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— Franks & Zalev - This Week in Family Law

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Contents

On September 4, 2020, the Ontario Court of Appeal released its decision in *Climans v. Latner*. The decision was almost immediately picked up by newspapers across Canada under some fairly sensational headlines, including:

• *Unmarried Ontario couple had no children and no house but man must still pay support, appeal court rules* (National Post)

• *No home or kids together but couple still spouses, Ontario's Appeal Court rules* (Globe and Mail)

• *Multi-millionaire must pay support even though he didn't live with woman* (Toronto Sun)

But the Court of Appeal's decision is actually much more nuanced than what was reported in the newspapers. It also deals with several other legal issues that warrant further thought and consideration. So, this week's edition of *TWFL* will focus entirely on this important and highly publicized case.

Apparently Continuous Doesn't Mean Continuous

Climans v. Latner, 2020 CarswellOnt 12505 (C.A.) - Gillese, Brown, and Paciocco JJ.A.

In this case, the Ontario Court of Appeal affirmed the decision of the trial judge, Justice Shore, that the parties were, in fact, common law spouses, having continuously cohabited in a conjugal relationship for at least three years.

So, who is a common law spouse, and what exactly is "continuous cohabitation"?

This question continues to vex all common law provinces, and the finding of a spousal relationship can be very significant, resulting in standing to claim spousal support and, in some provinces, property relief.

In Ontario, the *statutory* answer is easy. A "spouse" (we are not concerning ourselves with married spouses here) includes either of two persons who have ***cohabited continuously*** for a period of not less than three years.

From there, things get a *bit* more challenging. What does "cohabit" mean? Well, in Ontario, the *Family Law Act* provides a definition: "cohabit" means to live together in a conjugal relationship.

What does "continuous cohabitation" mean in the year 2020? In *Climans*, the Ontario Court of Appeal considers exactly that. Specifically, where parties are in a long-term romantic relationship but never marry, do not have children together, and choose to maintain their own homes rather than live together, was the time they spent together sufficient to amount to "cohabiting" or "living together" in a conjugal relationship?

Lisa Climans and Michael Latner were in a romantic relationship from October 2001 to May 2015 - almost 14 years.

When the parties met, Lisa was 38 years old. She was separated from her husband. She had two children, aged 8 and 11. She worked in sales and marketing for her brother's construction business, earning about $60,000 a year.

Michael was 46 years old. He was also divorced, and he also had children from his marriage. Michael was also ***very*** wealthy.

They quickly began a relationship, and by November 2001 (a month or so after they met), Lisa began sleeping at Michael's home on alternate weekends (when her children were with their father). She eventually quit her job to be available to run errands for Michael, travel with him, and spend time with him.

In the early years of their relationship, Lisa and Michael interacted daily. They usually ate dinner together at one home or the other's, often with whichever of their children were around. They had coffee together in the morning, walked their dogs together, and talked on the phone frequently. However, during this period, Lisa only slept at Michael's home on alternate weekends when her children were with their father (she stayed over at his Toronto home with even less frequency when her children were older).

Despite a few temporary break ups during the relationship, they had a committed relationship. In 2002, Michael gave Lisa a 7.5 carat diamond ring. He also proposed to her more than once - which proposals Lisa accepted. They each wore rings gifted by the other. They celebrated the anniversary of the day that they met each year. They exchanged cards. Michael often referred to Lisa by *his* last name. When Michael was in the hospital dealing with a health issue, Lisa slept at the hospital, occasionally alternating with Michael's children. She drove him to his medical appointments. They were sexually active throughout their relationship. While they introduced each other to their respective children early on, there was no melding of their children into one family. The parties also attended extended family functions together, went out socially, and held themselves out as a couple.

The quality of their relationship changed in 2006, after which Lisa slept only infrequently at Michael's home. On Lisa's evidence, between 2006 and 2013, she slept over at Michael's Toronto home no more than 10 to 20 times. Throughout the relationship, Michael rarely stayed over at Lisa's home.

The parties never merged their finances. They had no joint bank accounts. They did not own property together. However, starting in 2001, shortly after they met, Michael gave Lisa $5,000 per month (later $6,000). And in 2002, Michael started covering Lisa's home expenses and gave her a credit card for other expenses. He later paid off a mortgage on her home and paid for renovations to it. He was extremely generous. He was also extremely generous with her children, who were afforded a very generous lifestyle.

The parties always maintained their separate residences in Toronto. They never married or "moved in" together, but they stayed together when they travelled outside of Toronto. They spent July and August together each year in Michael's Muskoka cottage. In the winter months they spent time together in Florida - from Thursday until Monday morning on alternate weeks when Lisa's children were with their father, and sometimes during the winter school break. They also frequently vacationed together.

Early in the relationship, Michael told Lisa that he would not marry her or live with her unless they entered into a Domestic Contract. While he, at times, prepared and presented draft contracts to her, no contract was ever signed.

When their relationship ended in mid-2015, Lisa was almost 52 years old. She became qualified as a yoga instructor and was expected to earn $24,000 from teaching yoga. She was 55 at the time of trial. She sought indefinite support.

Michael was 63 at the time of trial. He acknowledged a romantic relationship with Lisa and described her as his girlfriend and travel companion - but they had never married or lived together and, at least in Michael's view, they were not spouses.

When the relationship ended, Lisa brought an action in the Ontario Superior Court of Justice for spousal support. Michael resisted the claim, arguing that Lisa was not his "spouse".

After an 8-day trial before Justice Shore, the parties were declared to be spouses within the meaning of s. 29 of the *Family Law Act*. Michael was ordered to pay Lisa spousal support of $53,077 per month starting on January 1, 2019. Support was indefinite in form based on the "Rule of 65" in the *Spousal Support Advisory Guidelines*, for which Lisa *just* qualified (by five months).

As the successful party at trial, Lisa was found to be entitled to costs. The trial judge ordered costs on a substantial indemnity basis for two reasons. First, she viewed Michael's position that he and Lisa had not been spouses to be unreasonable. Second, she found that Michael had not been "forthcoming" in his financial disclosure. As a result, Michael was ordered to pay costs of (gulp) $324,179.

Michael appealed. He argued that Justice Shore erred in finding a spousal relationship. He argued that Justice Shore erred in finding that the Rule of 65 applied (which was the basis for indefinite support). And, he argued that Justice Shore erred in ordering costs on an increased scale.

The Court of Appeal dismissed the appeal with respect to the finding of a spousal relationship. However, in an interesting twist, the Court of Appeal found that her Honour erred in concluding that the Rule of 65 applied as cohabitation had not started at the beginning of the relationship. And, finally, the appellate court varied the costs award, substituting costs on a partial indemnity basis.

THE TRIAL DECISION

Justice Shore's analysis focused on whether the parties had "cohabited continuously." Again, "cohabit" means "to live together in a conjugal relationship."

There are few decisions about incidents of "cohabitation" that do not refer to and consider *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), and its non-exhaustive list of *indicia* of a conjugal relationship: shared shelter, sexual and personal behaviour, services, social activities, economic support, children as well as the social perception of the couple. This list of considerations was later adopted and affirmed by the Supreme Court of Canada in *M. v. H.* (1999), 46 R.F.L. (4th) 32 (S.C.C.) at paras. 59-60.

Based on a consideration of the *Molodowich* factors, the trial judge had "no doubt" that the parties had been in a conjugal relationship. At para. 120 of the trial reasons, Justice Shore wrote:

> They were in a long term committed relationship. Michael treated Lisa as his wife. Their relationship was sexual in nature. They held themselves out as a committed couple and were perceived as a couple by their family and friends. Lisa was considered family by the extended Latner family. The parties participated in social activities as a couple. Michael supported Lisa financially. They travelled extensively together. They lived together at the cottage each summer.

The only consideration that gave Justice Shore any pause was the consideration as to "shared shelter": Had Lisa and Michael "lived together", even though they unquestionably maintained separate residences in Toronto?

By now, it seems to be accepted in most jurisdictions that it is not always necessary to live together in order to cohabit. In *Stephen v. Stawecki* (2006), 32 R.F.L. (6th) 282 (Ont. C.A.), for example, the Ontario Court of Appeal declined to rule that two people must move in together to be considered as living together or cohabiting. The specific arrangements made for shelter are, apparently, properly treated as only one of several factors in assessing whether or not the parties are "cohabiting" at law. However, Justice Shore did hold (at para. 128) that " . . . there needs to be *some element of living together* under the same roof. The very definition of 'cohabit' requires that the parties live together in a conjugal relationship." (emphasis added). Therefore, it is clear that parties can, in a consideration of the full factual matrix, be "cohabiting" without actually "living together" - a neat trick, given the above-mentioned definition of "cohabit" includes the idea of "living together."

Justice Shore's conclusion on this issue was repeated and adopted by the Court of Appeal:

> [139] I find that [Lisa] and [Michael] were spouses for the purpose of spousal support having regard to all the factors. The dynamic of their relationship was such that all of the elements were present to some degree or another, but when viewed all together, lead to the conclusion that they were spouses:

> a. Committed relationship: The parties were in a committed [14-year] relationship, as set out in more detail above, having exchanged rings (even if only "commitment rings", as described by [Michael]), celebrated their anniversary each and every year, exchanged numerous love letters with expressions of deep commitment, [Michael] calling [Lisa] Mrs. Latner (or other similar names), and [Lisa] caring for [Michael] during hospital stays. There was an expectation that [Lisa] be available to [Michael], and run errands for him.
>
> b. Financial Arrangements: [Michael] paid for [Lisa's] expenses for the entirety of the relationship, provided her with a lavish lifestyle, paid off one of her mortgages and created a financial dependency.
>
> c. Extended Family and Social Perception: [Lisa] was treated as family by the extended Latner family. The parties held themselves out as a couple in a long-term committed relationship to both family and friends. They have referred to each other as spouses in public. [Lisa] participated in the extended Latner family lifecycle events and even walked down the aisle with [Michael] at his daughter's wedding, standing under the chuppah (canopy) with him.
>
> d. Living together:
>
> > i. I find that every summer, [Michael] and [Lisa] moved up to and lived together at the cottage. This was their summer home, where they could be located throughout the summer for almost the entire 14 years.
> >
> > ii. I also find that for the first several years of the relationship, [Lisa] was residing at [Michael's] home on a regular basis, when her children were not in her care, being alternate weekends. I accept that she maintained a separate home for her children, to be close to their school, and by the time they graduated the parties were already in the process of building a home together. This may have changed later in the relationship but was certainly present in the first few years.
> >
> > iii. The parties also lived together as spouses when in Florida.
>
> Had these been the only factors, I would not have concluded that they were spouses. However, when taken into account along with all the other dynamics in this relationship (summarized above), I conclude that they were common law spouses.

Therefore, the Court of Appeal seems to be adopting the idea that "living together" should be interpreted to mean: "living together *sometimes* in a conjugal relationship along with other meaningful indicia of cohabitation."

Having found a spousal relationship, her Honour then concluded that Lisa was entitled to both non-compensatory and compensatory spousal support - although the compensatory claim was weak given that Michael was already well-established when they met. Therefore, Lisa's need, viewed through the lens of the standard of living during the relationship, was the driving factor in determining the amount of spousal support.

With respect to duration, her Honour noted that under the SSAGs, spousal support was payable for between seven and 14 years unless the Rule of 65 applied (where the years of cohabitation plus Lisa's age at separation total to 65 or more) such that spousal support was payable indefinitely.

Lisa was 51 years, 9 months, and 13 days old when the relationship ended. Her position was that she and Michael started cohabiting on November 1, 2001, and separated on May 11, 2015. By that counting, Lisa met the Rule of 65 by 5 months and was "entitled" to indefinite spousal support. We pause here, however, to remind everyone that the SSAGs are not law. They are advisory. The SSAGs may *suggest* indefinite support, but they do not, and cannot, *mandate* indefinite support - especially in the case of a close call.

The trial judge accepted that, while the parties may not have started living together as early as November 1, 2001, they started "cohabiting" within the first five months of the relationship.

After weighing the relevant factors and considerations - including lifestyle, ages, contribution to expenses, a weak compensatory claim, the duration of support and length of the relationship - the trial judge concluded that Lisa was entitled to indefinite ("without defined termination date") spousal support of $53,077 per month.

THE COSTS DECISION

In her reasons for the Costs Order (the "Costs Reasons"), the trial judge considered *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.), which emphasized the need for reasonableness and proportionality in the exercise of discretion when making a costs award and Rule 24 of the *Family Law Rules* regarding costs.

Having been the successful party, Lisa was unquestionably entitled to costs. However, while the trial judge refused the invitation to find that Michael had acted in bad faith, she did find his conduct to have been "unreasonable" in two ways: (1) his position that Lisa "was nothing more than a travel companion or girlfriend"; and (2) he had not been "forthcoming" in his disclosure. And, as a result, she ordered costs in favour of Lisa on a substantial indemnity basis, fixed at 70 percent of actual costs: an award of $324,179.

THE APPEAL

On appeal, Michael argued the trial judge had erred:

1. In concluding that he and Lisa met the definition of "spouse" in s. 29 of the *Family Law Act*;

2. In concluding that the parties began cohabiting in the first five months of their relationship so as to meet the Rule of 65; and

3. Awarding Lisa costs on a substantial indemnity basis

Cohabitation

On the issue of cohabitation, Michael first argued that the parties had a long-term relationship, but that the did not "live together" in a conjugal relationship.

Indeed, in *Stajduhar v. Wolfe* (2017), 99 R.F.L. (7th) 401 (Ont. S.C.J.[Estates List]), aff'd (2018), 10 R.F.L. (8th) 32 (Ont. C.A.), leave to appeal refused, 2019 CarswellOnt 1825 (S.C.C.), the Ontario Court of Appeal found that to "live together" means to have a "common abode" in the sense of a "readily identifiable" place "where both are ordinarily to be found most of the time when they are at 'home.'" Therefore, Michael's position was hardly without legal support. As the parties maintained separate residences throughout their relationship, argued Michael, the evidence did not support a "common abode." And no "common abode" meant no "cohabitation." Summers at the cottage and alternating weekends in Florida during the winter did not "cohabitation" make. In *Stajduhar*, the Court of Appeal also accepted that absent some element of cohabitation and a "common abode", a long-term romantic relationship is not enough.

Second, Michael argued that the trial judge had improperly merged the (admittedly somewhat overlapping) concepts of "cohabitation" and "conjugal relationship" - and Lisa had to show both. He argued that the trial judge accepted that their conjugal relationship was essentially a proxy for cohabitation, and that was not permitted by the plain language of the statute. A conjugal relationship did not make up for the fact that he and Lisa did not, in fact, "live together."

The Court of Appeal was not receptive to Michael's arguments, again emphasizing that *lack of a shared residence is not determinative of the issue of cohabitation*, as evidenced by the cases that find "cohabitation" on only intermittent cohabitation. It would have been helpful, however, had the Court of Appeal taken the opportunity to distinguish the results in *Stajduhar*.

Ultimately, this was a case of deference to the trial judge. The Court of Appeal accepted that whether the parties lived together, despite having chosen to maintain separate residences, was a question for the trial judge, who grappled with the issue at length.

But, ultimately, she found that the intermittent periods during which the parties shared a roof - including Lisa's overnight stays, the summers at the cottage, and the time spent in Florida - in all the circumstances, constituted living together in a conjugal relationship. And the Court of Appeal could find no error.

So, what does this mean for counsel? It means we *must be vigilant in advising our clients*. When a lawyer asks a client, "how long have you been living together," the answer usually provided is the date the parties actually moved in together. It is incumbent on counsel, however, to press further and to explain that "legal cohabitation" sometimes starts before parties actually move in together - and sometimes starts regardless of the fact that the parties have *never* actually lived together. Sometimes a Cohabitation Agreement is needed far earlier than anticipated, depending on the factual matrix. See also *Hazlewood v. Kent*, [2000] O.J. No. 5263, where cohabiting on weekends was found to be sufficient for a finding of "cohabitation".

The Rule of 65 Met?

Again, the "Rule of 65" applies where the length of cohabitation plus the recipient's age at the date of separation equals or exceeds 65. If the Rule of 65 applies, indefinite spousal support is appropriate: *Djekic v. Zai* (2015), 54 R.F.L. (7th) 1 (Ont. C.A.), at para. 9.

The trial judge concluded that Lisa satisfied the Rule of 65 based on her finding that the parties began cohabiting at some point in the first five months of their relationship (that is, prior to March 17, 2002). However, Michael argued that the trial judge erred in so finding. He argued that in mid-March 2002, the parties had not yet spent any time together at his Muskoka cottage, which first occurred in July 2002. Further, in the first five months, given Lisa's responsibilities to her children, they had spent only a few nights together at his home in Toronto. In the early years of their relationship, Lisa slept at Michael's Toronto home only on alternate weekends when the children were with their father (although this was sufficient in *Hazlewood v. Kent*). And, as the trial judge found, Michael did not stay over at Lisa's home.

Despite agreeing that the date of commencement of cohabitation was a finding of fact, attracting the highest standard of appellate review, the Court of Appeal determined that the trial judge had erred in finding that cohabitation started within the first five months of the relationship. In fact, found the Court of Appeal, the trial judge gave no reasons and did not refer to any legal principles or evidence to support her conclusion that the parties began cohabiting within the first five months of their relationship. Accordingly, the conclusion was the result of palpable and overriding error.

The Court of Appeal noted that the trial judge offered no timeline for her findings with respect to cohabitation, but that those findings reflected the trial judge's general findings about the relationship over its duration of almost 14 years. While some aspects of their conjugal relationship began right away - for example, its sexual nature - many others did not. In fact, found the Court of Appeal, many of the incidents of cohabitation on which the trial judge relied to find "cohabitation" had specifically not taken place in the first five months of the relationship. For instance, the first time the parties lived together at the Muskoka cottage was in the summer of 2002 - after March 2002. The proposal was in October 2002 - after March 2002. Other incidents progressed over time.

Therefore, the parties did not begin cohabiting within the first five months of their relationship, and the Rule of 65 did not apply. Accordingly, it was an error in principle to find that it did. Consequently, time-limited support was warranted.

We pause here to note the significance of this reasoning. Justice Gillese, writing for a unanimous Court of Appeal, went to great analytical lengths to show why the trial judge erred in determining that the cohabitation started within the first five months of the relationship, such that the "Rule of 65" did not apply. But, again, the *Spousal Support Advisory Guidelines* are just that - *advisory*. They are not law. The "Rule of 65" is not a legal rule. It is a recommendation in advisory *Guidelines*. It would have been an easy thing for the Court of Appeal to take the opportunity to make that clear, and to simply state that, regardless of when cohabitation may have started, the facts of this case - a close call at best - did not support indefinite support. Having not done that, the Ontario Court of Appeal has come one step closer to conferring on the SSAGs the force of law. If that was intentional, we take no issue with it. But we're not sure it was.

In any case, as the "Rule of 65" was not met, spousal support under the SSAGs was payable for between seven and 14 years. And, having regard to the purposes of a support order set out in s. 33(1) of the *Family Law Act*, Justice Gillese ordered that spousal support be paid for a period of 10 years.

On the issue of duration, there is one point that requires some clarification. The Court of Appeal ordered that Michael pay support for 10 years from January 2019, presumably meant to be mid-range-duration between the seven and 14 years. However, as a result of the interim support Michael paid (from May/15 to December/18), the result of the Court of Appeal order is that Michael will actually pay support for 14 years. It is unlikely this was their intention. When considering duration under the SSAG, it is imperative to consider any periods of interim support paid.

THE COSTS APPEAL

Michael sought leave to appeal the Costs Order on the basis that the trial judge erred in principle in awarding costs against him on a substantial indemnity basis. He argued that neither his position on the spousal relationship nor his position on financial disclosure were unreasonable.

The Court of Appeal first emphasized that leave to appeal the Costs Order was not required. When "the disposition on appeal changes the decision under appeal, leave to appeal from a costs order is not necessary": *Tadayon v. Mohtashami*, 2015 CarswellOnt 17315 (C.A.), at para. 70; *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.), at para. 2, leave to appeal refused, 2019 CarswellOnt 10896 (S.C.C.).

The Court of Appeal then found that the trial judge had erred in principle in finding that Michael acted unreasonably. It was not unreasonable for Michael to take the position that Lisa was nothing more than a girlfriend and travel companion:

> [90] A basic principle in our legal system is that a defendant is entitled to require the plaintiff to prove its claim - something more than advancing a reasonable position at law is required to attract heightened costs consequences. Thus, an unsuccessful party will not incur heightened costs consequences if his or her conduct, including the legal position advanced, is reasonable: *Hunt v. TD Securities Inc.*, 66 O.R. (3d) 481 (Ont. C.A.), at para. 153; see also *Foulis v. Robinson*, 21 O.R. (2d) 769 (Ont. C.A.), at p. 776.

Importantly, this basic principle does not result in a party being able to litigate with impunity. Where one party forces the other to prove its case and is unsuccessful, the length of the trial will be reflected in the bill of costs of the successful party. Therefore, when determining whether to make an elevated costs award, the question for the trial judge was whether Michael's conduct, including his legal position, was reasonable. And, according to Justice Gillese, it was.

First, the trial judge acknowledged that she struggled with whether the time the parties spent together during their relationship was sufficient to find that they "lived together" in a conjugal relationship. Second, a review of the case law demonstrates that where parties neither marry nor move in together, it is an open question as to whether they will be found to have cohabited. The fact that Michael lost on the issue of whether the parties had been spouses did not mean his legal position was unreasonable.

Also, in considering whether Michael acted reasonably "in relation to the issues", Justice Gillese noted that Michael entered into a Consent Order in which he agreed to provide Lisa with significant financial support, with which Order he fully complied, providing Lisa with over $620,000 between May 2015 and December 2018.

The Court of Appeal was also of the view that the trial judge also erred in principle in finding that Michael acted unreasonably in terms of his disclosure. The trial judge had opined at para. 18 of the Costs Reasons:

> Michael was not forthcoming in his disclosure. There is an absolute obligation in family law to provide reasonable disclosure. Michael's response to his lack of disclosure was that [Lisa] did not bring a motion asking for the disclosure. This is not an acceptable excuse. [Michael's] unreasonable behaviour will increase the costs award.

Justice Gillese agreed that Michael had an obligation to make "reasonable disclosure". The question is whether he did.

While the trial judge was critical of Michael's position that his annual income was not relevant because he conceded from the outset that he had the ability to pay any amount of spousal support, Justice Gillese found that position was not unreasonable. Michael had disclosed the standard items used to establish annual income, such as his income tax returns from 2012 to 2017. And he also candidly admitted that, in any given year, his actual annual income was substantially higher than that shown on the tax returns.

Michael had also made extensive financial disclosure to Lisa and her lawyers during their relationship, especially when they attempted to negotiate a domestic contract in 2002 and again in 2013 and 2014.

The amount of support to which Lisa was entitled was based largely on her need. There was no question that Michael was a person of extraordinary means, and financial disclosure beyond that which he provided was not necessary to demonstrate that. Further, Lisa played no role in Michael's financial success. Any compensatory claim was very weak, as found by the trial judge. Accordingly, Michael's means - beyond his ability to continue to support Lisa at the level he had during the relationship - were not relevant.

As a result, Michael's position regarding disclosure was not unreasonable. Reasonableness and proportionality are to be judged in context.

In conclusion, after factoring in the result of the appeal, Lisa was still the more successful party at trial and, consequently, was presumptively entitled to costs - but not to an elevated level of costs. Justice Gillese ordered costs in Lisa's favour on a partial indemnity basis. Her total legal fees at trial were $463,114. On what Justice Gillese referred to as the "usual approach" of treating partial indemnity costs as 60 percent of full indemnity costs (there is no concept of "partial indemnity" or "substantial indemnity" under the *Family Law Rules*), she awarded Lisa her trial costs of $277,868, all inclusive.

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