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General

The editors-in-chief of the Ontario Family Law Monthly (OFLM) are David Frenkel and David Tobin.

Various authors contribute to the text of the OFLM.

The articles in the OFLM are offered to educate, engage and inspire.

Legal Notice

The writers of the Ontario Family Law Monthly have contributed to this publication in lieu of spending more time with their family and friends. Depending on the family member or friend, the choice sometimes was purposeful. The writers have tried to provide the reader with enough legal information to help them understand the subject matter, but hopefully not too much as to put them to sleep. Regardless of the reader's conscious state during or after reading the article(s), **the OFLM is not a substitute in any way for legal or other professional advice, and no action should be taken by the reader without the advice of a lawyer** (and sometimes even if the reader is a lawyer themselves). Therefore, **if the reader requires legal or other expert advice, they should seek the services of a competent lawyer or other professional** (keyword is "competent").

Clients setting aside separation agreements: a recent decision and important principles

David Frenkel

Overview

The following article summarizes the recent decision of *Yin v. Feng* (2024 ONSC 455) which includes the legal claims often made when attempting to set aside a separation agreement. Those claims include insufficient financial disclosure and improper legal advice. The article also addresses the relevant legal principles and some common practical considerations that family lawyers should keep in mind when executing a domestic contract.

Introduction

Family law clients attempt to set aside separation agreements quite regularly. Every few weeks or so, a reported decision comes along showing yet another unsatisfied customer that either wants to set aside all of an agreement or just part of it.

Most of the time the claimant is unsuccessful because they don't have a genuine case to begin with. And in football terms, you can call it a Hail Mary attempt to right a self-inflicted wrong.

But as we know watching football highlights, Hail Marys do happen and thus you can't rule out their possible success on the football field and in the court room.

Therefore, as family law lawyers, it is important to stay up to date with the reasons why certain separation agreements get set aside and why others do not.

The following example is a Hail May that did not end up being caught.

Facts

In *Yin v. Feng* (2024 ONSC 455), a husband tried to set aside a separation agreement that he was not particularly happy about. The case summarizes the latest legal principles associated with such a claim and also provides important lessons that family lawyers can learn from.

In *Yin*, the husband wanted to set aside parts of a separation agreement relating to property division for three reasons: (1) due to the wife not disclosing certain assets, (2) an alleged side agreement between the parties that should have been followed and (3) him not receiving proper legal advice.

The wife also wanted to set aside parts of the agreement, but only those dealing with parenting time.

The parties were married for 20 years, had three children, ages 12, 15 and 19. When they separated, they owned a matrimonial home, a condominium, and two cottages.

About a year after the parties separated, the husband contacted a lawyer to help them draft a separation agreement. The lawyer initially assisted both parties and worked together with them to incorporate their wishes into the draft. During this period, the parties also exchanged financial disclosure. After some time, the wife retained a different lawyer to review the draft agreement.

About three weeks later, the wife's lawyer delivered to the husband a revised draft of the agreement which the parties executed.

About two months after signing, the parties completed the transfer of the properties. Specifically, the husband received the condominium, the wife received the matrimonial home and each of the parties received one of the two cottages.

The first argument of the husband was that at all times he was expecting the properties to be appraised so that the correct calculation would be determined. He requested the appraisals while the first lawyer was drafting the agreement and even

upon signing the final draft. The draft the wife's lawyer completed included estimated values of the properties but no formal appraisals. The wife even offered to defer the signing until the appraisals were done, but the husband insisted the agreement to be signed expeditiously.

According to the agreement, the net value of the two properties the husband received was $300,000 less than what the wife received ($1,200,000 versus $1,500,000). Subsequent appraisals showed that the difference was even greater. Unsurprisingly, this situation caused the husband to claim the inequity which he wanted to fix by setting aside the agreement.

The husband claimed that the parties always planned and agreed to obtain formal valuations of the properties and by not doing so, created an unequal and unfair result.

The husband's second argument was that the wife failed to provide certain financial disclosure of accounts and investments that she owned.

The final argument was that the husband did not receive appropriate legal advice from his lawyer and therefore was unable to understand the risks associated with the provisions of the agreement.

Legal principles

In *Yin v. Feng*, the court began their analysis with section 56(4) of the *Family Law Act* to determine whether (a) the wife failed to disclose, (b) the husband did not understand the nature or consequences of the contract, and (c) otherwise with the law of contract.

As the court elaborated on, if any of the above three provisions had become engaged, then it needed to consider whether it was appropriate to set aside the agreement. Justice Black referred to the often-quoted cases of *LeVan v. LeVan* (2008

ONCA 388), Toscano v. Toscano (2015 ONSC 487) and *Hashemi v. Alanimehr* (2021 ONSC 8569).

As a refresher, *LeVan v. LeVan*, 2008 ONCA 388 (at para. 51), stands for the principle that the analysis undertaken under s. 56(4) is essentially comprised of a two-part process. First, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged. Once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.

The principle in *Toscano v. Toscano* is that a party cannot resile from the consequences of failing to compel further disclosure unless that party can demonstrate that the financial disclosure provided was inaccurate, misleading or false (at para. 47).

Justice Black also referenced three more relevant cases. The first was the recent Supreme Court of Canada decision of *Anderson v. Anderson* (2023 SCC 13). As Black J. pointed out, *Anderson* stands for the proposition that an agreement negotiated between parties needs to be respected unless it arose from an unfair bargaining process. The second and third cases were *Peerenboom v. Peerenboom* (2020 ONCA 240 at para. 62) and *Hartstein v. Ricottone* (2016 ONCA 913 at para. 13). Those cases dealt with the principle that courts should examine the wording of domestic contracts based on a plain reading of it.

With respect to the lack of disclosure argument, the court referred to another seminal case, namely, *Quinn v. Epstein Cole LLP et. al* (2007 CanLII 45714 (ONSC)) along with *Odorico v. Odorico* (2021 ONSC 7290). Justice Black indicated that general awareness of the assets of the other party may be sufficient to avoid setting aside an agreement.

Again as a refresher, in *Quinn v. Epstein Cole LLP* the court held that parties are expected to use due diligence in ascertaining the facts underlying their agreements. A party cannot fail to ask the correct questions and then rely on a lack of disclosure. One must inquire whether the responding party withheld information or whether the information was available to the party seeking to set aside the agreement. (at para. 48)

Additionally, the court referred to *Turk v. Turk* (2018 ONCA 993) and noted that if more disclosure would not have changed the outcome, then that additional disclosure would not be "significant" for the purposes of s.56(4)(a).

The final argument of the husband revolved around not receiving proper legal advice. On this issue the court referred to two relevant cases.

The first case was *Harnet v. Harnett* (2014 ONSC 359), where Justice McGee determined that even when a lawyer provides a client with deficient legal advice, it still may not be sufficient to set aside an agreement. In *Harnet*, the court considered the fact that the plain reading of the agreement was sufficient to understand its nature and its consequences. Justice McGee also indicated that the court is less likely to interfere when the party seeking to set aside the agreement "is not the victim of the other, but rather his or her own failure to self-protect." Justice McGee also referred to a 1968 Ontario Court of Appeal decision of *Mundinger v. Mundinger* (1968 CanLII 250 (ON CA)) that stood for the proposition that courts typically step in to protect the client against being taken advantage of "by those in a position to do so because of their position".

The second case Justice Black referred to was *Gibbons v. Mulock* (2018 ONSC 4352) where Justice Jarvis dismissed a husband's application to set aside a marriage contract finding that the husband understood the contract. Jarvis J. also noted as follows:

> The issue of the competency of legal advice given to him is an issue between the husband and Mr. Baker, and is not a reason to set aside the marriage

> contract unless the wife knew that the husband did not understand what he was signing…

With respect to the second stage of the s.56(4) analysis, the court referred to the *Dochuk* factors (as affirmed in many cases including *Torgersrud v. Lightstone* (2023 ONCA 580 at para. 20)). Those factors include:

> (a) whether there had been concealment of the asset or material misrepresentation;
>
> (b) where there had been duress, or unconscionable circumstances;
>
> (c) whether the petitioning party neglected to pursue full legal disclosures;
>
> (d) whether he/she moved expeditiously to have the agreement set aside;
>
> (e) whether he/she received substantial benefits under the agreement;
>
> (f) whether the other party had fulfilled his/her obligations under the agreement.

Decision

Justice Black dismissed the husband's claim to set aside the agreement (as well as the wife's claim).

The court found that the following factors contributed to its reasoning:

- The husband was a sophisticated party who had the benefit of legal advice throughout the entire process.
- The husband did not seek to set aside the part of the agreement that indicated the parties signed it voluntarily and that they waived any need for more fulsome financial disclosure.
- The agreement was clear in that no further appraisals were to be conducted and thus contrary to the husband's claims that the parties agreed to do so.

- The agreement was clear that the parties were not following the equalization regime under the *FLA* and that it was a "full and final agreement between the parties".
- The agreement indicated that only the joint accounts were to be divided and thus the existence and extent of other accounts that may have not been disclosed by the wife were irrelevant. (*However, the court also said that had the wife's undisclosed assets were more substantial or significant, its conclusion would have been harder to maintain.)
- The husband was generally aware of the existence of the wife's personal accounts and that he made no inquiry or particular effort to determine their worth.

Understanding the contract

Regarding the claim of the husband not understanding the contract and not having sufficient legal advice, his arguments also failed.

Justice Black found that the husband was bright, sophisticated and the English language was not an issue. The husband also had an "acute grasp" of financial concepts and was "adept" at working with numbers generally.

Despite the husband's expectations that the division of properties between the parties would be adjusted after formal appraisals, the agreement clearly precluded such interpretations.

In essence, the husband "understood or ought to have understood" that when signing the agreement, "he risked or accepted not having any further recourse once the deal was executed."

Moreover, the husband also benefited from the agreement being signed. It allowed the process to occur expeditiously. It allowed him to receive and refinance the two

properties before potentially losing his job and losing a potential ability to qualify for the mortgage loans.

Whatever deficiency was present with respect to the legal advice the husband received, the court found no evidence that he was pressured by his wife to sign the agreement or that he did not understand it.

Second stage of the s.56(4) analysis

The court held that the husband did not meet any one of the statutory reasons to set aside the agreement.

Still, Justice Black went through the second stage of the analysis to determine whether there was any discretion to set the agreement aside.

In going through the *Dochuk* factors as discussed above, the court found no compelling basis on which any of the factors would cause him to exercise his discretion.

Practical considerations

The decision of *Yin v. Feng* reinforces several steps that family lawyers should take when drafting and executing separation agreements.

The first step is to review the main parts of seminal cases that address the issue of setting aside agreements. The reason being is that during the period of finishing a case, the mind may overlook the real possibility that your client or the opposing counsel's client may attempt to set aside the agreement in the future.

When representing the client that is provided with deficient or outstanding disclosure, we have an obligation to advise them of their responsibility to be vigilant in seeking additional disclosure. Significant omissions in disclosure production can

result in an inequitable division of property or receiving support that is not reflective of available income. If this occurs and a client is unsuccessful to set an agreement aside, they may turn to their lawyer for recourse. At that point, you would have wished that you sufficiently documented your advice to seek additional disclosure.

On the other hand, if you are representing the client that is not providing sufficient disclosure and that omission is significant, then the risk is that that omission can be a contributing factor in the agreement being set aside in the future. At that point, the client may also turn to you unless you have warned them at the time of executing the agreement that this could occur. Hypothetically, they can say that they were not advised that the outstanding disclosure can contribute to an agreement being set aside.

With respect to the issue of a client understanding the agreement itself, there are practical considerations arising from this as well.

When representing clients that are about to enter into a separation agreement, it would be prudent to discuss the important terms with them way ahead of any signing dates. Following such meetings, a reporting letter should be sent summarizing the discussions. This way, the client has sufficient time to digest what you are advising and have it also in writing as an opportunity to reflect on the discussions.

Often times after an important mediation session or court appearance, clients walk away in a fog and their recollections hazy. They are bombarded with a lot of information in a short period of time. They hear legal terms that they likely will not fully understand. They are making critical decisions while under very high levels of stress.

Therefore, it is important to regularly document your discussions with clients to allow them an opportunity to strengthen their knowledge and understanding. This way, when it does come to the day when an agreement may be reached within a short

period of time, they are prepared as best as they can and their stress-inducing factors minimized.

As lawyers, we can't predict all issues that arise when executing a separation agreement, but we can anticipate most of them.

Our job is to communicate this information to our clients clearly and effectively with sufficient notice. We also need to anticipate their particular stresses at various stages of the litigation and negotiation.

If we succeed in informing our clients of what they can expect to experience with sufficient clarity, then we have made their journey with us a bit less stressful, and our work, that much more satisfying.

Penalty hearings in contempt proceedings: A review of the applicable principles

Christina Hinds

Overview

In *E.M.B. v. M.F.B.* (2024 ONSC 162), Justice Mandhane considered the appropriate penalty after finding the mother in contempt. The father sought a reversal in primary parenting and decision-making.

Justice Mandhane reviewed Rule 31(5) of the *Family Law Rules* and considered the court's broad discretion to determine an appropriate penalty in contempt proceedings.

A reversal in primary parenting is an extreme order. Justice Mandhane noted that even at the penalty stage of a contempt hearing - where the overall goal is to promote compliance with court orders by punishing the contemnor and providing restitution to the victim – the only basis for ordering a reversal of primary parenting is that such a reversal is in the child's best interests.

After considering the principles applicable at the penalty stage, as well as the child's best interests, Justice Mandhane ultimately declined to order a reversal in primary parenting. Instead, Her Honour made an order for make-up parenting time and an expansion of the father's parenting time.

Facts

In July 2021, Justice Mandhane made a final order with respect to parenting time and decision-making. The final order granted the mother sole decision-making and primary residence, with parenting time between the child and father.

The father brought a contempt motion in August 2022 and Justice Mandhane found the mother in contempt. The mother had breached the overnight parenting provisions of the final order on three separate occasions. The mother's previous conduct in

denying parenting time, including before the trial, seemed to influence Justice Mandhane's decision to find the mother in contempt rather than ordering a lesser penalty. At paragraph 20, Her Honour explained: "In exercising my discretion to find the Mother in contempt rather than ordering a lesser penalty, I found that the Mother's actions were consistent with of a larger pattern of conduct that started immediately upon separation, and which continued before and after the trial." Justice Mandhane noted that the mother had shown a complete disregard for court-ordered parenting time and frequently resorted to self-help measures. (at para. 20)

Between the contempt finding and the penalty hearing, the Office of the Children's Lawyer (OCL) completed a report to provide the court with insight into the child's current circumstances and best interests. Due to delays in receiving third-party records, the report was released in October 2023. As a result, 16 months passed between the contempt finding and the penalty hearing.

The OCL determined that the child was doing well academically and socially and was very attached to the mother. The OCL also found that the mother had limited insight into how her behaviour was impacting the father's relationship with the child. The OCL recommended that the child remain in the mother's primary care, but that the father's parenting time be expanded.

Principles of Sentencing in Penalty Hearings

Subrule 31(5) of the *Family Law Rules* provides the court with broad discretion when determining the appropriate penalty in contempt proceedings. If the court finds a person in contempt of the court, it may order that the person,

(a) be imprisoned for any period and on any conditions that are just;
(b) pay a fine in any amount that is appropriate;
(c) pay an amount to a party as a penalty;
(d) do anything else that the court decides is appropriate;

(e) not do what the court forbids;

(f) pay costs in an amount decided by the court; and

(g) obey any other order.

The above list is not exhaustive or mutually exclusive. In *Geremia v. Harb* (2007 CanLII 30750), Justice Quinn stated that: "Use of "may" in subrule 31(5) indicates that the seven enumerated possible "sentences" do not represent a closed list. As well, the seven sentences are not mutually exclusive and may be levied in any number and combination found to be just and appropriate."

The overriding purpose of sentencing in contempt proceedings is the preservation of the integrity of the administration of justice (at para. 10).

Breaching a family court order must have consequences and in high conflict matters, meaningful consequences are essential. Otherwise, allowing a contemptor to "get away" with breaching a court order could be misinterpreted as judicial condonation for their behaviour. (at para. 10)

Similar to sentencing in criminal proceedings, Justice Mandhane noted that the sanction imposed must be "proportionate to the nature of the contempt and the mitigating and aggravating circumstances" (at para. 11):

> The sanction I impose must be proportionate to the nature of the contempt and the mitigating and aggravating circumstances […] The penalty should be both restorative to the victim and punitive to the contemnor; it must correlate to the conduct at issue, while not reflecting a marked departure from penalties imposed in similar circumstances […] I must consider the available sentences, proportionality to the wrongdoing, similarity of sentences in like circumstances, the presence of mitigating and aggravating factors, deterrence, and the reasonableness of a fine or incarceration […]

Purging Contempt

Purging one's contempt does not negate the contempt but rather goes to the appropriate remedy. If a party has purged their contempt, this will be a mitigating factor when determining the appropriate penalty. (at para. 12)

The onus is on the contemptor to demonstrate on a balance of probabilities that they have purged their contempt (at para. 12). Justice Mandhane found that "even on the narrowest view of the world "purge", the mother had not purged her contempt." (at para. 23) The mother did not offer any make-up parenting time and she withheld further parenting time after the contempt finding.

Reversal in Primary Parenting

A reversal of primary parenting is the most extreme order that a court can make in a parenting dispute. Even in the context of a penalty hearing following a finding of contempt, the only basis for making such an order is because it is in the child's best interest. (at para. 5)

Justice Mandhane found that a reversal in primary parenting was not in the child's best interest, explaining that (at para. 6):

> The question is whether such an extreme order is in the Child's best interests because of the Mother's ongoing efforts to minimize the Father's parenting role. In my view, it is not. At this stage in the Child's life and in the life of this litigation, the parents need to focus on maintaining stability, minimizing parental conflict, and supporting one another in their respective roles. The proposed reversal would not accomplish any of these goals. An order for make-up parenting time, along with an expansion in the Father's parenting time is a more proportionate penalty for the Mother's contempt.

The court must "show great restraint" when revisiting a final order outside of the context of a motion to change and a contempt motion should not become a litigation tactic to avoid proving a material change in circumstances (at para. 14). Further, a reversal in parenting must never be imposed as punishment for contempt – the court must only consider such an order where it is in the best interests of the child (at para. 15).

At paragraph 16, Justice Mandhane cited four cases wherein a reversal in primary parenting was found to be in the child's best interests. These cases involved findings

of significant manipulation and alienation. Those cases included *Y.H.P. v. J.N.,* (2023 ONSC 5766); *S. v. A.,* (2021 ONSC 5976); *Wilson v. Wickham*, (2017 ONSC 5279); and *JLZ v. CMZ*, (2021 ABCA 200).

At paragraph 18, Justice Mandhane cited Justice McGee's comments in *S. v. A.*:

> [A] reversal of primary care is the most difficult of parenting decisions. It is an option that must be approached with caution, and each case must be considered on its own facts. A reversal is not a vindication of which parent is right or wrong. It is a finding as to which parent can best provide physical, emotional, and psychological safety and security to a child in distress. Which parent will best protect the child from the conflict and place the child's well-being above the litigation "win."

Conclusion

As the child was doing well academically and socially, saw the father regularly, and had a strong relationship with both parents, Justice Mandhane found that a reversal in primary parenting would not be in the child's best interest (at para. 6).

Justice Mandhane ultimately ordered make-up parenting time, an expansion of the father's parenting time, therapy for the child, and that the parties engage a parenting coordinator (at paras. 49 – 54).

A few takeaways/reminders:

- The court has broad discretion to determine the appropriate remedy following a finding of contempt.
- A party's behaviour, such as limiting parenting time, may follow them indefinitely. Lawyers should be upfront with their clients about the dangers of "self-help remedies" when they spot such behaviour.
- A reversal in primary parenting is an extreme order and even in contempt hearings, will not be made unless it is found to be in the child's best interests.

Sale of a Matrimonial Home – the Partition Act versus the Family Law Act

Amruta Ponkshe

Overview

For many separated spouses, decisions regarding the matrimonial home, its possession and disposition, can be a point of contention as it is often a significant (if not the most significant) family asset with high sentimental value. One party may insist on having exclusive possession of the matrimonial home, while the other may insist on its sale.

In Ontario, a party who wishes to force the sale of a jointly owned property may rely on section 2 of the *Partition Act* that empowers the court to order the sale of a jointly held property, including a matrimonial home.

The *Partition Act* does not apply when the matrimonial home is owned by one spouse. In such situations, the spouse who has sole title to the matrimonial home is *prima facie* entitled to sell the home, but section 21 of the *Family Law Act* prohibits alienation of the home without the other spouse's consent.

Section 23 of the *Family Law Act* empowers the court to authorize the sale of a matrimonial home if the court finds that the spouse whose consent is required is unreasonably withholding consent.

This article looks at the tests established in common law, family law principles and other factors that dictate whether an order for the sale of a jointly owned matrimonial home can be made, and provides a synopsis of leading and recent case law.

The Court's Discretion – the "malicious, vexatious or oppressive" test

The word "may" (as opposed to "shall") in section 2 of the *Partition Act* settles that the court has discretion to refuse partition and sale. The test for the exercise of the court's discretion to refuse partition and sale was affirmed by the Ontario Court of Appeal in

Silva v. Silva (1990 CanLII 6718 (ON CA)) and requires malicious, vexatious or oppressive conduct.

In simpler words, to avoid an order for partition and sale, the non-consenting party must show the court that the conduct of the party requesting the sale is "malicious, vexatious or oppressive".

Very few court decisions have provided insight into what amounts to "malicious, vexatious or oppressive" conduct. Justice Faieta provides an overview in *Hutchison-Perry v. Perry* (2019 ONSC 4381) at paragraph 35:

> There is some overlap in the scope of the terms 'malicious' or 'malice', 'vexatious", and "oppressive'. **'Malice'** arises when a proceeding is brought for an improper purpose including spite, ill-will, vengeance, or to gain a private collateral advantage: *Nelles v. Ontario* (1989 CanLII 77 SCC) at paras. 193-194. A proceeding may be viewed as **'vexatious'** for numerous reasons including when multiple proceedings are brought to re-litigate an issue already decided or when a proceeding is brought to harass or oppress others rather than to assert a legitimate right: *Re Lang Michener et al. v. Fabian et al*. (1987) (1987 CanLII 172 ONSC); *Van Sluytman v. Muskoka (District Municipality)* (2018 ONCA 32), at para. 23. A motion for the sale of a matrimonial home is **'oppressive'** when the co-tenant that opposes the sale will suffer serious hardship if the matrimonial home is sold: *MacDonald v. MacDonald* (1976 CanLII 845 ONSC), at para. 254. (emphasis added)

Intersection of the Partition Act and the Family Law Act

In *Jarvis v. Jarvis* (2023 ONSC 7203), the court discussed the intersection between the *Partition Act* and the *Family Law Act* at paragraphs 13 and 14 by referencing the seminal case of *Silva v. Silva* (above).

In *Silva*, the Court of Appeal dealt with the interplay between the *Partition Act* and the *Family Law Act* and at paragraph 24, the Court wrote:

> The two statues are not incompatible, but where substantial rights in relation to jointly owned property are likely to be jeopardized by an order for partition and sale, an application under the *Partition Act* should be deferred until the

> matter is decided under the *F.L.A*. Putting it more broadly, an application under s. 2 (of the *Partition Act*) should not proceed where it can be shown that it would prejudice the rights of either spouse under the *F.L.A*.

In *Silva*, the custodial mother had relocated to England with the child and was supported on welfare. She received no support payments from the husband, who resisted the sale the matrimonial home until the equalization issue was determined. The Ontario Court of Appeal held that there was no reason to defer the sale and division of proceeds while the parties waited to have their equalization claim determined later, illustrating the importance of freeing up capital to support the immediate needs of the family.

In *Martin v Martin* (1992 ONCA 7402), the Ontario Court of Appeal stated that orders for the sale of a matrimonial home before the resolution of *Family Law Act* issues (particularly the determination of the equalization payment) should not be made as a matter of course and that, in addition, spousal rights of possession under section 19 of the *Family Law Act* and any order for interim exclusive possession should be taken into account.

In other words, if the substantive rights under the *Family Law Act* may be jeopardized by an order for partition and sale, the sale should be deferred pending the determination of rights under the *Family Law Act*.

When a sale of a matrimonial home is sought under section 23 of the *Family Law Act*, the onus is on the non-consenting spouse to establish, for example, that their claim to have exclusive possession of the homes triumphs the other party's right to sale or that the children of the marriage would be adversely affected by the move. Justice Akazaki discussed this at paragraph 15 in *Jarvis* (above), referencing *Jamil v. Iqbal* (2014 ONSC 4650), at paragraph 6, and *Goldman v. Kudeyla* (2011 ONSC 2718), at paragraph 19.

Hardship and best interests of the children

In *Dhaliwal v. Dhaliwal* (2020 ONSC 3971), at paragraph 16, Justice Pazaratz summarized the following:

> …

(l) The court **must consider the impact of a proposed sale on children or a vulnerable spouse** -- including the emotional impact, and the fundamental need to ensure that they have appropriate housing. *Delongte v. Delongte* (2019 ONSC 6954); *Kaing v. Shaw* (2017 ONSC 3050). The availability and affordability of alternate housing must be considered. As part of the analysis, support obligations may need to be co-ordinated - even on a temporary basis - to ensure that any party displaced by a sale will have the resources to arrange reasonable replacement accommodation.

(m) Orders for sale of a matrimonial home at the interim stage should not be made as a matter of course. *Fernandes v Darrigo* (2018 ONSC 1039). The court must be **mindful of the whole of the proceeding**, and the need to achieve a final resolution for the family as fairly and expeditiously as possible. *Kereluk v. Kereluk* (2004 CanLII 34595).

(p) The stage of a child's academic progress might also be relevant. Sale might be delayed if it would **allow a child to complete a certain grade level before an inevitable switch to another school**. On the other hand, immediate sale might be more appropriate if the child happens to be transitioning to a new school in any event.

(q) But the mere existence of children in a household is not in itself a sufficient basis to oppose a sale. A generic statement that children enjoy living in their current house or that they will be unhappy if they have to move, is not sufficient. The **party opposing a sale must establish a likely negative impact** more serious than the inevitable adjustments and disruptions which all families face when parents decide to separate. (emphasis added)

Additionally, in *Scodras v. Scodras* (2005 CanLII 14146 (ON SC)), the best interests of the children were found to warrant a sale of the matrimonial home. The parties had four children together and each party cared for two children. While the mother lived in the home with the younger two children, the father only had an apartment for the older two children. Justice Gordon held that the father needed his equity from the matrimonial home to place the older children in his care on an equal footing with the younger children who were in the mother's care.

Financial hardship

In *Jarvis*, the father had sole ownership of the matrimonial home. While he moved out of the home after the parties' separation, the mother enjoyed *de facto* exclusive possession

of the matrimonial home with the two children of the marriage for approximately seven years. The father had requested the mother's consent to sell the home, liquidate the equity and ameliorate the parties' ability to look after the children on an equal economic footing. The mother refused the sale. Ultimately, the father brought a motion for an order under section 23 of the *Family Law Act*, to dispense with the mother's consent to sell the property.

The father had been carrying the property, including two mortgages, in addition to his child and spousal support payments. Despite earning a good income, he incurred a monthly deficit in the order of $4,000. He serviced a personal line of credit and two credit cards, all approaching $50,000. He had to borrow money from family members in the total amount of almost $100,000. He was in arrears with his landlord. The effect of this staggering debt could mean that the father would soon be unable to provide a home for the children during his parenting days.

Justice Akazaki acknowledged the father's financial hardship and granted the motion for sale of the matrimonial home. At paragraph 21, his Honour also discussed that the circumstances of the children clearly dictated that it was in their best interest to free up the capital locked into the home, and allow the parents to relieve financial pressure.

***Nasser v. Nasser* (2024 ONSC 303)**

In the recently heard case of *Nasser v. Nasser* (2024 ONSC 303), the parties were married in 1975 and separated in 2020, after which the husband moved out of the matrimonial home. The parties were retired and had their two independent adult children. The husband had approximately $600,000 in savings and drove a Porsche, while the wife had about $123,000 in savings.

The husband brought a motion for sale of the matrimonial home and requested that the proceeds of the sale be held in trust. He stated that he required the equity from the home to fund his day-to-day living expenses. The wife resisted the sale of the home and asked for its exclusive possession.

Justice Mandhane reiterated that as a joint tenant, the husband was prima facie entitled to partition and sale of the home. However, the husband's motion would not proceed if the wife could establish that the sale would prejudice the rights of either party under the *Family Law Act*, or that the husband had been malicious, vexatious or oppressive in pursuing the sale.

The wife argued that the proceeds from the sale would be required to secure a future order of equalization and that she may be entitled to an uneven distribution of funds. Justice Mandhane held that there was no risk of the funds being depleted or otherwise becoming unavailable for the purposes of equalization since the husband had requested that the proceeds be held in trust.

In terms of the wife's argument for exclusive possession, Justice Mandhane did not accept that the wife would be unable to find alternate housing. Her Honour discussed that the wife may not have as favourable a financial position as the husband, but she still had substantial savings.

Justice Mandhane ordered for that the matrimonial home be listed for sale withing 60 days of the date of the order. Her Honour also order the wife to pay $5,000 in costs to the husband for her unreasonable position resisting sale of the home.

Conclusion

Key takeaways? The court will consider whether there is malicious, vexatious or oppressive conduct on part of the person seeking the sale. The court is also concerned with the substantive rights of the party seeking the sale, and whether they will be prejudiced if the sale is not ordered. In addition, the best interests of the children will be primary consideration in this analysis.

Ultimately, as discussed in *Davis v. Davis* (1953 ONCA 148), each case must be considered on its own facts. The court must consider all relevant factors in exercising its discretion.

Therefore, as family lawyers, it is important for us to be mindful of all of the above factors whether we represent the spouse trying to sell or trying to stop the sale.

Looking to change your child's name? You will need more than a temporary order for decision-making.

Ainsley Doell

Overview

Courts have long recognized the importance of a child's name and its deeper connection to their identity. As such, they do not take applications to change a child's name lightly. This article will look at Justice Gibson's decision in *Tansley v. Dikianidis* (2024 ONSC 212), and discuss what the courts are looking for in determining whether a change of name is in a child's best interests.

Introduction

Names are widely considered to be "fundamental to a child's identity" (*Tansley v. Dikianidis*, 2024 ONSC 212 at para. 2). For many people, they can signify a sense of familial belonging. This is one reason why parents may seek to change their child's surnames to match their own following separation, but is also a reason courts may be hesitant to allow the change.

The decision in *Tansley v. Dikianidis* featured a dispute over whether a temporary order for decision-making granted a mother the authority to apply to change her children's names without the consent of their father.

Justice Gibson finds that the answer to this question is 'no', as determining whether the father's consent should be dispensed with would require a full inquiry into the best interests of the children.

This article will review the legislation that applies to changing a child's name in Ontario, before considering *Tansley* and the factors that will likely be relevant if and when the matter returns before the court during the May 2024 trial sittings as scheduled.

Legislative background

When a child is born in Ontario, their name is initially registered under the authority of the *Vital Statistics Act* (R.S.O. 1990, c. V.4) ("*VSA*"). Disagreements between biological parents regarding their child's surname are far from uncommon, and these disputes have often made their way to court. The *VSA* provides that where parents cannot agree on a child's surname, the child will be given a surname that consists of "both parents' surnames hyphenated or combined in alphabetical order", provided that the parents have different surnames (*VSA*, s. 10(3)).

The solution to this type of disagreement is more complicated when it arises later on in a child's life. For example, a single parent whose child shares a last name with an absentee parent may wish to change that child's surname to match their own. In situations such as these, the *Change of Name Act* (R.S.O. 1990, c. C. 7) ("*CNA*") applies.

The *CNA* provides that a person with lawful custody of a child can apply to have that child's name or names changed. This is of course subject to restrictions, such as where there is a court order or separation agreement in place which prohibits them from doing so (*CNA*, s. 5(1)). This also requires the consent of every person who has lawful custody, and anyone else whose consent is required by a court order or separation agreement. If the child is at least twelve years of age, their consent is also required (*CNA*, s. 5(2)).

The dispute in *Tansley* required Justice Gibson to consider the terms of the *CNA* in light of both the particular facts at hand as well as the still somewhat recent legislative changes that replaced the term "custody" from the vernacular and replaced it with "parenting time" and "decision making" in both the federal *Divorce Act* (R.S.C. 1985, c. 3 (2nd Supp.)) and the provincial *Children's Law Reform Act* (R.S.O 1990, c. C.12) ("*CLRA*").

It is worth noting that there is additional legislation in place that governs name changes in the context of surrogacy agreements and adoptive parents seeking to change the name of an adoptee child (see *for example* the *CLRA* and the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1).

Tansley v. Dikianidis

a. Facts

The subjects of the dispute in *Tansley* were 4-year-old Atticus and 2-year-old Mabel, whose parents cohabited for a period of approximately four and a half years prior to their separation in 2021. Many parenting issues remained outstanding at the time of the motions, but the decision at hand deals with the motions brought by each of the parties with respect to the application the mother had made to change the children's names.

The proceedings commenced in September 2021. A temporary order made on consent in 2023 gave the mother temporary decision-making responsibility for both children. The father continued to pursue joint decision-making responsibility and shared parenting time.

A short while after the temporary order was made, the mother filed two applications under the *CNA*, without the father's knowledge. She sought to change the children's surnames from the father's surname of "Dikianidis" to "Tansley", to match her own.

When the father received copies of the application, he promptly took action through counsel and filed an objection with the Registrar General. He then proceeded to court to obtain a temporary stay of the name change applications.

It was at this point that the mother sought to withdraw her application and submit a new one, this time seeking to hyphenate the children's surnames as "Tansley-Dikianidis", as well as add an additional family name to Atticus' forename.

The court set out the issues to be decided on the motions as follows:

1. Should the Applicant be permitted to proceed to change the children's names under the *Change of Name Act* based upon a temporary order granting her decision-making responsibility?

2. Should the stay of the application to change the children's names be continued until after the children's best interests as a whole are determined at trial? (para. 16).

b. Interpreting "lawful custody"

It was clear on the facts that the father had not consented to the mother's applications to change the children's names. Instead, the question was whether the mother had the authority necessary to apply for the changes anyway. Per the *CNA*, this would require that she is the only person with "lawful custody" of the children.

Determining whether or not this is the case was complicated by the recent legislative amendments which replaced the language of "custody" in the *CLRA* with "parenting time" and "decision making". How "lawful custody" ought to be interpreted was central to the arguments of each of the parties.

Justice Gibson notes that "lawful custody" is not defined within the *CNA*, but that other legislation has been amended to harmonize with the new language of the *CLRA*.

The mother argued that "lawful custody" ought to be interpreted as equivalent to "decision-making responsibility" (para. 6). As such, pursuant to the temporary order, she should be considered to have the authority to apply to change the children's names.

The father's position was that regardless of whether "custody" should appropriately be considered as equivalent to "decision-making", it would be unreasonable to interpret a *temporary* order for decision-making as equivalent to "lawful custody". Logically, he argued, this term must be interpreted as meaning custody or decision-

making on a *final* basis. Otherwise, absurdity may flow from a parent changing the name of a child under the authority of a temporary without prejudice order for decision-making without the requirement of notifying the other parent (at para. 25).

From a practical standpoint, Justice Gibson notes that the old and new legislative language to not map on to each other in such a way that they can be considered perfectly synonymous for all purposes: Decision-making can be parcelled out into a framework promoting the best interests of a child in a way that was not possible under the former scheme of "custody" (at para. 27).

Justice Gibson was also not able to identify any reported decisions where a temporary order for either custody or decision-making provided the basis for dispensing with a parent's consent to a child's name change (at para. 28). On the other hand, *Roy-Bevington v. Rigden* (2017 ONCJ 730) provides good authority for the proposition that a temporary order is insufficient for doing so: Justice Finlayson found that a temporary order means that the question of custody is still a live issue, and that issues relating to a child's name can be properly dealt with at trial (or on a motion, in appropriate circumstances and subject to the appropriate test).

He noted case law that acknowledges the profound importance of a child's name to their identity, and that a court must find that such a name change is in the child's best interests. To allow the change at this stage in the proceedings would have "profound implications" for the father and would "risk deciding the issue and preventing [him] from having a full opportunity to present evidence at trial concerning the best interests of the children" (at para. 33).

The actions of the mother in taking steps to change the children's names on the basis of a temporary order which had been in effect for three months were found to be premature. Justice Gibson further noted that no evidence has been presented which shows "harm to the children on the basis of their current surname" (at para. 34).

It is noted that the mother's reasoning seems focused on her own "personal feelings" and "embarrassment", rather than focusing on the children (at para. 34). This kind of rationale has been denounced by the court in *Hennessy v. Brockett* (2021 ONSC 8280).

The mother's motion was dismissed, and the stay was continued.

How would this issue be decided on a final basis?

Tansley clearly demonstrates that a temporary order for decision-making will not be sufficient authority for dispensing with the other parent's consent to changing a child's name. This is because a full inquiry into the child's best interests ought to be conducted prior to making decisions that can impact something as central to a child's identity as their name.

However, this may cause readers to wonder, how will this issue be decided when the matter reaches trial?

When there is a dispute between parents regarding changing a child's name, the onus is on the parent seeking the name change to demonstrate that it is in the child's best interests (see *Herniman v. Woltz*, 1996 CanLII 8087 (ON SC) at para. 8).

This has been codified at section 5(5) of the *CNA*, which provides that an Application to dispense with the consent of a parent shall be determined "in accordance with the best interests of the child".

The *CNA* does not define "best interests". In *Tansley*, Justice Gibson points to the test under section 24(b) of the *CLRA* (at para. 36). However, there is also a line of case law enumerating various "best interests" factors relating specifically to name changes, that predate the *CLRA*. Many of these cases are considered by Gibson J, in arriving at his decision that the mother's application should not be allowed to continue absent the father's consent.

The factors appear in many iterations. one commonly cited version comes from Justice Sinclair in 1985, who pointed to Christine Davies' articulation in *Family Law in Canada*:

a. the welfare of the child is the paramount consideration;
b. the short and long term effects of any change in the child's surname;
c. any embarrassment likely to be experienced by the child if its name is different from that of the parent with custody or care and control;
d. any confusion of identity which may arise for the child if his or her name is changed or not changed;
e. the effect which any change in surname may have on the relationship between the child and the parent whose name the child bore during the marriage;
f. the effect of frequent or random changes of name.

(*Wintemute v. O'Sullivan*, 1985 CanLII 1363 (AB KB) at para. 7.)

These factors were adopted by Ontario courts and have been recently affirmed. For more recent applications of the factors from *Wintemute*, see for example *Cuthbert v. Nolis* (2018 ONSC 4643) and *Closner v. Closner* (2021 ONSC 6114).

In 2017, Justice Sherr considered the case law and provided a familiar list of non-exhaustive factors, which also included a consideration of the child's wishes (to be weighed in accordance with their age), whether there is a "continuing close relationship" between the child and the "non-custodial" parent, and "whether either parent has displayed any malice or improper motivation" (*Hermanson v. Kiarie,* 2017 ONCJ 598 at para. 22).

Conclusion

The parties in *Tansley* are scheduled for trial in the May 2024 sittings. Justice Gibson engaged in a preliminary discussion of the children's best interests which touched on many of the factors outlined above, including noting that the children are young enough that their views will not hold much weight.

If the mother is to be successful, then she will likely need to present a compelling argument that focuses on the best interests of the child rather than her own feelings about not sharing a surname with her children.

When seeking a name change for a child, consider the stage you are at in the proceedings and whether your argument in favour of the change is focused on your client's wishes, or on the child's best interests. There may be overlap between the two, but the legislation and the case law indicates that courts will only be interested in the latter.

It can often take a long time for matters to settle or get to trial, and temporary orders exist as a way to respond to the needs of parties and their children in the interim. However, given the importance of a name, courts are going to want to engage in a full analysis of the best interests of a child before allowing a name change.