Top ten family law developments to have on your radar


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In the past 18 months, we have seen significant developments in jurisprudence on a variety of family law issues. In addition, a number of cases have come out that, while not strictly related to family law, should be kept in mind. The following are the top ten noteworthy cases that every family law lawyer should know about.

Bread and butter cases

1 *Kerr v. Baranow and Vanesse v. Seguin*[1] (2011, S.C.C.) – Joint family venture

A must read (and re-read), this is one of the most important family law decisions to be released in the past several years. First, *Kerr* signifies the unquestionable end of the common intention resulting trust in Canada. Second, *Kerr* introduces the concept of "joint family venture" and a new remedial framework for spouses who successfully prove a cause of action in unjust enrichment.

Prior to *Kerr*, only two remedies were commonly thought available: a monetary award based on *quantum meruit* (or "value received"), or a proprietary award of constructive trust (based on "value survived").

In *Kerr*, the S.C.C. recognized that this remedial dichotomy did not accurately reflect the realities of many domestic partners, and introduced a "value survived" monetary award to be used in instances where the parties' relationship can be characterized as a "joint family venture." Whether the family functioned as a "joint venture" is a question of fact. Courts are to consider four non-exhaustive factors:

(1) mutual efforts: Whether and to what extent there was a pooling of efforts and teamwork by the parties to achieve common goals;

(2) economic integration: Whether and to what extent parties pooled resources to pay for all or part of their common expenses;

(3) the intent of the parties: The court will look at the parties' actual intentions, which may be inferred from the parties' actions; and

(4) priority of the family: Is there good evidence to show that the parties gave priority in decision-making to the family unit as opposed to their individual interests?

Where a joint family venture is found, but the claimant is unable to meet the threshold for a proprietary constructive trust, the quantum of the monetary award should equal the share of the accumulated wealth that is proportionate to the claimant's contributions to the joint family venture. The claimant need not show a contribution to any one particular asset to receive credit for the growth in the asset.

Although some provincial legislatures across Canada (Ontario included) continue to deny property rights to unmarried spouses, the introduction of a value survived monetary award in *Kerr* brings unmarried spouses far closer to an equitable property regime. Since there is no presumption of equal sharing, it will be interesting to see whether, in the right circumstances, the courts will allow a claimant spouse to receive more than 50 per cent of the growth in the family's wealth, such that a common law spouse may actually receive a greater proprietary entitlement than a married spouse (a hitherto unheard of result).

2 *Schreyer v. Schreyer*[2] (2011, S.C.C.) – Effect of discharge from bankruptcy on property claims

In this appeal, the Supreme Court of Canada addresses the interaction, and sometimes "clash," between the *Bankruptcy and Insolvency Act*[3] (BIA) and provincial legislation dealing with property division on marriage breakdown.

The parties separated after a 19-year marriage. The wife sought (among other things) equal division of marital property. While matrimonial litigation was ongoing, the husband made an assignment in bankruptcy without notice to the wife. The husband did not list the potential equalization payment as a debt, nor did he list the wife as a creditor. Prior to the resolution of the wife's property claims, the husband was discharged from bankruptcy. The wife did not even find out that the husband filed for bankruptcy until some time after he was discharged. The court of first instance ordered the husband to pay an equalization payment. The Manitoba Court of Appeal reversed the decision, finding that the wife's personal claim for equalization was provable in bankruptcy and the husband was released from his obligation to pay it when he was discharged. The S.C.C. agreed.

In *Schreyer*, the S.C.C. confirmed that an equalization regime, as found in Manitoba (and Ontario), creates only a "debtor-creditor relationship" between spouses and does not confer proprietary or beneficial interests. The S.C.C. found that an equalization payment is a debt, not a proprietary interest, and as such it is to be treated like any other unsecured claim under the BIA. The equalization payment was therefore "swept into the bankruptcy" and the husband was released from his obligation to pay it upon his discharge.

While the BIA creates exemptions for maintenance or support, it does not create an exemption for an equalization payment. The S.C.C. in *Schreyer* warns that, until changes are made to provincial legislation, creditor spouses should "be alive… to the pitfalls of the BIA." Counsel should heed this warning. If one is acting on a case where bankruptcy is a real possibility, counsel must advise the client about the possible impact of bankruptcy on the equalization payment. If necessary, counsel should move quickly to secure the client's equalization claim and rights, perhaps by moving before discharge to continue the claim against bankruptcy-exempt assets.

3 *Thibodeau v. Thibodeau*[4] (2011, Ont. C.A.) – Impact of bankruptcy on equalization payment

In *Thibodeau* the Ontario Court of Appeal addressed the legal impact of bankruptcy on a spouse's entitlement to receive an equalization payment. An arbitrator awarded the wife an equalization payment to be paid from the husband's share of the proceeds of sale of the matrimonial home. The wife brought a motion to incorporate the award into a court order. Before that motion was heard, the husband

[1] 93 R.F.L. (6th) 1, 2011 CarswellBC 240 (S.C.C.)

[2] 2011 SCC 35, 2011 CarswellMan 334 (S.C.C.)

[3] R.S.C., 1985, c. B-3 (hereinafter "BIA")

[4] 104 O.R. (3d) 161, 2011 CarswellOnt 686 (Ont. C.A.)

filed for bankruptcy. The wife immediately moved to add the trustee in bankruptcy as a party to the pre-existing court proceeding and asked the court to transfer the husband's RRSPs to her in partial satisfaction of the arbitration award.

The court below found that, because the arbitrator had directed the equalization payment to be paid from the husband's share of the proceeds of sale, the award created an equitable trust in favour of the wife over the husband's share of the net proceeds of sale, in priority to other creditors. The court below also ordered that the husband transfer to the wife his bankruptcy-protected RRSPs. The Court of Appeal disagreed on both counts.

The Court of Appeal emphasized that the *Family Law Act*[5] (FLA) does **not** provide for the division of property and that the arbitrator had done no more than award an equalization payment. Therefore, the award was nothing more than a money judgment – and the wife was simply another unsecured creditor. The Court noted that it (or an arbitrator) *may*, under s. 9(1) of the *FLA*, impose a legal relationship between the spouses other than a debtor-creditor relationship. However, as orders under s. 9(1) of the *FLA* can affect the rights of unknown and unrepresented third parties, such remedies should not be imposed "indiscriminately" or "routinely" and should only be used if the record justifies such "exceptional and intrusive action." In any event, the arbitrator in this case did not make an award under s. 9(1).

Ultimately, the Court of Appeal concluded that resort to the "proprietary rights" powers of s. 9(1) in cases of *pending or actual* bankruptcy should not be a regular occurrence. Interestingly, in *Schreyer v. Schreyer* (above), the S.C.C. suggested (albeit in *obiter*) that a payee spouse prejudiced by a bankruptcy might do exactly that which was eschewed by the Ontario Court of Appeal in *Thibodeau*. Having cited *Thibodeau* in *Schreyer*, perhaps the S.C.C. is signalling that, pending law reform, lower courts should, in proper cases, be more willing to resort to proprietary enforcement remedies in the face of bankruptcy than suggested by the Ontario Court of Appeal.

Notables

4 *Hansen Estate* v. *Hansen*[6] (2012, Ont. C.A.) – Severing joint tenancy by conduct

It is accepted in the jurisprudence that there are three ways to sever a joint tenancy: (1) by unilaterally acting on one's own share, such as selling or encumbering it; (2) through a mutual agreement between the co-owners to sever the joint tenancy; or (3) through any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

In *Hansen*, the Ontario Court of Appeal addressed what conduct constitutes a "*course of dealing*" sufficient to establish that a joint tenancy has been severed, such that the co-owners now hold the property as tenants in common. The Court stated that:

> *"It is not essential that the party requesting a severance establish that the co-owners' conduct falls into a formulation found to have had the effect of severing a joint tenancy in other cases. The court's inquiry cannot be limited to matching fact patterns to those in prior cases. Rather, the court must look to the co-owners' entire course of conduct – in other words the totality of evidence – in order to determine if they intended that their interests were mutually treated as constituting a tenancy in common. This evidence may manifest itself in different ways. Each case is idiosyncratic and will turn on its own facts."*

In *Hansen*, the parties were separated and were negotiating a settlement of the outstanding issues between them, including property division and equalization. Both parties, through correspondence by counsel, took the position the matrimonial home would be equally divided in a separation agreement. The respondent moved out of the home and took steps to value her half interest in the home, and the applicant made a will that was inconsistent with the right of survivorship. Looking at the totality of the parties' conduct, the Court of Appeal concluded that the course of dealing of the parties resulted in a severance of the joint tenancy.

Hansen appears to lower the threshold found in prior jurisprudence for a finding of severance of joint tenancy through a course of dealing. Based on the facts of this case, it would appear that in most family law cases where division and equalization of joint property is addressed in a meaningful way, the conduct of the parties will point to a severance of joint tenancy. Nonetheless, counsel would be wise to continue following LawPRO's advice and canvass the issues of severance with their clients at the earliest opportunity in order to minimize the risk of negligence claims against them.

5 *V. (B.) v. V. (P.)*[7] (2012, Ont. C.A.) – Access

This was an appeal by a father from a trial decision regarding custody, access, and spousal support. It is most notable for the Court of Appeal's comments on what constitutes an appropriate access schedule. The trial judge found that the mother assumed primary responsibility for the care of the child during the marriage, that the child had specific educational and social needs, and that the father displayed some controlling and disrespectful behaviour toward the mother. The trial judge awarded access to the father on alternating

[5] RSO 1990, c F.3 (hereinafter "FLA")

[6] 9 R.F.L. (7th) 251, 2012 CarswellOnt 2051 (Ont. C.A.)

[7] 2012 ONCA 262, 2012 CaswellOnt 4738 (Ont. C.A.)

weekends (from Friday after school to Monday morning), every Wednesday overnight, and three weeks in the summer.

The Court of Appeal found that the access schedule ordered by the trial judge was "minimal" and that the terms of access failed to respect the "maximum contact principle" set out in section 16(10) of the *Divorce Act*[8]. The Court found that, as a result of the father's behaviour toward the mother, equally shared physical custody was not appropriate, but that generous access was in the child's best interests. The Court ultimately ordered the parties to agree on the details of an access schedule whereby the father would have the child in his care for 35 per cent of the time.

It should be noted that, based on the trial judge's access schedule, the child was in the care of the father for five out of every 14 overnights, or 35.7 per cent of the time. It is therefore unclear how, exactly, the schedule should have changed. In any event, this case is yet another indicator that, while equally shared physical custody is not a presumption, the courts continue to award ever more generous access to non-resident parents.

6 *Pollitt v. Pollitt, et al*[9] (2011 N.S.S.C. and 2011 Ont. S.C.J) – Costs and the deductibility of legal fees

These five cases from the Ontario Superior Court of Justice and the Nova Scotia Supreme Court stand for the proposition that the tax deductibility of legal fees should be a factor in fixing costs. The relationship between the deductibility of legal fees and the quantum of costs has not been specifically addressed prior to these recent cases, therefore all family lawyers are encouraged to read and familiarize themselves with these decisions.

Pursuant to s. 18 of the *Income Tax Act*,[10] a party who is pursuing a claim for support may deduct the portion of legal fees attributable to pursuing those claims (but a party who is defending a support claim is not able to deduct her legal fees in the same way). In *Pollitt*, Justice Czutrin noted that if a claimant is able to deduct legal fees from his total income, the deduction will lead to overall tax savings. Justice Czutrin concluded that if the deducting party is entitled to costs, the tax savings resulting from the deduction should be taken into account in setting the quantum of costs payable. Justice Czutrin found that tax savings resulting from the deduction of legal fees provide a partial indemnification of a party's costs (even if minimal), and this indemnification is beyond the cost award that a court orders. If the tax position of the cost recipient party is ignored, the cost recipient may receive more costs than he or she actually spent, thus resulting in a windfall.

Counsel who wish to argue that a cost award against their client should consider the deductibility of legal fees by the recipient will bear the onus to set out for the judge what the impact of the deduction will be. To do so, counsel will need to establish, through evidence: (a) what portion of the legal fees relating to the cost award are tax deductible, and (b) the impact the deduction will have on the recipient.

7 *Ruffedeen-Coutts v. Coutts*[11] (2012, Ont. C.A.) – Appeals from consent orders

This is an important case about appeals from consent orders that should serve as a reminder to counsel of the importance of carefully considering all the consequences of entering into such orders, including the very limited rights of appeal.

In this case, in what was characterized as a consent judgment, a trial judge removed a child from the custody of the mother and awarded joint custody to both parents. The mother brought a motion for leave to appeal. There was some concern expressed by Justice Feldman, in dissent, that the mother was pressured by the trial judge into consenting to the change of custody, given the trial judge's remarks that, if she did not consent to joint custody, sole custody would be awarded to the father. The majority did not make a similar finding.

The majority found that in leave applications to appeal consent orders involving children, the court must take into account three factors:

(1) even though consent orders are not ordinarily accompanied by reasons, a trial judge's determination should attract deference;

(2) finality has been recognized as being in the best interests of the child; and

(3) in light of the prevalence of consent orders in family proceedings, allowing consent orders to be more easily appealed if children are the subject matter of the order may open the floodgates to appeals on other substantive issues.

Ultimately, the majority decided that leave to appeal consent orders in family cases involving children should not be granted unless the record demonstrates an arguable case that, at the time it was made, the order was not in the child(ren)'s best interests.

[8] R.S.C. 1985, c. 3 (2nd Supp.)

[9] 2011 CarswellOnt 5873 (Ont. S.C.J.); *Burchill v. Savoie*, 2011 CarswellNS 501 (N.S.S.C.); *Peraud v. Peraud*, 2011 NSSC 80 (N.S.S.C.); *Brandon v. Brandon*, 2011 CarswellNS 202 (N.S.S.C.); *Lockerby v. Lockerby*, 2011 CarswellNS 153 (N.S.S.C.)

[10] R.S.C. 1985, c. 1 (5th Supp.)

[11] 2012 ONCA 65, 2012 CarswellOnt 1184 (Ont. C.A.)

Good to know

8 *Jones v. Tsige*[12] (2012, Ont. C.A.) – Tort of intrusion upon seclusion

In *Tsige*, the Ontario Court of Appeal recognized a new cause of action for invasion of privacy in the form of a new tort named "Intrusion Upon Seclusion." To make out a case for intrusion upon seclusion, a claimant must show: (1) an unauthorized intrusion; (2) that the intrusion was highly offensive to the reasonable person; (3) that the matter intruded upon was private; and (4) the intrusion caused anguish and suffering. The tort does not require proof of any economic loss or harm to an economic interest. Where intrusion upon seclusion is found, damages can be awarded up to $20,000, absent aggravated or punitive damages.

Family law practitioners routinely receive information about the "other side" from clients who get their hands on keys to cabinets and/or electronic passwords, or find other ways to retrieve the other spouse's personal information. Counsel would be wise to advise their family clients of this new tort early on. And, of course, counsel should always be leery of recommending to clients to "have a look around and see what you can find," lest you wish to potentially become well acquainted with LawPRO.

9 *Van Breda v. Village Resorts Ltd.*[13] (2012, S.C.C.) – Conflict of laws: Real and substantial connection

Van Breda is the new leading authority on the test for *jurisdiction simpliciter* based on "real and substantial connection." After examining at some length the evolution of private international law, the Supreme Court of Canada accepted the Ontario Court of Appeal's "*Van Breda* Approach" to the real and substantial test (a reformulation of the test previously set out in the seminal case *Muscutt v. Courcelles*[14]). The S.C.C. identified four presumptive factors that, if found to exist in a tort case, will create a rebuttable presumption that there was real and substantial connection to the jurisdiction. The presumptive factors are: (1) the defendant is domiciled or resident in the province; (2) the defendant carries on business in the province; (3) the tort was committed in the province; and (4) a contract connected with the dispute was made in the province.

Although this is not a family law case, it provides an updated framework for cases involving jurisdiction issues. The Court's discussion regarding real and substantial connection and *forum non conveniens* are both applicable in family law cases involving any type of jurisdictional issues.

10 *Harte-Eichmanis v. Fernandes*[15] (Ont. C.A.) – Jurisdiction of the divisional court

Although not a family case, this case provides a useful summary of the jurisdiction of the divisional court in appeals of financial matters. Section 6(1) of the *Courts of Justice Act* which confers jurisdiction on the divisional court when:

(a) there is an award for a single payment of not more than $50,000, exclusive of costs;

(b) there is an award for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) an order dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) an order dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

The Court of Appeal noted that, when deciding whether the divisional court has jurisdiction, it must look at the four subparagraphs disjunctively and apply the following principles:

(1) where an amount is ordered to be paid, it is the amount of payment ordered (not the amount claimed) that is determinative;

(2) where an amount is ordered paid, a court is to look at each subsection individually to determine if the amount of the judgment claim is under or over $50,000;

(3) where a claim is dismissed, the divisional court has jurisdiction if the amount of the claim is not determined or is assessed at less than $50,000; and

(4) all of the claims within each subparagraph are to be added together and cannot exceed $50,000.

Counsel should keep this case in mind for clients who seek to appeal final orders where a single payment from a spouse, i.e., an equalization payment is not more than $50,000 or the periodic payments awarded do not amount to more than $50,000 (exclusive of costs) in the 12 months commencing on the date of the first payment. ■

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[12] 6 R.F.L. (7th) 247, 2012 CarswellOnt 274 (Ont. C.A.)

[13] 10 R.F.L. (7th) 1, 2012 CarswellOnt 4268 (S.C.C.)

[14] 213 D.L.R. (4th) 577, 2002 CarswellOnt 1756 (Ont. C.A.)

[15] 2012 ONCA 266, 2012 CarswellOnt 4925 (Ont. C.A.)