marriage is irretrievably broken down and the resumption of cohabitation is not reasonably in the cards": *Al-Sajee* at para. 39.

Kassabian, however, is more about when the parties start to live separate and apart than the question of a reasonable prospect of resuming cohabitation for which there exists a well-developed body of case law. But with respect to both parts of the test, courts are encouraged to be on guard - to exercise "extreme caution" in setting a valuation date as there is "a danger that parties will try to manipulate the date in order to improve their financial positions": *Taylor* at para. 7.

As noted by the Court of Appeal, the leading case for determining separation is *Oswell v. Oswell* (1990), 28 R.F.L. (3d) 10 (Ont. H.C.), aff'd (1992), 43 R.F.L. (3d) 180 (Ont. C.A.), wherein Justice Weiler (as she then was) set out factors that continue to frame the date of separation analysis to this day. However, then and now, the analysis is objective and fact-based where no single objective governs. However, in *Kassabian* the Court of Appeal offers some important considerations as to how lower courts are to decide which factors might be most important in any given case.

To start, Justice Madsen endorses the approach taken by Justice Chappel (as she then was) in *Al-Sajee*, adopting the Supreme Court of Canada's list of factors in *M. v. H.* (1999), 46 R.F.L. (4th) 32 (S.C.C.), that are relevant to the existence of a conjugal relationship as also relevant to the date of separation. In turn, *M. v. H.* refers to *Molodowich* for the generally accepted (and often-repeated) characteristics that are usually present to some degree in a conjugal relationship: shared shelter; sexual and personal behaviour; domestic services; social activities; economic support; children; and the societal perception of the couple.

Here is where the Court of Appeal "adds value" in *Kassabian*: the Court of Appeal imports and emphasizes the concept of *change*. That is, the court should consider the *differences or changes* in these characteristics of a conjugal relationship on the alleged date of separation. For example, if the parties did not have an "impressive" sexual relationship before the argued date of separation — the fact of not having sex is not an important factor. If the parties always slept in separate bedrooms — the fact of separate bedrooms is not a significant factor. And if the marriage was never particularly pleasing, good or happy — the fact of a continued bad marriage or bad communication is also not likely a driving factor. And if the parties often travelled separately — separate travel also does not matter in considering the date of separation.

What Justice Madsen does emphasize is that when the issue is the date of separation as opposed to the existence of a conjugal relationship, the formal steps taken to end the relationship (or to resume cohabitation) assume a position of heightened importance.

Justice Madsen then consolidates the list of relevant factors as follows, noting that the categories overlap and are not exhaustive:

- (a) Nature of the relationship;
- (b) Financial arrangements;
- (c) Interaction with third parties;
- (d) Formal steps taken to end the marriage or relationship; and
- (e) Any steps taken to resume cohabitation

This is the part of our program where we quote extensively from the reasons of the Court of Appeal. Why paraphrase when you can have it clearly and succinctly from the authors themselves? (We have edited a bit and we have omitted some notes and citations — which are extraordinarily useful — for readability, and all emphasis is added):

[25] **Nature of the relationship:** This category considers how the parties relate to one another as spouses and intimate partners, *emphasizing any changes* at the alleged date of separation. Relevant factors may include whether the parties reside separately, either within the home, or in separate residences. If the parties reside separately, whether for defined periods or indefinitely, the reasons for living separately, and the presence (or absence) of personal items at the other party's residence may all be considered.

[26] Also potentially relevant to the nature of the relationship are the presence or absence of sexual intimacy, including whether the parties maintain an "attitude of fidelity"; whether the parties are or have been romantically involved with others; arrangements for meal preparation, laundry, cleaning, shopping, and other household tasks; whether the parties continue to act as an intimate partnership, discussing family problems and issues, and making plans for the future; whether the parties share meals together; whether they attend social activities in the community or important events together such as weddings or funerals; whether the parties vacation together, with or without children; and whether the parties continue to exchange gifts, cards, or other tokens of affection.

[27] **Financial arrangements:** This category considers how the parties have organized themselves financially, *again emphasizing changes* at the alleged separation date. Factors include financial contributions towards the necessities of life (shelter, food, clothing, etc.); sharing of assets, or whether steps have been taken to separate assets (such as, for example, severing a joint tenancy or separating joint bank accounts, credit cards, or safety deposit boxes); the status of spousal RRSP contributions or other joint investments; any new acquisition of property in joint names, joint mortgage renewals, or joint assumption of lease obligations; the use of shared financial advisors, accountants, or other financial professionals. Any changes to designations in a party's last Will and Testament or changes in beneficiary designations may also be relevant.

[28] **Interaction with third parties:** This category considers how each party and the parties jointly have represented themselves and their relationship status to others, including extended family, friends, community members, professionals, businesses and government agencies, and on social media platforms. This could include whether one or both parties have told family members or friends that they are separated; whether they have continued to give gifts or cards to third parties jointly as a couple; whether they have advised accountants, financial advisors, real estate agents, for example that they are separated; what, if anything, has been represented to the children's teachers, activity providers, or other third parties about a change of relationship status; how either or both parties have represented themselves in banking documents such as loan or mortgage applications, or whether they have represented themselves as separated or married on their income tax returns. Relationship status as presented by a party on social media may also be relevant.

[29] **Formal steps taken to end the marriage/relationship:** This category relates to whether a party has taken legal steps consistent with an intent to end the marriage/relationship, and could include having consulted a lawyer about divorce, meeting with a family mediator to discuss separation, or having had a draft separation agreement prepared.

[30] **Any steps taken to resume cohabitation:** This category is particularly relevant to the second part of the test under the *Family Law Act*, for the purpose of establishing the valuation date. Considerations may include whether the parties have been engaged in couples therapy, marriage counselling, mediation, or other efforts to meaningfully "put their relationship back together": *Torosantucci v. Torosantucci* (1991) 32 R.F.L. (3d) 202, (Ont. U.F.C.), at para. 14. Related steps that may overlap with the other categories could include joint purchase of property, joint execution of a lease, new joint investments, or renewed travel as a romantic couple. As noted by Chappel J. in *Al-Sajee*, in assessing such steps to establish a reasonable prospect of resuming cohabitation and counter a proposed valuation date, there must be "more than wishful thinking on the part of either party." Further, "[h]alf-hearted suggestions . . . will not necessarily move the valuation date forward."

The Court of Appeal then offers the following principles to guide the approach to the above factors. (Same deal as above . . . citations omitted and all emphasis added):

a. **True intent:** In assessing a party's intent to separate, **it is the "true intent" and not the stated intent that is most salient.** While a party may state that they wish to separate, their **conduct may demonstrate otherwise.**

b. **Unilateral decision:** The decision to separate does not require the agreement of the parties or a meeting of the minds. It is a decision often made by one party over the objection of the other. As stated in *Strobele*, at para. 30: "[c]ontinuation of a relationship requires two people. Either can end a relationship without the consent of the other."

c. **Clear and unequivocal communication:** While the decision to separate may be unilateral, "a clear statement or unequivocal act by one of the parties of their desire to terminate the relationship will be very relevant to whether the parties are living separate and apart." The separating spouse **must "take some definite steps"** to notify the world at large of [their] intentions. **"One party cannot separate "in secret."** The communication by a spouse intending to separate, by words or actions, is to be viewed objectively.

d. **Uniqueness: Each marriage or relationship is unique, as is each separation. Weighing the incidents of separation requires a careful assessment of the underlying characteristics of the marriage.** For example, in *Chan*, McGee J. found that the purpose of the parties' marriage after the children were raised was primarily to shelter and foster wealth. Consequently, evidence of changes in the financial union was more probative of separation than joint activity or companionship. Similarly, in *Button v. Button* (2000), 8 R.F.L. (5th) 20, at para. 79, physical intimacy was not a significant feature of the marriage and thus its cessation did not weigh heavily in determining the date of separation. **Separation should be assessed not against a stereotypical image of a marriage or conjugal relationship, but in the context of the lived marriage or relationship of the parties.**

e. **Separation is often a process:** As the caselaw makes clear, **separation for many couples is best described as a process rather than an event**, with multiple smaller steps and decisions leading to the conclusion that one or both parties have decided to separate within the meaning set out above: see *Cheng v. Sze*, 2020 ONSC 937, 38 R.F.L. (8th) 165, at para. 3, aff'd 2021 ONCA 346, 56 R.F.L. (8th) 264.3 Yet, in accordance with the applicable legislation and governing caselaw, the task for the court is to determine, on a balance of probabilities, at what point - that is, on what day specifically - the requirements to establish the date of separation or valuation date have been made out. This is a process that requires careful attention and nuanced assessment by the trier of fact.

f. **The factors are not a checklist:** Related directly to the uniqueness of each relationship, courts must be cognizant that **the factors above do not comprise a checklist**, with an implied tabulation of factors for or against any alleged separation date. **No one factor is determinative**, and any factor considered must be weighed in the overall assessment of the uniqueness of each relationship, and of each separation. **Judges are not obligated to advert to every possible factor, but must consider all relevant factors.** It is possible individual factors may seem to contradict one another.

g. **Objective assessment:** While each marriage/conjugal relationship is unique and the incidents of separation must be assessed in that specific context, the judicial assessment is necessarily objective. As stated in *Strobele*, at para. 30: "[a] fair determination of this issue requires that an **objective eye be cast upon the unique circumstances of the couple.**" Each marriage has its own dimensions and the court must look at the circumstances, objectively, to determine when it has irretrievably broken down.

The Court of Appeal was also careful to note that any determination of the separation date or valuation date is necessarily a determination of fact and credibility falling squarely within the discretion and province of the trial judge. Therefore, absent an extricable legal error, this determination attracts a high level of deference.

It is also noteworthy that the court is not obligated to choose between the dates proposed by the parties: *Cheng v. Sze* (2021), 56 R.F.L. (8th) 264 (Ont. C.A.) at para. 6. Also, the court notes that focused third party evidence may be very helpful to the court, and documentary evidence reflecting how the parties have represented themselves to the world may also assist.

Here, the trial judge had done her job. She had considered the relevant factors and case law and weighted them as she thought appropriate. Importantly, the court below highlighted that a bad marriage — or a marriage that disappoints — does not necessarily mean that parties have separated, especially if the marriage had been unfulfilling for a meaningful period of time.

This separation was not a "pop." It was a hiss; a very, very slow, seven-year hiss.

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