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

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Breaking News

From the "Who Knew?" files, a Private Member's Bill to amend the *Divorce Act* — Bill C-223 — has passed first reading (September 18, 2025) and is scheduled for second reading — and because of the priority assigned, unlike with usual Private Member's Bills, this one will get to Second Reading and then likely to Committee.

The Bill proposes some rather significant amendments, and we're quite surprised that the Bill has made it this far with no fanfare (positive or negative) whatsoever.

Much of the Bill is about family violence, but it also includes some provisions about "parental alienation" (although that term is not used) and relocation. On it's face, it also seems to encourage judicial interviewing of children.

We only just learned about this (from Professor Rollie Thompson), so we've not reviewed the (short) Bill in depth. We will reserve comment for now until we can digest it. The one thing we can say is that the Bill is likely to be **very** polarizing.

In the meantime, if you'd like to see it: https://www.parl.ca/documentviewer/en/45-1/bill/C-223/first-reading

Let Freedom Reign . . . and Let Common Sense Prevail

J.P. Thomson Architects Ltd. v. Greater Essex County District School Board, 2025 CarswellOnt 7561 (C.A.) — Rouleau, van Rensburg and Gomery JJ.A.

Issues: Ontario — Dispute Resolution Clauses

In separation agreements, parties will often include a dispute resolution clause that contemplates negotiation, mediation and then arbitration in a stepped sequence. For example, an agreement might say that support is to be reviewed at some point in the future, and if the matter cannot be resolved by negotiation, the parties will mediate the issue, and if mediation is not successful after 60 days, then the matter can be arbitrated.

A question arises whether arbitration can be started if the prior steps have not been completed.

In *J.P. Thomson*, the Court of Appeal for Ontario confirmed that a "stepped" dispute resolution clause does not bar recourse to arbitration when pre-arbitration steps were not completed within the timeframe specified in the clause. The court also reaffirmed the competence-competence principle, re-affirming that it is for the arbitrator to determine the scope of: (i) the dispute being

arbitrated; and (ii) their jurisdiction over the matter. The question of jurisdiction is itself within the jurisdiction of the Arbitrator: *Dell Computers v. Union des Consommateurs*, 2007 CarswellQue 6310 (S.C.C.); *Peace River Hydro Partners v. Petrowest Corp.*, 2022 CarswellBC 3142 (S.C.C.) at para. 42; *Patel v. Kanbay International Inc.*, 2008 CarswellOnt 7811 (C.A.); *Dalimpex Ltd. v. Janicki*, 2003 CarswellOnt 1998 (C.A.); *Dow Chemical Canada ULC v. Nova Chemicals Corporation*, 2023 CarswellAlta 2944 (C.A.); and *Touvongsa v. Lahouri*, 2024 CarswellBC 3544 (C.A.).

In *J.P. Thomson*, the parties had agreed to a stepped dispute resolution clause:

> Any dispute between the parties arising out of or relevant to this Agreement which cannot be resolved by the parties within thirty (30) days of the dispute arising, shall be referred to mediation, upon the request of either party . . . In the event that the parties have not selected a mediator within thirty (30) days of the giving of notice of mediation by one party to the other, either party may proceed to the arbitration process as hereinafter set forth. In the event that any dispute between the parties has not been resolved by such mediation within thirty (30) days following selection of the mediator, such dispute shall be settled and determined by binding arbitration requested by either party, pursuant to the Arbitration Act of Ontario, in which case the following provisions shall apply.

That is: (1) any dispute which cannot be resolved by the parties within 30 days of the dispute arising shall be referred to mediation upon the request of either party; and (2) if the dispute has not been resolved by mediation within 30 days following selection of the mediator, such dispute shall be settled and determined by binding arbitration.

Thomson requested mediation under the dispute resolution clause arising from letters sent by the Board over the preceding 15 months. The Board refused to appoint a mediator, arguing that the 30-day period for requesting mediation had expired. Thomson then issued a Notice of Arbitration, which the Board also refused to recognize on the same basis.

Therefore, Thomson applied to the Ontario Superior Court of Justice under s. 10(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 for an order appointing an arbitrator. But the application judge dismissed the request, holding that the clause required Thomson to have initiated mediation within 30 days of the dispute arising.

The Court of Appeal allowed Thomson's appeal.

The Court of Appeal emphasized that, subject to restrictive wording, dispute resolution clauses are to be read "purposively and commercially, not technically." Now, we assume that, for *our* purposes, "commercially" can be replaced with "reasonably." Therefore, the referenced 30-day period for requesting mediation was to be read as a minimum period for negotiation, not a hard deadline. It would not make sense to interpret the clause to require the parties to serve Notices of Mediation every time they were unable to resolve their differences within 30 days.

Therefore, Thomson did not lose all right to engage in dispute resolution under the contract by failing to serve a mediation request within thirty days of a dispute arising.

The Court of Appeal ordered the parties to proceed to mediation within 60 days, following which Thomson retained its recourse to arbitration.

It's nice to see common sense prevail.

Trust Me

Bulut v. Bulut, 2025 CarswellOnt 676 (S.C.J. [Commercial List]) — Jane Dietrich J.

Issues: Ontario — Constructive Trusts

This is not a family law case per se; but it is a case about constructive trusts and, at that, a kind of constructive trust we family lawyers do not often consider as part of our arsenal. But perhaps it should be.

We generally think of a constructive trust in the remedial sense, as a remedy for breach of trust or breach of fiduciary duty or as a remedy for unjust enrichment. But there is a theory of constructive trust based on the Supreme Court of Canada decision of *Soulos v. Korkontzilas*, 1997 CarswellOnt 1489 (S.C.C.) ("*Soulos*") that suggests all manners of constructive trust are based on situations where "good conscience" so requires it, such that a constructive trust might be awarded absent a wrongful act. In *Moore v. Sweet*, 2017 CarswellOnt 2958 (C.A.) (albeit in dissent), Justice Lauwers helpfully points out the bases upon which courts have awarded constructive trusts in the past, the last being "where good conscience requires it."

Bulut was a dispute between two brothers over a 100-acre property. While the property was originally gifted by their father with the understanding that both brothers would benefit equally, the property was actually gifted to a corporation owned by only one brother (who we will call "Brother 1"). There was evidence that (in other unrelated lawsuits about the property) the father had given evidence that if Brother 1 sold the property, he would have to give Brother 2 half the sale proceeds. When there had been discussions about selling the property, both brothers participated, and there was evidence that both brothers had, at times, referred to the parcel as "our property."

The brotherly relationship went south, and the parties went to an arbitration.

In the award, the arbitrator found that Brother 2 had proven unjust enrichment.

However — and here is the interesting part — the arbitrator found that the property was a gift to the company owned by Brother 1 "with a string attached", specifically, that Brother 2 was to equally benefit from the property. As a result of this finding, the arbitrator held that "as a matter of good conscience, Brother 2 is entitled to a constructive trust of a 50% interest in the property."

As a result, Brother 2 was awarded a 50% interest in the property by way of constructive trust. Brother 1 was not happy, and he sought leave to appeal the arbitrator's award.

Brother 1 argued (*inter alia*) that the Arbitrator erred in law by awarding a constructive trust based on "good conscience" alone.

Brother 2 thought the arbitrator had done a wonderful job.

The test on a motion for leave to appeal under s. 45(1)(a) and (b) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Act*") is similar to the same test across the country (with slightly different wording):

> **Appeal on question of law**
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> 45 (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
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> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
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> (b) determination of the question of law at issue will significantly affect the rights of the parties.

Brother 2 admitted that the issue was sufficiently important to justify an appeal (so as to meet the hurdle of s. 45(1)(a)).

Justice Dietrich referred to *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 CarswellBC 2267 (S.C.C.) for the proposition that extricable questions of law include legal errors involving the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.

Brother 1 argued that the Arbitrator had erred in law by basing the finding of constructive trust on good conscience alone. He argued that the current state of the law does not permit a constructive trust based solely on good conscience as this would grant judges immeasurable judicial discretion. Rather, *Soulos*, properly interpreted, limits the application of a constructive trust to two situations (i) a wrongful act; and (ii) a finding of unjust enrichment. And here, Brother 2 had made no allegation of any wrongful act.

Therefore, Justice Dietrich had to consider whether the current state of the law precludes a finding of a constructive trust based solely on good conscience alone — and whether, if precluded, this is what the Arbitrator had done.

As to the first question, Her Honour has the benefit of the recent decision from Justice Steele in *Hrvoic v. Hrvoic*, 2021 CarswellOnt 17335 (S.C.J.):

> [45] There is some disagreement in the case law as to whether a constructive trust may be imposed in situations other than wrongful act/gain and unjust enrichment. The case law is unclear as to whether these two situations exhaust the "broad umbrella of good conscience". Accordingly, I set out why it is my view that "good conscience" should encompass more than these two limited situations in appropriate circumstances.
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> [46] The remedial constructive trust is a tool of equity. In *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, the Court stated, at para. 32:
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> > "A constructive trust is a vehicle of equity through which one person is required by operation of law — regardless of any intention — to hold certain property for the benefit of another (Waters' Law of Trusts in Canada (4th ed. 2012), by D.W.M. Waters, M. R. Gillen and L.D. Smith, at p. 478). In Canada, it is understood primarily as a remedy, which may be imposed at a court's discretion were good conscience so requires. . . . "
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> [47] Under Canadian common law, the constructive trust is available as a remedy in at least two situations: where there has been unjust enrichment, or where property has been obtained through a defendant's wrongful act, such as fraud or breach of fiduciary duty: *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 S.C.R. 217 at para. 39.
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> . . . . .
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> [50] In *Soulos*, at para. 43, McLachlin J. recast the justification for the remedial constructive trust as being that of "good conscience," concluding that, "in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation". She described "[g]ood conscience" as a "common concept unifying the various instances in which a constructive trust may be found" (para 35). Although she acknowledged that "good conscience" has "the disadvantage of being very general," (para. 35) she also provided some guidance, at para. 34:
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> > "The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. **Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case**." [Emphasis in original]
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> [51] Where neither of the two recognized grounds has been established, it is less clear whether a constructive trust may be imposed. The Supreme Court has given conflicting signals on this issue. On the one hand, in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, Rothstein J., for the Court, at paras. 144-45, cited *Soulos* for the proposition that there are "**two grounds** on which a court can impose a constructive trust" and that "good conscience might require the imposition of such a trust in **two situations**" (emphasis in original). On the other hand, the Supreme Court in Sweet refused to answer the "**open question**" of whether *Soulos* "should be interpreted as precluding the availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty" (para 95, emphasis added).
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> [52] . . . **The remedial constructive trust is an equitable remedy. I see no reason why it should be confined to only unjust enrichment or wrongful acts like breach of fiduciary duty**. **There are certainly other cases where good conscience may require the imposition of a remedial constructive trust**, and this case is one of them. [emphasis added]

Unhelpfully, in the appeal of *Hrvoic*, while the Ontario Court of Appeal upheld the result in *Hrvoic*, it did so while saying, "As we uphold the trial judge's finding of equal shareholdings, it is unnecessary for us to review the trial judge's imposition of a constructive trust. We therefore should not be taken as endorsing the trial judge's decision on this issue." Argh.

So Justice Dietrich had a decision to make. Who to follow? She decided that given the Supreme Court's reference to the "open question" of whether the constructive trust remedy is precluded beyond cases of unjust enrichment or wrongful acts, she was not persuaded that the Arbitrator would have erred had the constructive trust been based on good conscience alone. Therefore, there was no error law.

However, to cover her bases, Her Honour found that, if she was incorrect such that the imposition of a constructive trust based on good conscience alone is an error of law — the Arbitrator had also made a finding of unjust enrichment sufficient to impose a remedy of a constructive trust.

The Arbitrator found:

> In the end, the most important fact in this case is that the Property was a gift from [the father] to [Brother 1's Company] with a string attached to it by [the Father]. That string was that [Brother 2] was to benefit from the Property as much as [Brother 1], with [the Father] seeing [Brother 1] as a person with better business skills than [Brother 2]. [Brother 1] understood that string that was attached and acted consistently with it . . . As a consequence I hold that in equity as a matter of good conscience, [Brother 1] is entitled to a constructive trust of a 50 percent interest in the Property.

Justice Dietrich was not persuaded that this paragraph should be interpreted to find that the constructive trust was based on good conscience alone. Rather, when the Award is read in its entirety, the Arbitrator was also satisfied that the elements of unjust enrichment had been made out. But this isn't the important part.

Interesting for us family lawyer — no?

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