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— Franks & Zalev - This Week in Family Law

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Form vs. Function?

***Lang-Newlands v. Newlands*, 2026 CarswellOnt 11825 (C.A.) — van Rensburg, Paciocco and Thorburn JJ.A.**

Disclaimer: Epstein Cole was co-counsel for the Respondent on this Appeal.

Lang-Newlands was perhaps the most anticipated family law judgement from the Ontario Court of Appeal in recent memory. The appeal was argued on January 13, and the decision finally released on July 21. It is very rare for the Ontario Court of Appeal to take over six months to release a decision. So . . . was the wait worth it?

Where is the line between form and function in Ontario's *Family Law Act*, R.S.O. 1990 c. F.3? That is the central issue in the decision of *Lang-Newlands v. Newlands*, 2026 CarswellOnt 11825 (C.A.). While the decision primarily addresses how to characterize something as a date-of-marriage deduction or an exclusion, it also has interesting things to say about unequal divisions on the basis of unconscionability under s. 5(6) of the *Family Law Act*.

The Trial Below

The matter involved a high net-worth family. The primary issue at the trial was how to treat the Wife's interest in a trust formed following an estate freeze. Before the parties' marriage, the Wife's father settled a trust that held shares in his extremely successful business. The Wife was the sole beneficiary and would acquire the assets of the trust at age 39. The shares were worth $16 million on the date of marriage. During the marriage, and before she turned 39, the Wife received a distribution of the shares from the trust.

In 2001, eight years after the Wife received the shares, and 18 years before the parties separated, the shares were the subject of an estate freeze — technically undertaken by her — but, in reality — implemented at her father's instruction. The Wife's father settled a new trust for $100 (the "Newlands Family Trust" or "NFT"), and a new holding company was created. The Wife sold her shares to the holding company and received $24.5 million in preference shares in return. The NFT then purchased 100 shares of the new holding company, with the result that the NFT was entitled to the future growth in the value of the shares held by the holding company.

The Wife and the parties' four children were the beneficiaries of the NFT.

At the date of separation, the Wife's interest in the NFT was valued at $134 million. Both valuators agreed that the NFT owned shares in the publicly-traded family business that were worth about $600 million — as a result of which the Husband claimed a $300 million equalization payment.

The Wife had two main arguments regarding her interest in the NFT: **First**, she argued that her discretionary interest in a trust (the NFT) of which she was not a trustee and over which she had no control did not meet the definition of "property" under the *FLA*.

Second, the Wife argued that her interest in the NFT had been gifted to her by her father when the NFT was settled by him. The Husband, on the other hand, argued that the Wife's interest in the NFT was directly traceable to the assets in the pre-marriage trust and, as a result, the "gift" had occurred prior to the marriage.

The stakes were significant. Section 4 of the *Family Law Act* sets out that gifts received *during* the marriage from a third party are *excluded* from the calculation of a spouse's net family property and are not subject to equalization. On the other hand, spouses receive a *deduction* for the value of property owned on the date of marriage, including pre-marriage gifts from third parties, but they still share in the growth of the value of their deductions:

> **Excluded Property**
>
> (2) The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:
>
> 1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.
>
> 2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.

The Wife argued that the estate freeze done by her father *during* the marriage was a "new" gift to her. She had not been a beneficiary of the then-non-existing NFT at the date of marriage and the gift she received was a beneficial interest in the NFT. The preferences shares that she received in the estate freeze were subject to equalization, but she claimed that the increase in value of the shares held in the post-estate freeze was a gift or was traceable to a gift. The Husband, on the other hand, argued that the "value" of the gift had occurred prior to the marriage and that the shares owned by the trust and the beneficial interests were not gifts. The difference was substantial; if the Wife was right, then her interest in the NFT would be excluded and she would not have to equalize the difference between the trust she held on the date of marriage ($16 million) and her interest in the NFT on the date of separation ($134 million as determined by the trial judge).

The complicating factor was the evidence — agreed to by all — that the Wife (and her siblings) would have done anything their father asked of them with respect to their shares in his company, such that this was not really "the Wife's estate freeze" but "the Wife's father's estate freeze" that created the NFT. There was irrefutable evidence that the Wife's father directed everything.

The second complicating factor was that the Wife included the remaining value of the $24.5 million in preferred shares that she received in the estate freeze in her net family property. Her position was that she sold her shares for the $24.5 million and that her interest as a beneficiary in the growth for years to come was a gift from her father to her and her children when he settled the NFT.

The parties were married in 1987 and separated in 2019 after almost 32 years of marriage and four children. They had an expensive lifestyle with homes in Toronto, Muskoka, Ellicottville and Florida. Initially, the Husband worked and provided for the family. He contributed his income and some of his relatively minor inheritance to the family expenses. The Wife made contributions from her interest in the NFT. The Court of Appeal stated that "for the duration of the marriage, theirs was a financial partnership".

That changed in 2012 when the Husband stopped working full-time after experiencing "mental health and physical challenges". The Trial Judge determined that for the final seven years of the parties' marriage, he was financially dependent on the Wife.

The NFT

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The Wife's father had established a business in 1951 called "CCL Industries" ("CCL"). CCL was successful during his lifetime but grew exponentially in value after his death when the Wife's brother changed the business strategy and direction. Before her marriage, the Wife's father settled a trust (the "BJL Trust") that held 90 common shares of a holding company which, in turn, held shares in CCL.

The Wife was the sole beneficiary of the BJL Trust, but she was not a trustee. Under the terms of the BJL Trust, if the trust was not collapsed before her 39th birthday, the Wife was to acquire its assets outright when she turned 39-years-old. Therefore, at the date of marriage, the Wife was a beneficiary of the BJL Trust that held the shares — but she did not hold any shares directly.

In 1993 (six years after marriage) and before she turned 39-years-old, the Wife received shares in the holding company directly from the BJL Trust. Eight years later, in 2001, those shares were the subject of an estate freeze that was initiated and directed by the Wife's father just a few months before he died.

The NFT was reorganized in 2022, after separation, as a result of the 21-year rule, and the Wife received approximately 17% of the distributions.

For those unfamiliar with the concept of an "estate freeze" — the Court of Appeal provided a helpful definition at paras. 28 to 31:

> [28] An estate freeze is a tax and estate planning strategy. It separates the current value of an asset — usually, shares in a private company — from its future growth value. The purpose of an estate freeze is to transfer the future growth value of the shares to others (such as children or grandchildren) while the transferor retains the current value.
>
> [29] This is done by the transferor exchanging the original "growth" shares for new, "frozen" assets that will not increase in value (like fixed-value preferred shares).
>
> [30] The original shares are then transferred or put into a trust. The transferor gets an income stream from dividends on the fixed-value preferred shares or may redeem the preferred shares for par value in cash. The transferees get the benefit of the growth value of the original shares.
>
> [31] This defers the payment of taxes that would arise if the original shares were willed to the transferees or gifted.

As noted above, the estate freeze transaction was directed by the Wife's father. He retained and instructed the lawyers to undertake the estate freeze — and the Wife complied with his wishes. Importantly, while the instructions came from the Father and he provided the initial trust settlement of $100.00, the shares involved in the transaction came from the Wife. As set out above, a new holding company was formed, and the Wife transferred her shares to the new holding company in exchange for fixed-value preference shares valued in the amount of $24.5 million — the remaining value of which on separation was included as the Wife's property. The NFT was set up to benefit from the future growth in the value of the shares. Between the time the NFT was settled and the date of separation, the value had increased from $24.5 million to approximately $670 million before taxes. As noted above, the Wife was not the sole beneficiary of the NFT, and accordingly her interest was valued as one of five beneficiaries.

The Wife's first argument — that her interest in the NFT was not "property" within the meaning of the *FLA* did not go over well. In s. 4(1) of the *FLA*, "property" (that is subject to equalization) is defined as:

> 4.1 . . . any interest, present or future, **vested or contingent**, in real or personal property and includes,
>
> (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
>
> (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property . . . [**emphasis** added]

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The Trial Judge held — and the Court of Appeal tacitly accepted — that the Wife's interest in the NFT was "property" within the meaning of the *Family Law Act*. While this was certainly the "easy" decision to make, trying to remain as detached as possible, it would have been helpful for the Court of Appeal to have offered further comment on this finding. The Wife was one of five discretionary beneficiaries; there was evidence that the lion's share of the NFT was meant to benefit her children, not her; she was not a trustee; she had no control over the NFT; she could not control disbursements; she could not demand distributions. She had no powers of appointment (save for appointing new trustees on her death). She had no property interest in any specific assets of the trust: *Spencer v. Riesberry* (2012), 17 R.F.L. (7th) 94 (Ont. C.A.). Her interest in the trust was not subject to garnishment: *Borges v. Santos* (2017), 100 R.F.L. (7th) 483 (Ont. C.J.). This issue, we believe, was worthy of more appellate ink, especially because there are decisions that suggest otherwise: *Tremblay v. Tremblay*, 2016 CarswellOnt 922 (S.C.J.) at paras. 27-33; *Lowe v. Lowe* (2006), 22 R.F.L. (6th) 438 (Ont. C.A.) at paras. 12-15; *Pallister v. Pallister* (1990), 29 R.F.L. (3d) 395 (Ont. Gen. Div.) at pp. 404-406; and *Kochar v. Kochar* (2015), 71 R.F.L. (7th) 183 (Ont. S.C.J.) at para. 20.

The trial judge also accepted that the Wife's father had intended to give her a gift when he had settled the NFT. Based on the decision of *Shinder v. Shinder* (2018), 13 R.F.L. (8th) 1 (Ont. C.A.), which the Trial Judge felt bound him, he found that the Wife's interest in the NFT was excluded. The Trial Judge relied on para. 58 of *Shinder*:

> The trust comprised Sol's [Neil's father] property and Neil's common shares in Coofer that had originally been given to him by Sol and then exchanged for preference shares that were disclosed to Randi [Neil's wife] and included in both of Neil's financial statements. **In the face of the disclosure of these Coofer shares, any additional benefits Neil might receive under the trust would constitute a gift or inheritance acquired after the date of the marriage** and hence would have to constitute excluded property as defined under the *Family Law Act*. [**emphasis** added.]

While the Trial Judge clearly felt compelled to follow *Shinder*, he did not seem sure about it. Therefore, the Trial Judge provided an alternative analysis and found that, ***if*** he was not bound by *Shinder*, he would assign to the Wife a 20% interest in the value of the NFT (as one of five beneficiaries). The Trial Judge then undertook an analysis in terms of the valuation of the NFT and the Wife's contingent tax liabilities. He determined that if *Shinder* was not binding, the Wife would owe an equalization payment of $25,748,826.01.

But that was not the end of the analysis. The Trial Judge determined that an equalization payment in that amount would be "unconscionable" as the Wife had received only 17% of the post-separation distributions from the trust, thereby reducing her net family property by more than $11 million. A payment of $25 million to the Husband would result in the Husband having a *higher* net worth than the Wife. The Trial Judge was particularly concerned about this given his findings that the Husband had mismanaged finances, taken money from the Wife, and forged the Wife's signature to make investments for himself. At the same time, the Wife had paid a disproportionate amount of the family debt.

The Trial Judge also found little to recommend the Husband in his litigation behaviour. The Trial Judge preferred the Wife's evidence, finding that the Husband did not give honest evidence during his testimony.

The Trial Judge determined that the Wife should pay the Husband an equalization payment of $1,183,495.01 based on her interest in the NFT being excluded and that she should pay $25,649.00 per month in spousal support on an indefinite basis. Finally, given the Wife's relative success at trial, the offers to settle, and the Husband's behaviour during the trial, he ordered that the Husband pay the Wife's costs in the amount of **$2,800,000.00**.

The Appeal

Unsurprisingly, the Husband appealed the decision.

The Court of Appeal ultimately agreed with the Husband and overturned the Trial Judge's equalization determination — but only the equalization determination.

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The Court of Appeal disagreed that *Shinder* was binding authority for these circumstances. *Shinder* involved an appeal from a failed summary judgment motion. The primary issue in *Shinder* was whether or not there had been material non-disclosure prior to signing a separation agreement. The Husband in *Shinder* had owned shares in his father, Sol's, company. During the marriage, Sol set up a family trust of which the Husband was one beneficiary. The trust included both the Husband's pre-marriage shares **and** additional property from Sol. The question in *Shinder* was whether the Husband had properly disclosed his beneficial interest in the trust — the issue of what constituted net family property was not central to the case.

Despite this, as noted above, the Trial Judge in *Lang-Newlands* relied on para. 58 of *Shinder*:

> The trust comprised Sol's property and Neil's common shares in Coofer that had originally been given to him by Sol and then exchanged for preference shares that were disclosed to [Neil's wife] and included in both of Neil's financial statements. In the face of the disclosure of these Coofer shares, **any additional benefits Neil might receive under the trust would constitute a gift or inheritance acquired after the date of the marriage and hence would have to constitute excluded property** as defined under the *Family Law Act*. [**emphasis** added.]

The Court of Appeal distinguished the family trust in *Shinder* from the NFT. In *Shinder*, the family trust was made up both of the Husband's pre-marriage shares *and* property from Sol that was placed in the trust during the marriage. The additional benefits placed in the trust by Sol after the Husband's marriage came from Sol and they would constitute a gift or inheritance to be excluded from the net family property.

In contrast, the Trial Judge found that the NFT was comprised of the Wife's property. The only thing her father transferred into the trust was the $100 to set it up. As a result, the *Shinder* situation (which the Court of Appeal referred to as a "mixed trust") was not analogous to the situation in *Lang-Newlands*.

The Court of Appeal determined that the Trial Judge's decision allowed "form to overwhelm function". The only assets in the NFT were the shares in which the Wife herself had a beneficial interest prior to marriage. According to the Court of Appeal, there was no true "gift" from the Wife's father when he set up the NFT, save for the *de minimis* contribution of $100. The father did not give "new property" after marriage that she did not "already possess" and he did not divest himself of anything. As a result, the Wife's interest in the NFT could not really be considered a "gift" and was subject to equalization.

The Court of Appeal stated the following in terms of the wider application of this case:

> [85] I leave for future consideration of this court more complicated scenarios such as those involving mixed asset trusts, or where a spouse brings gifted property into marriage, divests herself of it for some length of time beyond what occurred in this case as a formal aspect of the estate freeze transaction, and is re-gifted the same traceable property at some later date. None of these occurred in this case. [The Wife's] interest in the NFT was directly traceable to other "property" as defined under the *Family Law Act* that was already hers at the date of marriage.

Notably, this was arguably the situation in *Reisman v. Reisman* (2012), 22 R.F.L. (7th) 423 (Ont. S.C.J.), aff'd (2014), 42 R.F.L. (7th) 1 (Ont. C.A.), which excluded the husband's interest in a trust settled by his father after marriage — but which trust *also* included assets owned by the husband on the date of marriage.

Not everything, however, went the Husband's way. Aside from finding that the Wife's interest in the NFT was not an exclusion, the Court of Appeal otherwise adopted the entire "alternative" analysis from the trial judge, which included valuation findings not favourable to the Husband's position and a finding of unequal division in favour of the Wife, all of which very significantly reduced the equalization payment to which the Husband would otherwise have been entitled:

> [90] I accept the trial judge's conclusion that an equalization payment to [the Husband] of $25,748,826.01 would be unconscionable given that: (1) [the Wife] received only 17 percent of the post-separation distributions when the NFT was reorganized in 2022, thereby reducing her net family property by over $11 million; (2) [the Wife] paid for a disproportionate share of the family debt; (3) [the Husband] mismanaged the family finances in later years; (4) he engaged in some

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> unconscionable behaviour as set out above; and (5) to do otherwise, would result in [the Husband] having a higher net worth than [the Wife].

Of particular interest was that the Court of Appeal rejected the Husband's position that s. 5(6) of the *Family Law Act* [providing for unequal division] cannot be used to sanction bad behaviour:

> [93] Also distinguishable are the authorities [the Husband] relies on to support his position that s. 5(6) cannot be used to sanction bad behaviour. In some of the cases he cites, the spouse accounted for her debts and in another, there was no evidence of extravagant lifestyle: *McLean v. Dahl*, 2017 ONSC 1288, 26 E.T.R. (4th) 96, at para. 263; *Gibson v. Gibson*, 2011 ONSC 4406, at paras. 384-413; and *Crawford v. Crawford* (1997), 33 R.F.L. (4th) 381 (Ont. C.A.), at para. 14. As such, there is no basis to overturn the trial judge's findings on this point: see also *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161, at paras. 60-67.

The Court of Appeal also determined that, given the much larger equalization payment, the Husband was not entitled to prospective spousal support. The Trial Judge had helpfully included this analysis in his "alternative" reasons. The spousal support award was limited to $25,649 per month from August 1, 2019 to the date of the first tranche of equalization payment paid.

Finally, and revealingly, the Court of Appeal did not disturb the Trial Judge's costs decision — **$2.8 million** owed by the Husband to the Wife. Not only had the Wife made an Offer to Settle that would have seen the Husband receiving a net benefit of $18.5 million, which equaled roughly to what he received, but the Court of Appeal also disapproved of the Husband's conduct. Of particular interest, the Court of Appeal stated:

> [111] Furthermore, as the trial judge noted, [the Husband] now 71, leaves the marriage with $26 million that is "a product of a gift from [the Wife's Father]; it is not a product of the joint success of the parties during the marriage". By operation of legislation intended to apply to very different circumstances, [the Husband] is sharing in a gift never intended for him. [The Husband] created significant debt for the family and spent money without [the Wife's] consent.

This is a curious statement given the result, especially given the comment from the Court of Appeal that to allow the exclusion would allow "form to overwhelm function." While the Court of Appeal (and Trial Judge) seem troubled that the Husband is able to leave the marriage sharing in a gift never intended for him — they allowed him to do just that — allowing the "form" of the *Family Law Act* to overwhelm the "function" of the Wife's father's clear intention.

Finally, we wish to address a concern that has arisen as a result of this decision. There has been much talk about whether this decision now means that shares gifted on an estate freeze are no longer to be considered as excluded property. This concern appears to arise from people focussing on one specific paragraph of the reasons:

> [86] As such, only the inconsequential $100 amount is a gift after marriage that is excluded property under s. 4(2)1 of the *Family Law Act*.[4] [**Footnote 4:** The $100 is clearly a gift after marriage. It, along with its appreciation, is excluded from net family property . . .]

Respectfully, we believe this concern is overblown, as suggested by the immediately preceding two paragraphs:

> [84] In these circumstances, **[the Wife's] father did not give [the Wife] new property after marriage that she did not already possess, nor did he divest himself of anything beyond $100**. The 702 **shares were not his to give**. Characterizing [the Wife's] entire interest in the NFT as a "gift after marriage" solely because the trust was initially seeded with $100 from her father **would allow form to overwhelm function**.
>
> [85] I leave for future consideration of this court more complicated scenarios such as those involving mixed asset trusts, or where a spouse brings gifted property into marriage, divests herself of it for some length of time beyond what occurred in this case as a formal aspect of the estate freeze transaction, and is re-gifted the same traceable property at some later date. None of these occurred in this case. [The Wife's] interest in the NFT was directly traceable to other "property" as defined under the *Family Law Act* that was already hers at the date of marriage. [**emphasis** added]

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"Ordinary" plain vanilla run-of-the-mill estate freezes in favour of future generations should still be safe. The common shares that result from such transactions (*during* marriage) remain excluded from net family property. But freezing assets that the person already owns should cause for some serious discussion.

The Court of Appeal had to make a policy decision about what happened regarding the family structuring on these facts, and it did. If a family estate plan involves freezing assets that a spouse already owns in favour of that same spouse — read *Reisman v. Reisman* (2012), 22 R.F.L. (7th) 423 (Ont. S.C.J.), aff'd (2014), 42 R.F.L. (7th) 1 (Ont. C.A.); read *Lang-Newlands*; contemplate how "mixed" a trust has to be a "mixed trust"; and then worry.

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