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The *Anderson* framework: helpful in Saskatchewan, but in Ontario, we have *LeVan*

David Frenkel

Overview

The legal framework that the Supreme Court of Canada proposed in *Anderson v. Anderson* (2023 SCC 13) does not appear to add new law in Ontario in light of the existing *LeVan* framework. The main reason is that s.56(4) of the Ontario *Family Law Act* ("FLA") already addresses setting aside a domestic contract and it is significantly different from Saskatchewan's *Family Property Act* ("FPA"). While *Anderson* does reinforce useful principles, its framework for setting aside property settlements does not appear to be applicable in Ontario.

Introduction

The Supreme Court of Canada decision of *Anderson v. Anderson* was released on May 12, 2023, and it addressed the issue of how courts should deal with domestic contracts that opt out of a provincial property scheme where at least one party did not obtain independent legal advice ("ILA").

The reason why ILA was a focus point in *Anderson* was that according to the Saskatchewan *FPA*, unless there is ILA and certain other criteria (*FPA*, s. 38), it does not reach the level of an "interspousal contract" and there is no longer a presumption that the agreement is binding between the spouses.

In Saskatchewan, even if parties don't have ILA, the courts still can consider such an agreement (pursuant to s.40), but it no longer retains its interspousal contract name and it loses its presumptive status.

From this context, *Anderson* created a new framework to follow when courts address the issue of setting aside certain agreements that opt out of a provincial property scheme and lacking ILA. The details of the framework will be discussed in more detail below.

However, in Ontario we run into a bit of a kerfuffle applying *Anderson* since the Ontario *FLA* is different than the Saskatchewan *FPA* from which the new *Anderson* framework arises.

The difference is that Ontario does not have a provision in its Act that makes any domestic contract presumptive. The only criteria are that it be in writing, signed and witnessed (*FLA* s.55(1)).

Moreover, when a court needs to decide whether to set aside all or part of the contract, the starting point in Ontario is s.56(4) that assess whether,

(a) a party failed to disclose significant assets/debts existing when the contract was made;
(b) a party did not understand the nature or consequences of the contract; and,
(c) otherwise in accordance with the law of contract.

Ward v. Ward (2011 ONCA 178) provided the list of examples for the principle of the "law of contract": unconscionability, undue influence, duress, uncertainty, mistake, misrepresentation, fraud, and repudiation of a term of the contract.

LeVan v. LeVan (2008 ONCA 388 at para. 51) outlined a specific two-stage framework when applying s.56(4):

> Stage 1 - whether one or more of the provisions in s.56(4) have been engaged; and,
>
> Stage 2 - whether it is appropriate for the court to exercise discretion in favour of setting aside the agreement.

Justice Kiteley in *Turk v. Turk* (2015 ONSC 5845) also provided a list of factors to consider (pooled from *Dochuk v. Dochuk*, *Quinn v. Epstein Cole LLP* and *Toscano v. Toscano*) when exercising its discretion in stage 2 of *LeVan*:

a) whether there had been concealment of the asset or material misrepresentation;
b) whether there had been duress, or unconscionable circumstances;
c) whether the petitioning party neglected to pursue full legal disclosure;
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.

The *LeVan* framework has been consistently applied in Ontario for the last 15 years including the following more recent cases:

- *MacLeod v. MacLeod* (2022 ONSC 2457 at para. 115)
    - marriage contract set aside; contract opted out of spousal support of the *Divorce Act* and equalization provisions of the *FLA*; wife did not have ILA, was unaware of her rights/obligations to both support and

equalization, and clearly did not understand the nature or consequences of the contract;

- *Togersrud v. Lightstone* (2022 ONSC 7084 at para. 274)
    - marriage contract set aside; contact only dealt with property issues and not spousal support; husband failed to disclose significant assets; wife did not have ILA; wife did not appreciate the contract's nature and consequences;

- *Malaviya v. Dhir* (2023 ONSC 1993 at para. 131)
    - court dismissed a summary judgment motion to dismiss the husband's claim to set aside a cohabitation agreement; the agreement protected the husband's business interests; the issue for trial was whether there was insufficient disclosure, duress, unconscionability and undue influence;

In light of the existing *LeVan* framework, how would the new *Anderson* framework fit in Ontario to set aside property agreements? The answer will be discussed later, but for now, let's take a look at what the *Anderson* case was all about.

The Facts in Anderson and the application of Miglin

In *Anderson*, the SCC decision of *Miglin v. Miglin* (2003 SCC 24) took center stage. It was referenced and distinguished extensively, and according to the SCC, the *Miglin* framework was incorrectly applied by the Saskatchewan Court of Appeal.

As a refresher, *Miglin* provided us with a two-stage framework for determining whether to allow an application for spousal support in the face of a separation agreement with contrary terms (*Shalaby v. Nafei*, 2022 ONSC 5615 at para. 69). The first stage requires the court to examine two aspects of fairness at the time of making of the agreement, that is, the bargaining process and the substance of the agreement. The second stage evaluates the time of enforcement and whether the contract still reflects the original intentions of the parties and remains consistent with the objectives of the *Divorce Act*. (See Justice Karakatsanis's concise summary of Miglin at para. 26 of *Anderson*).

The facts in *Anderson* are fairly straight forward. The husband attempted to set aside an agreement he and his wife entered into after a three-year marriage (not the first for

either party). They had no children. The parties brought into the marriage considerable assets, including houses, vehicles and investments.

Two months after they separated, the parties signed an agreement prepared by the wife, dividing the family property. The agreement was witnessed by two friends without any exchange of financial disclosure or independent legal advice.

The wife, to her credit, did recommend that the husband "think it over and talk to a lawyer", but he immediately declined and signed anyways.

The agreement kept the parties separate as to their respective assets and liabilities except for the family home (having no equity at the time) and a vehicle that the wife agreed to reconvey to the husband.

However, two years later, the husband refused to follow the agreement and claimed an equalization payment which was determined at trial as $62,646.

The Saskatchewan Court of Appeal set aside the trial decision, found the agreement binding (based on the *Miglin* framework) and ordered the husband to pay the wife $4,914.

The Supreme Court in *Anderson* reviewed the *Miglin* framework and held that it was improperly applied by the Saskatchewan Court of Appeal to uphold the agreement.

As Justice Karakatsanis put it at paragraph 7: "*Miglin* is not and was never intended to be, a framework of general applicability for courts in dealing with all types of domestic contracts. Rather, the judge's interpretive exercise is statute-specific, and differences between property division and spousal support, division of powers concerns, and the distinctive features of the Saskatchewan statute mandate a tailored analytical approach."

Applying and not Applying Miglin in Ontario

Anderson was a case originating in Saskatchewan and accordingly reviewed the *Miglin* application with its provincial legislation in mind. *Anderson* did not mention Ontario specifically and thus it is important to review how Ontario fits the *Miglin* framework alongside its provincial statutes.

Referring to *Rempel v. Smith* (2010 ONSC 6740), Phil Epstein cautioned us that *Miglin* was intended to be used for spousal support cases and *LeVan* for property division (Fam. L. Nws. 2011.07).

Phil Epstein had this to say:

> One needs to be very careful about this analysis. In this particular case, we are talking about a separation agreement that primarily resolved property issues. **Miglin is not about property issues but, in particular, it is about Section 15 of the Divorce Act and the court's authority to override an agreement that relates to spousal support**. It is true that *Rick v. Brandsema*, 62 R.F.L. (6th) 239 (S.C.C.) may well have extended the *Miglin* analysis about the circumstances surrounding the negotiation and execution of an agreement related to property matters, and if that is what Justice Henderson meant, then he has the backing of the Supreme Court of Canada.
>
> Besides *Rick v Brandsema*, however, this is the clearest case that treats a separation agreement that deals primarily with property in the same way that a support release is dealt with when the party who gave the release seeks to set it aside. **It is not necessarily correct to treat the principles of *Miglin* in the same way as Section 56(4) is treated in *LeVan*, since one is about property and the other is about support**. (emphasis added)

Still, there are times where you may need to use both *Miglin* and *LeVan* and that would be when the agreement that one is trying to set aside has both spousal support and property division components.

The following are some recent examples where courts used both *LeVan* and *Miglin*:

- In *Kinsella v. Mills* (2020 ONSC 4785), Justice Chappel employed both *LeVan* and *Miglin* to uphold an agreement made by the parties. The agreement was in the form of a Minutes of Settlement and a Consent and addressed spousal support and property division. The wife attempted to set the agreement aside and ultimately was not successful.

- In *Chee-A-Tow v. Chee-A-Tow* (2021 ONSC 2080), the wife brought a claim to set aside a separation agreement dealing with both property and support. Justice Sossin referred to both *LeVan* and *Miglin* and held that the separation agreement should be set aside.

- Finally, in *Oliver v. Coderre* (2021 ONSC 4102), Piccoli J. used both the *LeVan* and *Miglin* frameworks to refuse a husband's claim to set aside a cohabitation agreement that included both spousal support and property division components.

The "Anderson framework" as outlined by Justice Karakatsanis.

So, in light of an improper use of *Miglin*, the Supreme Court outlined the correct framework (the *Anderson* framework).

At paragraphs 8-9 in *Anderson*, Justice Karakatsanis outlined the general Anderson framework to follow when setting aside agreements that are not interspousal agreements as defined by the *FPA* of Saskatchewan.

You can read the original version in the SCC decision but also refer to following simplified version of the *Anderson* framework as outlined below:

1. Stage One

    i. Examine the integrity of the bargaining process for undue pressure or an exploitation of a power imbalance or other vulnerability.

    ii. Determine whether the parties executed the agreement freely and understanding its meaning and consequences.

    iii. Unless the court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration.

2. Stage two

    i. Once the court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement in order to determine how much weight to afford the agreement in fashioning an order for property division.

    ii. The weight to ascribe to the substance of the agreement will ultimately be determined by what is fair and equitable according to the scheme set out by the provincial legislation.

How does the Anderson framework apply in Ontario?

It appears that in Ontario, the *Anderson* framework does not have much legal implications when a court assesses a claim to set aside domestic contracts dealing with property division. The reason is that in Ontario, we already have the framework in place and *Anderson* does not appear to add that much more than we already have.

Firstly, s.56(4)(a) of the *FLA* addresses the failure to disclosure significant assets or debts. If there is a failure, then the *LeVan* framework is invoked. The contract can then be set aside if the non-disclosure is significant enough and if the court does not exercise its discretion not to.

Second, s.56(4)(b) addresses the issue of whether a party understood the nature or consequence of the contract. If it is found that a party did not understand the consequences, the court can either set it aside, or again not, depending on its discretion.

Finally, s.56(4)(c) addresses the law of contract (i.e. duress, unconscionability, etc.) If present, a court can set the contract aside, or not, depending on discretion.

And, independent legal advice in and of itself is not determinative as it is in Saskatchewan and the *FPA*. Rather, Ontario courts assess ILA as part of the s.56(4)(b) analysis. In contrast, *Anderson* created a whole framework around its absence as the *FPA* did not have a s.56(4) equivalency.

With the *LeVan* framework already in existence, when would we fit in the *Anderson* framework?

That is a bit of a head scratcher.

But the more you think about it, it appears clear that the *Anderson* framework does not seem to add any additional principles in Ontario that we do not already employ.

Anderson Take-Away Principles for Ontario

Despite not adding any new legal frameworks in Ontario, there are still a number of helpful principles in *Anderson* that have been already discussed in prior decisions.

Agreements

1. The court will support the freedom of parties to settle their domestic affairs privately as long as family law public policy objectives are not thwarted (para. 3).

2. Judges must approach family law settlements with a view to balancing the values of contractual autonomy and certainty with concerns of fairness (para. 34).

3. Courts must have careful regard to the financial and emotional pressures that characterized the relationship, and not simply presume that legal advice immunizes a contract from unfairness (para. 35).

4. The purposes and criteria of the statute provide an objective yardstick against which to assess the parties' subjective understanding of what is fair, and limit the risk that parties will depart significantly from public policy goals expressed by the legislature (para. 37).

Miglin

5. Our jurisprudence on domestic contracts, beginning with *Miglin*, values the principles of autonomy and certainty by encouraging parties to arrange their intimate affairs outside the court system. But the emotional complexities of family dynamics make contracting over domestic affairs unlike regular arm's length transactions. The unique context out of which these agreements arise requires courts to approach them with keen awareness of their potential frailties to ensure fairness, having regard for the integrity of the bargaining process and the substance of the agreement. (para. 38)

6. *Miglin* was never intended to be a framework of general applicability for courts in dealing with *all types* of domestic contracts (para. 7).

7. Vulnerabilities are not simply to be presumed because agreements are negotiated and concluded in an emotionally stressful context. A finding of vulnerability must be ground in evidence (para. 69, referencing *Miglin*).

Disclosure

8. Disclosure is critical in family law to prevent misinformation and exploitation (para. 67).

9. A lack of disclosure, on its own, will not necessarily call for judicial intervention (para. 67).

10. A court may intervene, where a failure to disclose is deliberate and coupled with misinformation, or where a failure to disclosure leads to an agreement that

departs substantially from the objectives of the governing legislation, that is, resulting prejudice from uneven access to information (para. 67).

Discussion - Miglin, LeVan and Anderson frameworks

When setting aside agreements, it is usually helpful to keep in mind and distinguish the seminal cases that courts regularly refer to. These usual suspects include:

- *Miglin v. Miglin* (2003)
    - separation agreement (spousal support)
- *Hartshorne v. Hartshorne* (2004 SCC 22)
    - marriage contract (property division)
- *LeVan v. LeVan* (2008 ONCA 388)
    - marriage contract (property division and spousal support)
- *Rick v. Brandsema* (2009 SCC 10)
    - separation agreement (property division)
- *Anderson v. Anderson* (2023 SCC 13)
    - separation agreement (property division)

Although *Hartshorne* dealt with the issue of setting aside a domestic contract, the principles arising from it mainly applied to British Columbia. The reason is that BC has a relatively lower threshold for judicial intervention when setting aside agreements compared to other provinces. It uses the term "unfair" while other provinces have higher thresholds (*Hartshorne,* at para. 14).

In Ontario, *Hartshorne* has been referred to for various principles relating to autonomy and independent legal advice, but the courts typically have not used any of its frameworks and have stuck to s.56(4) and *LeVan*.

In *Rick v. Brandsema*, the Supreme Court addressed the issue of setting aside a separation agreement with respect to property, and it did not propose any new frameworks applicable to Ontario. Rather, it focused on the issue of unfairness as defined in the BC property legislation and provided principles relating to autonomy, disclosure, misinformation and the integrity of the bargaining process (*Rick*, paras. 46 – 48).

That leaves us with *Miglin, LeVan* and *Anderson* which did create frameworks to follow.

One of the key differences between the three cases is that when applying the *Miglin* framework, a court is to review both the circumstances that occurred after the

agreement was reached and at the time of making the agreement. While, in *LeVan* and *Anderson*, the courts' focus is primarily on the time of entering the agreement.

The reason for the difference between setting aside a spousal support versus a property division agreement was explained by Justice Karakatsanis at paragraph 30:

> **Spousal support is primarily a prospective and ongoing obligation that looks to future value, and is in part based on means and need**; "[t]he default assumption is that, spousal support is open to modification in response to changing circumstances" …
>
> **The division of family property, by contrast, is a chiefly retrospective exercise**: it takes stock of property brought into and acquired during the spousal relationship as past contributions giving rise to a property entitlement ….
>
> This subject matter distinction has similarly been recognized by this Court (see *Miglin*, at para. 76), and partly explains why we have never fully extended the *Miglin* framework to the division of family property… (emphasis added)

Therefore, it appears that in Ontario, *Anderson* does not add any new framework to follow that *LeVan* and the related case law do not already address. Both in the *Anderson* and *LeVan* frameworks, we are required to assess the procedural fairness of the agreement and also the fairness of the result relative to the appropriate legislation.

Aside from the general principles as outlined above, we can now breathe a sigh of relief that we don't need to add a new Supreme Court of Canada framework in the already existing Ontario landscape.

Liar(s), liar(s), pants on fire – credibility revisited

David Tobin

Overview

As a lawyer prepares their client for trial, Justice Kraft in *F. v. F.* reminds us that it is crucial that they examine the inconsistencies in their witnesses' stories. A lawyer cannot abdicate their duty by permitting a client to tell a story that is obviously inconsistent or implausible.

Credibility, inconsistency and lying

The facts of *F. v. F.* (2023 ONSC 2682) include cheating spouses being caught in the act in an underground parking garage, safes full of cash and precious metals, and perjury. Although reminiscent of a soap opera episode, they are not the important part of this case.

Justice Kraft's review of the law of credibility is what matters and can be found at paragraphs 4 to 10 of the decision.

Justice Kraft reminds us that credibility is not an all or nothing determination. A judge can accept a witness' story in some respect and find them not credible in other respects – even if the findings of their lack of credibility goes to the heart of the matter at issue.

Justice Kraft makes a distinction between being

1) not credible as a result of inconsistency in one's story, and

2) not credible as a result of deliberate lying.

The latter, "may well cause the trier of fact to question or reject the entirety of a witness' testimony".

With respect to lying under oath, Justice Kraft was concerned about the husband who lied under oath, yet still accepted much of his evidence. Justice Kraft found that the husband

> "…lied under oath when he testified in court that he was in the minivan with Veronica in the parking garage. [Seva] was self-represented at trial. During his

> closing submissions, he said that Veronica was not the woman with whom he was found in the minivan."

However, while this hurt his credibility it was not enough for the wife to overcome her own credibility issues.

With respect to internal inconsistencies in a witness' testimony, this can undermine a trial judge's trust in the accuracy of testimony. In this case Justice Kraft found that the wife was the one who likely stole items from two safes belonging to the husband, in part because the wife accused the husband of removing the safe from the walls with a crowbar.

When she was questioned about why the husband would do this when he had the combination to the safes, the wife answered, "he did so because he had a plan to call the police and accuse her of robbing him."

The problem with this explanation is that when the wife was asked whether the husband had, in fact, called the police and reported that she robbed him, "she acknowledged that he did not do so".

Justice Kraft found that "this answer by [the wife] is nonsensical and I find it to be disingenuous."

This inconsistency undermined the wife's testimony on the key issue of who stole the family's cash and precious metal.

Credibility and reliability

Although *F. v. F.* did not address the point head on, it is important to remember the difference between credibility and reliability.

The case of *K v. S.* (2022 ONSC 6413) specifically addressed this point at paragraph 28 where Justice Agarwal wrote:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall, and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

In essence credibility means truthfulness and accuracy where as reliability is only about accuracy.

Justice Kraft found neither Mr. F. nor Ms. F. to be credible and thus it flowed that they were not reliable witnesses.

Preparing a witness

Understanding the criteria through which a judge will assess a witness' or party's credibility is crucial to properly prepare your witness for a hearing.

A helpful list of criteria in assessing credibility has been repeated by different judges in both family law and non-family law cases. At paragraph 244 of the case *N. v. F.,* 2020 ONSC 7789, Justice Conlan lists the questions a judge asks themselves when considering a witness' credibility. Those questions are as follows:

> a) Did the witness have an interest in the outcome or was he/she personally connected to either party?
>
> b) Did the witness have a motive to deceive?
>
> c) Did the witness have the ability to observe the factual matters about which he/she testified?
>
> d) Did the witness have a sufficient power of recollection to provide the court with an accurate account?
>
> e) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions?
>
> f) Was there an internal consistency and logical flow to the evidence?
>
> g) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased?
>
> h) What cultural factors need to be considered in the manner in which the evidence is provided?
>
> i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

These questions and the answers do not lead to a scientific determination of a witness' credibility. In fact, in *Al-Sajee v. Tawfic* (2019 ONSC 3857), Justice Chappel reminds us that the Supreme Court of Canada stated in *R. c. Gagnon* (2006 SCC 17) at paragraph 20 that it is not always possible "to articulate with precision the complex intermingling

of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events".

Lessons for counsel

F. v. F. and the additional above cases highlight the importance of presenting your witnesses as credible and the lens through which a judge determines credibility.

How your witnesses present in court is very much in control.

If your witnesses are not prepared for a hearing, they may feel confident that they can outsmart the other lawyer and convince the judge of their 'story'.

Your witnesses, and in particular your client, need to be challenged early on with respect to the veracity of their story. They need to be reminded that they are not expected to be a perfect person and where they made mistakes or had lapses in judgment, it plays much better to own up to them rather than dance around them.

There are few things more heartbreaking during the course of a trial than watching your client try to dig their way out of their own grave.

Thus, the practical take away from these cases is that as a lawyer prepares their client for trial, it is crucial that they examine the inconsistencies in their witnesses' stories.

Having a client spin a yarn which is obviously inconsistent or implausible is an abdication of duty. The holes in the wife's story in *F. v. F.* could have been easily spotted with better preparation – which could have saved the wife embarrassment, among other things.

Foreign judgments and the defence of public policy: repugnant facts won't cut it

Christina Hinds

Overview

Yan v. Xu (2023 ONSC 1288) is a case that reminds us that the public policy defence to enforce a foreign judgment is extremely narrow. The fact that the Canadian law would have arrived at a different result than a foreign court will not be sufficient for the court to refuse enforcement of a foreign judgment.

Introduction

The recent Superior Court decision of *Yan v. Xu* dealt with the enforcement of foreign judgments and the narrow defences available once it is determined that the foreign court had jurisdiction.

As held by the Supreme Court of Canada in *Pro Swing Inc. v. Elta Golf Inc.* (2006 SCC 52), (citing the earlier SCC decision of *Beals v. Saldanha* – 2003 SCC 72) "**absent evidence of fraud or of a violation of natural justice or of public policy**, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered." (emphasis added)

In *Yan v. Xu*, both parties commenced separate family law proceedings upon separation. The father commenced proceedings in China (dealing with divorce, child support and property division) and the mother commenced proceedings in Ontario (dealing with decision-making responsibility and parenting time under the *Divorce Act*).

In 2018, a final order was made in Ontario. The mother thereafter amended her application to seek child support and spousal support pursuant to the *Family Law Act*.

In February 2023, Justice Diamond heard the mother's motion for interim child support and interim spousal support. The father brought a cross-motion seeking summary judgment granting an order recognizing and enforcing the Chinese judgments (thereby precluding the relief sought by the mother under the *Family Law Act*). The father's motion for summary judgment was successful and the mother's motion was dismissed.

After a review of the law applicable to summary judgment motions, Diamond J. set out the test applicable to recognizing and enforcing foreign judgments.

Enforcement of Foreign Judgments

First, the court must determine if the foreign court had jurisdiction. This will typically involve application of the "real and substantial" test developed by the Supreme Court of Canada in *Beals v. Saldanha*. However, attornment to the foreign court will also result in the foreign court being granted and maintaining jurisdiction (litigating the foreign claim on its merits rather than simply challenging the jurisdiction of the foreign court).

As there was no dispute that the mother had attorned to the Chinese court, Diamond J. moved on to the second stage of the analysis – whether the mother could avail herself to any of the "three essential defences" - extrinsic fraud, a denial of natural justice, and public policy.

Justice Diamond found that there was no evidence of any extrinsic fraud. Regardless, the defence of fraud was not available to the mother as she attorned to the Chinese court.

The defence of the denial of natural justice was also not available to the mother as the Chinese court applied the "minimum standards of fairness" – the mother was served with notice of the proceedings, actively participated, and filed submissions which were acknowledged in the final judgments. The defence of natural justice is concerned with forum and process, not the merits of the foreign proceedings.

The Defence of Public Policy

To invoke the defence of public policy, the foreign law upon which the judgment is based must offend our sense of morality or shock the court's conscience. The defence of public policy is concerned with "repugnant law" – not "repugnant facts". It involves *impeaching* the foreign judgment and *condemning the foreign law on which the judgment is based*.

Diamond J. provided an example of a successful use of the public policy defence. In *Kariminia v. Nasser* (2018 BCSC 695), the BC Supreme Court considered an Iranian court order that denied a woman a divorce on the basis that an Islamic divorce was only available to a man, not a woman. The BC Supreme Court held that this was

against Canadian public policy and was contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

Child Support Lower than the Guideline Amount

In *Yan*, the Chinese court ordered child support at an amount that was $1,300 below the monthly *Guideline* amount.

The mother argued that the father had forum shopped to find the "cheapest international child support rates" and that the Chinese judgments should not be enforced as that approach is "so offensive to this court's moral conscious".

The mother's argument was not successful.

Justice Diamond held that the fact that the Chinese court awarded child support less than dictated by the *Guidelines* "does not offend or shock the conscious" of the court. The Chinese court had jurisdiction to deal with the issue of child support and the principles underlying the *Guidelines* are "arguably irrelevant" to the foreign court's decision.

Diamond J. noted the conflicting reasoning in the recent decision of *Vyazemskaya v. Safin* (2022 ONSC 7311). That case dealt with a Russian judgment which the wife alleged the husband obtained through forum shopping in order to avoid paying spousal support. In that case the wife was not eligible to receive spousal support under Russian law. The court agreed with the wife and held that the husband's behaviour involved the type of "moral and fundamental values" that inform the public policy defence. Diamond J. stated that the court's decision in *Vyazemskaya v. Safin* was based on "admittedly repugnant facts" rather than repugnant law.

Inability to Claim Spousal Support

The Chinese court did not make an order for spousal support as there is no right to claim spousal support within the Chinese family law regime. The mother argued that her inability to claim spousal support "so offends the Canadian sense of morality that the Chinese judgment should not be recognized and enforced in Ontario".

Diamond J. considered the evidence of the father's expert who explained that property division is the primary means of providing financial resources to separating spouses. There is no stand-alone concept of spousal support.

In China, property division is a one-time payment, by way of a potential unequal division of marital property if warranted by the circumstances. The Chinese regime considers the roles during the marriage and whether a spouse is unable to meet their basic needs upon separation. However, it is solely a function of the marital property upon separation and not a function of the current or ongoing income of the payor spouse, or maintaining the standard of living enjoyed during the marriage.

As acknowledged by the court, under the Chinese regime, a spouse with little to no income would be "out of luck" if the separating spouses had no property upon separation, even if the other spouse had an extremely high income.

While sympathetic to the mother's "somewhat dire" financial situation, Diamond J. stated that such facts were "legally irrelevant" in determining whether the defence of public policy applies.

Diamond J. reviewed the British Columbia Supreme Court's decision in *Cao v. Cheng* (2020 BCSC 735) – a case "nearly on all fours" with the motions before him. In that case, Justice Forth rejected the public policy defence and found the Chinese judgments to be enforceable, stating that the public policy defence cannot be invoked only because the foreign law is based on different policies or leads to a different outcome than the Canadian law would.

While there is no stand-alone concept of spousal support under the Chinese law, the Chinese regime does divide the financial resources of spouses by way of property division and may result in an unequal division of property.

The Chinese regime considers the ability of spouses to meet their basic needs upon separation and the roles held during the marriage. Justice Diamond found that while this does not amount to spousal support as defined in Canadian law, the law upon which the Chinese judgments were based did not amount to the type of "shock to our moral conscience" sufficient to invoke the public policy defence.

Conclusion

Differences between Canadian law and foreign law will not, in and of itself, be sufficient to invoke the defence of public policy.

It is common for Canadian decisions to arrive at different results than foreign courts. We, for example, apply the *Child Support Guidelines* and well-established principles of spousal support.

However, just because another court does not mirror our judgments, this will not be sufficient for a court in Canada to refuse enforcement of the foreign judgment in question.

Although some people like to wear t-shirts that say “Toronto vs. Everyone”, in family law, “Canadian Judgements vs. Everyone” will unlikely make the fashion trend.

To impute or not to impute is not the question

Amruta Ponkshe

Overview

Osanebi v. Osanebi (2023 ONSC 2546) is a case penned by Justice Akazaki asking the question why minimum wage should be the default floor when imputing income where there is a default proceedings or a payor fails to make appropriate disclosure. The decision was a unique take on a common issue and may (or may not) set a precedent in future cases. Still, we tip our hats off to Justice Akazaki in writing this unconventional and creative decision in an effort to help recipients of support in similar situations.

Basis for Imputing Income – Legislation and Jurisprudence

Before we discuss *Osanebi,* it may be worth while to review the basics of imputing income in Ontario.

Justice Pazaratz succinctly once noted in *Trang v. Trang* (2013 ONSC 1980) that "Imputed income matters. The reason why income had to be imputed also matters".

Sections 19 and 23 of the *Child Support Guidelines* allow the court to draw an adverse inference against a party that has failed to provide financial disclosure and impute income it considers appropriate.

Section 19(1) includes a non-exhaustive list of nine enumerated categories to impute income, one of which is a spouse's failure to provide income information when under a legal obligation to do so.

While the goal of the *Guidelines* is to maximize objectivity, predictability and consistency, section 19(1) is one of the most litigated areas of the *Guidelines*. And not surprisingly, the law of imputation of income is a continuously evolving area in family law.

While it is always open to the court to find new circumstances in which to impute income, the justification for imputing income and the methodology to impute income must be addressed by the court in its reasons (R*iel v. Holland*, 2003 CanLII 3433 (ON CA)).

In addition to factors such as age, education, experience, skills and health of the parent, a spouse's failure to recognize their child support obligation and failure to pay child support despite doing well financially, are also relevant factors when determining the quantum of income to impute (*Drygala v. Pauli*, 2002 CanLII 41868 (ON CA) at para. 49).

The Facts in Osanebi

In *Osanebi*, the Court was faced with what, at first glance, seemed to be just another fight for divorce and corollary issues arising from separation. But, it was more interesting than that.

Justice Akazaki appears to have departed from the common practice of using minimum wage as the default position for determining child support obligations and instead, used a more average or median earning capacity as the default.

The parties separated in November 2014 after being married for 6 years. The Applicant mother sought a court order for divorce, and sole decision-making responsibility and child support for the two children of the marriage, aged 10 and 12.

While the mother and the children continued to live in Toronto after the parties separated, the Respondent father relocated to Lagos, Nigeria.

The father was employed and self-employed during the marriage, but the mother was unsure of what the father's employment and income in Nigeria. The father did not participate in the children's lives and did not provide any support to the family since he left them.

While the issues of divorce and decision-making responsibility were relatively straightforward, the father's failure to participate in the court process and provide information about his income and financial circumstances made the issue of child support complex.

The departure from common practice

The common practice to calculate income for a party who has failed to comply with the information requirements, is to impute an income equivalent to the provincial minimum wage (*Rose v. Baylis*, 2018 ONCJ 230, at paras. 79-93.)

While the Ontario Court of Appeal has made it clear that there must be a rational and evidentiary basis for imputing income above the provincial minimum wage, which must be governed by the principles of reasonableness and fairness, Akazaki J. noted that the appellate court has not set minimum wage as the default position (see *Carmichael v. Abel*, 2022 ONSC 7034, at para. 50 and *Drygala v. Pauli*, 2002 CanLII 41868 (ON CA) at paras. 43-52).

Accordingly, Justice Akazaki was not keen in using minimum wage as the default in situations where pleadings were struck and/or litigants who have failed to comply with financial disclosure.

Justice Akazaki took the idea one step further and wrote as follows:

> The idea of minimum wage as the default income to be imputed in these situations troubles me, because there is no principled reason to adopt it as a judicial norm. In fact, there is ample reason to reject it and to use a more average or median earning capacity as the default, in cases where the non-custodial parent has failed to make appropriate disclosure.

This novel approach was supported with the following observations:

- Data from Statistics Canada confirms that minimum-wage earners represent only about 10% of the Canadian workforce and that the average hourly wage in Canada in about $30 per hour, or almost double the Ontario minimum wage.

- In a situation in which the court has little or no information about the earner's income and the earner has failed to comply with the legal disclosure rules, logic would dictate that the median income would capture a wider net of possible outcomes, based on a balance of probabilities.

- Other areas of law use average statistics as the default, for example, in personal injury awards, average income is the default floor, not minimum wage, for determining damages for loss of earning capacity.

- Use of the minimum wage as the default floor amount encourages concealment of income among those who earn substantially more than minimum wage.

- Use of median income levels as the presumptive range would encourage more engagement in the process. Instead of checking out of the family process knowing that child support would be calculated on an imputation of minimum wage, a payor spouse would have to take part in the proceedings and disclose actual minimum wage earnings to have the income imputed at the lower amount.

- Family law should not default to a range of income earned by only one tenth of the labour force, when the court in other fields of law refer to average statistics representing the majority, or at least the largest cross-section of earners.

The imputation in Osanebi

Akazaki J. inferred from the father's return to Nigeria that his Ontario wage provided insufficient economic incentive for him to stay in Canada, compared to what he stood to earn in Lagos and the standard of living that city offered.

If it suited the father to reside in Nigeria away from his children, he should be expected to pay support based on the economic conditions of the location where the children reside, that is, Toronto.

The mother had submitted a draft order with the calculation of child support for the children as $491 per month based on a minimum wage imputation. However, in light of his observations discussed above, Justice Akazaki imputed an income of $50,000 per annum on the father as being a level of income close to the $30 per hour median. He ordered that the father pay $755 as monthly child support based on the CSG table amount two children aged 10 and 12 based on the $50,000 imputed annual amount.

Perhaps anticipating a possible appeal on his decision, Justice Akazaki went on to say that if the appellate court believed he was wrong to use factors approaching median wage income as opposed to minimum wage income, the appellate court can use the minimum wage to derive a table amount of $491 monthly instead of $755.

In addition to the higher amount of monthly child support, Justice Akazaki also stated that the case clearly warranted an award of retroactive child support and awarded 48 months of retroactive child support totaling $36,240 as of April 2023.

Discussion

The *Osanebi* case represents a common occurrence in family law where certain fathers blatantly abscond their parental and financial responsibilities.

In turn, the mothers are forced to spend money they don't have on legal fees and miss time from work in order to fight for scraps of support that they may or may not even receive.

It is honestly frustrating for family lawyers when faced with such cases. It makes our blood boil when we see such injustice and also have our hands tied to legal precedent that simply does not help.

So, we can either accept the status quo and tell our clients that the system is not fair, or we can hope for decisions like this one.

Mind you, Justice Akazaki appears to have taken a few risks with his conclusions with respect to the evidence and the corresponding inferences. For example, just because an individual leaves Canada, it doesn't necessarily mean that they will enjoy a better standard of living elsewhere (para. 18). Or, using median income as a presumptive range may not actually encourage more engagement by payors in the process (para. 14).

Still, what else are family lawyers and litigants to do when the payor does not participate in the legal process and does not produce disclosure? Why does a single mother without any financial or parental help need to carry even more of the burden?

We instinctively know the answers, but are powerless in the solutions.

We should strive to take calculated legal risks for the sake of helping litigants in need and be brave in our attempts to do so regardless of the risk of appeal.

Justice Akazaki certainly did, and we applaud him for his efforts.

Striking the balance on striking a party's pleadings for non-disclosure

Samantha Rich

Overview

In *Nayaik v. Nayaik* (2023 ONSC 2645) the mother brought a motion to strike a father's pleadings in the face of significant non-disclosure. Justice Jarvis noted that the courts do not look favourably upon deferred disclosure, delayed disclosure, and non-disclosure. However, Jarvis J. also inferred that judges can similarly get frustrated when parties do not clearly show the court what disclosure is in fact outstanding. Although the mother obtained a cost award for the motion, she was not successful in striking the father's pleadings.

Background

In *Nayaik*, the respondent mother brought a motion to strike the pleadings of the applicant father for alleged non-compliance with six court orders for financial disclosure and for leave to proceed with an uncontested trial.

Justice Jarvis held that he could not strike the father's pleadings, given the totality of the disclosure provided to date. However, since the disclosure was late and unsatisfactory, the court could provide further directions for the trial and leave it to the trial judge to determine the extent of the father's participatory rights (para. 33).

Unreasonable litigation behavior

Justice Jarvis noted that the father's behaviour in not following the court orders regarding providing financial disclosure was "unreasonable litigation behaviour".

Nayaik reminds us of the important lesson that in order to prevent the court noting unfavorable behaviour which could very well negatively impact our client's matter, it is imperative that family law litigants abide by the *Family Law Rules* and orders from the court regarding requiring financial disclosure.

Clarity and certainty with respect to disclosure request

Interestingly, the court appeared frustrated in coming to its ultimate conclusion of non-disclosure. Justice Jarvis indicated that neither the mother's evidence nor the Disclosure List informed the court when the balance of the disclosure was provided or whether and when the mother would have been satisfied with the father's answers or explanations.

The court's frustration was palpable at paragraph 12 of the decision:

> This court has had to wade through the plethora of endorsements, Orders and (where appropriate) affidavits to piece together the disclosure (or, as it were non-disclosure) path and must infer that the father did comply with the preponderance of the disclosure ordered or that the wife accepted or chose not to further pursue disclosure of information involving those not listed above as outstanding.

And thus, yet another lesson emerges for counsel: when providing the court evidence of the other party's disclosure deficiencies, clearly indicate the basis of your requests and specifically which documents or information is still outstanding and on what basis.

If you are not clear, you will likely frustrate the court, at best. And at worst, your motion may be dismissed with costs.

Striking of pleadings

Justice Jarvis also noted that, "striking a party's pleading does not, ipso facto, relieve the party obtaining that relief from having to affirmatively prove their case at trial" (para. 25).

The court needs enough disclosure in order to make a decision which does not give rise to factual errors resulting in an unjust award of support. As noted in the Court of Appeal decision of *Kovachis v. Kovachis*, pleadings should only be struck in exceptional circumstances because without one party's participation in the trial, there is a risk that the court will not have sufficient or accurate information to make a just result (2013 ONCA 663, at paras. 24-25).

The court in *Spettigue v Varcoe*, affirmed that striking a party's pleadings, is a "drastic remedy of last resort" and should be "restricted to particularly egregious cases of deliberate, persistent non-compliance, total disregard for the court process, and

failure on the part of the offending party to either comply or adequately explain non-compliance." (2011 ONSC 6618, at para. 31)

The Court of Appeal noted in *Purcaru v. Purcaru*, that the exceptional nature of remedy of striking a party's pleadings stems from the adversarial nature of the legal system:

> "The adversarial system, through cross-examination and argument, functions to safeguard against injustice. For this reason, the adversarial structure of a proceeding should be maintained whenever possible. Accordingly, the objective of a sanction ought not to be the elimination of the adversary, but rather one that will persuade the adversary to comply with the orders of the court." (2010 ONCA 92, para. 49)

Importance or materiality of disclosure

A list of missing disclosure is also not enough. Rather, an applicant should also provide evidence to the court of the importance or materiality of the disclosure they are seeking to be produced. In *Kovachis*, the Court of Appeal noted that before pleadings are struck due to financial non-disclosure the court must consider the importance or materiality of the disclosure not produced (*Kovachis*, para. 34).

Additionally, in *Mullin v. Sherlock*, the Ontario Court of Appeal noted that the court is obliged to "contextualize the relevancy and impact of the non-disclosure, the complexity of the issues in dispute, the extensiveness of the disclosure produced and the seriousness of the defaulting party's efforts and explanations for the inadequate or non-disclosure" (para. 28).

The court in *Mullin* at paragraphs 41-42 also added the following context from the perspective of the court:

> **"Judges presiding over family law disputes are frequently faced with mounds of material, a busy court docket and pressure to process files expeditiously.** Repeated and frequent motions for disclosure are often necessary, though they should not be. As stated by Benotto J.A. in Roberts, at para. 12, delinquencies add significant expense to proceedings and consume substantial judicial time and resources. Counsel and their clients should not expect that repeated adjournments and indulgences will be given to instances of non-disclosure. Furthermore, an effective remedy for inadequate or non-disclosure should be available.

> **At the same time, a litigation strategy that involves repetitive motions for disclosure untethered from the disclosure already made may give a false impression of the extent of the non-disclosure.** It must be recognized that given the size and complexity of some estates, it may be easier to ask the question than to give the answer." (emphasis added)

The court in *Spettigue v Varcoe* at paragraph 15 emphasizes the positive duty to provide financial disclosure and that this duty flows from numerous sources:

> …there is a general duty in all cases to disclose information that is **relevant and material to the case**, subject to any claims respecting privilege or other exclusionary rules of evidence… (emphasis added)

In *Nayaik*, Justice Jarvis found that the non-disclosure was particularly egregious because not only did the father not object to producing the disclosure three and a half years prior but also because the probative value of the disclosure risks his support paying ability not being fairly assessed by the court.

Culture shift

Justice Jarvis referred to the Supreme Court of Canada case of *Hryniak v. Mauldin* (2014 SCC 7) and agreed that there needs to be a culture shift in cases involving deferred disclosure, delayed disclosure, and non-disclosure. He noted that, "What the court permits, it promotes" (para. 32).

The court's displeasure regarding failure to comply with the *Family Law Rules* and previous court orders regarding disclosure was abundantly clear:

> "No family law litigant should have to tolerate the kind of litigation behaviour demonstrated by the father in this case".

As pointed out by the court in *Levely v. Levely*:

> Family Court proceedings are intended to be a means by which aggrieved parties can have their disputes arising after separation adjudicated upon by the court in a just, efficient and timely manner. Unfortunately, they all too often become a destructive tool which one party wields and manipulates in order to create further financial and emotional hardship for the other party. **The frequency with which Family Law litigation degenerates into an abusive game of delay tactics, stonewalling, and dodging of judicial authority is a concern which must remain at the forefront of the judge's mind in considering remedies for a party's failure to participate as required in**

> **court proceedings or to comply with court orders**. Family Law litigants who come to the court for assistance must come with a strong sense of assurance that the process will be an effective means of mending and stabilizing the family fabric, rather than a futile money pit of failed justice. **The court has a critical responsibility and role to play in ensuring that proceedings which are intended to protect families and lead to resolution of pressing and emotionally divisive issues are not hijacked by a party and transformed into a process for further victimizing the other party and the children in their care**. (2013 ONSC 1026 at para. 12) (emphasis added)

The court ultimately held that the mother is entitled to costs and considered:

- the delay in the case (which was almost entirely attributable to the father);
- the expense to which the mother has been unfairly and unreasonably put; and
- expressing the court's displeasure with the father's litigation conduct.

Not surprisingly, the court awarded the father to pay the mother her costs in the amount of $15,000.

Nayaik is an important reminder to produce disclosure and to ask for it clearly.