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

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**Contents**



## Jointly Retained Experts

*Kasapoglu v. Kasapoglu* (2020), 48 R.F.L. (8th) 60 (B.C. S.C.) - MacNaughton J.

In almost all Canadian jurisdictions, where expert opinion evidence is required on a financial issue, both parties generally retain experts. In British Columbia, however, if a party wants to present expert opinion evidence on a financial issue, the *Supreme Court Family Rules*, B.C. Reg. 169/2009, require that the evidence be presented through a jointly appointed expert, unless the court orders, or the parties agree, otherwise.

In *Kasapoglu*, the issue was whether an expert report from a Turkish family lawyer on the enforceability of a prenuptial agreement (the "Contract"), had to be from a jointly retained expert or not.

The parties were Turkish citizens, and were married in Turkey on March 7, 2010.

Before marrying, the parties signed the Contract, which set out a regime for property division on marriage breakdown. The wife alleged that she did not receive independent legal advice or disclosure prior to signing the Contract. She also alleged that she signed the Contract under duress as a result of her father's threats of violence if she continued to live in a common law relationship with the husband. And the husband, knowing of these threats, said he would not marry her unless she signed the Contract.

The parties moved to Canada in November 2011. They separated on September 28, 2018.

In September of 2020, the husband's counsel proposed that the parties retain a joint expert to opine on Turkish family law, and he proposed a number of lawyers who could assist.

After receiving no response, the husband filed a motion for an order pursuant to Rule 13-4 of the *Supreme Court Family Rules*, for the parties to jointly retain a specific lawyer, Mr. Bozkurt, to provide an expert legal opinion on Turkish law and the enforceability of the Contract. Expert evidence was certainly required to determine the enforceability of the Contract, and the enforceability would have a major impact on the issue of property and debt division, which are specifically "financial issues" under Parts 5 and 6 of the British Columbia *Family Law Act*, S.B.C. 2011, c. 25.

The wife opposed the appointment of a joint expert. She argued that the enforceability of the Contract under Turkish law was not a "financial issue", but only tangential to a "financial issue" between the parties.

Justice MacNaughton noted that the object of the *Supreme Court Family Rules* was to help parties resolve their cases fairly and to secure the just, speedy, and inexpensive determination of every case on the merits.

Rule 13-3 sets out the rules governing the appointment of joint expert witnesses. It provides:

> **Definition**
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> 13-3 (1) In this rule, "financial issue" means
>
> (a) an issue arising out of a claim under Part 5 or 6 of the *Family Law Act* or out of an application for a FHRMIRA order,
>
> (b) a claim for an interest in property based on unjust enrichment or other trust claims, or
>
> (c) a claim for compensation based on unjust enrichment.
>
> **Joint appointment on financial issues**
>
> 13-3 (2) If any party wishes to present to the court expert opinion evidence on a **financial issue**,
>
> (a) that evidence must be presented to the court by means of a **jointly appointed** expert unless the court otherwise orders or the parties otherwise agree, and
>
> (b) Rule 13-4 applies.
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> **Other appointments on non-financial issues**
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> 13-3 (3) If a party wishes to present to the court expert opinion evidence on an issue **other than a financial issue**,
>
> (a) the parties **may** present that evidence by means of a jointly appointed expert under Rule 13-4, or
>
> (b) any one or more of the parties may appoint his or her own expert. [emphasis added]

Therefore, the question before the Court was whether an expert report from a Turkish family lawyer on the enforceability of the Contract dealt with a "financial issue." If so, then absent a court order or agreement between the parties, the expert opinion evidence had to come from a jointly appointed expert. If not, then the husband could appoint his own expert to present that opinion evidence.

In *Bartch v. Bartch*, 2017 CarswellBC 483 (C.A.) at para. 25, the B.C. Court of Appeal considered the specific provisions in the *Supreme Court Family Rules* concerning joint experts:

> [25] *Family Rule* 13-3(2) dictates that if a party wishes to present to the court evidence on a financial issue, that evidence must be presented through a jointly appointed expert unless the court otherwise orders or the parties otherwise agree. Financial issue is defined in *Family Rule* 13-3(1) and includes issues arising out of a claim under Part 5 or 6 of the *Family Law Act*, S.B.C. 2011, c. 25.
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> [26] *Family Rule* 13-3(2) makes the joint appointment of financial experts the default procedure. This differs from the process in civil actions. While the *Supreme Court Civil Rules* (the *Civil Rules*) give a judge or master at a Case Planning Conference the power to appoint a joint expert (*Civil Rule* 5-3(1)(k)), absent such an appointment or agreement of the parties, parties to an action may each appoint their own expert to tender opinion evidence (*Civil Rule* 11-4). Similarly, the parties in a family law action are free to appoint their own experts on non-financial issues (*Family Rule* 13-3(3)).

  

Therefore, in *Bartch*, the Court of Appeal signalled that the scope of what is "an issue arising out of a claim under Part 5 or 6 of the *Family Law Act*" should be a financial one, that is, one to be dealt with by a financial expert, as opposed to a legal, medical, or other expert.

In *Aquilini v. Aquilini*, 2012 CarswellBC 3338 (S.C.), Justice Smith noted the policy reasons for the default position of using jointly retained financial experts in family cases:

> [10] In making those *Family Rules*, the Lieutenant Governor in Council has stated a strong policy preference for the use of jointly appointed financial experts in family cases. That policy decision responds to common features of family cases that are not necessarily present in other kinds of litigation. These include:
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> (a) The central importance of the division of family assets and the corresponding need for valuation or accounting evidence;
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> (b) The cost of obtaining such expert evidence in many cases;
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> (c) The fact that the parties frequently do not have equal ability and resources to retain experts;
>
> (d) The fact that while separately appointed valuation or accounting experts may disagree on some matters, they frequently find a great deal of common ground, resulting in needless duplication of costs (this, of course, assumes that all experts, whether jointly or separately appointed, have proper regard to their duty to assist the court and not act as advocates for either party); and
>
> (e) The overly adversarial nature of some family cases, which can put in issue matters on which the parties should be able to agree.

Notably, this list refers to expert evidence that is truly financial in nature, and Justice MacNaughton in *Kasapoglu* agreed that the intent of Rule 13-3 was that the value of assets subject to division should be jointly presented.

Therefore, her Honour found that the Courts had consistently concluded that factual issues of a financial nature relating to property division, such as valuations, appraisals, accounting assessments, and actuarial issues, should be addressed by a joint expert. Rule 13-3(2) did not, however, cover expert evidence about foreign law or the binding nature of a foreign contract, even if there were tangential financial issues. At its core, the issue before the Court was not financial, but about foreign law. Therefore, the requirement for a joint expert did not apply. The B.C. Court would decide the financial issues based on its understanding of Turkish law based on the evidence of the retained expert(s). Each party would have the right to retain an expert to opine on Turkish law and the enforceability of the Contract.

**Designer (As Opposed To "Off the Rack") Justice**

*Louis v. Poitras*, 2021 CarswellOnt 870 (C.A.) - Watt, Lauwers, and Hourigan JJ.A.

This is not a family law case, but with its recent decision in *Louis*, the Ontario Court of Appeal has invited courts across Ontario to find new and creative ways to ensure timely access to justice.

The plaintiff in *Louis* was seeking damages for a motor vehicle accident that occurred in 2013. The 10-week jury trial was supposed to have started on April 20, 2020, but it had to be adjourned because of COVID-19.

When the Superior Court of Justice in Ottawa suspended civil jury trials until *at least* January 2021, the plaintiff brought a motion to strike the jury notice so that the trial could proceed without further delay. Since the court was only scheduling non-jury trials of three weeks or less at that point, the plaintiff asked to be able to proceed with "a non-continuous trial broken into three-week blocks". It argued that, "the trials must start", and that, "even if there are interruptions, the trials would likely be completed before a lengthy jury trial could commence."

 

The motion judge, Justice Beaudoin, granted the plaintiff's motion (2020 CarswellOnt 13250 (S.C.J.)). While his Honour recognized that, "trial scheduling premised on non-continuous trials is novel", he was nevertheless satisfied that, "it should be attempted during these unprecedented times", and "that justice to the parties will be better served by these actions proceeding to trial, in a timely manner, before a judge alone."

The defendant appealed Justice Beaudoin's decision to the Divisional Court (2020 CarswellOnt 16769 (Div. Ct.)). In granting the appeal, the Divisional Court found that his Honour's decision was "arbitrary" because he had focused solely on the potential for general delay "without any reliance on evidence that explained the anticipated length of the delay, the circumstances that might cause it to be extended or ameliorated or its impact on the administration of justice."

The plaintiff appealed the Divisional Court's decision to the Ontario Court of Appeal. In granting the plaintiff's appeal, the Court of Appeal emphatically stated that local motion and trial judges are in the best position to determine how to ensure access to justice during the pandemic based on the specific conditions and limitations with which each particular court site is faced, and that appellate courts should generally refrain from second guessing them:

> [1] **The civil justice system in Ontario faces an unprecedented crisis**. Among other challenges, the COVID-19 pandemic has significantly reduced the availability of courtrooms. Trial courts have necessarily had to prioritize criminal and family law cases to the detriment of civil cases' timely resolution. Consequently, civil justice reform has shot to the forefront as a public policy imperative. **Procedural reforms have been implemented to respond to the challenge**, including increasing the use of electronic filing and electronic hearings. **In addition, more fundamental changes in the operation of the civil justice system are being contemplated**, such as the potential elimination of civil jury trials. Whether these reforms will come to pass remains to be seen. **In the meantime, our courts are charged with the management of a civil justice system that is being overwhelmed**.
>
> [2] **Judges of the Superior Court work tirelessly to keep the civil justice system afloat. This sometimes means that they must find creative ways to ensure that parties get their day in court in a timely manner**. In so doing, they respond to the Supreme Court's injunction in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, that no less than a cultural shift is required to preserve our civil justice system. In the cases at bar, the motion judge made such a creative order. He struck the jury notices and ordered that the cases proceed in three-week tranches. On appeal, the Divisional Court held that while the motion judge had the discretion to make that order, it was made on an insufficient evidentiary basis and was therefore arbitrary. It set aside the motion judge's order and restored the jury notices.
>
> [3] **There is no single province wide answer to the problems we face in delivering timely civil justice**; local conditions will necessarily impact the choice of effective solutions. However, **what must remain consistent across the province is that motion and trial judges have the discretion to respond to local conditions to ensure the timely delivery of justice**. It is a necessary corollary to that proposition that intermediate courts of appeal should not lightly second guess those discretionary decisions. In the cases at bar, the Divisional Court did just that under the guise of a finding regarding the evidentiary record. That finding is unsupportable. The motion judge had an abundance of evidence to justify his order.
>
> [4] More fundamentally, **the Divisional Court's approach is at odds with the current reality faced by our courts. Superior Court judges are acutely aware of local conditions, and it is counterproductive for intermediate appeal courts to interfere unnecessarily. It is only in rare situations that an appellate court should overrule discretionary case management decisions**. This was not such a rare case. On the contrary, **this was a situation where the motion judge's creativity should have been the subject of approbation, not condemnation**. Therefore, for the reasons I will more fully detail below, I would grant leave to appeal, set aside the Divisional Court's order, allow the appeal and restore the motion judge's order.
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> . . . . .
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> [26] A proper consideration of the administration of justice would recognize that **local judges are best positioned to understand the availability of resources and the appropriate approach in the circumstances of a given case**. Judicial

  

> responses to the pandemic and court resources availability vary across the province: *Passero v. Doornkempt*, 2020 ONSC 6384, at para. 49. **That does not mean that different approaches reflect a conflict in the case law. Rather, they reflect the due exercise of judicial discretion in differing local circumstances**: *Belton v. Spencer*, 2020 ONCA 623, at para. 75. **An appeal court must respect the reasonable exercise of this discretion**. It impedes the proper administration of justice by second-guessing the local court's discretionary case management decisions under the pretext of an arbitrariness analysis. [emphasis added]

Although these comments were made in the context of a civil case, in our view they apply with equal (if not more?) force in the family law context. Before we even heard of COVID-19 or Zoom, we had already begun to see family courts find ways to resolve family law disputes without a full-blown traditional trial. For example, in *Figurado v. Figurado*, 2009 CarswellOnt 1857 (C.J.), Justice Sherr conducted a focused hearing that allowed him to decide various (albeit relatively minor) parenting issues that would ordinarily require a trial by employing the following process:

- Each party "would set out in writing the access terms in dispute and how they wanted the court to frame them in the final order."
- The parties "would continue to negotiate these disputed items and advise the court which terms could not be resolved."
- The parties "would each make oral submissions regarding each term still in dispute."
- The parties would not give oral evidence, and would rely solely on written evidence.
- The hearing would take a maximum of half a day.
- The court would then make a final decision.

For further discussion about focused hearings, see Justice Sherr's excellent paper, "Focused Hearings", which is available on CanLii at 2016 CanLIIDocs 4447. And for cases that offer similar views, see *Hartley v. Del Pero* (2010), 83 R.F.L. (6th) 305 (Alta. C.A.); *Panasiuk v. Leclercq* (2015), 64 R.F.L. (7th) 61 (Alta. Q.B.); *Kun v. Kun*, 2015 CarswellSask 416 (Q.B.); *Pippin v. Pippin* (2014), 51 R.F.L. (7th) 460 (Sask. Q.B.); and *I. (M.) v. W. (M.)* (2011), 6 R.F.L. (7th) 167 (Ont. S.C.J.).

With the recent imprimatur of the Ontario Court of Appeal inviting local courts to design new and creative ways of providing access to justice, we look forward to seeing what happens.

**Say What You Mean and Mean What you Say . . .**

*The Estate of Denise Joanne Pynenburg et al. v. Donald Rocan Salkeld* (2020), 48 R.F.L. (8th) 104 (Man. Q.B.) - Rempel J.

This case serves as a good refresher about how to (and how not to) interpret a domestic contract. Sometimes, people forget that the general principles of contract interpretation apply to domestic contracts: *Dutton v. Davies*, 1997 CarswellOnt 4040 (Gen. Div.); *Campbell v. Campbell* (2013), 28 R.F.L. (7th) 298 (B.C. C.A.); *Turner v. DiDonato* (2009), 63 R.F.L. (6th) 251 (Ont. C.A.); *Moses Estate (Trustee of) v. Metzer*, 2016 CarswellOnt 4177 (S.C.J.); *MacDougall v. MacDougall*, 2005 CarswellOnt 7257 (Ont. C.A.); and *Holm v. Holm* (2013), 35 R.F.L. (7th) 255 (Alta. C.A.).

Denise and Don were in a common law relationship for 21 years. The relationship ended in August of 2003. With the assistance of counsel, Denise and Don signed a comprehensive "Settlement Agreement" that resolved the legal issues in dispute between them.

Denise died a few years after the Agreement was signed, and her estate brought an action to enforce Don's obligations thereunder. Don defended by arguing that he did not have any continuing obligations to the estate because the Agreement provided for the payment of ongoing spousal support, and that Don's obligation to pay spousal support had ended on Denise's death.

The estate brought a motion for summary judgment.

  

Don disputed that the matter could be fairly resolved on affidavit evidence alone. He wanted a trial, where he said his credibility could be fairly assessed. Don argued that the Agreement could only be properly understood if he gave testimony about the nature of his discussions and email exchanges with Denise prior to and after signing the Agreement. (Readers who *don't* need a reminder of the principles of contract interpretation will immediately see the problem in Don's submission.)

The section of the Agreement in issue called for Don to pay Denise a (non-taxable) lump sum of $204,000 in monthly installments of $1,500 until it was paid in full, and for Don to maintain a $200,000 life insurance policy and to irrevocably name Denise (and her daughter, Kelly) as its beneficiaries for the rest of his life. Specifically, the Agreement provided that:

- The $204,000 payment from Don to Denise was described as a "lump sum support payment to achieve a resolution of claims and division of assets as between the parties" payable in installments of $1,500 per month (3 x $500 in each month) "until the $204,000.00 is paid in full to Denise".

- Unlike typical spousal support payments, the monthly payments of $1,500 were intended to be tax neutral, such that Denise would not claim the payments as part of her annual income and Don could not deduct them from his income.

- Either party had the option to file the Agreement with the Designated Officer of the Maintenance Enforcement Program ("MEP") so that the monthly payment obligation would be payable through MEP.

- The "installment payments" could be accelerated or increased, and Don could " . . . pay the entire amount owing at any time in a lump sum payment. Alternatively, there may be a partial lump sum payment made to Denise at any time by Don, which will not affect or vary the subsequent tri monthly installment amounts" set out in the Agreement.

- Upon paying the "total amount of $204,000.00" to Denise, Don's obligations to Denise would terminate "save and except" for the maintenance of the $200,000 life insurance policy irrevocably naming Denise and Kelly as beneficiaries.

- Don agreed to maintain a life insurance policy naming Denise and her daughter, Kelly, as irrevocable beneficiaries, and the policy was to remain in place for the duration of Don's life. The benefit payable was to be at least $200,000.

The Agreement also included a full and final spousal support release, along with a "full and final agreement" clause and a "no modifications" clause. The Agreement was clearly meant to be "final".

Don made all of the required monthly payments before Denise died in 2010. He then stopped. When Denise died, the amount owing on the $204,000 lump sum had been reduced to $130,850. Prior to her death, Don had paid Denise $20,000 to help her with the down payment on a condominium. However, the parties disagreed on whether this payment was a gift or should be credited against the money that Don still owed Denise.

Don also failed to maintain the required life insurance policy after Denise's death.

Don actually conceded that a plain reading of the words in the Agreement supported the interpretation advanced by the estate - that the balance owing under the Agreement was an enforceable debt - but argued that the written words did not accurately describe the real agreement between the parties or mirror their true intentions when the Agreement was signed.

Don's argument was as follows:

- The Agreement was intended to support Denise during her lifetime. Don and Denise agreed that Don would contribute reasonably to Denise's support and maintenance and the payments were intended to help Denise pay for her anticipated monthly living expenses. The parties did not intend that Don would continue paying support for the benefit of Denise's estate if Denise died.

- Don had no explanation for why the parties' intentions were not set out in the Agreement. Nevertheless, Don should be allowed to testify in that regard to avoid the otherwise significant financial consequences that were never contemplated.

  

• While there was no specific term in the Agreement that would allow Don to escape his obligation to maintain an insurance policy if Denise died before the payments were complete, the insurance policy was clearly meant to act as a safety net for Denise if Don died before her.

The parties agreed that, in Manitoba, the legal test for summary judgment was recently set out by the Manitoba Court of Appeal in *Dakota Ojibway Child and Family Services et al v. MBH* (2019), 438 D.L.R. (4th) 693, 29 R.F.L. (8th) 259 (Man. C.A.). The moving party bears the persuasive burden of proof at all times to establish that the process it is proposing allows for a fair and just adjudication on the merits, such that there is no genuine issue requiring a trial. This means the moving party must persuade the Court either that:

1. The proposed process will permit the judge to make the necessary findings of fact, without having to resort to any additional fact-finding powers; or

2. The court can otherwise fairly resolve the matter by weighing the evidence, evaluating credibility, and drawing inferences, without the need for a traditional trial, under the principles of proportionality, timeliness, and cost-effectiveness.

This persuasive burden of proof rests on the moving party at all times, and the standard of proof is on the balance of probabilities. If the moving party meets this burden, the responding party must show why the record, the facts, and/or the law preclude a fair disposition of the matter in a summary way.

***The Principles of Contractual Interpretation - Even for Domestic Contracts***

In *Matic v. Waldner*, 2016 CarswellMan 202 (C.A.), the Manitoba Court of Appeal recently confirmed when a binding agreement is reached:

> [55] The standard for determining whether an agreement, written or oral, has been reached, is whether an "objective reasonable bystander", looking at all the material facts, would say so. GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) describes the test as follows (at p 15):
>
> > Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. ***The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement***; **it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms**. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, [2003 ABCA 221 at para. 9, 330 AR 353]:
> >
> > > the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, **where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract** and the essential terms of that contract can be determined with a reasonable degree of certainty.
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> [56] The requirements for the formation of a contract were described in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 53 O.A.C. 314 (Ont. C.A.), a leading decision on oral contracts. Robins JA wrote (at para 21):
>
> > However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.

 

> [57] The principle that can be distilled from *Bawitko* and *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, 2003 ABCA 221, 330 A.R. 353 (Alta. C.A.) (quoted by Fridman), is that there are three requirements for a binding contract-the intention to contract; the essential terms of the contract have been settled; and the terms are sufficiently certain. ***Whether the three requirements are met in any case is to be determined from the perspective of the objective reasonable bystander.*** [***emphasis*** added]

The same principles apply across Canada: *Leoppky v. Meston* (2008), 48 R.F.L. (6th) 359 (Alta. Q.B.); *Tether v. Tether*, 2008 CarswellSask 651 (C.A.); *Berthin v. Berthin* (2016), 76 R.F.L. (7th) 58 (B.C. C.A.); *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 CarswellOnt 2082 (C.A.); *Ward v. Ward* (2011), 91 R.F.L. (6th) 280 (Ont. C.A.).

And, to be clear, these general principles of contract interpretation apply with equal force to domestic contracts.

Justice Rempel was of the view that the matter could be resolved fairly by summary judgment as the Agreement was complete, comprehensive, and clear. As a result, and contrary to Don's argument, there was no need to evaluate credibility.

Specifically, there was no need for a traditional trial to let Don set out his subjective belief as to the "real" meaning of the provisions at issue and his intentions. His subjective understanding about the meaning of the Agreement and/or the subjective intentions of the parties was irrelevant to the interpretation of the Agreement, as it almost always is. Evidence of subjective intention and negotiation history is almost always inadmissible as being ***irrelevant*** to the interpretation of a contract: *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CarswellNat 1061 (S.C.C.); *Olivieri v. Sherman*, 2007 CarswellOnt 4207 (C.A.); *Athwal v. Black Top Cabs Ltd.*, 2012 CarswellBC 703 (C.A.); *541788 Alberta Ltd. v. Bourgeois & Company Ltd.*, 2018 CarswellAlta 2072 (C.A.); and *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 CarswellAlta 13 (C.A.).

There is a good reason why the law does not allow the subjective perspectives of litigants to creep into the interpretive exercise. To do so would inject uncertainty into an otherwise clear agreement. It would make an otherwise clear agreement subject to attack based on subjective evidence for which there is no proof, and where the parties (understandably) were each motivated solely by their own self-interests. It would needlessly extend trials. And these problems would be exacerbated in cases like this where one of the parties is dead. Justice Rempel found that the Agreement was clear: the intention of the parties was to divide their family property by way of a lump sum payment that would be paid in installments. Given the release of spousal support and the clear wording of the Agreement, these payments were not spousal support. They were property payments to be made over time.

So far, we are in complete agreement. However, Justice Rempel went one step further. He suggested that the property payments were "dressed up" in spousal support language to give Denise the option to pursue payment through the MEP if she wanted to. Respectfully, this is where we part company with Justice Rempel. As with support enforcement agencies across Canada, the MEP only enforces support. As the agencies do not enforce property, if the MEP was enforcing, the payments had to be on account of support: *Santor v. Santor*, 2012 CarswellOnt 4319 (S.C.J.); and *Korn v. Korn* (2016), 76 R.F.L. (7th) 205 (Ont. S.C.J.). Private parties cannot extend the legislative mandate of the MEP to serve their own private interests.

The life insurance was an added component of the property division for the benefit of Denise and Kelly that would only come into effect on Don's death.

The requirements for a binding agreement were clear on the face of the Agreement, which also laid bare the intentions of the parties.

***One Final Try: The Parol Evidence Rule***

Don also suggested that the Parol Evidence Rule provided justification for his oral testimony. But Justice Rempel easily (and properly) found that the Rule did not apply in this case.

In *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 CarswellMan 485 (C.A.), the Manitoba Court of Appeal took the opportunity to set out what it described as the "often confusing" Parol Evidence Rule:

  

> [35] Basically, the rule can be stated as follows: where the whole of a contract has been reduced to writing, extrinsic evidence is not admissible to add to, subtract from, vary or contradict that written contract. Extrinsic statements and promises cannot affect the parties' obligations as stated in the written agreement.

The Parol Evidence Rule only applies where the written document may not reflect the complete agreement between the parties or where the parties struck a collateral agreement:

> [38] The first task of a judge in contractual interpretation matters is to determine the terms of the contract. If the court finds, as it did in this case, that the contract is partly in writing and partly oral, the problem of the parol evidence rule does not arise because the rule is not applicable. The rule only comes into operation when the court is satisfied that it was the parties' intention that the writing represents the exclusive record of the parties' agreement.

Justice Rempel was satisfied that clauses in the Agreement (including clauses generally thought to be "boilerplate"), evidenced the finality of the Agreement. The wording of the Agreement clearly reflected the intentions of, and bargains between, the parties.

***Life Insurance***

With respect to the obligation to maintain life insurance, Justice Rempel referred to some of the cases where a party had failed to maintain an insurance policy required by contract. Generally, the intended beneficiary is entitled to relief.

In *Fraser v. Fraser* (1995), 16 R.F.L. (4th) 112 (B.C. S.C.), the Court ordered specific performance of an obligation to maintain a life insurance policy naming the plaintiff as a beneficiary.

And in *Adams (Next Friend of) v. Adams Estate* (2001), 15 R.F.L. (5th) 237 (Alta. Q.B.), the Alberta Court of Queen's Bench held that the deceased's estate was liable for the failure of the deceased to maintain a life insurance policy, and awarded damages in an amount equalling the full value of the life insurance policy.

Here, there was no ambiguity about the life insurance policy in the Agreement. It was Don's obligation, and Justice Rempel ordered Don to comply with it by obtaining and maintaining a life insurance policy on his life in the amount of $200,000, and naming Kelly (Denise's daughter) as the irrevocable beneficiary.

Finally, with respect to the $20,000 payment for the condominium, as the payment was made after the Agreement was signed, and as the Agreement contemplated Don making advances or prepaying, Justice Rempel determined that it was a payment on account of the lump sum obligation.

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