FAMLNWS 2021-43
Family Law Newsletters
November 8, 2021

— Franks & Zalev - This Week in Family Law

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What Do Canada and the Great State of Kentucky Have in Common?

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-and-

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Potts v. Potts

In August, a Kentucky Family Court judge declined to grant a divorce, and ordered the parties to attend marriage counselling.

The parties had been married for about 13 years and separated in 2020 after marriage counselling failed. While both parties believed their marriage was over, they had done an exceedingly admirable job of putting the needs of their child at the fore. The parents acted maturely and cordially with each other for the sake of their child.

The pair seemed to get along so well, however, that the Court declined their divorce petition, and instead ordered them to attend counselling.

At the hearing, Judge Meredith said to the parties: "I get the vibe that you might be able to work this out, and I could be wrong, but I sit through a lot of these things." And she then asked them if it might be beneficial for them to attend for further marriage counselling.

Although the wife was clear that they were "done", Judge Meredith was not wholly convinced.

In Kentucky, to grant a divorce, the court must find that the marriage is "irretrievably broken." That is the sole ground for divorce in Kentucky. The court must also apply the law so as to "strengthen and preserve the integrity of marriage and to safeguard family relationships."

The judge found that, based on the evidence of their cooperation and extraordinary history of being able to get along, she could not find that the marriage was irretrievably broken. Overall, found the judge, the parties were respectful and courteous toward one another and both held themselves in dignified and mature composure. The judge posited that the parties were perhaps just "two people who have lost the ability to communicate with one another about their emotional relationship and, perhaps, have let their pride become a wall between them."

Critically, the judge found that the matter of the divorce was *not pressing* (keep this in mind) and that there was no immediate detriment to the parties for the Court to hold its decision in abeyance. The judge then ordered that they attend counselling for two months to see if they could resolve the root cause of their marital issues.

Certainly no one saw that coming.

Could this happen in Ontario, or anywhere else in Canada for that matter?

The short answer is "yes" — and in two possible ways.

The *first* way is under s. 10(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "*Divorce Act*") — a section to which no one really pays much attention:

> Duty of court - reconciliation
>
> 10 (1) In a divorce proceeding, it is the *duty of the court*, before considering the evidence, *to satisfy itself that there is no possibility of the reconciliation* of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.
>
> Adjournment
>
> 10 (2) Where *at any stage* in a divorce proceeding it appears to the court from the nature of the case, *the evidence or **the attitude** of either or both spouses that there is a possibility of the reconciliation of the spouses*, the court shall
>
> (a) adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation; and
>
> (b) with the consent of the spouses or in the discretion of the court, nominate
>
> (i) a person with experience or training in marriage counselling or guidance, or
>
> (ii) in special circumstances, some other suitable person,
>
> to assist the spouses to achieve a reconciliation. [emphasis added]

This is really no different than the situation faced by Judge Meredith in Kentucky. So it is certainly possible.

The *second* way results from the amendments to the *Divorce Act* and the new definition of "family dispute resolution process," some creative arguments from counsel, and a bold decision by Justice Kraft.

Leinwand v. Brown

In *Leinwand*, the husband brought a single issue to court: the determination of school placement for the parties' child, commencing September 2022 (that is, a year away). The parties could not agree on whether the child was to attend parochial school or public school with the addition of Sunday Hebrew School.

Counsel for the wife argued that the Court should not make a disposition at the time, but that the Court should instead order the parties to attend a "family dispute resolution process" pursuant to s. 16.1 of the *Divorce Act*.

The parties were married on August 16, 2015. They separated on March 19, 2019. Their only child was born in September of 2018.

The parties mediated their outstanding issues (with the assistance of Philip Epstein no less) in May of 2019. They reached an agreement on all financial and parenting issues, subject to a review in September 2020. If the parties were not able to reach agreement at the time of the review, they were to determine the dispute resolution process.

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The husband issued an application in December of 2020, seeking relief with respect to parenting, a custody/access assessment (or, we suppose now a decision making authority/parenting time assessment), and other financial relief.

After a Case Conference, the parties agreed to a 2/2/3/3 shared residential schedule for the child. They also agreed to share the Jewish holidays.

Other than the residency schedule for the child to which the parties had agreed, there was currently no parenting agreement/parenting plan in place, and there was no agreement or order in place with respect to decision-making authority.

The husband had arguments — wonderful arguments — for why the child should attend public school and Hebrew School. And the wife had arguments — fantastic arguments — for why the child should attend Hebrew Day School. But Justice Kraft seemed quite intrigued by the arguments of the wife's counsel, detailed below.

Significant amendments to the *Divorce Act* came into force on March 1, 2021. These amendments modernized the language in the *Act* by removing any reference to the terms "custody" or "access" and replacing them with terminology that focuses on parents' responsibilities for their children, with the goal of helping to reduce parental conflict. The *Act* introduced new terminology relating to "parenting orders", "parenting time" and "decision-making responsibility", and further added other terms and definitions including "*family dispute resolution process*", "family justice services", "family member" and "family violence." As noted by Her Honour, these were welcome changes, meant to help reduce parental conflict.

The amendments to the *Divorce Act* also provide that the court may now make an order directing the parties to attend a "family dispute resolution process" pursuant to s. 16.1(6). The definition for "family dispute resolution process" is set out in s. 2(1) of the *Act*, as follows:

> ***family dispute resolution process*** means a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law; (*mécanisme de règlement des différends familiaux*)

As did Judge Meredith in Kentucky, Justice Kraft noted that the parties before her had a demonstrated history of being able to reach agreement in relation to matters concerning the child. For example, they were able to reach a parenting agreement in mediation in May of 2019. Then, after the husband commenced his application, and even though he sought a custody/access assessment and raised some concerns about the wife's mental health and parenting abilities, the parties were able to agree on an equal-time shared parenting schedule at their case conference.

Again, at mediation, the parties had agreed to the parenting schedule to be in place for one year and then to be reviewed in September of 2020 and — failing agreement — the parties were then supposed to determine the dispute resolution process.

As determined by Justice Kraft:

> While court is unquestionably a dispute resolution process, I find that a court application was not a dispute resolution process of first resort envisioned by the parties when they signed their agreement at mediation. Had court been the first option, they could easily have said so.

Justice Kraft then noted (as did Judge Meredith in Kentucky) that there was no urgency to the Court making a determination about the child's school placement for September of 2022. There was, in Justice Kraft's view, an opportunity here for the parties to attempt a less divisive solution. The parties could enter into a family dispute resolution process where, "with creativity and compromise", they might be able to negotiate a further agreement regarding decision-making responsibility and design a comprehensive parenting plan including addressing such matters as:

- how information was to be shared and communicated between them;
- how other related issues were to be addressed, such as the involvement of a new partner with the child;

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• how future disagreements about the child were to be resolved;

• whether or not a parent should have a right of "first refusal" if the scheduled parent is unable to personally be with the child

• how the parents were to manage attendance at child-related events;

• which parent was to hold the child's government-issued documents;

• how travel with the child could take place;

• how the child's personal items were to be managed; and

• what school the child was to attend.

That is, they might be able to resolve all of the presenting issues, and not just the immediate issue of school placement.

Justice Kraft then had this to say about s. 16.1(6) of the *Act*:

> Section 16.1(6) of the *Act* is a new tool that can be used by the Court to assist parties who cannot agree about a major decision that impacts their child(ren) prior to making such a determination, ***in circumstances where such a decision is not time-sensitive.*** Having parents arrive a decision together, with the assistance of a skilled professional, is far better for children than having the Court impose a decision on a family where parents cannot reach a resolution about an important matter affecting children. If parents, even those who have tremendous difficulty, can be part of the design of a parenting plan, they will no doubt be far more likely to follow the terms of the plan since they were invested in making up the terms and plan. . . . The amendments to the *Act* which enable the Court to order the parties to attend a family dispute resolution process, in my view, are a reflection of the growing body of research about the effects of separation and divorce on children which can be reduced if parents are able to develop parenting plans that meet the needs of children and promote children's healthy development. [emphasis added]

Therefore, found Justice Kraft, there was no compelling reason for the Court to determine the issue of school placement for September of 2022 ***now*** in October of 2021.

In sending the parents to a family dispute resolution process, Justice Kraft also made two further orders.

First, Her Honour ordered no costs, as "[a]n Order for costs at this point would be inimical to the consensual dispute resolution process I have ordered." Clever.

Second, Her Honour made it clear that her Order was not meant to be a means to delay a decision or to "run the clock." Therefore, if either party unreasonably delayed in the family dispute resolution process, the matter could be returned to her. Clever again.

As the terms of the actual order are important, we have reproduced them in full:

> 1. Pursuant to s. 16.1(6) of the *Divorce Act*, the parties shall make immediate arrangements to attend a family dispute resolution process with a mediator skilled in the area of high-conflict parenting and/or family law. The purpose of this process is to assist the parties in designing a comprehensive parenting plan that addresses all pertinent issues related to [the child]. If the parties cannot agree on a mediator within ten days, then each party shall submit a name of a mediator he/she proposes to the Court, to be brought to my attention, and I will make the determination. I encourage the parents to review the Association of Family and Conciliation Courts (AFCC-Ontario) parenting plan guide which can be found at AFCC-O-Parenting-Plan-Guide-Version-2.0-August-2021.pdf (afccontario.ca) prior to commencing the family dispute resolution process.
>
> 2. If, after engaging in a family dispute resolution process, the parties do not reach agreement on the school placement decision for [the child] commencing September 2022 by April 15, 2022, the parties shall notify the Family Law Office to

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> advise that this issue remains outstanding and I shall make a determination on this issue, without the need for the parties to file additional motion material or re-attend on the motion, unless they agreed to do so on consent.

Keeping in mind that this interim resolution and a referral to a family dispute resolution will only work where the issues before the court are not pressing — we like it. We like it a lot.

A Dead Man Tells No Tales — But His Estate Can Receive a Pension

Meloche v. Meloche, 2021 CarswellOnt 13076 (C.A.) — Fairburn A.C.J.O., van Rensburg and Huscroft JJ.A.

Disclaimer: Epstein Cole LLP represented the Appellant in this case.

Where a retired member spouse's pension payments are divided at source for family law purposes in Ontario, can the parties agree (or can a court order) that payment sharing continue to the non-member spouse's estate for the balance of the retired member spouse's life?

According to the Ontario Court of Appeal's decision in *Meloche*, the answer to this question is "yes". And that makes complete sense. But it took the Court of Appeal to say so.

The husband and wife in *Meloche* were married in 1984.

During the marriage, the wife worked as a teacher. She retired in 2015, and started receiving payments of approximately $4,300 a month from her pension.

In 2016, the husband was diagnosed with Amyotrophic Lateral Sclerosis, which is more commonly known as Lou Gehrig's Disease. The parties separated a little over a year after that.

When the parties separated, the wife's pension was by far their most valuable asset. According to the valuation that was provided by the pension plan, it had a gross value of almost $1,300,000.

As the pension was already in pay when the parties separated, they only had two options for equalizing it pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*"):

> 1. They could treat the pension as though it was any other asset (such that the wife would include it as part of her net family property, and its value would be equalized by way of a cash payment). While this approach would have been simple and straightforward, it would have left the wife owing the husband hundreds of thousands of dollars that she had absolutely no ability to pay.
>
> 2. They could divide the payments from the pension at source pursuant to s. 10.1(5) of the *Family Law Act*, which allows the stream of payments from a pension to be divided at source for the life of the member. (To be clear, there is no question that payments to a non-member spouse must end on the death of the member, although in some cases the non-member will then be entitled to start receiving payments from his or her survivor pension.)

While the second option would have made logical sense for these parties since the pension was their only material asset, and the wife would have had no way to pay a lump sum equalization payment, it also raised a serious question: What would/should happen to the husband's share of the payments from the pension in the almost certain event he died before the wife?

Given the husband's health issues and the wife's much longer life expectancy, the husband wanted his share of the payments from the pension to continue being paid to his estate after his death. The wife wanted the payments to revert back to her. But the wife went even further than that; she argued that not only *should* the payments revert back to her on the facts of this case, but that the Court had no authority or jurisdiction to order otherwise.

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In order to have this issue decided without the need for a full trial, the husband brought a motion pursuant to rule 16(12)(a) of the *Family Law Rules*, O. Reg. 114/99, which allows a court to "decide a question of law before trial, if the decision may dispose of all or part of the case, substantially shorten the trial or save substantial costs[.]"

Somewhat surprisingly — given that both the pension plan and Ontario's pension regulator disagreed with the wife's interpretation of the statutory scheme — the motion judge agreed with her, and determined that when a pension is divided at source pursuant to s. 10.1(5) of the *Family Law Act*, the non-member's share of the payments *must* always revert back to the member if the non-member dies first.

As the husband died *two days* after the motion judge released his decision (such that he never actually received any payments from the wife's pension), based on the motion judge's decision, the only way the husband's estate would have been able to obtain any money at all in relation to the pension would be to obtain judgment against the wife for an equalization payment, and then try to collect it. This likely would have been impossible for the estate to actually do given that:

> 1. The wife did not have enough other assets to actually pay the estate the substantial equalization payment she would have owed based on the value of the pension.
>
> 2. The estate would not be able to enforce a judgment against the pension or the payments from it, as they were exempt from garnishment by virtue of s. 66(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*Pension Benefits Act*"), which provides that "[m]oney payable under a pension plan is exempt from execution, seizure or attachments."

The husband's estate appealed. And, after thoroughly analyzing the relevant provisions of the *Family Law Act* and *Pension Benefits Act*, the Ontario Court of Appeal found that the motion judge's decision was incorrect, and that the applicable statutory regime does ***not*** preclude a court from ordering, or parties from agreeing, that a non-member's share of a pension should continue being paid to the non-member's estate if the non-member dies first:

> [109] As part of the policy to encourage out-of-court settlement of family law disputes, **it is important that the option for pension sharing to continue to the estate — acknowledged by the OTPP and FSCO — remains available. There are many scenarios where such an option would clearly financially benefit both sides, thereby facilitating resolution.** Viewed as a means by which to avoid placing a pension-holder in the difficult position of owing money to which they do not at the time have access, the sharing of pension payments at source for the continuation of the retired member's life, which in no way is precluded by the relevant statutes or regulation, makes both conceptual and practical sense.
>
> [110] In my view, contrary to the decision appealed from, **nothing in the PBA or the Regulation prohibits division of pension payments for family law purposes from continuing to a former spouse's estate for the life of the pension member spouse.** [emphasis added]

After deciding the legal issue, the Court declined to decide what should actually happen in this case. Instead, it sent the matter back to the Superior Court in order to give the parties "the opportunity to settle the litigation to their mutual benefit."

Because the Court declined to decide the case on the merits, two important questions remain unanswered.

First, what test should a judge (or arbitrator) apply when deciding whether payments from a pension should be paid to the non-member's estate, or revert back to the member? (Although s. 10.1(4) of the *Family Law Act* sets out factors for the court to consider when deciding whether to order a lump sum payment out of a pension that is not yet in pay, the *Family Law Act* and the *Pension Benefits Act* are both silent about what factors should be considered when dealing with pensions that are already in pay. That said, there is no reason different considerations should apply.)

Second, what should happen if an order or agreement dividing a pension in pay is silent about who should get the non-member's share of the payments if the non-member dies first? Prior to the Court's decision in *Meloche*, Ontario's pension regulator expressed the view that since this issue was not specifically addressed in the applicable legislation, the non-member's share of the payments should revert back to the member unless the parties' court order, family arbitration award, or agreement said

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otherwise. However, as the regulator's view is not binding on the court (as illustrated by the fact that the motion judge in this case did not follow it), we will have to wait and see how the courts deal with this issue when it inevitably arises.

In the meantime, when drafting agreements and consent orders dealing with pensions that were already in pay when the parties separated, make sure to specify exactly what is supposed to happen to the non-member's share of the payment if s/he dies first. It might just save you a trip to the Court of Appeal.

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