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

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When Security is not "Security"

Johnston v. Johnston, 2020 CarswellOnt 15763 (S.C.J.) - McCarthy J.

The parties separated on May 28, 2017.

A few months later, the jointly held matrimonial home was sold. The net proceeds totalled about $185,000. On June 7, 2018, the parties were in court, and Justice McCarthy made an order (the "June Order") with respect to the sale proceeds:

> The net sale proceeds from the sale of the parties' jointly owned matrimonial home shall be held in an interest-bearing trust account by the parties' real estate lawyer **as security for the Applicant's spousal support claims**, in view of the Respondent's dissipation of assets, resistance to a spousal support order and threat of or likelihood of bankruptcy, pending further Court order or the written agreement of the parties. [emphasis added]

On June 3, 2019, as threatened, the Respondent made an assignment in bankruptcy, and BDO was appointed as Trustee in Bankruptcy of his estate. As of that date, about $170,000 of the net proceeds remained in the real estate lawyer's trust account.

On July 31, 2019, the Applicant successfully claimed costs of $25,000 from the Respondent, and the costs award was ordered to be paid out of the Respondent's 50 percent share of the net proceeds. However, as the Court had not been advised of the bankruptcy prior to making the costs award, the Trustee was not served motion material. The Applicant claimed that she was not aware of the Respondent's application for bankruptcy until August 22, 2019, by which time the costs award had been paid out of the Respondent's share of the proceeds by the real estate lawyer.

On this most recent motion, the Applicant asked for a declaration that, by virtue of the June Order (wherein the net sale proceeds from the sale of the parties' jointly owned matrimonial were to be held "as security for" the Applicant's spousal support claims), the Applicant's interest in the Respondent's 50 percent share of the net sale proceeds was a secured claim and had priority over the Trustee in Bankruptcy.

For its part, the Trustee argued that it was entitled to the Respondent's 50 percent share of the proceeds as a result of the Respondent's assignment in bankruptcy and the usual vesting provisions in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

The Respondent, being an undischarged bankrupt, had no standing to respond to the motion, and took no position on this issue.

Subsection 70(1) of the *BIA* states:

> Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, **except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor**. [emphasis added]

That is, the bankruptcy takes precedence over all but a fully executed execution and the rights of a secured creditor.

The corollary to s. 70(1) is found in s. 71 of the *BIA*, which provides that the property of the bankrupt vests with the Trustee upon an assignment being filed:

> On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act **and to the rights of secured creditors**, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer. [emphasis added]

Therefore, the question was whether or not the Applicant was a "secured creditor".

In the *BIA*, a "secured creditor" is:

> 2. In this Act, . . . secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

Justice McCarthy found (correctly based on the case law) that the Applicant was *not* a secured creditor. Therefore, the Respondent's 50 percent of the net proceeds vested in his Trustee as of the date the assignment had been made.

The use of the words "security for payment for the Applicant's spousal support claims" in the June Order did not make the Applicant a secured creditor. Rather, those words were only meant to preserve the proceeds so that they could be available to pay the Applicant's spousal support claims, if proven. While the "spectre of bankruptcy" had been mentioned on the hearing that resulted in the June Order, something more than that was required. Here, the court did not stipulate (nor was it asked to stipulate) that the Applicant would stand as a secured creditor for the purposes of the *BIA*.

In *Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.*, 1995 CarswellOnt 319 (Gen. Div.), aff'd 1997 CarswellOnt 22 (C.A.), the motions judge had similarly ordered that a defendant pay a certain sum into court "as security for the Plaintiff's claim." It was subsequently held that this wording did not create a security interest in favour of the plaintiff. The Ontario Court of Appeal agreed, and held that the order in question "did no more than create a fund to abide the outcome of the trial and cannot be treated as constituting the appellant a secured creditor." The wording of the June Order in *Johnston* was very similar, and Justice McCarthy was satisfied that the intention of the wording in both orders was the same: to preserve a pool of money that could be used to satisfy the Applicant's claim for spousal support, if successful.

This decision, while unfortunate for the Applicant, is correct in law. At the time of the June Order, the Applicant could not have qualified as a secured creditor; the Applicant's right to spousal support had yet to be determined. Again, the order in question was simply a mechanism to allow the Court (perhaps sensing that an asset was in danger of being deliberately dissipated), to preserve that asset.

In *Bascello v. Bascello (Trustee of)*, 1997 CarswellOnt 892 (Gen. Div.), Justice Kozak said that to determine whether an Order made under the *Family Law Act* or *Divorce Act* elevates a party to the status of "secured creditor", the Court must examine all the pertinent circumstances, including the language of the Order itself. However, in one of the leading cases about the interplay between family law and bankruptcy law, *Thibodeau v. Thibodeau* (2011), 5 R.F.L. (7th) 16 (Ont. C.A.), the Ontario Court of

Appeal cautioned that in conducting this exercise, the Court must look for clear language pointing to an intention to create a secured creditor within the meaning of the *BIA*:

> [49] . . . judges should be wary about interpreting orders that are principally designed to assist one spouse in his or her efforts to enforce the order vis-a-vis the other spouse in a fashion that gives the payee spouse an advantage over third parties whose interests are at stake and who were not before the arbitrator or the court at the time the award/order was made.

Thibodeau also confirms that an order or agreement that one spouse pay an amount from his/her share of net proceeds of sale (or presumably any other fund) does not create a trust relationship that would make the proceeds exempt from a subsequent bankruptcy. The Court in *Thibodeau* was clearly concerned about family law "machinations" being used to get around the *BIA* to the prejudice of third-party creditors. See also *McCoy v. Hucker*, 1998 CarswellOnt 2919 (Gen. Div.). Even though the Respondent may have gone bankrupt to avoid having to pay the Applicant's legitimate claims, that alone did not justify the retroactive creation of a remedial trust-like relationship or the strained interpretation of an existing order, in what would essentially have been an indirect attempt to reorder priorities in the bankruptcy (see *Thibodeau*, at para. 54).

In making the June Order, the Court was clearly concerned that the Respondent's continued conduct might lead to the Applicant being unable to collect spousal support. But much more would have been required to conclude that the Court meant to create a security interest that would prejudice the rights of other third-party creditors - especially given the preferred status that is already given to spousal support under the *BIA*. The June Order was more in the nature of a Preservation Order - not an Order that created a security interest.

It also did not help that following the June Order, the parties agreed to an Order directing that $19,000 be paid from the net proceeds to retire a joint line of credit. That was inconsistent with either party believing that the Respondent's half of the proceeds stood solely as security for the payment of spousal support in priority to all creditors.

As a result, Justice McCarthy concluded that the June Order did not create a security interest in favour of the Applicant in the Respondent's half of the net proceeds. Rather, the Respondent's share vested in the Trustee when the assignment was filed on June 3, 2019. Therefore, any order that purported to deal with the Respondent's share of the proceeds without notice to the Trustee and outside the ambit of the *BIA* was a nullity. And, therefore, that portion of the costs order directing that $25,000 be paid to the Applicant out of the Respondent's share of the net proceeds also had to be set aside.

The Trustee was entitled to $85,000 based on the value of the Respondent's share of the net proceeds at the time of his assignment. Fortunately for the Applicant, as there was still sufficient money in trust from the sale to pay this amount in full, there was no need for the Court to Order the Applicant to repay any of the money that she had already received to the Trustee.

A Handy-Dandy List of Shared Parenting Factors, Considerations and Principles

CAS v. NPC (2020), 43 R.F.L. (8th) 73 (Alta. Q.B.) - Lema J.

Separated parents disagreed on parenting for the 4-1/2 and 2-1/4 year-old children. The mother had been the primary parent since at least separation and wanted to continue in that role. The father wanted an order for shared parenting.

So Justice Lema took the opportunity to list and synthesize all of the shared custody factors, principles, and considerations set out in past cases.

In this instance, the Court decided that the children were served by a gradual move to a shared parenting arrangement.

The Court first noted the three fundamental principles set out in the *Divorce Act*:

- Subsection 16(8), which clarifies that only the best interests of the children matter;

- Subsection 16(9), which says that the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of the child; and

• Subsection 16(10), which calls for as much contact with each spouse as is consistent with the best interests of the children.

The Court then set out some 25 factors from previous cases - with citations - that tend to support and oppose an award of shared parenting:

[9] Factors supporting shared parenting include:

• both parties being capable and engaged parents: *PJG v ZIG*. See also *AB v CD* ("both parents have the willingness, and ability, to provide for the needs of their children"); *CRW v SJA* ("[non-primary parent] exhibit[s] good parenting skills"); and *Botticelli v Botticelli* (where one-time statement by non-primary parent expressing doubt about his child-care abilities explained and discounted);

• good communication between the parents: *SDK v AL*. In *Thember v King*, "serious communication problems" and generally high conflict had been partly overcome and did not preclude shared parenting. In *Gray v Gray*, parties were perceived as capable of achieving sufficient level of cooperation;

• each parent loving the children and "no evidence that they will not be properly cared for with all their needs being met in the care of each parent": *Gordon v Gordon*; "both parents loving and capable": *Parsons v Parsons*; "no evidentiary basis for questioning either party's commitment or ability to provide for all of the physical, emotional, cultural, moral and spiritual aspect of their children's lives": *Duckett v Duckett*;

• adequate proposed work and child-care arrangements from the non-primary parent, even if less developed than the primary parent's: *Gray v Gray* (para 17);

• history of shared parenting (during relationship and first two years after separation - discontinued when father moved temporarily for work): *Leikeim v Leikeim*;

• parents having different and important interests and capabilities to pass on to their children: *Leikeim v Leikeim* at para 33;

• where children (8 and 9 years old) have spent significant time with the non-primary parent and have strong attachments to both parents: *TLG v CLL*; where young child (2.75 years) having had close to daily contact and every-second-weekend overnights with non-primary parenting for over 1.5 years: *VC v KC*;

• a parenting assessment recommending shared parenting: *MacDonald v MacDonald*; *PJG v ZIG* at paras 15-17 and 29;

• children (9 and 10 years old) preferring shared parenting (views sounded by parenting expert): *PJG v ZIG* at para 33;

• child's extracurricular activities not having to change; *MacDonald v MacDonald* at para 6;

• shared parenting enhancing children's contact with mother's cultural background: *Hunt v Hunt*;

• increased opportunity for child to learn each parent's first language: *VC v KC*;

• "[increased] rich time" with half-siblings residing with the non-primary parent: *CZ v RB*; see also *MacDonald v MacDonald* (cited above) at paras 6 and 10; increased contact with half-sibling not residing with mother but in her orbit: *Hunt v Hunt* (para 83); opportunity for closer contact with half-siblings living with non-primary parent (particularly important where those children are mid- to late-teen ages and soon to be more involved in outside-of-family life): *VC v KC* at para 21;

• child retaining "meaningful contact" with other members of his family (step-siblings residing with current primary parent): *MacDonald v MacDonald* at para 11;

• continuation of shared parenting allowing children to continue attending the school where their friends are and where one of the parents worked: *PJG v ZIG* at para 32;

• nothing to suggest any harm to or neglect of child by non-primary parent (*CRW v SJA* at para 20) or that non-primary parent unfit: *SDK v ALK*;

• non-primary parent in unique position to assist child with disabilities, having experienced similar ones in childhood: *CRW v SJA* at para 20;

• both parents having an appropriate residence for the children: *Nissen v Nissen*; father's home not as luxurious as mother's but "adequate for the children's needs": *AB v CD* (at para 33);

• where the non-primary parent "would likely require the assistance of his parents" with child care, the involvement of those grandparents not being a negative factor: *Nissen v Nissen* (paras 16 and 24); "[shared parenting will help] maintain the close relationship [the children] have always had with their paternal grandparents", who will assist the father when he shared-parents the children: *Moreau v Moreau*;

• the ability of both parents to adapt easily to shared parenting: *Nissen v Nissen* (paras 16 and 24);

• a shift to shared parenting "[giving the current primary parent] a break from the children and allow[ing] her more time to build [a] business]": *Nissen v Nissen* (paras 16 and 24)

• manageable driving time between parental residences: *CZ v RB* at para 33; *MacDonald v MacDonald* (cited above) at para 6 (parties living in a "small community" and travel arrangements "not onerous"); *SDK v ALK* (cited above) at para 33 ("[child's] travel time to school is significant with both parents and should not be an impediment to shared parenting");

• where the current primary parent's only objections were that "change would be difficult" and that the other parent "can be difficult": *Nissen v Nissen* (latter dimension attributed to resolved-by-trial financial issues) (para 119 of QB decision);

• where shared parenting may neutralize or minimize the parents' communication difficulties and personal hostility: *TT v JT*; "shared parenting will tend to prevent the type of bickering in which the parents currently engage over small matters": *Moreau v Moreau* at para 16;

• a primary parent's efforts to thwart the other's parenting time: *CZ v RB* (para 33 of CA decision);

• the current access parent and a new partner "providing a loving home to the children": *CZ v RB* (para 33 of CA decision);

• a working-at-home non-primary parent's ability to manage both work and child care: *VC v KC*;

• child care provided by one parent's new partner not a counter-indicator to shared parenting, especially where other parent also relies on non-parental child care: *PLM v DJH*;

• when setting interim parenting, where the post-separation *status quo* was shared parenting: *HG v RG*. See also *LDM v WFT* at paras 7-8; and

• existing shared parenting to continue during investigation of one parent's mental health as long as she resided with her parents: *Christensen v Stephen*.

[10] Factors signaling against shared parenting include:

• parents' inabilities to put their children's interests ahead of their own to such a degree that regular cooperation and coordination in scheduling is impossible: *Rensonnet v Uttl* at para 25 (CA decision). See also an earlier ABCA decision in that matter: *Rensonnet v Uttl*, as well as *DH v. MLD* and *PT v LM* (one parent largely responsible);

• the parties being and having been in "substantial conflict" and lacking a "genuine willingness to work together to ensure the success of a shared-parenting arrangement." (Per a parenting expert, it would be "pretty much impossible" for them to make decisions together): *AE v TE*;

• where separation of the child from his or her primary caregiver, particularly at a young age (children there 8 and 9), may be emotionally and developmentally disruptive for the child: *TLG v CLL*;

• medical evidence suggesting no major changes to routines of seriously disabled child: *AJC v TCC*;

• a parent's frequent violence and angry outbursts against child; child feeling need to disparage other parent in that's parent's presence; child at risk of serious psychological problems (shared parenting discontinued): *LSA v JM*;

• one parent's residential and new-relationships instability, coupled with information gap about who would care for child during that parent's working time: *Davenport v Misa*;

• a parent's proposal that each enroll the children in separate activities, to be pursued only while with the enrolling parent ("would lead to parallel, compartmentalized lives and . . . severely restrict the type of activities in which they could engage"): *Rensonnet v Uttl* (CA decision #1) at para 20;

• one parent having "more scheduled" work commitments requiring him to "delegate responsibility to third parties[,] which would offer less consistency than that available with [the other parent], who worked from home": *Rensonnet v Uttl* (CA decision #1) at para 20;

• the absence of definite plans for where the non-primary parent would live with the children or where they would go to school: *Rensonnet v Uttl* (CA decision #1) at para 20;

• the opposed-to-shared-parenting opinions of the children (15 and 12 years old), as reflected in a Practice Note 7 "View of the Child" report finding their opinions to be "independent and considered": *Shwaykosky v Pattison* (interim-order context). See also *VSG v TAH*;

• one parent's move (from Edmonton to Kelowna) making it "impossible to continue with the alternating week parenting schedule": *DB v MB*;

• too much travel (between Red Deer (school) and Rocky Mountain House (mother's residence)): *Cook v Ross*; distance between parents' residences (Lloydminster to Paradise Valley area) making shared parenting impractical once children starting extracurricular activities: *Gregory v Ball*;

• one parent very likely moving away to resume education: *Gregory v Ball* at paras 30 and 31 (QB decision);

• "demonstrated inability [of non-primary parent] to responsibly exercise his access over the last two years" (father missed about 80 per cent of access time), plus father in flux with new family on a different continent and trying to relocate them to Canada . . . father unable to provide "stability and predictability": *Ernst v Martins*; before trial, where there is significant disagreement on the evidence: *Rensonnet v Uttl* (CA decision #1) at para 9;

• a shared-parenting regime will not automatically be restored after a long departure from it (father out of contact for many years): *RV v RP*;

• mere fact of non-primary parent (here, father) having more time and ability to parent is insufficient; evidence lacking on strength or importance of relationship between children, on the one hand, and father's new partner and child with

her, on the other, as well as on father's proposed special-needs accommodations and school-attendance commitments: *IMD v RAD*;

• shared parenting not to start until non-primary parent has his own residence that can accommodate him and the children: *Leikeim v Leikeim* at para 34;

• shared parenting not in four-year-old's best interests; may be appropriate later: *Witherly v Witherly*;

• one parent's possible serious alcohol dependency - increased (but not shared) parenting for her - to be reviewed in nine months for independent evidence of her condition: *Cech v Fisher*;

• no shared parenting until mother demonstrating healthy and safe home environment for the children (series of unstable post-separation relationships): *Babich v Babich*;

• shared-parenting issue deferred to special chambers with *viva voce* evidence in light of insufficient evidence on impact of proposed "sibling break-up" (only some children proposed for shared parenting), the impact on the children of witnessing an altercation between the parents, and one child's subpar school performance: *RNK v JLL*;

• no shared parenting until (at minimum) "the children's wishes can be ascertained with the assistance of an expert" (children 15 and 13): *Oosterhuis v Oosterhuis*; and

• resumption of interrupted shared parenting deferred until re-introduction-of-absent-parent process completed: *SLT v AKT*. [citations omitted]

While determining parenting arrangements is certainly not a "box-checking exercise", the listed factors can serve as *indicia* of the best interests of the children. And, of course, the weight to be given to these factors will change from one case to the next.

In this case, the mother's primary argument was that she had always been the children's primary caregiver. While much of the affidavit material conflicted, the *undisputed* evidence seriously undercut many of the mother's claims and allegations in that regard. This serves as a good reminder: while the Court should not make orders based on a conflicting paper record, some conflict is more apparent than real. [See *O.M. v. S.K.* (2020), 42 R.F.L. (8th) 343 (Ont. S.C.J.); *C. (P.A.) v. C. (W.D.)*, 2012 CarswellAlta 186 (C.A.)]

Upon reviewing the evidence, Justice Lema found that:

- the parents were both loving, capable, involved, and committed parents;
- each had a track record of taking the parenting lead, at various times, over many years;
- their communication difficulties did not appear insurmountable;
- they were able to cooperate at times;
- no evidence pointed to the children not being strongly bonded to both parents;
- the children's needs would be fully met in each home;
- each parent appeared to have a suitable-for-parenting residence; and
- none of the counter-indicator factors applied here, with one possible exception (discussed next)

What of the fact that the children were quite young - 4-1/2 and 2-1/4 years old? Was that too young for shared parenting?

While there are certainly decisions that go both ways - as one would expect when the sole criteria is the best interests of the specific children before the Court - Alberta courts (and other provincial Courts) have certainly approved shared parenting for

very young children. [See, for example: *Parsons v. Parsons* (2014), 50 R.F.L. (7th) 451 (Alta. Q.B.) (1 year old); *Botticelli v. Botticelli* (2009), 74 R.F.L. (6th) 367 (Alta. Q.B.) (22 months old); *Eberle v. Pascoe*, 2009 CarswellAlta 303 (Q.B.) (2 years old); *Lowes v. Lowes*, 2012 CarswellAlta 363 (Q.B.) (2 and 4 years old); *AH v. KC*, 2018 CarswellAlta 1766 (Prov. Ct.) (three years old); *Cavannah v. Johne* (2008), 64 R.F.L. (6th) 203 (Ont. S.C.J.) (2-1/2 years old); *Button v. Konieczny*, 2012 CarswellOnt 12353 (S.C.J.) (3 years old); *White v. Stevens-White*, 2013 CarswellNS 852 (S.C.) (4 years old); *T. (J.E.) v. O. (L.)*, 2015 CarswellYukon 76 (S.C.) 2-1/2 years old); *Dukart v. Quantrill* (2015), 74 R.F.L. (7th) 328 (Sask. C.A.) (6 years old); *C.D.B. v. A.B.*, 2017 CarswellBC 3615 (S.C.) (5 years old); *Amazon v. Minniefield*, 2019 CarswellNS 17 (S.C.) (14 months old); and *Al Tamimi v. Ramnarine* (2020), 46 R.F.L. (8th) 174 (Ont. S.C.J.) (2 years old)]

Ultimately, a shared parenting schedule was determined to be in the children's best interests. However when it came to decide the "rhythm" of the shared parenting schedule, Justice Lema gave the parties 10 days to decide what schedule worked best for them, failing which they would each put forward their proposed schedules and let the Court decide. We do not know whether this was ultimately a prescient way to encourage the parties to cooperate further; or whether they had to go back to court.

The Taxman Cometh

White v. The Queen, 2020 CarswellNat 237 (T.C.C. [General Procedure]) - D'Arcy J.

We'd like to thank Rob Kreklewetz of Millar Kreklewetz LLP for bringing this case to our attention.

One of the CRA's particularly draconian collection powers is its ability to issue "derivative assessments" to relatives of taxpayers who received money, property, or dividends from a corporate tax debtor at a time that the corporation or the director had an outstanding tax liability.

We recently discussed the CRA's powers under s. 160(1)(e) of the *Income Tax Act* in the July 6, 2020 edition of *TWFL*. That section imposes joint and several tax liability on a spouse, common-law partner, minor, or otherwise non-arm's length party who received property from a transferor who had an outstanding tax liability at the time of transfer (to the extent that the consideration paid was less than fair market value).

Here's another one. Under both s. 160 of the *Income Tax Act* and s. 325 of the *Excise Tax Act*, the CRA can assess the *relatives* of a taxpayer where there has been a transfer of property for less than fair market value. And, to make it more fun, there is no statute of limitations on these so called "Related Party Transfers".

In *White v. The Queen*, a corporate director became liable for the corporation's default of GST and source withholding obligations, and his wife was assessed many years later for the amounts that the husband/director had contributed to their joint bank account.

In August 2009, the husband/director, Mr. White, was assessed personally for his corporation's tax debt. Mr. White subsequently obtained new employment (his corporation failed), and between March 2013 and March 2014, he deposited $89,806 of employment income into a joint bank account with his wife. In March 2016, the CRA assessed the wife for the amounts that Mr. White had deposited to their joint bank account that were subsequently used to pay the wife's line of credit and the mortgage on a home that was solely owned by her.

The Tax Court of Canada concluded that the actual deposits into the joint account were not, in fact, Related Party Transfers (because Mr. White continued to have access to the funds in the joint account). However, once the wife accessed those funds, that *did* constitute a "transfer", and the wife then became liable to repay them to the CRA.

This certainly raises questions about where the CRA's derivative assessment powers end.

Sleep well.

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