FAMLNWS 2026-12

Family Law Newsletters
March 30, 2026

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Say What You Mean — And Mean What You Say

***Desai v. Desai* (2025), 23 R.F.L. (9th) 159 (B.C. S.C.) — Girn J.**

***Shibley v. Shibley* (2025), 22 R.F.L. (9th) 173 (Alta. K.B.) — B. Brookes J.**

We've seen this movie before. Parties settle their family law case, confirm terms through counsel, and then, days or weeks later, change their mind. (See e.g. "My Kingdom for a Motorcycle — Is it an Agreement or Not?", our comment on *Widdifield v. Hunter* (2023), 97 R.F.L. (8th) 194 (Ont. S.C.J.) in the May 20, 2024 (2024-19) edition of *TWFL* for an example.)

The excuses are predictable. Disclosure was incomplete. They felt pressured. They forgot something. They didn't really understand what they were signing. Their lawyer let them down. Their dog ate . . . you get where we're going.

Two recent decisions — one from BC and one from Alberta — reject these excuses. Both courts enforced settlement agreements over objections about disclosure, pressure, and regret. And both treated the same fact as decisive: each party had a lawyer.

***Desai v. Desai* (2025), 23 R.F.L. (9th) 159 (B.C. S.C.): Offer, Acceptance, Regret, Repeat**

In *Desai*, the parties attended mediation on April 3, 2024. They did not settle, but the mediator circulated draft Minutes of Settlement the next day.

That same day, the wife's lawyer emailed opposing counsel twice. The first email said they had an agreement hinging on one thing. The second was more formal: the wife accepted the agreement reached at mediation, subject to a jointly retained and funded appraisal of a property in Surrey.

The husband's counsel responded April 5. And by April 6, both sides had confirmed: done deal.

Three days later, the wife's counsel wrote again: no deal and requesting further disclosure.

Her position was that the husband had not provided an Amazon employment letter within 24 hours of mediation, as allegedly promised. His Financial Statement showed Amazon income of nearly $438,000, but also said he expected to be laid off and did not know what his income would be going forward. The wife believed he had misled her.

The problem was timing. WhatsApp messages from April 6 — the day the husband accepted — showed the wife telling her lawyer she wanted to investigate whether the husband was lying about his employment. But she never actually told her lawyer to withdraw the offer or add the employment letter as a condition precedent.

The wife later argued that her lawyer was out of the office until April 8, so she could not revoke until April 9. Justice Girn was unconvinced. If the wife wanted to investigate before being bound, why make the offer at all? And why wait three days after acceptance to raise the issue?

None of this was in the offer, which contained only one condition: the appraisal. The husband accepted. And, again, nothing made the employment letter a precondition.

Justice Girn found a binding agreement. She applied the familiar principle that contract formation turns on whether parties agreed on essential terms, assessed objectively, and not on what they later claim they *intended*: *Sehic v. Sehic*, 2024 CarswellBC 2480 (S.C.). A deal can exist even if documents remain to be signed or minor details worked out.

If you do not want to be bound until you have agreed on everything you subjectively consider essential, *then you must make that intention objectively clear*: *Campbell v. Campbell* (2023), 95 R.F.L. (8th) 39 (B.C. C.A.). The wife in *Desai* did not do so.

Imperfect disclosure does not necessarily equate to informational asymmetry negating the ability to negotiate: *Farrer v. Farrer*, 2013 CarswellBC 1856 (S.C.). Here, the wife had counsel throughout and did not request further disclosure before making the offer.

More likely than not, this was just a case of after-the-fact sober second thought — and that is insufficient to overturn a settlement: *Hagel v. Giles*, 2006 CarswellOnt 805 (S.C.J.), aff'd 2006 CarswellOnt 5217 (C.A.); *Diegel v. Diegel* (2008), 60 R.F.L. (6th) 18 (Alta. C.A.); *Jedfro Investments v. Jacyk*, 2007 CarswellOnt 8195 (S.C.C.); *Quesnel v. Nadon-Quesnel* (2001), 24 R.F.L. (5th) 89 (Ont. S.C.J.); *Wilkins v. Wilkins*, 1992 CarswellNB 369 (Q.B.); *Klimek v. Klimek*, 2015 CarswellAlta 488 (Q.B.); *Deschenes v. Lalonde*, 2020 CarswellOnt 7063 (C.A.).

***Shibley v. Shibley* (2025), 22 R.F.L. (9th) 173 (Alta. K.B.)**

Shibley is a bit more "messy" than *Desai*, but legally similar. The parties separated in 2023. Each retained counsel, and in November 2024, they attended two four-way meetings. At the end of each, the terms were read out and confirmed. The husband started paying child support in accordance with the terms and started taking steps to implement the other terms of the agreement. His lawyer also drafted a Separation Agreement.

Then the wife got a second opinion, and things started to unravel.

The wife argued that essential documents were missing or not provided in time, that she was pressured because the husband had been withholding support making her financially vulnerable, and that certain debts — like a consumer proposal and a promissory note — were not properly disclosed or accounted for.

Justice Brookes would have none of it. The wife's own evidence was telling: she said the meetings did not amount to any *filed* order or agreement — not that *no agreement* was reached. She did not dispute that her counsel read out the terms at the end of each meeting, or that she participated fully. Her real complaint? Once she obtained a second opinion, she was no longer satisfied with the terms and refused to sign the draft Separation Agreement. That sounds like "sober second thought" to us — as it did to Justice Brookes.

That is not a defence. Again, buyer's remorse doesn't let you escape an otherwise-enforceable deal: *Diegel v. Diegel* (2008), 60 R.F.L. (6th) 18 (Alta. C.A.).

Justice Brookes properly applied *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Company Limited*, 2003 CarswellAlta 1049 (C.A.): parties will be found to have reached an enforceable "meeting of the minds" where it would be clear to the objective reasonable bystander, fully aware of all the material facts, that the parties intended to contract, and where the essential terms of that contract can be determined with a reasonable degree of certainty. An executed agreement is not required. Furthermore, as the Alberta Court of Appeal recognized in *Diegel*, a binding deal can exist even with unsettled details, *so long as those details do not go to the heart of the bargain*.

The more interesting wrinkle was statutory non-compliance. Sections 37 and 38 of Alberta's *Family Property Act,* RSA 2000, c F-4.7 (the "*FPA*"), set out formal requirements for agreements between spouses relating to ownership and division of property. An agreement that complies with s. 38 — including written acknowledgments before separate lawyers — is "enforceable" and ousts the court's jurisdiction to redistribute property under Part 1 of the *FPA*. The Agreement here did not comply with those requirements.

But failing to comply with the strict formalities does not render an agreement irrelevant. Under s. 7 of the *FPA*, courts have discretion to distribute matrimonial property in a manner that is "just and equitable." Subsection 8(g) directs the court to consider, among other factors, "the terms of an oral or written agreement between the spouses or adult interdependent partners". As the Alberta Court of Appeal explained in *Corbeil v. Bebris* (1993), 49 R.F.L. (3d) 77 (Alta. C.A.), this means a non-compliant agreement is not simply adopted — but neither is it just ignored. The court assesses its impact as one of the circumstances bearing on what distribution is fair.

This is similar to the analysis and ultimate result in *Anderson v. Anderson* (2023), 86 R.F.L. (8th) 1 (S.C.C.) involving sections 38 and 40 of the Saskatchewan *Family Property Act*, S.S. 1997, c. F-6.3, and although Justice Brookes did not cite s. 8(g) or *Corbeil* expressly, she did rely on *Anderson*. The Saskatchewan legislation, like Alberta's *FPA*, allows a court to consider an agreement that does *not* comply with the statutory formalities, and to give it whatever weight it thinks reasonable. As *Anderson* instructs, courts must balance contractual autonomy and certainty against fairness concerns, reviewing domestic contracts with sensitivity to vulnerabilities in the family law context, without presuming spouses lack agency simply because negotiations were emotionally charged. An agreement that is procedurally sound and substantively fair can still be given significant weight even if it falls short of the formal requirements.

On the facts, Justice Brookes' analysis tracks what the s. 8(g) framework requires.

The Agreement was the product of two four-way settlement meetings where both parties were represented by counsel. While voices (and the temperature) may have been raised during the meeting, the Agreement was not the result of an unfair bargaining process. Financial disclosure was exchanged in advance of the four-way meetings, and there was no evidence either counsel at the time believed financial disclosure was deficient. The wife only raised concerns about missing disclosure *after* the Agreement had been reached and *after* she sought advice from another lawyer. The Agreement departed from an equal distribution of property — but in favour of the wife — because the husband had agreed to waive the equalization payment payable to him. The Agreement was enforced.

The Real Lesson

The doctrinal point is familiar: settlements are meant to stick. The courts consistently favour the settlement of lawsuits in general, and there is an overriding public interest in favour of settlement: *Loewen, Ondaatje, McCutcheon & Co. v. Sparling*, 1992 CarswellQue 126 (S.C.C.). The discretion to refuse to enforce settlements should be exercised rarely: *Catanzaro v. Kellogg's Canada Inc.*, 2015 CarswellOnt 17316 (C.A.); *Olivieri v. Sherman*, 2007 CarswellOnt 4207 (C.A.).

More particularly, courts should strive to uphold domestic contracts: *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.); *Hojnik v. Hojnik* (2010), 81 R.F.L. (6th) 288 (Alta. C.A.); *Bradshaw v. Bradshaw* (2011), 7 R.F.L. (7th) 441 (B.C. S.C.); *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.); *Ramdial v. Davis (Litigation guardian of)* (2015), 68 R.F.L. (7th) 287 (Ont. C.A.); *Cheng v. Li* (2015), 69 R.F.L. (7th) 306 (Alta. C.A.).

Where both parties have counsel and agree on essential terms, courts will be loathe to revisit the bargain. That is the upshot of both *Desai* and *Shibley*. In each case, representation by counsel was not just incidental; it was largely dispositive.

The practical implications are obvious: put all conditions in writing when the offer goes out. If there are true conditions precedent, make them clear: *Turney v. Zhilka*, 1959 CarswellOnt 81 (S.C.C.); *Ball v. Ball* (2002), 27 R.F.L. (5th) 229 (Ont. C.A.); *Campbell v. Campbell* (2023), 95 R.F.L. (8th) 39 (B.C. C.A.). And, as we discussed in "Roses are Red; Violets Are Blue; If You Mean to Have A Binding Agreement then Say So!", our comment on *Butler v. Butler* (2022), 78 R.F.L. (8th) 237 (Ont.

S.C.J.) in the November 7, 2022 (2022-41) edition of *TWFL*, if you want to make a binding deal, make that clear at the time, or it's just a trip to court waiting to happen.

A Caution for Ontario Lawyers

Ontario lawyers should read these cases carefully. Neither B.C. nor Alberta have the same formal requirements for domestic contracts that Ontario does.

In Ontario, s. 55(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, requires that domestic contracts be in writing, signed, and witnessed. The *Geropoulos* exception, which we've discussed in prior editions (most recently in "My Kingdom for a Motorcycle . . . " that we reference above), allows settlements reached with counsel *during litigation* to be enforced without those formalities, on the theory that counsel have ostensible authority to settle litigation. But whether *Geropoulos* extends to pre-litigation settlements remains unsettled — and the *vast* weight of authority *strongly* suggests *it does not*. See *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.) for a recent exception and *El Rassi-Wight v. Arnold* (2024), 97 R.F.L. (8th) 25 (Ont. C.A.) for the more common strict application of the rule.

As the Ontario Court of Appeal made clear in *El Rassi-Wight v. Arnold* (also discussed in "My Kingdom for a Motorcycle . . . ") the s. 55(1) requirements are not just evidentiary. They are specifically meant to ensure deliberateness, to avoid kitchen table agreements, and to "drive home" the fact that the parties are entering into a binding agreement.

In *Desai*, the B.C. court simply applied common law contract principles without a statutory formality hurdle. In *Shibley*, the Alberta court acknowledged non-compliance with sections 37 and 38 of the *FPA* but relied on *Anderson* — and implicitly on s. 8(g) of the *FPA* — to enforce anyway. Neither court had to decide whether email exchanges between counsel or verbal agreements could constitute a binding domestic contract or be given weight without strict compliance with the statutory formalities, because neither statute posed that obstacle. Ontario lawyers, litigants and judges do not have that luxury.

It's also worth noting, as we did in "My Kingdom for a Motorcycle," that *Anderson* can be distinguished from the Ontario context on yet another basis. While in *Anderson* and *Shibley* the parties' agreement did not comply with the statutory formalities, that same legislation nevertheless gave the court discretion to give the agreement weight. Ontario's *Family Law Act* has no equivalent — save for the ability to consider an agreement that is not a domestic contract when considering unequal division in s. 5(6)(g).

For Ontario lawyers, the flexibility these courts had likely does not exist.

But no matter where you live, it is always best to be crystal clear. Is this a binding agreement ***now***? Or are there conditions precedent? Is this a binding Memorandum of Agreement? Or is this just the structure of a potential agreement?

At the end of the day, have it no other way: say what you mean and mean what you say.

Snowbirds Beware: Ontario Courts Don't Fly South for the Winter . . . or Ever, For that Matter

***Gargarella v. Hrga* (2025), 21 R.F.L. (9th) 460 (Ont. S.C.J.) — Tobin J.**

It has been some time since *TWFL* last addressed the limits on an Ontario court's jurisdiction to make orders affecting foreign immovable property. The last occasion was the December 5, 2017 (2017-48) edition of *TWFL*, in a comment by Philip Epstein on *Chan v. Chan* (2017), 100 R.F.L. (7th) 301 (N.L. T.D.).

Gargarella v. Hrga provides a timely opportunity to revisit the issue — not because the law has changed, but because the same thought process continues to arise in family litigation. Where all parties are before a court in a particular province where the economic dispute is centred, there is a natural temptation to ask the court to "deal with everything", including foreign real estate. *Gargarella* is a useful reminder of why that instinct needs to be considered with caution.

The general rule is longstanding and uncontroversial: courts have no jurisdiction over foreign immovables and cannot determine title to land located outside their territorial jurisdiction. This is not a technicality. The Rule reflects two closely related concerns.

First, rights in land are governed by the law of the place where the land is situated — the *lex situs — the* "the law of the place." Questions of title, transfer, and enforcement fall within the exclusive authority and territorial competence of the courts of that jurisdiction. While a domestic court may determine the parties' *personal* rights and obligations as between themselves (thereby including the *value* of foreign property in property division calculations), it cannot displace the legal regime that governs land located elsewhere. Courts of Manitoba generally have no say regarding property located in Narnia.

Second, courts generally avoid making orders they cannot effectively supervise or enforce. A judgment that purports to affect foreign land may appear decisive, but in fact be practically meaningless if the court lacks control over its execution. The concern is not abstract. Orders that depend entirely on the threat of contempt, or on the hope that a foreign court will enforce it, risk being illusory. These limits reflect a basic principle of judicial restraint: courts should avoid making orders that are not enforceable "on the ground."

As the Ontario Court of Appeal explained in the seminal case of *Catania v. Giannattasio*, 1999 CarswellOnt 950 (C.A.), these concerns underpin the general rule — long recognized in Anglo-Canadian law and affirmed by the Supreme Court of Canada in *Duke v. Andler*, 1932 CarswellBC 101 (S.C.C.) — that Canadian courts have no jurisdiction to determine title to, or interests in, foreign land. Title to real property must be determined by the law of the place where the land is situated.

That said, to everything there is a season, and to every rule there is an exception. And Canadian courts have recognized a narrow exception to the general rule. In very *limited* circumstances, Canadian courts may exercise ***in personam*** jurisdiction to enforce personal obligations between parties properly before the court, even where those obligations incidentally affect foreign land. This reflects the reality that some claims have both proprietary and contractual or equitable aspects.

But the exception is (and has been) tightly constrained. To ensure that *in personam* jurisdiction is exercised only where it will be effective, *Catania* requires four preconditions:

1. the court must have personal jurisdiction over the defendant;

2. there must be a personal obligation running between the parties;

3. the court must be able to supervise the execution of its order; and

4. the order must not be wholly ineffective in the *lex situs*.

These criteria are not formalities. They exist to ensure that courts do not issue orders they cannot meaningfully control, or that will be meaningless, having no real-world effect. Courts do not make orders as a form of judicial exercise.

In *Gargarella v. Hrga*, the parties were married for over two decades during which they accumulated a portfolio of jointly owned real estate. At the time of the motion, they jointly owned four properties: three located in Ontario and one located in Scottsdale, Arizona. By the time the matter was argued, the parties had agreed that all Ontario properties would be listed for sale. The only remaining dispute was whether the Ontario Court had jurisdiction to order the sale of the Arizona property.

The first two *Catania* criteria were satisfied. Both parties were before the court, and the parties plainly owed personal obligations to one another arising from their marriage and joint ownership of property.

The difficulty arose with the third *Catania* criterion: supervision of execution.

Justice Tobin was not satisfied that an Ontario court could meaningfully supervise the execution of an order compelling the sale of property in Arizona. The moving party argued that any non-compliance could be addressed through contempt proceedings or sanctions under the *Family Law Rules*. The court rejected that submission, drawing a clear distinction between supervising execution and merely punishing disobedience. As Justice Tobin explained, there was nothing in the evidence to suggest that the Ontario Superior Court of Justice could supervise a sale process taking place in Arizona, and the availability of contempt or sanctions did not fill that gap. The ability to punish non-compliance is not the same thing as the ability to supervise the execution of the order.

Justice Tobin acknowledged that some cases have granted orders affecting foreign property, but concluded that enforcement through contempt alone does not satisfy the third *Catania* requirement. That conclusion is consistent with decisions such as *Jung v. Jung* (2016), 84 R.F.L. (7th) 181 (Ont. S.C.J.) and *Chan v. Chan* (2017), 100 R.F.L. (7th) 301 (N.L. T.D.), where courts declined to exercise *in personam* jurisdiction with respect to foreign property because they could not supervise execution, emphasizing the distinction between overseeing compliance and responding after the fact to non-compliance.

Notably, the distinction is *not* between cases that involve foreign property and those that do not, but between cases that ask the court to determine ownership or affect title of foreign property, and those that do not. *Rees v. Shannon*, 2020 CarswellOnt 11009 (S.C.J.), provides an example that falls into the latter category. There, the court was not being asked to determine ownership of the foreign property or to make an order altering title. The parties agreed as to ownership, and the dispute concerned the interpretation of a domestic contract and whether one party had a contractual entitlement to assets that had been substituted for a foreign property. That entitlement could be satisfied through a money judgment enforceable in Ontario — a remedy the court could supervise. The court also relied on expert evidence suggesting that a Florida court might recognize and enforce an Ontario judgment, and on the fact that related proceedings in Florida had been stayed *pending* the Ontario court's determination. In those particular circumstances, the court could not conclude that its order would be ineffective in the foreign jurisdiction.

The fourth *Catania* criterion was also not met. There was no evidence before the court addressing whether an Ontario-ordered sale would be recognized or effective under Arizona law. In the absence of such evidence, the court declined to assume that its order would have any practical effect in Arizona.

As a result, the request to an order to compel the sale of the Scottsdale property was for want of jurisdiction, leaving the parties to pursue relief in Arizona if the issue could not be resolved between them.

So — after all that, when should this kind of relief be requested?

Gargarella underscores that applications seeking Ontario orders affecting foreign land require more than just claims of presence, convenience and fairness.

Such relief *may* be appropriate where, for example:

- the foreign property is already listed for sale and the court is merely enforcing cooperation obligations;
- the relief sought is financial or accounting-based, rather than a direct disposition of land;
- there is at least some evidence that the foreign jurisdiction will recognize and give effect to the Ontario order; or
- the domestic court can realistically supervise compliance through concrete mechanisms, not just contempt.

None of those features were present here.

Instead, the Ontario Court was being asked to compel the sale of land in Arizona without evidence about the applicable foreign law, without any realistic ability to supervise the sale process, and without assurance that the order would be effective beyond the threat of sanctions at home. That is precisely the scenario *Catania* warns against.

The takeaway here is not that Ontario courts are powerless when foreign property is involved. It is that counsel must be strategic. Where cooperation over foreign land is contested, the question is not only whether a domestic court *can* make the order, but whether doing so will actually help the client. If an order obtained in the domestic forum cannot be enforced where the property is located, or if enforcement will require further litigation abroad, or indirect pressure through contempt or other domestic mechanisms, the apparent victory may be somewhat illusory and very hollow.

In those circumstances, it may be more efficient, and ultimately more effective, to deal directly with the issue in the foreign jurisdiction, rather than becoming embroiled in threshold jurisdictional disputes at home followed by a second round of litigation in the foreign jurisdiction about enforceability.

Not that litigation can't be fun . . .

End of Document

