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

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Child Support for an Adult Child with Addiction Issues - Not

L.M.G. v. R.E.G. (2020), 41 R.F.L. (8th) 432 (Ont. S.C.J.) - Carey, J.

The parties were married on May 5, 1994, and they separated on May 5, 2009. There were two children of the marriage: K.R.G., now 20 years old, and R.M.G., now 15 years old. This case was primarily about whether or not K.R.G. continued to be a "child of the marriage."

The mother suggested that K.R.G. suffered with mental illness and addiction issues, but that he had tried to address those issues with her "unwavering support." At this point, however, argued the mother, K.R.G. was unable to provide for himself, receiving only $672 per month from the Ontario Disability Support Program ("ODSP"). K.R.G. wanted to gain his independence and return to school.

The father argued that K.R.G. was not suffering from mental illness. Rather, K.R.G. had chosen to continue a lifestyle of drug use and alcohol abuse, enabled by the mother. The mother admitted that the ODSP funds were controlled by K.R.G. and that none of those monies were paid to her or towards rent.

The father submitted that he loved his son and that he wanted to see him re-enter education and stop using drugs and alcohol - but that as long as his mother was allowing him to live in her house and spend his money on drugs and alcohol, K.R.G. had no incentive to deal with his issues. The father argued that ODSP is meant to support someone with a disability, but that the mother was enabling K.R.G. to continue his pattern of drug/alcohol abuse and non-attendance at school by giving him free room and board and no responsibilities.

The mother's position was that the very receipt of ODSP confirmed that K.R.G. suffered with a disability and that he was therefore, by definition a "child of the marriage": a child "the age of majority or over . . . but unable, by reason of illness or other cause, to withdraw from their charge or to obtain the necessaries of life." It was not the father's opinion that mattered.

The mother called no medical evidence to support her position that K.R.G. suffered from a mental illness. Instead, she filed a six-page exhibit ("Exhibit 1") relating to discharges of K.R.G. from Windsor Regional Hospital. She also tried to file an unsworn Emergency Discharge document from October 2018 which contained an opinion as to a diagnosis. As the father opposed its admission, the document was not admitted into evidence. The lack of evidence was a problem.

Exhibit 1 generally referred to K.R.G's mental health and addiction issues and several discharge summaries and recommendations.

The mother also filed an outline of K.R.G.'s monthly expenses. The outline suggested total monthly expenses (excluding medical benefits, counselling, tutoring, and orthodontic treatment) of $2,123.70, and a monthly deficit of $1,450 after deducting the ODSP payments. The outline also referenced orthodontic treatment, and ongoing outstanding medical costs in the amount of $2,450.82. Justice Carey took serious issue with this propounded budget. He concluded that the outlined monthly expenses for K.R.G. were completely unrealistic given the incomes of the parties and K.R.G.'s needs and abilities - so unrealistic, in fact, as to seriously undermine the mother's credibility.

Justice Carey turned to the oft-cited case of *Rebenchuk v. Rebenchuk* (2007), 35 R.F.L. (6th) 239 (Man. C.A.), for the test for determining support for adult children. And he reminded himself that an applicant for child support bears the onus of proving that a child is still "a child of the marriage."

Justice Carey was not persuaded that the receipt of ODSP was dispositive of the issue of whether K.R.G. remained a child of the marriage. His Honour also accepted the father's evidence that K.R.G. had not been receptive to his father's direction or assistance in dealing with his addictions, keeping employment and upgrading his education. According to Justice Carey, "Many people today with mental illnesses are productive members of society because they want to be and follow medical direction, including rehabilitation, to pursue their education and refrain from the abuse of addictive substances."

Justice Carey also noted the complete lack of admissible medical evidence to support the mother's assertion that K.R.G. was suffering from schizoaffective disorder and bipolar disorder. And even if he was, the mother had not demonstrated that K.R.G. was incapable of making his own decisions. In short, Justice Carey did not accept that K.R.G. was involuntarily disabled by a mental illness: *KMR v. IWR*, 2020 CarswellAlta 242 (Q.B.). At age 20, and given that addiction is unquestionably a mental health issue, this result seems harsh - but again, courts require evidence.

There was no dispute that the mother had allowed K.R.G. to live under her roof with no restrictions imposed on his drug and alcohol use or his non-attendance at school. She had provided him free room and board without requiring him to pay to her even a portion of his ODSP monthly payment. And the uncontradicted evidence was that K.R.G. had been using that money irresponsibly and largely on drugs, alcohol and other things "inconsistent with the purposes of disability payments." As such, the evidence supported the father's argument that the mother was enabling K.R.G. in his continued addiction, non-attendance at school and failure to maintain regular employment:

> [24] . . . Well-intentioned though [the mother] may be, it is incomprehensible that [the mother] fails to grasp the serious ramifications of her allowing K.R.G. to do as he pleases while living under her roof payment free. He has been given full access to a payment designed to support someone with a disability who has no other means of support. Unfortunately, she believes she is helping her son with a mental illness.

On the other hand, the father impressed Justice Carey as sincerely interested in the well-being of both of his children, and frustrated and hurt by what he described as a 10-year campaign of parental alienation, while enabling K.R.G. to continue to make poor lifestyle and career choices.

Ultimately, Justice Carey found that the mother's decision to provide K.R.G. with the necessaries of life while allowing him to irresponsibly dissipate his monthly disability payments had only hurt K.R.G.'s future prospects and ability to become independent and productive. The mother had damaged the relationship between both sons and their father and had undermined K.R.G.'s ability to become independent and addiction free.

As a result, his Honour determined that K.R.G. was no longer a "child of the marriage" as defined by the *Divorce Act* and that the mother was not entitled to support or s. 7 benefits for her then 20-year-old son.

In real estate, the rule is: location, location, location.

But in litigation, the rule is: evidence, evidence, evidence.

"Hey Siri . . . Remind Me to Move this Case Forward in a Meaningful Way Sometime in the Next Three Years"

Bonnefoy v. Geisler (2020), 38 R.F.L. (8th) 137 (Man. Q.B.) - Thomson J.

Rule 24 of the Manitoba *Queens Bench Rules* gives the court jurisdiction to dismiss an action for delay if the delay has caused significant prejudice to another party.

On January 1, 2019, amendments to Rule 24 came into force that significantly circumscribed judicial discretion for cases involving prolonged delays. In particular, Rule 24.02(1) now provides that a case ***must*** be dismissed if three years has gone by without a "significant advance in an action" unless:

> 24.02(1) . . . (a) all parties have expressly agreed to the delay;
>
> (b) the action has been stayed or adjourned pursuant to an order;
>
> (c) an order has been made extending the time for a significant advance in the action to occur;
>
> (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
>
> (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.

Rule 24.01(2) also now provides that, "[i]f the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party." This is, to some extent, a codification of the common law. See, for example: *Tanguay v. Brouse*, 2010 CarswellOnt 475 (C.A.).

The purpose of these amendments was, as Justice Martin explained in *D.L. et al. v. C.P. et al.*, 2019 CarswellMan 279 (Q.B.), to shift the primary focus of motions to dismiss for delay away from the more subjective question of actual prejudice, to the more objective question of the extent of the actual delay:

> [32] The new Rules were designed in part to alleviate perceived unease of dismissing claims for lack of diligence in advancing a claim or, in other words, because of poor case management rather than a poor case. **Inevitably in such motions actual or inherent prejudice became a dominant if not decisive factor, and often a vague and subjective one at that**. As well, an overriding principle was to apply a "kind of essential justice", involving a final balancing of a plaintiff's right to proceed against a defendant's right not to be prejudiced by unreasonable delay[.] . . . **From a policy standpoint, this was markedly sub-optimal as real-life application of the Rule did not offer consistency and predictability of outcomes**. Yet, these policy considerations, along with finality of actions, are critical to a robust and modern civil procedure scheme where the volume of actions and litigation expense steadily increase. Hence, the judiciary's sentiment has moved away from condoning, or even fostering, uneven outcomes as necessarily incidental to dismissal in delay motions (because of the fact specific nature of what is unreasonable, whether prejudice is shown and a final balancing for essential justice). **The revised Rules change the focus to spotlight delay, which is often more defined and demonstrable than prejudice. A sharper, perhaps harsher, dawn is at hand. Particularly with Rule 24.02 now in force, with its very limited exceptions, counsel and parties will have to be most vigilant to advance actions. Stagnant actions will be weeded out, and active claims finished swifter. Balancing for "a kind of essential justice" will not save the day**. [emphasis added]

In *Bonnefoy v. Geisler*, Justice Thomson was faced with what appears to be the first family law case to consider the new provisions of Rule 24.

Ms. Bonnefoy and Mr. Geisler were in a relationship and had a child together. In August 2012, Ms. Bonnefoy started an Application against Mr. Geisler for, among other things, property division and support, and claimed that she had been in a common law relationship with Mr. Geisler for 12 years. Mr. Geisler opposed Ms. Bonnefoy's claims, and denied that they had ever actually cohabited.

Despite a number of court attendances in 2014 and 2015, and for reasons that are not explained in Justice Thomson's reasons, Ms. Bonnefoy did not take any real steps to move the case forward for many years.

Mr. Geisler eventually brought a motion to dismiss Ms. Bonnefoy's claims pursuant to Rule 24. He argued that the court was *obligated* to grant his motion as the evidence showed that three years had passed without a "significant advance" in the case, and none of the exceptions in Rule 24.02 applied. Mr. Geisler also took the position that the court should exercise its discretion to dismiss the case for delay because the delay had been "inordinate and inexcusable", and pursuant to Rule 24.01(2) was "presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party."

Justice Thomson agreed with Mr. Geisler that Rule 24.02 applied. Almost nothing had happened on the matter since the parties attended a third Case Conference in May 2015, and what little had happened did not come close to constituting the type of "significant advance" that is required to defeat a motion under Rule 24.02.

Justice Thomson was sympathetic to Ms. Bonnefoy, and noted that, "[t]he summary disposition of the action may have significant, and, perhaps, disproportionate, pecuniary consequences for [Ms. Bonnefoy]", who was claiming that Mr. Geisler owed her more than $237,000 for her share of the family property. Nevertheless, because of the length of the delay and the fact that Ms. Bonnefoy had not established that any of the enumerated exceptions in Rule 24.02 applied, his Honour had no choice but to dismiss Ms. Bonnefoy's case.

While the new provisions of Rule 24 may seem harsh, those provisions were clearly enacted to put lawyers and litigants on notice: let cases linger at your peril. At some point, the delay will become inordinate and inexcusable (three years in Manitoba) and the case will be dismissed.

Counsel in Manitoba should consider adding something to their standard Retainer Agreements to the effect that, once litigation starts, cases must move forward with reasonable dispatch, failing which, the case can be dismissed. Practically speaking, Rule 24.02 is now a veritable minefield for lawyers.

"Odour" [not=] Evidence

2187459 Ontario Ltd. v. Duns (2020), 38 R.F.L. (8th) 409 (Ont. S.C.J.) - Vallee, J.

In Ontario, section 42 of the *Family Responsibility and Support Arrears Enforcement Act, 1996* (the "*FRSAEA*") permits a support order to be registered against the land of a support debtor. Once registered, the order becomes a charge on the property and may be enforced by a sale - in much the same way as a sale to realize on a mortgage. A very handy provision. But, as seen here, it has its limitations.

2187459 Ontario Ltd. ("218") was incorporated on October 14, 2008. Mr. Duns was the initial director. Ballantrae, a company owned by Mr. P, owned 100 percent of the shares. On July 25, 2013, Mr. Duns bought 50 percent of the shares of 218 from Ballantrae, and he became an officer and director of 218.

In 2014, 218 decided to purchase the property in question. In order to obtain a more favourable interest rate, Mr. P and Mr. Duns agreed that Mr. Duns would take title to the property in trust for 218. The parties executed a Bare Trust Agreement on September 29, 2014, and the purchase closed on September 30, 2014.

Meanwhile, Mr. Duns was in a relationship with Ms. Churchill and they had children together. They ultimately separated, and Ms. Churchill issued an Application on December 16, 2015. Merry Christmas, Mr. Duns.

On March 11, 2016, Justice Hughes issued an interim Consent Order that required Mr. Duns to pay Ms. Churchill child support of $1,845 per month (based on an income of $100,000).

On January 24, 2017, pursuant to a promissory note, Mr. P lent Mr. Duns $500,000, which was to be repaid by April 27, 2017 (this loan was for a business that Mr. Duns operated). As collateral for the loan, Mr. Duns pledged his shares in 218 as security

- unusual collateral given the positions later taken by Mr. Duns and Mr. P. The promissory note stated that if Mr. Duns (who only reported income of $100,000) failed to repay the $500,000 loan, his shares in 218 would be transferred to Ballantrae.

On August 11, 2017 (after Mr. Duns had already pledged his shares in 218 for the loan), Justice Hughes made a final Consent Order. Paragraph 12 of the Order froze Mr. Duns' interest in ***the property*** - not in the shares of 218. Paragraph 13 of the Order restrained Mr. Duns from encumbering, selling or otherwise disposing of his 50 percent ownership interest in 218. Mr. P swore that he did not learn of the final Consent Order until almost a year later.

It will come as no surprise that Mr. Duns did not repay the $500,000 loan by April 27, 2017, and on October 12, 2017, Mr. P realized on the security through Ballantrae: Mr. Duns' shares in 218 were transferred to Ballantrae, and Mr. Duns was removed as an officer and director of 218.

It will also come as no surprise that Mr. Duns was an "unmotivated support payor." By January of 2018, he was in arrears of about $165,000 to Ms. Churchill; an impressive feat with a support order of $1,845 per month.

So, at this point, we have Mr. Duns - reporting income of only $100,000 - receiving a $500,000 loan from his business partner, defaulting on that loan, and handing over his shares in 218 - the argued beneficial owner of the property purchased in 2014 - as a consequence. So something doesn't smell so good.

Adding to the poor optics, Ms. Churchill offered the following comments. However, as Ms. Churchill "declined the opportunity" to provide sworn evidence, the Court gave her comments little weight. This could have been a strategic error:

- Ms. Churchill left the relationship because Mr. Duns was abusive.
- Mr. P and Mr. Duns were good friends. They vacationed together in Florida.
- Mr. Duns had supervised access to the children. Mr. P was the supervisor.
- Mr. Duns' business operated out of premises owned by 218.
- Mr. P knew about Mr. Duns' family law proceedings. His evidence that he only learned about Justice Hughes' order one year later is likely not true.
- Two cottages were sold through Mr. P which resulted in $700,000 going through Mr. Duns' bank account.

On January 10, 2018, three months after Mr. P seized Mr. Duns' shares, FRO took steps to enforce Mr. Duns' support arrears and registered the Order on the property. FRO also filed a writ of seizure and sale.

Of course, 218 took the position that, prior to the purchase of the property in question, 218 and Mr. Duns had executed the Bare Trust Agreement, such that Mr. Duns held title to the property as trustee for the benefit of 218, and that, as such, Mr. Duns had no beneficial interest in the property. 218 took the position that because Mr. Duns has no beneficial interest in the property, FRO's charge ought to be discharged.

The main questions for Justice Vallee were whether Mr. Duns had any beneficial interest in the property when FRO registered its charge - and if not, whether the property was available to satisfy FRO's charge.

Notwithstanding the optics, if the Court accepted that the property was beneficially owned by 218, FRO had a problem.

The law is clear that, while an execution creditor can seize and sell land owned by an execution debtor, the creditor takes the land subject to the charges, liens and equities to which it was subject in the hands of the debtor. A creditor stands in no better position that the debtor, and an unregistered interest is entitled to priority over an execution: *Young v. LeMon*, 1985 CarswellOnt 419 (Dist. Ct.); and *Gibb v. Jiwan*, 1996 CarswellOnt 1222 (Gen. Div.) at para. 10.

It has also been held that a writ of seizure and sale does not attach to real property held in a valid trust by a bare trustee, even though the bare trustee had misled his creditor as to the nature of his interest in the property: *Colantonio v. Don Park L.P.*, 2013 CarswellOnt 1852 (S.C.J.) at paras. 17-18 and 31-32.

FRO argued that Mr. Duns consenting to the final Order of Justice Hughes prohibiting his dealing with his 50 percent interest in 218 was an admission that he *did* have an interest in 218 when the Order was made. That is, if Mr. Duns had already pledged his shares in 218 as security for the loan, he would not have said that he was a 50 percent shareholder at that time. Even though Mr. Duns purportedly held title to the property as a bare trustee for 218, he had a beneficial interest in the property because he owned shares in 218.

Justice Vallee was not persuaded. The Bare Trust Agreement had been executed on September 29, 2014, and the property was purchased the next day - over one year before Ms. Churchill commenced her proceedings. And the terms of the Bare Trust were clear: Mr. Duns held title to the property in trust for 218.

Justice Vallee noted that FRO did not provide any authority for the proposition that *prior* to pledging his shares, Mr. Duns had a beneficial interest in the property through 218 because he was a 50 percent shareholder of 218. According to her Honour, a corporation is a separate entity apart from its shareholders. It held the beneficial interest. Its shareholders did not. On this point, we refer to our comment on *Aubin v. Petrone* (2020), 40 R.F.L. (8th) 26 (Alta. C.A.) in the August 31, 2020 edition of *TWFL* as to the ability of the Court to pierce the corporate veil in certain circumstances. However, *Aubin* would not have assisted FRO in addressing the fact of the Bare Trust Agreement.

The facts (as accepted by Justice Vallee) were the facts: Mr. Duns pledged his shares as security for the money that he borrowed *before* he consented to Justice Hughes' Order. While Mr. Duns may have misrepresented his circumstances to the Court by agreeing to not encumber his interest in 218 when he already had done so, that did not change the fact that he defaulted on the loan and Ballantrae realized on the shares on October 12, 2017, which was three months *before* FRO registered its charge. When FRO registered its charge, Mr. Duns continued to hold the property only as a bare trustee, as he had done since September 30, 2014, before the separation. Mr. Duns had no personal beneficial interest in the property. And there was no sworn evidence to the contrary or that the Trust was not valid. No one alleged fraud.

Ultimately, absent evidence, the Court's hands were tied. While Ms. Churchill was certainly entitled to be paid the arrears she was owed, if they were to be paid from the sale of property, that property had to be one in which Mr. Duns held a beneficial interest, and not from a property he held in trust for another entity. Again, an execution creditor may claim no more than the interest of the debtor in the land and stands in no better position than the debtor. See also *1842752 Ontario Inc. v. Fortress Wismer 3-2011 Ltd.*, 2020 CarswellOnt 4915 (C.A.).

As a result, Justice Vallee ordered the FRO's charge to be discharged and removed from title. And she ordered costs of $11,000 against FRO.

There is just no substitute for evidence.

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