Canadian Family Law Matters

October 2023
Number 404

NOVEL FAMILY VIOLENCE TORT HAS NO PLACE IN ONTARIO LAW, COURT OF APPEAL RULES (AHLUWALIA V. AHLUWALIA)

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In July 2023, the Ontario Court of Appeal held that a novel tort specific to "family violence" should not have been created in family law proceedings since the law is clear that new torts should only be introduced where the existing remedies are inadequate: ***Ahluwalia v. Ahluwalia***, 2023 ONCA 476 (CanLII). In setting aside the lower court's decision creating the tort, the Court of Appeal determined that existing torts, properly applied, were already in place to address the claims of domestic violence and coercive control at issue.

In ***Ahluwalia***, the appellant husband and respondent wife sought to address various family law issues arising from the breakdown of their marriage, including property equalization, child support, and spousal support. In addition, the wife sought damages in relation to the husband's alleged abuse during their marriage. The wife also argued that her husband had stifled her ability to seek out gainful employment in order to assert his economic dominance and was aggressive towards her attempts to gain any independence.

The trial judge found that the marriage in this circumstance was a 16-year relationship characterized by a pattern of emotional, psychological abuse, physical abuse, and financial control. The decision affirmed a new tort of family violence and awarded $150,000 in damages for "family violence during the marriage" in addition to spousal support and child support.

The trial judge further held that the federal ***Divorce Act*** does not create a complete statutory scheme for addressing all the legal issues arising in a situation of alleged family violence. Given that the ***Divorce Act*** does not provide the victim with a direct avenue to obtain reparations from harms flowing directly from family violence and that go beyond the economic fallout of the marriage, the trial judge accepted that creating the tort of family violence provides for a remedy that properly accounts for "the extreme breach of trust" occasioned by the husband's violence, and that "brings some degree of personal accountability to his conduct."

In defining the elements on this new tort, the trial judge held that a plaintiff can establish that they experienced family violence. Under the first mode of liability, the plaintiff must establish that the family member intended to engage in conduct that was violent and threatening. Under the second mode of liability, the plaintiff must establish that the family member engaged in behaviour that was coercive and controlling. The third mode of liability requires that the plaintiff establish that the family member engaged in conduct that they would know, with substantial certainty, would cause the plaintiff's subjective fear.

LexisNexis

On appeal, the appellant husband conceded that he was liable in damages but objected to the novel tort on the basis that it was poorly constructed, too easy to prove, would apply to a vast number of cases, and would create a floodgate of litigation that would fundamentally change family law. Further, the husband argued that the trial judge's decision largely disregarded the recent amendments to the ***Divorce Act***, which were intended to address family violence. The fact that the legislature did not remove the restriction on considering spousal misconduct when making a spousal support award or including family violence as a factor for such an award should be respected.

In response, the wife submitted that the new tort was necessary because existing torts do not address the cumulative pattern of harm caused by family violence. She further proposed that the appellate court define a narrower tort of "coercive control" which would provide a more sophisticated recognition of family violence, one that is made out "where a person in the context of an intimate relationship inflicted a pattern of coercive and controlling behaviour that, cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness or otherwise cause harm."

In overturning the trial judge's decision, a unanimous panel of the Court of Appeal declined to affirm the new tort, finding that existing torts have enough flexibility to address the fact that abuse has many forms. While the appellate court recognized that intimate partner violence is a "pervasive social problem" and it is "axiomatic" that family violence must be recognized, denounced, and deterred, this did not, by itself, justify the judicial creation of a new tort.

Further, the Court of Appeal had concerns that adopting the definition of "family violence" for a new cause of action in the context of family law litigation ignored the clear intention of the legislature to reduce the application of the concept only in the context of parenting. Similarly, the court disagreed with the wife's proposed new tort of coercive control since, among other things, the existing tort of intentional infliction of emotional distress already provided an adequate remedy and eliminated the requirement to establish visible and provable injuries.

In the result, the Court of Appeal determined that it was unreasonable and disproportionate to add punitive damages in the amount of an additional 50% of the total claimed. The appeal with respect to the punitive damage award was allowed, thereby reducing the total damages by $50,000 to $100,000.

Given the acknowledged prevalence and nature of family violence, it is unclear what the implications will be for survivors of patterns of abuse. The decision affirms that in most cases the creation of new tort laws will be left to the elected members of the provincial government rather than arising from a dispute between two private parties. However, the decision may signal a need for lawmakers to create a more comprehensive statutory scheme to address all the legal issues that can arise in situations of family violence. The need to stay abreast of social change cannot strictly fall on the court's reliance on the general principle of tort law but rather must involve a coordinated community response to support victims of violence and their families.

LEGISLATION UPDATE

Ontario

Regulation 135/23, *Administrative Calculation and Recalculation of Child Support under the Family Law Act*, amends *Administrative Calculation and Recalculation of Child Support*, O. Reg. 190/15. The amendments include sections on documents to be provided to the child support calculation service. Regulation 135/23 was published in the Gazette on July 8, 2023 and came into force on August 21, 2023.

Saskatchewan

Bill 101, *The Child and Family Services Amendment Act, 2022*, received First Reading on November 14, 2022, Second Reading on March 8, 2023, Third Reading on April 20, 2023, and Royal Assent on April 25, 2023. Bill 101 amends *The Child and Family Services Act*, SS 1989-90, c. C-7.2, to improve child welfare services. Amendments include raising the age of children entitled to protective services from 16 to 18; increasing the flexibility of information sharing, disclosure, and confidentiality for children; enhancing services allowing youths to be supported through either voluntary or protective pathways; updating the best interests of the child provisions to recognize unique cultural aspects of Indigenous children,

and broadening information sharing to Indigenous Governing Bodies. Section 3(c), 15(3), and portion of section 19 that adds subsection 52(4) were proclaimed into force on July 28, 2023.

RECENT CASES

Child, Youth and Family Enhancement Act Provisions on Authorizing Health Care for Minors Constitutional

Court of Appeal of Alberta, May 29, 2023

In 2019, the appellant child had been admitted to hospital at age 14 for pain due to sickle cell anemia. Due to their religious beliefs as Jehovah's Witnesses, the child and her family refused the blood transfusion that was recommended by her physician. The child was prescribed medication instead, and after the pain episode passed, the child's hemoglobin count dropped to dangerous levels and a future episode could require a blood transfusion. The director under the *Child, Youth and Family Enhancement Act* (the "Act") sought to apprehend the child in order to enable doctors to provide medical care to her if needed. While the child was in the hospital, a Provincial Court Judge granted the *ex parte* apprehension order. The judge did not make a discreet finding on the child's level of maturity or her ability to provide input into her medical treatment. The order permitted the administration of a blood transfusion to the child, but only as a last resort. Three days later, when the child's condition stabilized, the Director applied to have the apprehension and medical treatment orders set aside. The child was discharged from the hospital and no blood transfusion was ever administered. The parents and child appealed the apprehension and medical treatment orders. The Director applied to have the appeal struck, as the issue was moot. A judge held that some of the issues were important enough to proceed despite potential mootness. The appeal was dismissed. The appeal judge concluded that the position of a "mature minor" in Alberta was that set out in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 CFLG ¶26,467 (SCC) ("*A.C.*"). On that basis, the Act was constitutional. The appeal judge concluded that the child's Charter and procedural rights had been respected at the *ex parte* hearing. The child and parents appealed.

The appeal was dismissed. Pursuant to case law, where a Director was involved, the provisions of the Act overlay the common law on the issue of a mature minor who is able to consent to their medical treatment. Section 22.1 of the Act states, "If the guardian of a child who has been apprehended refuses to consent to essential medical, surgical, dental or other remedial treatment for the child that is recommended by a physician or dentist, the director must apply to the Court for an order authorizing the treatment … (5) If it is satisfied that the treatment is in the best interests of the child, the Court may authorize the treatment notwithstanding that the guardian of the child refuses to consent to the treatment."

While *A.C.* involved a challenge to the constitutionality of Manitoba legislation, that statute was similar to the Act, as the basis of the decision under it was also the best interests of the child. In *A.C.*, the Supreme Court of Canada found that if the legislation was properly interpreted and applied, it was constitutional; specifically, "if the young person's best interests are interpreted in a way that sufficiently respects his or her maturity in a particular medical decision-making context". *A.C.* recognized that assessing an adolescent's maturity was inherently imprecise, and held that to be constitutional, the "best interests" of the child had to give sufficient account to the child's maturity given the severity of the medical treatment. While the court always had discretion in determining what medical treatment was in the best interests of the child, the discretion became narrower as the maturity of the teenager increased. Accordingly, the child's Charter protected interest in autonomy was balanced with society's interest in protecting vulnerable citizens. As long as there was no irrebuttable presumption that mature minors lacked capacity, the statute was not arbitrary. There was no meaningful constitutional distinction between the Manitoba statute that was the subject of *A.C.* and the Act.

The Provincial Court judge had applied the correct overall legal test, being the best interests of the child. The judge was clearly aware and respectful of the child's views. The judge's failure to assess the child's maturity was not consistent with *A.C.* and was thus an error. However, there was no indication that the outcome would have been any different had the proper procedure been followed. As the matter was moot, no further review was required.

The Court further dismissed the argument that the order permitting the transfusion itself amounted to a Charter breach. The mere existence of an order, where no actual action was taken, could not amount to a Charter breach.

J.I. v. Alberta (Child, Youth and Family Enhancement Act, Director), 2023 CFLG ¶27,979

Court Permitted Dispensing With Service of Adoption Application Where Biological Father Not Located

Court of King's Bench of Alberta, June 26, 2023

The biological parents of the subject child had a short interaction. Upon becoming pregnant, the mother informed the father that she intended to place the baby for adoption. The mother claimed that the father told her that he did not want anything to do with the baby and did not care about the adoption. The only contact information the mother had for the father was a social media account address that she provided to the adoption agency (the "social media account"). The account was not verified as actually belonging to the father. The applicants, as represented by the adoption agency, applied to adopt the child. The child's mother consented to the adoption. The father was not served with the adoption application materials, contrary to s. 64(1)(*g*) of the *Child, Youth and Family Enhancement Act* (the "Act"). The Act required personal service of the adoption application materials with a notice of objection that the recipient could file. Under the Act, the Court could abridge service, direct other methods of service, or validate a method of service. The Act did not provide for dispensing with service. The adoption agency had written a message to the account holder of the social media account, stating that it was working with the mother on making an adoption plan and requesting a response, but did not receive a response. The applicants applied to dispense with service on the biological father.

The application was allowed. The Act did not explicitly authorize a judge to dispense with service and the case law conflicted as to whether the Court had jurisdiction to dispense with service. Certain longstanding cases provided that the Legislature intended to only allow the Court to give directions on service, but not to dispense with it, with s. 64(8) being a complete statutory code regarding service in adoption applications. The Court stated that it was "concerned" that the line of authority not permitting dispensations of service would severely hamper adoptions to the detriment of the child's best interests. There were foreseeable situations where a party could not be served, as their whereabouts was not known. The Court stated that the Legislature provided the power to make regulations, such as the *Court Rules and Forms Regulation* (the "Regulation") under the Act, that were necessary for carrying out the intent and purposes of the adoption provisions. Section 2 of the Regulation permitted the Court to apply the *Alberta Rules of Court* in all proceedings under the Act. Rule 11.29 provided for dispensation with service. While the Regulation did not permit the Court to override the mandatory requirements under the Act, the Court found that having regard to the strong focus of the Act on a child's best interests, s. 64(8) was not to be read to impliedly exclude relief in cases where dispensing with service was necessary. Rule 11.29 provided that an application for dispensing with service where it was "impractical or impossible" required an affidavit "(a) setting out that all reasonable efforts to serve the document have been exhausted or are impractical or impossible, (b) stating why there is no or little likelihood that the issue will be disputed, and (c) stating that no other method of serving the document is or appears to be available." The Court found that sending a more detailed notice to the social media account, even if it was no longer actively checked by the father, would be a reasonable effort to attempt service on him by the adoption agency. The Court stated, however, that it would not be reasonable to transmit sensitive and private materials with the parties' names to a social media account. Having regard to the above, the Court ordered that the adoption agency send a notice to the social media account of the court application being pending for the adoption of the child, and stating that the mother had identified the father as the biological father. The mother would be named by first name only, the child was not to be named, and only the child's month and year of birth were to be included. The message would state that the father could contact the agency for further information about the application and give instructions on filing a notice of objection.

BH (Re), 2023 CFLG ¶27,981

Judge Erred in Not Considering Child's Physical Presence in B.C. at Time Notice of Family Claim Was Filed

Court of Appeal for British Columbia, June 19, 2023

The appellant father and respondent mother married in 2006. They had one child, born in Taiwan, and aged 13. The father was a Canadian citizen who had moved to Taiwan in the 1990s. The mother was a Taiwanese citizen. The family moved from Taiwan to Vancouver in September 2019. The parties continued to travel to Asia for work while the child attended school in Vancouver. In March 2020, the mother and child returned to Taiwan during spring break and remained there due to the developing COVID-19 pandemic. The child commenced school in Taiwan in the fall of 2020.

The father arrived in Taiwan in December 2020 and the parties decided to separate. The father returned to Canada in June 2021, and the mother and child returned to Canada in July 2021. The mother and child had tickets to return to Taiwan in September 2021, but did not do so. The child attended school in Vancouver. In January 2022, the father filed a notice of family claim (the "NOFC") in the Supreme Court of British Columbia, seeking orders respecting divorce, support, and parenting. The mother retained counsel in Taiwan and in March 2022, filed a notice of family claim and sought interim orders in Taiwan. In April 2022, the mother and child returned to Taiwan. The mother disputed the British Columbia courts' jurisdiction over the divorce and child-related claims. In June 2022, the father brought an application in the Supreme Court of British Columbia seeking a declaration that the court had jurisdiction over parenting issues and an order that the mother return the child to British Columbia (the "jurisdiction application"). The application judge held that the Supreme Court of British Columbia did not have territorial competence over parenting issues based on the child's habitual residence, and that, even if it did, Taiwan was the more appropriate forum to determine those issues. The application judge found that the parties were never habitually resident in British Columbia under s. 74(2)(*a*) of the *Family Law Act* (the "Act"). The father appealed.

The appeal was dismissed. Under s. 74(2)(*a*) of the Act, the court had jurisdiction if the child was habitually resident in British Columbia at the time "the application is filed". If the child was not habitually resident in British Columbia when the application was filed, but was physically present in the province at that time, the court could still have jurisdiction pursuant to s. 74(2)(*b*) of the Act if certain other criteria were met. The application judge had started his analysis by noting that s. 74(2)(*b*) was not applicable, as the child was not physically present in British Columbia when the father filed the jurisdiction application. Accordingly, the judge had restricted his analysis to s. 74(2)(*a*). The Court found that the application judge had referred to the correct test of "settled intention" in determining habitual residence and made no error in regard to that finding. The judge was attentive to both parties' accounts of their intentions regarding living in Vancouver, and the Court was unable to identify a reviewable error in how the judge made factual determinations based on the parties' communication about whether they had intended to permanently settle in Vancouver. The Court considered whether "when the application is filed" in s. 74(2)(*b*). meant the NOFC commencing the proceedings, filed in January 2022, or the jurisdiction application, filed June 2022. The judge's decision not to consider s. 74(2)(*b*) on the basis that the child "was not physically present in British Columbia when [the father's] application was filed" indicated that he understood "application" to refer to the jurisdiction application. The Court noted that there was divergence in the case law as so what "application" referred to. The Court stated it was only aware of the decision of *Gill v. Delbeck*, 2019 BCSC 1660, which found that "when the application is filed" meant "when the document that commences the claim for guardianship, parenting arrangement or contact is filed". The Court held that this was a correct analysis of, and applying that interpretation of "application", it found that since the child was physically present in British Columbia when the NOFC was filed, the judge ought to have considered the applicability of s. 74(2)(*b*). The Court found that even if the judge had applied s. 74(2)(*b*), he would have ultimately reached the same conclusion as to the lack of jurisdiction, pursuant to the second part of that provision, which states: "on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia". This engaged the same test as the *forum non conveniens* framework that the judge had applied. The Court found no reviewable error in the judge's analysis regarding the more appropriate forum. The child's months-long presence in Taiwan, the presence of the child's family, friends, and counsellor in Taiwan, and the Taiwanese court's proactive involvement were factors in his decision to decline any jurisdiction. While the mother's manner of removing the child from Vancouver was "troubling", the Court stated that it would be for the Taiwanese courts to determine how this should impact the parenting order.

B.C. v. D.E., 2023 CFLG ¶27,982

Court Denied Retroactive Request for Permission to Relocate Children

Supreme Court of British Columbia, May 24, 2023

The claimant father and respondent mother had two children, born in 2011 and 2013. The father was employed as a long-haul truck driver. The parties and children resided together in 108 Mile Ranch, British Columbia until August 9, 2021, when the father unilaterally relocated the children to St. Albert, Alberta, where they had since resided with him and the paternal grandparents. At the time of the children's removal, the mother was a homemaker and the children's primary caretaker. The father wrote an e-mail to the mother on August 29, 2021, giving her "the required 60 day notice" and stating his intention to relocate the children to the Edmonton area. In September 2021, the mother filed a without-notice application in Provincial Court for the children's immediate return. The father did not bring a relocation application

within 60 days of the date of his e-mail. The father claimed that he left the home with the children after an argument with the mother about her alleged heavy drinking and socializing with another man. Since February 2022, the father drove a truck for a waste removal business in St. Albert. The mother did not have any in-person contact with the children from August 2021 until two court-ordered supervised weekend visits in November 2021. The mother had the children in 108 Mile Ranch for six weeks in the summer of 2022 by consent order and for Christmas 2022 and spring break 2023. In October 2021, the Provincial Court dismissed the mother's application for the immediate return of the children and ordered a s. 211 report. The Court also did not grant any order authorizing the relocation of the children to St. Albert. The mother had recently begun a full-time job as a gas station clerk and claimed that if the children were returned to her, she had friends who could help watch them after school. At trial, the father sought an order granting him retroactive permission for relocating the children to St. Albert. The father's parenting plan involved having his parents assist with childcare when he was at work.

The claim was dismissed. The Court noted that, until the trial, the father had not sought a court order authorizing the relocation. The Court also stated it was unaware of any evidence that the father had ever notified the police or child welfare ministry regarding concerns about the mother's behaviour prior to removing the children. The Court considered that the s. 211 report opined that both parents could adequately discharge their parent roles but that the children should reside with the mother, after finding that the children were both presently struggling with their emotional adjustment to living in Alberta. The report stated that the children indicated they were unhappy and had a fear of punishment, with signs of anxiety. The report stated that the mother was more sensitive to the children's needs and understood them better, and that the children's perspective regarding the mother had been influenced by the father. The report could not confirm the mother's alleged commitment to sobriety. There was case authority that where an unlawful removal of children without compliance with the legislative requirements occurred, generally their return was to be immediate. As the parties made arguments based on the usual relocation criteria, the Court applied that framework. Pursuant to s. 16.93(1) of the *Divorce Act*, the father had the burden of proving the relocation to Alberta was in the best interests of the children, as it could be said that pre-removal to Alberta, the parties had agreed to live together with the children in 108 Mile Ranch. The Court considered the best interests of the child factors under s. 16(3) of the *Divorce Act*. The children were close to the mother who had been the children's primary caregiver, in particular while the father worked a job that involved weeks of absence. Post-August 2021, the father did not make any meaningful effort to allow the children to see the mother, and his behaviour did not show a willingness to support the child-mother relationship. The Court found that there was a potential that the father would not cooperate with the mother about matters affecting the children. The mother, in turn, appeared to value the children's relationship with the father. The Court found no evidence that the mother's visits with the children since August 2021 involved any problems with alcohol or her parenting. The text messages relied on by the father to establish that the mother had a drinking problem pre-August 2021 did not show that he was concerned about the mother's drinking. The Court did not find that the mother committed "family violence" against the children through "the failure to provide the necessaries of life". The Court concluded that the children's relocation to St. Albert was not in their best interests. It ordered that the children be returned to their mother in 108 Mile Ranch. The mother was to have primary care, and the father was to have parenting time for two weeks during the summer vacation and on alternate holidays, as well as parenting time for one hour via video four times per week. The mother was to have final decision-making authority. The Court further ordered the father to pay child and spousal support.

S.T. v. A.T., 2023 CFLG ¶27,985

Court Erred in Deviating from Agreement's Property Division After Finding It Merited Great Weight

Supreme Court of Canada, May 12, 2023

The respondent wife and appellant husband married in 2012 and separated in 2015. Both parties had been previously married and both came into the relationship with significant assets. In 2013, the parties purchased a new home, with each making equal contributions. The husband invested $225,000 in a contracting company with which he was employed and became the owner of 50 per cent of its shares. One month post-separation, the wife invited the husband to a reconciliation meeting with mutual friends and presented him with an agreement (the "agreement"). They both signed the agreement in the presence of two witnesses and without legal advice. The agreement provided that the parties would each retain property that they purchased or amassed and forfeited the right to make claims with regard to the other's

property. With regard to the home, the parties would obtain a valuation and proceed to divide its equity or else mediate the issue. The husband petitioned for property division and took the position that the agreement was invalid. At trial, the judge found that the agreement did not qualify as an interspousal contract under s. 38 of the Family Property Act (the "Act"), and gave it nominal weight and consideration, pursuant to s. 40. The judge ordered that the wife pay an equalization of approximately $90,000. The Court of Appeal set aside the decision, finding that the agreement was binding and should be accorded great weight, pursuant to the Miglin v. Miglin, 2003 SCC 24, ("Miglin") analysis (see 2022 CFLG ¶27,816 (Sask. CA)). The Court of Appeal ordered the husband to pay the wife an equalization of $5,000, based on the family property values closest in time to the agreement. The husband appealed to the Supreme Court of Canada.

The appeal was allowed. The Court stated that legal domestic contracts were to be generally supported by courts, absent compelling reasons to discount them, so as to recognize self sufficiency, autonomy, and finality in the family law context. The Court stated that the Miglin principles were not meant to be a generally applied framework for all types of domestic contracts. As Miglin arose within a different statutory context, it was not to be transposed onto provincial family law legislation. Instead, the interpretive exercise was to be statue-specific. Under the Act, the presumption of equal distribution applied, but spouses were permitted to contract out of the scheme. The Act recognized two types of domestic contracts dealing with family property. Interspousal contracts were presumptively enforceable under s. 38 where they conformed to the requirements of that section, including that the parties formally acknowledged that they understood the nature and effect of the agreement before independent counsel. Where a domestic contract did not meet the requirements under s. 38, it could still be considered by a court and assigned whatever weight the court deemed appropriate, pursuant to s. 40 of the Act. In determining whether to consider an agreement that did not conform with s. 38, a court was to consider the agreement's validity pursuant to ordinary contract law principles. The court would then consider if the agreement merited consideration in the equalization analysis, assessing its procedural integrity, including any power imbalance or other vulnerability or unfair bargaining process. The absence of financial disclosure or independent legal advice on their own did not necessarily impugn the fairness of an agreement. The court would next assess the substantive fairness of the agreement, to determine how much weight to afford it in determining property division. The "purposes and criteria" of the applicable governing statute would "provide an objective yardstick against which to assess the parties' subjective understanding of what is fair" and ensure that this did not depart too significantly from public policy goals, as expressed in the statute. As the parties' agreement was binding and there were no substantiated concerns regarding fairness, it was entitled to serious consideration. The agreement reflected the parties' understanding of what division of property was fair in the context of their relationship at the time of separation. While the Court of Appeal had found that the agreement should be afforded great weight, it ended up equalizing the family property in a way that defeated the intent of the parties and resulted in unfairness. The Court of Appeal's approach had granted the wife a windfall by equalizing the husband's interests at a time when the business was performing uncharacteristically well, where the agreement provided that the wife would have no interest in the business at all. As the only property that the agreement had contemplated dividing was the family home and the household goods, the Court limited the equalization calculation to these assets. It found that valuing the family home as of the date of trial was fair, given the husband's continued contribution to the mortgage and the terms of the separation agreement. No circumstances warranted a departure from the strong presumption of equal distribution of a family home in the Act, and an equal division as of the date of adjudication resulted in a payment of $43,382 owed by the wife to the husband.

Anderson v. Anderson, 2023 CFLG ¶27,995

Judge Erred in Limiting Supervised Parenting Time Order to 60 Days

Court of Appeal of New Brunswick, May 10, 2023

The appellant mother and respondent father separated in 2018 and had three children, aged 16, nine, and seven. In 2020, the parents entered into a final consent order granting the father parenting time with the children on alternate weekends. In May 2022, the mother sought refuge in a woman's shelter due to alleged abuse by the father during one of his visits. The mother obtained a 90-day emergency intervention order and filed a motion to vary the final order. In her affidavit, the mother chronicled various incidents of erratic behaviour by the father and claimed he had "diabetic rages" during which he threatened the children with gun violence. The motion judge varied the final consent order, accepting the mother's affidavit evidence as to the father's "physical lack of control" that included breaking "things," slamming doors, throwing items around, and engaging in road rage. The motion judge granted the father supervised parenting time at a supervised centre for a weekly two-hour visit, until September 2022, after which time the father would have

parenting time for four hours on alternate weekends, to be supervised by the maternal grandmother. The judge provided that the order would remain in force for 60 days. After the 60 days, the terms of the final consent order would remain in full force and effect. The mother appealed and obtained a stay of the motion judge's order. She took the position that the judge erred in imposing an unconditional 60-day termination on the supervised parenting time.

The appeal was allowed. The Court found that the motion judge erred in failing to explain how the order met the best interests of the children. The judge's reasons did not provide why the judge decided that supervised parenting time should automatically terminate after 60 days. The Court found that the termination clause was arbitrary. The judge had acknowledged he was required to conduct a balance between the desirability of maintaining maximum contact between a child and their parents and the best interests of the child, and had accepted the mother's evidence concerning family violence. The Court found that the judge erred in then concluding that supervised parenting time was to be limited to short periods of time in all cases, regardless of the circumstances. While historically courts had been reluctant to issue supervised access orders for extended periods of time, the paramount concern was the best interests of the child, and this could require a long-term supervised order. The judge had found that the father had difficulty in getting past the parties' separation and this affected his willingness to communicate with the mother on matters relating to the children. The judge did not articulate what steps the father was taking to improve. While the judge found the mother established that a supervised order was appropriate, he did not explain how the 60-day limit was arrived at or how it was in the best interests of the children. This gap in the judge's reasons did not permit meaningful appellate review. The Court held that the issue of supervised parenting time was to be remitted back to the judge for review.

A.M. v. E.T., 2023 CFLG ¶27,986

Wife Did Not Establish *Prima Facie* Unjust Enrichment Claim to Preclude Motion for Partition and Sale

Ontario Superior Court of Justice, May 26, 2023

The applicant wife and respondent husband separated in 2014 and divorced in 2015. They had two children, aged 17 and 22. Post-separation, since January 2014, the parties' jointly-owned investment property was occupied by the wife and children. The home was not a matrimonial home. The parties did not make a claim for equalization of family property. The home had been purchased in 2005 and had appreciated since separation. It was currently valued at $2.2 to $2.85 million. The property had a mortgage of $323,000 for which both parties were liable, a home-equity line of credit of $367,000, and property tax arrears. The equity in the home was likely over $1.5 million. The wife had paid the carrying costs for the property since separation. In October 2020, the husband brought a motion for partition and sale of the property, pursuant to the *Partition Act* (the "Act"), and occupation rent. The wife argued that due to her payment of the home's carrying costs and renovations, she was entitled to a claim on the grounds of unjust enrichment and sought a proprietary claim, to be argued at trial.

The motion was granted. As a joint owner of a property, the husband had a *prima facie* right to partition and sale under s. 2 of the Act, unless the wife could demonstrate that there was malicious, vexatious, or oppressive conduct on the husband's part in relation to the sale. The evidence indicated that the husband had sought the wife's cooperation in the sale of the home since 2014 without success. The husband had struggled financially due to his inability to access the equity in the property. The wife's financial situation was also dire. Having regard to the high debts that both parties had, including arrears of property tax, the Court found that the sale of the home was necessary. The Court did not accept the wife's argument that she would suffer prejudice if the sale were ordered, as if would affect her ability to buy out the husband's interest. The wife did not have a right to buy out the other owner's interest. The Court did not accept the argument that the sale would create undue hardship amounting to oppression, as the mother needed to remain close to the younger child's doctors and school. The mother did not file any expert evidence supporting that the child had special needs, and no evidence of her search for alternative accommodations. The mother did not meet the burden of establishing that the presumptive sale order should not proceed. The Court found that the wife did not establish on a *prime facie* basis that she would succeed on an unjust enrichment claim such that the motion for the sale should not proceed. The bulk of the appreciation in the home was due to the rising market. The wife was entitled to contribution in respect of mortgage, property tax, and property insurance, and provided that the husband would pay his share of the carrying costs for the property, there was no unjust enrichment. The Court found that the husband was entitled to occupation rent. The wife had been enriched in occupying the home for nine and a half years where the payment of the

carrying costs was less than what would have been payable for rent. The husband was deprived of rental income and use of the property, and there was no juristic reason for the wife's enrichment in that regard. Aside from unjust enrichment, a second basis for an award of occupation rent was when the joint tenant in occupation requested reimbursement for expenses as part of the partition or sale, which was what took place in the instant case. The decision as to whether to award occupation rent was discretionary. The husband had been requesting the sale of the home since 2014, with the wife being aware of his dire financial situation. The Court found, however, that the husband delayed in seeking occupation rent, and the wife could have modified her behaviour and agreed to sell the home if she had been aware of the rent liability. The husband was entitled to occupation rent, with the payments to commence as of October 2020, the date when he brought his application. Pursuant to case law, the value of occupation rent was typically set at 50 per cent of the rent that could have been earned if neither spouse had lived in the house. The wife was to pay occupation rent of $3,100 per month. The husband was to pay the wife 50 per cent of the costs of the mortgage, property tax, house insurance, and receipted renovations since the date of separation. The house was to be listed for sale within 21 days after a realtor was retained.

Doyle v. De Sousa, 2023 CFLG ¶27,994

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Ontario

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