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— Franks & Zalev - This Week in Family Law

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Contents

• A General Unifying Theory of Retroactive Child Support; Einstein Would be Thrilled

• If She Could Just Have Hung On for Eight More Months . . .

• And You Thought *Your* In-Laws Were Difficult?

A General Unifying Theory of Retroactive Child Support; Einstein Would be Thrilled

Henderson v. Micetich, 2021 CarswellAlta 614 (C.A.) - Paperny, Watson and Wakeling, JJ.A.

Retroactive Support after **Michel**

If you read only one case on retroactive child support this year, this is likely the one to read. (We know what you're thinking: "What about *Michel v. Graydon*???" That was soooo 2020.)

Henderson is the first provincial appellate court to consider the Supreme Court's decision in *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.) ("*Michel*"), and its impact on retroactive support claims. The Alberta Court of Appeal's extensive reasons examine the context in which *S. (D.B.) v. G. (S.R.)* (2006), 31 R.F.L. (6th) 1 (S.C.C.) ("*D.B.S.*"), was decided and the changes driven by *Michel*. It also provides important guidance about how to consider claims for retroactive child support in this new world. Notably, *D.B.S.* also came from the Alberta Court of Appeal, so it has now come full circle.

The Court of Appeal noted that when *D.B.S.* was decided by the Supreme Court of Canada in 2006, the *Guidelines* were still relatively young, having come into force in 1997. The Supreme Court, at the time, was concerned about the impact retroactive support claims could have on agreements and orders made under the old, pre-*Guidelines* regime. Now, however, such concerns no longer exist. *Michel* grounds the retroactive support analysis firmly alongside the *Guidelines* regime and the principles that underpin it. It focuses on the fact that child support is the right of the child, and that since payors have a natural informational advantage in child support litigation, without disclosure only they know whether their income has increased or not.

Michel mandates a holistic approach for retroactive child support claims. And Justice Paperny, likely the main author of *Henderson*, was particularly well-positioned to write on this topic - she was the author of the Alberta Court of Appeal decision in *D.B.S.* back in 2005.

In *Henderson*, the parties cohabited from 2002 to 2007 and had two children. They did not have a written agreement or court order. However, they had agreed orally that the father would pay $800 a month in child support based on an income of $54,000 a year, and he would see the children every other weekend.

The mother re-partnered and married in April of 2009, and her new spouse earned considerable income that afforded her and the children a comfortable lifestyle.

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The father started a claim in January 2018, to increase his parenting time. The mother counter-claimed for child support retroactive to January 2017, but subsequently changed her request to only ask for child support to commence as of January 2018.

Since 2007, the father's income had actually *decreased* steadily. He earned $147,624 in 2018, $121,207 in 2019 and $114,720 in 2020.

The father's spending far outpaced his income over the years. He made a consumer proposal in 2018 to deal with his more than $400,000 in personal debt. As a result of the proposal, his debt was reduced to $42,000, which he serviced at a rate of $700 per month

Based on affidavit evidence that was before the court in September of 2020, the motion judge declined to order retroactive support. In doing so, she considered *D.B.S.*, as *Michel* had not yet been released by the Supreme Court. The motion judge considered:

1. Whether there was a reasonable excuse for why support was not sought earlier;

2. Blameworthy conduct by the payor parent;

3. The circumstances of the child; and

4. The existence of any hardship for the payor parent.

The first issue with the motion judge's decision was that it appeared to misapprehend the mother's actual claim. Any support payable after January 1, 2018 - when the litigation started - was *not* retroactive support and, accordingly, *D.B.S.* did not apply (the mother had not actually claimed retroactive support back to 2007, but the motion judge seemed to think that she had).

The motion judge found that:

1. The mother had not brought a claim for support before 2018 because she was satisfied with the oral agreement that the father would pay $800 per month and she would be the primary parent. The motion judge found that the mother's application for retroactive support was in response to the father's claim for parenting.

2. The motion judge determined that the father had not engaged in blameworthy conduct because he, subjectively, had not thought what he was doing was wrong. The motion judge cited *Smith v. Gulka*, 2020 CarswellAlta 44 (Q.B.), where the Alberta Court of Queen's Bench had determined that blameworthy conduct required a *subjective intention* on the part of the payor. In this case, the father believed that he was following the oral agreement and, as a result, his underpayment was not "blameworthy."

3. The motion judge determined the mother's husband provided a very high standard of living for the children that was well above the vast majority of households in Alberta. As a result, while a retroactive award would not provide a benefit to the children, it would cause the father a great deal of hardship.

4. Finally, the motion judge found that, after considering the father's consumer proposal, requiring him to pay retroactive child support, in addition to ongoing support, would place a significant financial burden on him.

According to the Court of Appeal, the motion judge had made a fundamental error in proceeding on the basis that the mother was claiming retroactive support. In fact, the mother was claiming ongoing/prospective child support commencing January 1, 2018 - which is when the litigation actually started. The motion judge treated it as a claim for retroactive support because the motion was not heard until September 2020 - but that was an error. When a court is determining support for the year in which the application is made, it is entitled to make a finding for that entire year. See also *MacKinnon v. MacKinnon* (2005), 13 R.F.L. (6th) 221 (Ont. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Cassidy v. McNeil*, 2010 CarswellOnt 1637 (C.A.); *Dickson v. Dickson* (2011), 93 R.F.L. (6th) 241 (Man. C.A.); *Cameron v. Cameron*, 2018 CarswellOnt 8398 (S.C.J.).

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The Court of Appeal then considered the motion judge's retroactive support analysis, particularly in the post-*Michel* context.

Reasons for Delay

The Court of Appeal set out that, in *Michel*, the Supreme Court recognized that there can be many reasons that a recipient parent might delay bringing an application for increased child support. These reasons might include informational asymmetry, a lack of access to justice because of financial difficulties, potential intimidation, misleading behaviour on the part of the payor, and intimate partner violence. Delay on the part of a recipient parent must be considered in the broader social context, with consideration towards issues of intimate partner violence and access to justice. Delay is not in and of itself inherently unreasonable.

The Court of Appeal set out that, absent a clear agreement or court order that waives ongoing disclosure or provides another mechanism for calculating child support, delay will rarely prejudice a payor parent. The payor knows that his or her child support obligation should be calculated based on their line 150 income, adjusted annually. The payor parent is often the only party to know that his or her income has increased. This informational asymmetry puts the payor at an implicit advantage over the recipient parent.

The Court of Appeal summarized the issue by stating "delay has a very limited role to play in determining the availability and extent of a retroactive child support order." Any delay on the part of a recipient parent must be viewed "in light of available information, resources, and social context, including gender, social and economic inequities", and "there will be few cases where delay can be truly seen as unreasonable or a factor that should preclude the award of previously-owed support to children."

Notably, this is consistent with Justice Paperny's views in *D.B.S.* while writing for the Alberta Court of Appeal (wherein she questioned the "one year rule" for the collection of child support arrears while acknowledging that there are many possible - and reasonable - explanations for a recipient's delay in claiming increased child support).

In this case, there had been no delay on the mother's part. She commenced her claim in 2018 and sought child support starting in January 2018. However, of note, the Court of Appeal found that even if that had not been the case, the mother's "delay" would not have precluded an award of retroactive child support in this case. The Court of Appeal was very troubled by the motion judge's finding that the mother had commenced her claim for support as a tactic or litigation strategy in response to the father's parenting application. Child support is the right of the child. The children's entitlement to support from their father was independent of the mother's litigation strategy, and any resources she currently had from her new spouse.

The father "was well aware, or should have been aware" that he was not paying proper Guideline child support. That the mother acquiesced or had been prepared to accept less did not mean that she waived the children's entitlement to child support from their father.

Conduct of the Payor Parent

The Court of Appeal rejected the concept of "subjectivity" in assessing blameworthy conduct. Instead, they cited the definition used in *D.B.S.* - that blameworthy conduct is anything that privileges the parent's own interests over his/her children's right to an appropriate amount of support. Such conduct includes a failure to provide full and accurate financial disclosure or to disclose an increase in income. Payor parents now *clearly* have an *affirmative duty* of full disclosure. "No one asked me" will no longer be an excuse.

In this case, the father had never disclosed his income prior to June of 2018. That was, on its own, blameworthy conduct. It could not be said that the father was unaware of his child support obligations. There was no doubt, according to the Court of Appeal, that he was aware that the children were entitled to more support than he had paid.

Blameworthy conduct is a concept that will now, into the future, have "limited utility." Blameworthy conduct allows for a retroactive award beyond the three-year rule put forward by *D.B.S.* A retroactive award ought to be restorative, rather than

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punitive. While blameworthy conduct can militate in favour of an award beyond three years, its absence should not be found to militate against the making of any retroactive order at all.

Circumstances of the Child

The Court of Appeal set out that, under the *Guidelines*, child support is the right of the child. The right to support cannot be bargained away by either parent. Retroactive support should be analyzed from a child-centered approach, recognizing that support is the child's right. The fact, in this case, that the children enjoyed a comfortable lifestyle and did not "need" the support was irrelevant. A payor parent cannot avoid a retroactive award by arguing that the recipient parent was able to sufficiently care for the child on his or her own.

The Court of Appeal focused on the fact that children are entitled to support from *both* parents, and that child support is *presumed* to benefit the children. A wealthy stepparent does not detract from that benefit. In addition, a wealthy stepparent may not be around forever, and the child's financial circumstances could change.

Of particular importance, and in a melding of *Michel* and *Henderson*, the Court of Appeal determined that children remain entitled to retroactive child support even after they become adults. Child support obligations arise upon separation, and retroactive support awards provide a means to "enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid." The Court of Appeal found that a loss of benefit to the child is presumed where a payor parent fails to pay the amount of support required under the *Guidelines*. Children are entitled to expect and receive child support from both of their parents. It would be odd for a child to *not* benefit from the provision of monies to which they are entitled, but which were previously withheld.

Hardship the Award Might Entail

The Court of Appeal set out that while the hardship to the payor is *a* consideration, it is not the *sole* consideration under this branch of the analysis. Hardship to the recipient and the children must also be considered. Very importantly, the Court of Appeal noted that, under *Michel*, hardship experienced by the payor must be *undue* hardship. This brings the analysis in line with the *Guidelines*, which incorporates the concept of undue hardship to payors in certain situations. But hardship can only be assessed after taking into account the hardship which would be caused to the child and the recipient if retroactive support is not ordered. The assessment of hardship must take into account the payor, the recipient, the child, and any other dependents who might be affected.

From the payor's perspective, a claim of hardship must be tangible and supported by evidence, and the hardship must be undue. There is often financial difficulty when an immediate lump sum cash payment is awarded. This, without more, is neither undue nor unfair according to the Court of Appeal. Moreover, the analysis must take into account who has benefited from failing to fulfill the obligation in the meantime - usually the payor. Hardship is a "broad concept and a legitimate concern, but the focus cannot be exclusively on the payor."

In *Henderson*, the Court of Appeal found that the father's financial circumstances did not reveal the kind of undue hardship that would lead a court to decline to make any retroactive award. His consumer proposal was entered into *after* the mother had commenced her counter-claim. The father could not rely on his own personal debt to reduce his child support obligations, as his first obligation was to his children. The Court of Appeal stated that any concerns of unfairness raised in a case like this could be managed through an "adjustment to the quantum of the retroactive award or through a payment schedule."

In the end, the Court of Appeal ordered the father to pay a total of $24,408.90 for the period starting January 1, 2018, at a rate of $500 a month.

If She Could Just Have Hung On for Eight More Months . . .

Booth v. Bilek, 2021 CarswellOnt 2607 (C.A.) - Miller J.A., Brown J.A. and Strathy C.J.O.

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The sole issue on this appeal was equalization of net family property. Subsection 5(6) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") allows the court to vary a spouse's share of net family property "if the court is of the opinion that equalizing the net family properties would be unconscionable" using the listed criteria in sections 5(6)(a) to (h). Here, the parties were married, and they separated after just under 4-1/2 years of cohabitation. There were no children.

The trial judge awarded an unequal division in favour of the husband based on:

1. the extent to which the wife's net family property came from gifts from the husband [s. 5(6)(c)];

2. that a full equalization payment would be disproportionate to the period of cohabitation that was less than 5 years [s. 5(6)(e)]; and

3. the parties' respective financial contributions to the property they owned during their marriage (the husband was essentially the sole financial contributor to the property during the marriage) [presumably s. 5(6)(h)].

However, s.5(6)(e) was clearly the primary consideration.

The trial judge found that the wife had benefitted significantly financially from the "comparatively short marriage." She received just short of $200,000 from the sale of the matrimonial home even though she made no direct financial contribution to its purchase. And, although the wife contributed $16,000 to the cost of renovating the first matrimonial home, those funds came from the sale of a condominium that had been entirely financed by the husband before the marriage. The trial judge also found that the wife had benefitted from the gift of wedding and engagement rings from the husband worth in excess of $87,000.

The trial judge found that the difference between the parties' respective net family properties at separation was attributable almost entirely to the growth of the husband's investments over the course of the marriage, and that the wife had not contributed to them. Therefore, none of the family income had been used to finance those investments. The trial judge also noted that the husband was 69 years old and was living solely off the income generated by his investments, while the wife was 46 and had become self-supporting. While this was noted by the trial judge, and repeated by the Court of Appeal, the *FLA* does not make the age gap or sources of income a consideration for unequal division.

Whereas the full equalization payment to the wife would have been $106,275, she was awarded only 10 percent of that sum - or $10,627 - at trial (in addition to the about $200,000 she received from the sale of the matrimonial home).

The wife appealed. She argued that full equalization would not be "unconscionable" and that, in the alternative, she should have been awarded 87 percent of her equalization entitlement based on having cohabited with the husband for four years and four months out of five years (52/60).

As the trial judge had noted, and the Court of Appeal reiterated, the threshold for unconscionability is high. It is more than mere unfairness [*Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.) at paras. 47-48; *Ward v. Ward* (2012), 26 R.F.L. (7th) 358 (Ont. C.A.)]. The high bar for unconscionability is meant to promote certainty.

Subsection 5(6)(e) of the *FLA* says that equalization of net family property can be found to be unconscionable if it would be "disproportionately large in relation to a period of cohabitation that is less than five years." According to the Court of Appeal, this promotes certainty about equalization for relationships longer than five years, but also "provides notice to parties who have been married for less than five years that a court may take a closer look at whether equalizing would be unconscionable in the specific circumstances of a shorter marriage." While this means that parties can expect less certainty in relationships of less than five years (or more particularly marriages where cohabitation has lasted less than five years including pre-marriage cohabitation), the gateway to unequal division is still a finding of *unconscionability*.

The Court of Appeal did not agree that the trial judge erred in concluding that equalizing the parties' net family properties would be unconscionable. In addition to the "short" marriage, over the course of that marriage, the wife had made little contribution to the acquisition and maintenance of the matrimonial home (or other family assets), and received sizable benefits from its sale.

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We are not *convinced* that an equalization payment of $106,000 after a marriage only eight months short of the five-year threshold meets the test of unconscionability. While the gateway to unequal division is a finding of unconscionability, on the wording of s. 5(6), a finding of unconscionability must relate to the otherwise full equalization payment. That is, before having resort to s. 5(6), the court must calculate the usual equalization payment and find that it is unconscionable having regard to the factors in s. 5(6): *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.).

Would an equalization payment of $106,000 been unconscionable? Would it "shock the conscience of the court"? [*Serra*] We're not convinced. In *Ward*, for example, the Ontario Court of Appeal cautioned against lowering the threshold of unconscionability to mean "inequitable".

The wife also argued that the trial judge did not give appropriate weight to the length of the marriage, arguing that the court should have prorated the full equalization that would be available after five years of marriage to the 52-month marriage: 52 months/60 months = 87 percent, which would entitle her to $92,458.80. This formula was developed in *Sarcino v. Sarcino*, 1999 CarswellOnt 819 (Gen. Div.), and has been used in several cases since then. While neither the *FLA* nor the case law requires the application of a formula, in combination with the high threshold of "unconscionability", it would certainly provide some certainty and minimize litigation for short marriages.

However, as noted by the Court of Appeal in *Gomez v. McHale* (2016), 79 R.F.L. (7th) 305 (Ont. C.A.):

> [11] In several cases, courts have looked at the actual period of cohabitation (e.g. 48 months) and then fixed an unequal division of net family property using that period as a percentage of the five year statutory period, i.e. 48/60 = 80% . . .
>
> [12] . . . Although a mathematical formula may be of assistance in some cases, we do not think that the motion judge erred by not applying it in this case. He did what s. 5(6) of the FLA requires. He looked carefully at the backgrounds of both parties, determined that an equal division would be "unconscionable", and fixed what he regarded as a reasonable figure. We see no error in the motion judge's approach.

As a result, the appeal was dismissed.

And You Thought *Your* In-Laws Were Difficult?

Klassen v. Klassen (2020), 43 R.F.L. (8th) 347 (Ont. S.C.J.) - Williams J.

The moving party ("Lily") brought an application in Family Court against her husband, Kyle. Kyle's parents, Henry and Beverley Klassen (the "Klassens") brought a separate action against Lily for repayment of an alleged loan they claimed to have made to Lily and Kyle to help them purchase a home.

In her motion, Lily asked for, among other things:

> a) an order that Kyle pay Lily occupation rent from September 1, 2018, to December 1, 2019, at a rate of $1,466 per month;
>
> b) an order consolidating the family proceeding with the civil claim commenced by the Klassens (pursuant to Rule 6.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194);
>
> c) an order striking out the jury notice filed in the civil action and directing that the civil action be tried by a judge alone (pursuant to Rule 47.02 of the *Rules of Civil Procedure* and s.108(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
>
> d) provided the civil action was consolidated with the within proceedings, an order that the *Family Law Rules*, O.Reg. 114/99, apply to the combined case.

Occupation Rent

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The parties separated on January 2, 2018, but both continued living in the matrimonial home until August 31, 2018, when Lily moved into her own home. Living conditions were reportedly tense during the eight months the parties lived separate and apart under the same roof. Lily was prepared to sell her interest in the home to Kyle, but Kyle had not made an offer for some time. Kyle eventually purchased Lily's interest in the home for $437,500.00, and the transfer was completed on December 23, 2019.

Lily argued that after she moved out of the matrimonial home, Kyle had the benefit of living there, mortgage-free, from September 1, 2018 until December 1, 2019, while she was forced to make mortgage payments on the house she purchased.

There was no order for exclusive possession, so s. 24(1)(c) of the *Family Law Act* (which permits a court to order a spouse to whom exclusive possession has been given to make periodic payments to the other spouse), did not apply. However, s. 122(2) of the *Courts of Justice Act* still allowed the Court to make an award for occupation rent between joint tenants. Either way, the same factors applied. Pursuant to *Higgins v. Higgins* (2001), 19 R.F.L. (5th) 300 (Ont. S.C.J.) at para. 53 these factors include:

a) The conduct of the non-occupying spouse including the failure to pay support;

(b) The conduct of the occupying spouse including the failure to pay support

(c) Delay in making the claim;

(d) The extent to which the non-occupying spouse was prevented from having access to his or her equity in the home;

(e) Whether or not the non-occupying spouse moved for the sale of the home and, if not, why not;

(f) Whether the occupying spouse paid the mortgage and other carrying charges of the matrimonial home;

(g) Whether the children resided with the occupying spouse and, if so, whether the non-occupying spouse paid, or was able to pay, child support; and

(h) Whether the occupying spouse increased the selling value of the property.

Contrary to some older authority, ouster is not required: *Higgins v. Higgins* (2001), 19 R.F.L. (5th) 300 (Ont. S.C.J.); *Carmichael v. Carmichael*, 2005 CarswellNS 597 (S.C.); *Casey v. Casey* (2013), 32 R.F.L. (7th) 1 (Sask. C.A.).

Occupation rent is not "automatic". It is an equitable remedy, and in modern cases, it tends to be awarded "cautiously" and only in exceptional circumstances and where required to do justice between the parties. [For example, see *Malik v. Malik*, 2015 CarswellOnt 7465 (S.C.J.) at para. 155; *Khan v. Khan*, 2015 CarswellOnt 16622 (S.C.J.) at para. 11; *Morrison v. Barclay-Morrison*, 2008 CarswellOnt 6956 (S.C.J.); *Guillemette v. Guillemette*, 2008 CarswellOnt 434 (S.C.J.); *Kazmierczak v. Kazmierczak* (2001), 22 R.F.L. (5th) 321 (Alta. Q.B.), aff'd (2003), 45 R.F.L. (5th) 373 (Alta. C.A.); *Kozun v. Kozun* (2001), 18 R.F.L. (5th) 115 (Sask. Q.B.); *McColl v. McColl* (1995), 13 R.F.L. (4th) 449 (Ont. Gen. Div.)] It tends to act as an "equalizer": *Shen v. Tong* (2013), 40 R.F.L. (7th) 257 (B.C. C.A.); *McManus v. McManus*, 2019 CarswellBC 175 (S.C.); *Stasiewski v. Stasiewski*, 2007 CarswellBC 654 (C.A.); and *G. (J.D.) v. V. (J.J.)*, 2016 CarswellBC 3643 (S.C.).

It is also only very rarely awarded on an interim motion - and this case was no exception. Justice Williams determined that the claim for occupation rent was best left to the trial judge who would be in a better position to assess whether, "in all of the circumstances, it would be reasonable and equitable to make an order for occupation rent."

Consolidating Claims and Striking the Jury Notice

As noted above, the Klassens started a civil action against Lily to recover $175,000 they lent to Lily and Kyle to help purchase the matrimonial home. The four parties signed a loan agreement in November 2003.

Lily and Kyle made monthly payments until the end of 2008. At that time, the Klasssens proposed that payments be suspended as Lily and Kyle were strained financially due to the general costs of raising their three children.

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Lily argued that the Klassens never again asked for payments and that the loan had been forgiven - an argument supported by the fact that Kyle did not show a loan owing to his parents on his sworn Financial Statement. Lily claimed that the first time the loan was raised again was after the separation and after Lily claimed spousal support from Kyle.

The Klassens started their action - against Lily only - in August 2019. As Kyle immediately acknowledged liability under the loan and arranged to repay it, the Klassens believed it was unnecessary to name him as a defendant.

Lily delivered a Statement of Defence and named Kyle as a third party, and Kyle delivered a defence to the third-party claim.

Lily requested an order consolidating her family law claim and the Klassens' civil claim and an order striking the jury notice in the civil action. Understandably, Lily argued that the two proceedings were closely intertwined and that there would be a risk of inconsistent findings if the proceedings were heard independently. She also argued for efficiency and for the cost-effectiveness of consolidation.

Kyle opposed Lily's request for consolidation. He argued there were no common questions of law and fact in the two proceedings and that the relief claimed in both actions did not arise out of the same transaction or occurrence. He argued that the validity of the Klassens' loan should be determined in the civil action first.

Unsurprisingly, the Klassens agreed with Kyle. They also argued that:

> (a) The action could not be consolidated because they were not proceeding "in the same court" in that the civil action was under the civil jurisdiction of the Superior Court of Justice and the family action was in the Family Court, a separate branch of the Superior Court;
>
> (b) The actions could not be consolidated because a jury notice had been served in their action and family law proceedings may not be tried by a jury;
>
> (c) They would be deprived of their counsel of choice if the proceedings were consolidated because their lawyer does not practise family law; and
>
> (d) Consolidation provisions were "not intended to transform the Family Court into a one-stop platform for judicial services to a divorcing individual."

None of these arguments were particularly strong.

The *Family Law Rules* specifically allow for "cases, claims or issues" to be heard together when it would be "more convenient": Rule 12(5). "Case" in the *Family Law Rules* "means an application or any other method allowed in law for bringing a matter to court for a final order . . . ". "Claims" and "issues" are not defined.

As noted by Justice Williams, Rule 12(5) "hints at", but does not clearly provide for, the type of consolidation order requested by Lily, which would combine a Family Court application with a civil action in the Superior Court of Justice. However, Rule 1(7) of the *Family Law Rules* provides that, in a situation such as this, where the *Family Law Rules* do not cover a matter adequately, the practice is to be decided by analogy to the *Rules of Civil Procedure* and with reference to the *Courts of Justice Act*.

Rule 6 of the *Rules of Civil Procedure* deals squarely with consolidation or hearing together of "proceedings." Rule 6.01 allows the court to order consolidation or trial together of "[w]here two or more proceedings are pending", and the court is satisfied that "they have a question of law or fact in common", "the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences", or "for any other reason".

The Klassens argued that the two proceedings could not be consolidated because they were not "pending in the court" as required by Rule 6.01, in the sense that they were not pending in the *same* court. While this argument seems strained, *Legue v. Till-Fab Ltd.*, 2005 CarswellOnt 246 (S.C.J.) suggests that when the Superior Court sits in different jurisdictions (in *Legue*, the different

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jurisdictions being civil and bankruptcy), the jurisdictions are not "co-extensive." Therefore, Justice Williams did have to give further consideration to what seemed to otherwise be a clear case for consolidation.

In Ontario, the Family Court is a branch of the Superior Court of Justice. All judges of the Superior Court of Justice are also judges of the Family Court, and judges appointed as members of the Family Court are all judges of the Superior Court of Justice: *Courts of Justice Act*, ss. 21.1(1), 21.2(3) and 21.2(1).

The Family Court has the jurisdiction conferred on it by the *Courts of Justice Act* or any other Act: *Courts of Justice Act*, s. 21.1(3.) Section 21.8 of the *Courts of Justice Act* provides that proceedings under the family law-related statutes are to be started and heard in the Family Court. However, the jurisdiction of judges who are members of the Family Court is not limited to the jurisdiction of the Family Court. Family Court judges are judges of the Superior Court of Justice. Section. 21.2(4) of the *Courts of Justice Act* makes it clear that their jurisdiction is not restricted to that of the Family Court, as that section provides that the Chief Justice may temporarily assign the members of the Family Court to hear matters outside the Family Court's jurisdiction.

Furthermore, matters that are not within the jurisdiction of the Family Court may, in certain circumstances, be heard in the Family Court. With leave of the judge, the Family Court may hear matters not otherwise within its jurisdiction if the matter is within the judge's jurisdiction and is combined with a related matter that is within the jurisdiction of the Family Court: *Courts of Justice Act*, s. 21.9.

Therefore, if the two proceedings were related, there was no jurisdictional impediment to consolidation. If the proceedings were combined, both could be heard, with leave, in the Family Court, by a Family Court judge, who would certainly be a Superior Court judge and who may also be a member of the Family Court.

With no jurisdictional impediments, Justice Williams went on to consider whether Lily's family law application and the Klassens' civil action were related such that they should be consolidated or tried together.

Referring back to Rule 6.01 of the *Rules of Civil Procedure*, Justice Williams was satisfied that the two proceedings had "a question of law or fact in common." The enforceability of the Klassens' loan was an issue common to both proceedings. This issue would turn on several findings, including whether the Klassens forgave the loan and whether the Klassens' claim was statute-barred. The two proceedings had their entire factual matrices intertwined: the loan contract; the factual basis for Lily's argument that the loan was forgiven; the Klassens' intentions with respect to repayment; oral and written communications between the Klassens and Lily and Kyle; the treatment of other financial gifts from the Klassens; etc.

Kyle and the Klassens (cleverly) argued that the loan actually had no bearing on the family law proceeding because its enforceability would affect Kyle and Lily equally and would have no impact on the equalization calculation. Justice Williams did not accept this argument, but for reasons with which we do not agree.

Justice Williams found that it *may*, but it does not *necessarily*, follow that if the loan is enforceable, its effect would be felt equally by Lily and Kyle. Her Honour noted that, in *Poole v. Poole* (2001), 16 R.F.L. (5th) 397 (Ont. S.C.J.), the Court considered similar facts: a family law application and a civil action involving loans by parents to their son and daughter-in-law. Her Honour then reasoned that, in *Poole*, the Court concluded that the loans were valid debts but also determined that a residual valuation issue may remain if, for example, the parents would never actually require their son to repay the debt.

Having found that the family law application and the civil action had a question of fact or law in common, her Honour went on to consider whether it would be appropriate to consolidate the two proceedings, or to order that they be tried together, to avoid a multiplicity of proceedings and the risk of inconsistent findings.

In *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 CarswellOnt 4183 (S.C.J.) at para. 18, Master Dash compiled an often-cited list of factors a court should consider when faced with a request to consolidate proceedings:

a) the extent to which the issues in each action are interwoven;

b) whether the same damages are sought in both actions, in whole or in part;

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c) whether damages overlap and whether a global assessment of damages is required;

d) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;

e) whether the parties the same;

f) whether the lawyers are the same;

g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;

h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;

i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;

j) the litigation status of each action

k) whether there is a jury notice in one or more but not all of the actions;

l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;

m) the timing of the motion and the possibility of delay;

n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;

o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;

p) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;

q) whether the motion is brought on consent or over the objection of one or more parties.

Clearly, many (but not all) of these factors weigh in favour of consolidation - the most important of which is the risk of inconsistent findings in respect of the common issue of the enforceability of the Klassens' loan.

The Jury Notice in the Civil Claim

Lily argued that the Klassens only served a jury notice *after* she notified them of her intention to move for consolidation, and that the jury notice was just a strategic effort to avoid consolidation.

The right to a trial with a jury is a statutory right that should not be taken away from a party lightly or without substantial reason: *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.*, 2002 CarswellOnt 2604 (C.A.) at paras. 52 and 68.

Unfortunately for the Klassens, at the beginning of 2020, the *Courts of Justice Act* and the *Rules of Civil Procedure* were amended to prohibit jury trials in some actions. The Klassens' action was grandfathered as the jury notice was served before the amendments. However, the legislature and Ontario's Civil Rules Committee had both indicated, through the January 1, 2020 amendments that, despite cases such as *Hunt*, depriving litigants of the right to a jury trial in simple cases was justified and consistent with both the goals of the *Courts of Justice Act* and the guiding principle of the *Rules of Civil Procedure* - the efficient use of court resources and securing the just, most expeditious and least expensive determination of every civil proceeding on its merits.

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By serving a jury notice, the Klassens had chosen the most expensive possible route to justice, in a case involving a promissory note for $79,000.

The actions were consolidated, and the jury notice was struck.

Her Honour then considered the best, most efficient mode of consolidation, given that the two actions were at different stages. Trying the two proceedings separately, even with the same judge, would result in a duplication of effort, including testimony and submissions, and would be more expensive and more time-consuming for the parties and would require more court and judge time and more court resources than if the proceedings were combined.

However, there was no reason to fully consolidate the two proceedings given that they were at different stages of maturity: the family law proceeding was almost settlement-conference-ready; whereas the productions had not been exchanged in the civil action and examinations for discovery had not taken place.

Therefore, in the circumstances, her Honour considered the just and most expeditious approach to be to order that the civil action proceed, under the *Rules of Civil Procedure*, through documentary and oral discovery and mediation and that the two proceedings then be pre-tried and tried together in the Family Court.

Now, just to show that there is unquestionably room for advocacy in these cases, we direct you to *Beardsley v. Beardsley*, 2020 CarswellOnt 15778 (S.C.J.). Similar case. Similar loan from a parent. Similar claim for consolidation. Consideration of same Rule 6.01. Consideration of precisely the same factors from *1014864 Ontario Ltd. v. 1721789 Ontario Inc.*, 2010 CarswellOnt 4183 (S.C.J.). Completely opposite result: no consolidation. The primary factor against consolidation in *Beardsley* appears to have been the very advanced stage of the civil case as compared to the family case.

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