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A monthly review and discussion of family law in Ontario

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General

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

Various authors contribute to the text of the OFLM.

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

Legal Notice

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

Planning to claim a section 7 expense? Remember to review the principles

David Frenkel & Samantha Rich

Overview

On the surface, claiming *Guideline* section 7 expenses appears to be simple and straightforward.

What could be difficult about discerning whether an expense is food, shelter, or clothes? If it is not one of the three, then isn't that a section 7 expense?

Not really.

Rather, a claim for a section 7 expense requires a true understanding of whether the expense for a particular child is necessary and reasonable.

And it may not come as a surprise for some that what a court determines is a s.7 expense for one party may not be allowed for another.

Therefore, the "why" matters and this is what this article is all about.

By way of an overview, we first reviewed the recent case of *Campbell v. Campbell* (2023 ONSC 5952). In *Campbell*, Justice Ellies discusses what share, if any, the father should pay of the child's university application and moving costs. Spoiler alert: evidence was a key factor in dismissing the mother's claim.

Then, we reviewed the published cases in Ontario from 2022 and 2023 (and some from 2021) and summarized the principles and case law that are regularly referred to when discussing special and extraordinary expenses in Ontario.

From our review, there were some decisions deserving honorary mention such as *A.E. v. A.E.* (2021 ONSC 8189), where Justice Chappel beautifully summarized many critical concepts and principles. Also, *O'Neill v. Cutler* (2023 ONSC 1143) was a recent decision where Justice Davies did a great job assessing ancillary university expenses

with the care and attention that they deserve. And we can't forget the often-quoted court of appeal decisions of *Titova v. Titov* (2012 ONCA 864) and *Park v. Thompson*, (2005 CarswellOnt 1632) that all family lawyers should be familiar with.

Finally, and just for fun, we collected all claimed expenses from the last couple years and divided them into two lists: where courts allowed them to be s.7 and where courts did not. We hope the list can serve as a useful reference guide for counsel dealing with s.7 claims in the future.

Campbell v. Campbell

Campbell v. Campbell is a good reminder when going to court to claim s.7 expenses, to do so with sufficient evidence. Otherwise, you may walk away with your tail between your legs and wishing you were more prepared.

In *Campbell*, the self-represented mother sought a contribution towards the child's post-secondary education expenses under s.7 of the *Federal Child Support Guidelines* (the "*Guidelines*").

The mother sought to recover the father's proportionate share of the costs of the child's university application, as well as the costs of the child moving to North Bay and setting up a residence there.

The father, also self-represented, submitted that he should not be required to pay for the moving costs because he bought the child a new computer, gave him the sum of $4,000 by way of e-transfers, and would be giving him another $1,000 in the near future (at para. 10).

Under s.7, the court has discretion to allow certain expenses taking into account the necessity of the expense, the best interests of the child as well as the family's circumstances.

Justice Ellies reiterated that, "the exercise of apportioning a child's post-secondary expenses requires that the court determine the reasonable costs of the child's post-secondary education and how much the child can reasonably contribute to those costs" (at para. 27).

However, to do so, the court required a certain levellevel of information, which was not present in this case.

Although the mother deposed that the child had started working and "at minimum wage", the court noted that "I am not sure how much that is, nor am I told how many hours he works a week or whether he works any overtime. I have no pay slips ..." (at para. 28)

The mother further claimed that the child was paying rent in the amount of $620 per month for his residence in North Bay and $250 per month for his trainer. The mother said that the child should be able to save about $1,000 per month for school.

Again, the court was left hanging with respect to the evidence. Justice Ellies noted that the mother did not indicate when the son started paying rent or the trainer costs and she did not give enough information to know if the estimate for school savings was reasonable or not or if this goal was met or exceeded in the past summer (at para. 29).

The mother continued to dig her metaphorical hole deeper.

The mother claimed that the child qualified for $10,200 of government financial assistance, $6,200 of which was a grant and $4,000 of which was a loan.

Justice Ellies again noted that there was no information about the child's monthly unpaid-for expenses apart from his rent and thus he could not be sure that the government assistance would cover them all.

On the father's side, the level of evidence was also unimpressive.

While the father demonstrated that he had given the child $4,000, the court noted that it had "no idea what that was used for" since some of it "may not have been used for post-secondary education expenses at all…" (at para. 31).

Ultimately, Justice Ellies held that he needed more information about the child's income and expenses before he could apportion the child's post-secondary expenses.

The mother's claim was dismissed but an important lesson emerged to lawyers and litigants alike: don't bring claims without adequate evidence.

Principles relating to claims for s.7 expenses

Campbell v. Campbell focused on the necessity of evidence when making s.7 claims. However, in addition to evidence, counsel need to reflect on the relevant principles and integrate them when grappling these issues.

The following are the s.7 principles that are used most often in courts in recent years.

The Titova Roadmap

1. Justice Chappel in *A.E. v. A.E.* (2021 ONSC 8189 at para. 374) referred to the often-quoted decision of *Titova v. Titov* (2012 ONCA 864) and developed the following road map:

    1. Calculate each party's income for the purposes of determining contribution to section 7 expenses.

    2. Determine whether the expense in question falls within one of the enumerated categories set out in section 7 of the Guidelines.

    3. If the expense falls under section 7(1)(d) or (f), determine if the expense meets the definition of "extraordinary."

4. Determine whether the expense is necessary in relation to the child's best interests and is reasonable in relation to the means of the spouses and those of the child, and to the family's spending pattern prior to separation.

5. Determine the net amount of the expense after applying any applicable subsidies, benefits or income tax deductions and credits relating to the expense.

6. Consider what amount, if any, the child should reasonably contribute to the payment of the expense.

7. Finally, determine how much of the remaining amount each party should pay.

Right of the child

2. Child support and section 7 expenses are the right of the child (*K. v. N.,* 2023 ONSC 5339 at para. 10).

Extraordinary expenses

3. In determining what is "extraordinary" the court must consider the amount of the expense in relation to the income of the party, including the amount of child support payable. The court may also consider the nature and number of activities, the special needs or talents of a child and any other similar and relevant factors. (*K.R. v. M.R.*, 2022 ONSC 794 at para. 36)

4. Modest expenses arising from a child's participation in extracurricular activities are to be covered by basic child support (*Craig v. Niro*, 2022 ONSC 5178 at para. 45).

Reasonable and necessary

5. To determine reasonable and necessary, the following factors should be taken into consideration:
    a. The combined income of the parties;
    b. The fact that two households must be maintained;
    c. The extent of the expense in relation to their combined income;
    d. The debt of the parties;
    e. Any prospect for a decline or increase in the parties' means in the near future; and
    f. Whether the non-custodial parent was consulted about the expenses before they were incurred. (*Hawkins v. Hawkins,* 2019 ONSC 7149 at para. 116, reference to *Piwek v. Jagiello, 2011 ABCA 303* and *Correia v. Correia*, 2002 MBQB 172)

6. In deciding whether an expense is necessary in relation to the child's best interests, the question is whether it is appropriate having regard for the particular needs and any special skills of the child, and the importance of supporting their overall physical, emotional and social wellbeing and development (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 380).

7. In the context of extracurricular activities, the necessity factor requires the court to consider the nature and extent of the benefits that the child derives from the activities, including "self-esteem, teamwork, friendships, family camaraderie and the ability to operate in a structured setting" (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 380, with reference to Richer v. Freeland, 2019 ONSC 6840 at para. 41).

Onus

8. The onus is on the party seeking contribution to demonstrate that the expense falls within one of the categories under s.7, and that they are reasonable **and** necessary, considering the parties' financial circumstances. (*Gaddon v. Da Silva*, 2023 ONSC 5400 at para. 52)

Future expenses

9. The court may order reimbursement for s.7 expenses that have not yet been incurred. The language of s.7 allows for an estimate to be made in relation to future expenses and to permit an order requiring contribution to them. (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 376 with reference to *Beneteau v. Young*, 2009 CarswellOnt 5099 (S.C.J.))

Ordinary Expenses

10. S.7 expenses shall not include routine extra-curricular expenses but must be special and/or extraordinary in accordance with the definition set out in the *Guidelines* (*Rushlow v. Tremblay-Garland*, 2022 ONSC 2675 at para. 101).

11. Ordinary expenses are covered under the basic Table amounts of child support and include the following:

    a. food,
    b. shelter,
    c. clothing,
    d. grooming,
    e. entertainment,
    f. pets,

g. vacations,
h. many reasonably-priced school fees, supplies and trips,
i. children's allowances, and
j. other basic necessities, as well as many reasonably-priced recreational and extracurricular expenses (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 377)

Means

12. In assessing the reasonableness of an expense in relation to the means of the parties and the child, the court's analysis is not limited to considering their incomes. The term "means" has been given an expansive interpretation in the law, and encompasses all financial resources, capital assets, income from any sources, investments, pensions, and any other sources from which the spouse derives gains or benefits (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 382).

13. Where the expense is not within the means of the parties, the court may limit or deny recovery of that amount (*Kovalchuk v. Kovalchuk*, 2023 ONCJ 355 at para. 59).

Past expenses

14. The fact that a party has strongly agreed to and encouraged the incurring of an expense in the past may support a finding that the expense is necessary, but it is not determinative as the court must ultimately determine the question of necessity as of the time when the order is made (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 380).

15. The fact that the parties incurred the expense prior to separation is not determinative and must be considered along with all other relevant considerations, including the following:

a. Whether the expense caused financial strain to the parties during the relationship;
b. The fact that each party may now have more limited means as a result of having to maintain separate households;
c. Whether the expense has increased since the parties were together; and
d. Whether the means of either party have decreased significantly since the separation. (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 384).

Retroactive claims

16. Retroactive s.7 orders may best be left for trial depending on the degree that the trier of fact can determine whether there was consultation, whether the expenses were reasonable and whether there is clear evidence of the parties' incomes at the relevant times (*Whittaker v. Whittaker*, 2023 ONSC 2923 at para. 28).

17. The retroactive support analysis equally applies to claims for retroactive s.7 expenses (*Lobban v. Lobban*, 2022 ONCJ 163 at para. 38).

18. The *D.B.S.* principles apply to claims for retroactive claims for contributions to s.7 expenses, or retroactive increases in such contributions (*R. v. I.*, 2022 ONSC 3531 at para. 127)

Interim orders

19. It may be a waste of judicial resources to have past s.7 expenses determined on an interim basis, only to have them reconsidered by the trial judge a few months later where findings may be different (*K. v. D.*, 2022 ONSC 1071 at para. 56)

Consent/Consultation/Notification

20. The *Child Support Guidelines* do not require that s.7 expenses only be incurred after the other parent consents, although whether or not the other parent consents to the expense or was aware of the expense may be a factor in considering whether the expenses are reasonable and necessary (*Ford v. Cassell*, 2023 ONSC 1553 at para. 51).

21. There are too many factors that may militate against consultation and notice for the court to make them absolute pre-requisites for obtaining an order for contribution to s.7 expenses (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 387). Examples of factors include:
    a. if the payor's comments and actions made it abundantly clear that consultation would have been a futile and meaningless endeavour;
    b. the party against whom reimbursement is sought clearly knew that the expenses were being incurred and did not raise any objection;
    c. due to intimidation or family violence by the payor.

22. Consultation is just one of many factors to be considered in the determination of the entitlement and is not a prerequisite for obtaining an order (*S.C. v. C.C.,* 2022 ONSC 1763 at para. 421).

23. Even where there is an order or agreement requiring prior consultation or consent, the court retains an overriding discretion to allow s.7 claims notwithstanding lack of compliance with such terms (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 388). Examples of relevant factors include:
    a. the payor's attitude and conduct clearly demonstrate that efforts to consult and obtain consent would have been pointless,
    b. the payor could not be located,

c. the recipient was unable to comply for valid reasons or in situations where requiring consultation and consent would be unadvisable due to concerns about intimidation or family violence.

24. An argument may be made for not consulting or notifying a spouse of s.7 expenses as they are incurred where it may be reasonable not to communicate with a former spouse. This could occur where parties separate as a result of violence, there are restraining orders in place, etc. However, despite a non-contact order, a spouse may still be able to provide receipts through a third party. (*Kostrinsky v. Nasri*, 2022 ONSC 2926 at para. 139)

25. Section 7 expenses do not require prior consultation for allowable expenses, but a failure or refusal by a claiming parent to discuss an expense with the other parent in advance bears on the court's exercise of its discretion in determining whether it is reasonable. However, where consultation would be meaningless due to chronic default of payor, or attitude of payor, prior consultation should not be required. (*El Quazzani v. Chabini*, 2022 ONSC 5773 at para. 66)

Post-secondary education

26. When children over the age of majority attend post-secondary educational institutions, the court must consider whether the child is able to contribute to their own post-secondary expenses. The level of contribution by the child is within the discretion of the trial judge. (*O'Connor v. O'Conner*, 2022 ONSC 3482 at para. 139 referring to the Ontario Court of Appeal decision of *Lewi v. Lewi*, [2006] O.J. No. 1847)

27. Not all expenses incurred by an adult child while attending post-secondary studies are considered s.7 expenses. Only those expenses necessary for the

pursuit of education should be included. (*Pyne v. Landaverde*, 2022 ONSC 4518 at para. 74)

28. There is no requirement that post-secondary education expenses be extraordinary. Nonetheless, to qualify as a post-secondary education expense, the expense must be sufficiently connected to the program of study. (*Craig v. Niro*, 2022 ONSC 5178 at para. 24)

Discretion

29. Unlike section 3 of the *Guidelines*, which presumptively provides for the table amount of child support, an order for s.7 expenses involves the exercise of judicial discretion (*Kovalchuk v. Kovalchuk*, 2023 ONCJ 355 at para. 56).

30. An order for contribution to special and extraordinary expenses under s.7 of the *Guidelines* is discretionary as to both entitlement and amount (*H. v. S.,* 2023 ONCJ 343 at para. 63).

31. The court has the discretion to apportion the s.7 expense in a different manner than pro-rata to the parties' incomes, depending on the circumstances of the case (*Kovalchuk v. Kovalchuk*, 2023 ONCJ 355 at para. 60; *H. v. S.,* 2023 ONCJ 343 at para. 65).

    a. For example, in *Zhao v. Xiao*, (2023 ONCA 453 at para. 17), the court of appeal upheld the trial judge's determination that the parties pay the s.7 expenses in proportion to the combined household incomes rather than just the income of the parents alone.

Evidence

32. The party seeking contribution to the expense has the onus of adducing credible and reliable evidence respecting the necessity and reasonableness of the expense (*A.E. v. A.E.,* 2021 ONSC 8189 at para. 379).
    a. Examples of evidence can be receipts and credit card/bank statements (*R.L. v. M.F.*, 2023 ONSC 6063 at para. 30).

33. A Request to Admit can be an effective method to provide evidence with respect to claims for s.7 expenses (*R.L. v. M.F.,* 2023 ONSC 6063 at para. 30).

34. Claims for s.7 expenses should be made with documentation or oral evidence and following the disclosure provisions in the *Child Support Guidelines* and the *Family Law Rules*. Otherwise, the claims can be dismissed. (*W.A.C. v. C.V.F.*, 2022 ONSC 2539 at para. 35)

Examples of section 7 expenses in recent decisions

The following two lists (expenses allowed and not allowed) are a collection of examples where courts found that certain s.7 claims were allowed as s.7 expenses and certain ones which were not allowed.

Although informative as to how a court adjudicated a specific claim, the lists should be reviewed with the understanding that a court could have made a different decision if the contextual factors were different.

For example, if the income of the parties were higher, then a s.7 expense may have been considered to be an ordinary expense to be paid out of child support. Alternatively, if the income of the parties were lower, the expense may not have been allowed as it would not be an item that the parties would have been able to afford in the first place.

Other factors that can influence a decision on s.7 claims include the best interest of the child, the capability of the child with respect to a certain activity, the level of consultation prior to the expense being incurred, etc.

Nevertheless, the following lists are a helpful starting point to see what s.7 claims have and have not been allowed by courts since January 1, 2022 (along with a select number of cases in 2021 as well).

Section 7 expenses: allowed

The following is a list of claimed expenses which have been allowed as a s.7 expense:

- **before and after-school care**
  - (*Downs v. Downs*, 2022 ONSC 3382 at para. 16)
- **car insurance**
  - (*M.C. v. R.K.*, 2022 ONSC 3281 at para. 97)
  - See also *Ferlisi v. Boucher,* (2021 ONCJ 48 at para. 97) where the expense was not allowed.
- **caregivers providing nursing care for child**
  - (*Choudhury v. Awal*, 2023 ONSC 4064 at para. 88)
- **caregiver** (part-time)
  - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 3)
- **cell phone and cell phone plan**
  - (*C.Z. v. J.Y.*, 2023 ONSC 80 at para. 6)
  - But see *Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 98 and *M.B. v. B.,* 2023 ONSC 125 at para. 91 where cell phone bills were not allowed.
- **childcare** (during summer and school PD days)
  - (*Mestiri v. Mestiri,* 2022 ONSC 1052 at para. 75)
- **coaching** (soccer)
  - (*R.L. v. M.F.,* 2023 ONSC 6063 at para. 11)

- **computer** (and replacement every two years)
    - (*Saroli v. Grette,* 2022 ONSC 148 at para. 430)
    - (*Mestiri v. Mestiri,* 2022 ONSC 1052 at para. 64 – case note: if purchased for school requirements)
- **contact lenses**
    - (*R. v. R.*, 2022 ONSC 965 at para. 24)
- **cord blood bank/cord blood storage**
    - (*R.L. v. M.F.,* 2023 ONSC 6063 at para. 11)
    - (*N.C. v. C.H.*, 2022 ONSC 7142 at para. 17)
        - The parties made a joint decision at the time of each child's birth to store their cord blood which is rich in stem cells.
- **counselling**
    - (*Jones v. Iqbal*, 2022 ONSC 6566 at para. 120)
- **dance** (competitive & non-competitive)
    - (*Ojigho v. Burge*, 2023 ONSC 2029 at para. 39)
    - Not allowed in *Lima v. McCarthy* (2022 ONSC 1383 at para. 226)
- **dental**
    - (*El Quazzani v. Chabini*, 2022 ONSC 5773 at para. 66)
    - The court also noted that the lack of consultation by the wife with the husband would not be a bar to this expense. The court held that meeting the child's dental needs was a mutual obligation of both parents and that the child's health should not be sacrificed due to the lack of communication between the parties.
- **drum lessons**
    - (*AE v. AE*, 2021 ONSC 8189 at para. 10)
- **eye exam**
    - (*Kovalchuk v. Kovalchuk*, 2023 ONCJ 355 at para. 70).
- **eyeglasses**
    - (*K.R. v. M.R.*, 2022 ONSC 794 at para. 45)

  - The court also noted that eyeglasses should not need to be replaced annually unless the prescription changes or they break.
- **food** (while child away at university)
  - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 12)
- **gas money** (as part of post-secondary expenses)
  - (*C v. N.,* 2023 ONSC 3792 at para. 35)
- **guitar lessons**
  - (*H. v. S.*, 2023 ONSC 4668 at para. 115)
- **gym membership**
  - (*Boisvert v. McDonald*, 2023 ONSC 4824 at para. 6)
- **gymnastics**
  - (*H. v. S.,* 2023 ONCJ 343 at para. 74)
- **health insurance premiums**
  - (*A. v. J.*, 2023 ONSC 1855 at para. 66)
    - The wife did not provide evidence as to the portion of the expense that was for her own insurance and the portion for the child. The court permitted one-half of the premium as s.7 expenses. But see *Brun v. Fernandez*, 2023 ONSC 4787 at para. 54 where $0 was permitted as a s.7 expense.
- **hockey courses**
  - (*Campbell v. Campbell*, 2022 ONSC 5816 at para. 24)
  - The courses the child chose all related to the career path he was following at the time: hockey. The court held that there was nothing unreasonable in these course choices on his part. The court also concluded that the expenses were necessary to maintain the child's competitiveness in the sport.
- **hockey lessons**
  - (*AE v. AE*, 2021 ONSC 8189 at para. 10)
- **horseback riding**

- (*Wilson v. Sinclair,* 2022 ONSC 2154 at para. 351)

- **hot lunches**
  - (*Blaskavitch v. Smith*, 2023 ONSC 2133 at para. 333)
  - (*D'Amico v. D'Amico*, 2022 ONSC 574 at para. 36)
- **hotel** (for hockey tournaments)
  - (*J.L. v. D.L*, 2022 ONSC 1003 at para. 24)
- **incidentals** (while child away at university)
  - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 14 – clothing, computer repairs, household supplies, school supplies and personal items)
- **karate** (taekwondo)
  - (*Ojigho v. Burge*, 2023 ONSC 2029 at para. 39)
- **Kumon**
  - (*El Quazzani v. Chabini*, 2022 ONSC 5773 at para. 101)
  - The wife was advised by the school that the child was lagging behind in reading.
- **lab fees (university)**
  - (R.L. v. M.F., 2023 ONSC 6063 at para. 21)
- **laptop** – one every 2 years and replacement, upgrade in case of lost, stolen, damage and data recovery
  - (*CZ v. JY*, 2023 ONSC 80 at para. 10; *C v. N.,* 2023 ONSC 3792 at para. 35)
- **laptop and storage capacity**
  - (*Boutin v. Lucitt*, 2023 ONSC 2754 at para. 100)
- **LCBO** (as part of post-secondary expenses)
  - (*C v. N.,* 2023 ONSC 3792 at para. 35)
- **nanny/housekeeper**
  - (*M v. L.,* 2023 ONSC 4897 at para. 184)
- **martial arts**
  - (*R. v. I.*, 2022 ONSC 3531 at para. 128)

  - But also see *Lobban v. Lobban* (2022 ONCJ 163 at para. 78) where the expense was not allowed.
- **meal plans (university)**
  - (*R.L. v. M.F.,* 2023 ONSC 6063 at para. 21)
- **Medic Alert monthly membership**
  - (*K.R. v. M.R.*, 2022 ONSC 794 at para. 45)
  - case note: given the severity of the child's allergies.
- **music lessons** (up to $2,000 per year per child)
  - (*CZ v. JY*, 2023 ONSC 80 at para. 10)
- **neuro assessment** ($10,158)
  - (*R. v. I.*, 2022 ONSC 3531 at para. 128)
- **online study guides/courses** (Study.com, Enotes.com, Licharts.com)
  - (*R.L. v. M.F.,* 2023 ONSC 6063 at para. 11)
- **orthodontics** - braces ($6,880)
  - (*Lima v. McCarthy*, 2022 ONSC 1383 at para. 222)
  - The court rejected the husband's submission that the expense for braces was unreasonable. The court was satisfied with the evidence that the child's dental work was necessary lest she be forced to have her jaw broken at a later date. The quantum of the expense was also reasonable.
- **personal training** ($300/mo.)
  - (*Sne v. Sne*, 2023 ONSC 566 at para. 43)
- **Presto pass**
  - (*Duncan v. Donaldson*, 2023 ONSC 5114 at para. 77)
- **psychotherapist**
  - (*Brun v. Fernandez*, 2023 ONSC 4787 at para. 58)
- **psychologist's assessment**
  - (*Gaddon v. Da Silva*, 2023 ONSC 5400 at para. 55)
- **religious Muslim school**
  - (*Al-Hadad v. Al-Harash*, 2023 ONCJ 463 at para. 157)

- **snowboarding lessons**
    - (*McMillan Barta v. Barta*, 2023 ONSC 125 at para. 104)
    - (*M.B. v. B.,* 2023 ONSC 125 at para. 94)
- **soccer expenses**
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 91)
    - But not allowed in *Lobban v. Lobban* (2022 ONCJ 163 at para. 78) as the wife was able to reasonably cover this expense, taking into account her income and the *Guidelines* table amount of support.
- **therapy**
    - (*Wilson v. Sinclair*, 2022 ONSC 2154 at para. 366)
    - Therapy was to assist and support the children with the change in their residential care, with processing their experiences surrounding their parents' separation, and to generally help the children cope and to see themselves as independent people.
- **therapy** (speech)
    - (*M. v. L.*, 2023 ONSC 4897 at para. 198)
- **swimming lessons**
    - (*M.B. v. B.,* 2023 ONSC 125 at para. 93)
- **technology fees** (university)
    - (*R.L. v. M.F.,* 2023 ONSC 6063 at para. 21)
- **tutoring** (Kumon and A-plus)
    - (*Gaddon v. Da Silva*, 2023 ONSC 5400 at paras. 8, 50 & 53)
- **transportation costs** (for school)
    - (*Bakker v. Bakker*, 2023 ONSC 3025 at para. 67)
    - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 13 – gas, insurance, car repairs)
- **travel costs** (from school back home as part of post-secondary expenses)
    - *Trecroce v. Chorney* (2023 ONSC 96 at para. 94)

    - During the summer, the child returned home four times during the summer. In the court's view this was excessive, and it deducted three of those trips from the court's estimate as to reasonable expenses. The court viewed that it was reasonable that the child would return home four times a year.
- **UBER** (as part of post-secondary expenses)
    - (*C v. N.,* 2023 ONSC 3792 at para. 35)
- **uniforms** (for school)
    - *Bakker v. Bakker* (2023 ONSC 3025 at para. 67)
- **university applications**
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 102)
- **vacation** (as part of post-secondary expenses)
    - (*C v. N.,* 2023 ONSC 3792 at para. 35)
- **vehicle purchase** (for child)
    - (*Boutin v. Lucitt*, 2023 ONSC 2754 at para. 109)
- **vitamins**
    - (*K.R. v. M.R.*, 2022 ONSC 794 at para. 45)
    - but only if prescribed by a physician.
- **wisdom teeth**
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 101)
- **YMCA membership**
    - (*Boisvert v. McDonald*, 2023 ONSC 4824 at para. 6)

Section 7 expenses: not allowed

The following is a list of claimed expenses which courts have not allowed or not determined to be s.7 expenses:

- **alcohol** (entertainment while child away at university)
    - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 15)
- **baby formula**
    - (*Pereira v. De Souza,* 2022 ONCJ 607 at para. 107)
- **bus passes** ($500/child/year)
    - (*M.B. v. B.,* 2023 ONSC 125 at para. 91)
    - The court noted that this expense was "not normally extraordinary" and could not be found to be extraordinary without significantly more supporting evidence.
- **cannabis** (entertainment while child away at university)
    - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 15)
- **car insurance**
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 97)
- **cell phone**
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 98)
    - (*M.B. v. B.,* 2023 ONSC 125 at para. 91)
    - (*R. v. R.*, 2022 ONSC 965 at para. 18)
- **cell phone bills/charges**
    - *(F. v. F.*, 2023 ONSC 2682 at para. 167)
    - *(L. v. Y.*, 2022 ONSC 812 at para. 14)
    - (*N.C. v. C.H.*, 2022 ONSC 7142 at para. 20)
        - The court took into account the broader context of the parents' roles prior to the marriage and their relative incomes and found that the children's cellular plans were properly considered normal

childcare expenses and were not captured by the term "special and extraordinary" in the parties' Separation Agreement.

- **chiropractor services**
    - (*N.C. v. C.H.*, 2022 ONSC 7142 at para. 16)
    - This treatment is not properly considered "medical expenses" unless and until they are prescribed or recommended by the child's treating physician.
- **cream** (over the counter)
    - (*K.R. v. M.R.*, 2022 ONSC 794 at para. 51)
- **dance lessons** ($3,000-$4,000)
    - (*Lima v. McCarthy*, 2022 ONSC 1383 at para. 226)
    - The court held that however much the child may have benefitted from the lessons, they were not an entirely reasonable expense. $3,000 to $4,000 per year for dance was too expensive to be considered a reasonable expense given the husband's income. The court was also mindful that the parties have four children and needed to ensure that the needs of all the children were met.
- **diapers**
    - (*Pereira v. De Souza,* 2022 ONCJ 607 at para. 107)
- **driver** (to drive children to and from school)
    - (*Hergert v. Hergert*, 2022 ONSC 723 at para. 37)
    - The expense of a driver, at approximately $19,000 per year, was simply not reasonable given the modest income of each parent. If the wife were required to pay a proportionate share of the expense, this would constitute a substantial portion of her annual net income. Given that the children were with the husband for two weeks each month, the expense was disproportionate.
- **driving school**
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 96)

- **food supplements**
    - (*R. v. R.*, 2022 ONSC 965 at para. 18)
- **gifts** (birthday and Christmas)
    - (*K.R. v. M.R.*, 2022 ONSC 794 at para. 57)
    - This expense was not a proper s.7 expense but could be allowed if there was agreement to pay.
- **gluten-free food**
    - (*R. v. R.*, 2022 ONSC 965 at para. 18)
- **headphones** (wireless noise cancelling)
    - *(F. v. F.*, 2023 ONSC 2682 at paras. 164, 167)
- **health insurance premiums**
    - (*Brun v. Fernandez*, 2023 ONSC 4787 at para. 54)
    - The insurance was a "family plan" and the wife did not provide any breakdown of the premiums to separate out her portion from the children's portion. But also see *A. v. J.* (2023 ONSC 1855 at para. 66) above where the court did permit half as a s.7 expense.
- **hockey AAA** ($12,000)
    - (*Kuzyk v. Simeoni*, 2022 ONSC 5736 at para. 22)
    - The court was not satisfied that the father had made out on the materials filed that AAA hockey was an extraordinary expense. "This is because he cannot get past the first aspect of the test in section 7(1)(f). The expenses for the past six years have not been ones he cannot reasonably cover."
- **hockey equipment**
    - (*Craig v. Niro,* 2022 ONSC 5178 at para. 46)
    - The court reasoned: "I would not ordinarily consider a $320 hockey stick to be a modest expense. However, given Mr. Niro's income and the contributions of Ms. Craig and the daughter, I consider the remaining

expense to be modest and within the amount of child support being set off against the amount that Mr. Niro would otherwise pay."

- **horse boarding fees**
    - (*M.B. v. B.,* 2023 ONSC 125 at para. 91)
    - There was no evidence to support why such expenses were reasonable and necessary.
- **hotel and transportation** (for child's sporting tournaments)
    - (*M.M.B.(V) v. C.M.V.*, 2022 ONSC 770 at para. 205)
    - These costs were incurred not only for the child but also for the parent that attended. The court can appreciate that the parent may wish to attend, but that fact on its own does not categorize the claimed expenses as reasonable and necessary.
    - But see *J.L. v. D.L* (2022 ONSC 1003 at para. 24) where the court allowed this expense.
- **language lessons** (Arabic)
    - (*El Quazzani v. Chabini*, 2022 ONSC 5773 at para. 95)
    - Although this expense was considered an educational expense by the court, the wife should have consulted with the husband as to which Arabic lessons were available to meet the child's particular needs and what was affordable to the family.
- **leadership camp** ($200)
    - (*Ferlisi v. Boucher*, 2021 ONCJ 48 at para. 99)
- **martial arts**
    - (*Lobban v. Lobban*, 2022 ONCJ 163 at para. 78)
    - The wife was able to reasonably cover this expense, taking into account her income and the *Guidelines* table amount of support.
- **medication** (over the counter such as Gravol, Maalox and Tums)
    - (*K.R. v. M.R.*, 2022 ONSC 794 at para. 45)
- **naturopathic services**

- (*N.C. v. C.H.*, 2022 ONSC 7142 at para. 16)
- This treatment is not properly considered "medical expenses" unless and until they are prescribed or recommended by the child's treating physician.

- **parent coaching**
  - (*C. v. D.,* 2023 ONSC 3984 at para. 65)
- **pet care**
  - (*Pyne v. Landaverde*, 2022 ONSC 4518 at para. 78)
  - Pet care was found not to be a necessary expense for the pursuit of education. The court did not have any evidence to explain why $1,000 a year was a reasonable or necessary expense for the child for pets.
- **private school**
  - (*T.W. v. J.A.,* 2023 ONSC 3123 at para. 116)
    - The cost of the school ($8,600-$10,000 per year) was not a reasonable or necessary expense given the parent's incomes of $62,000 and $17,000 per year, respectively.
  - (*A.C. v. K.C.*, 2023 ONSC 6017 at para. 102)
  - (*Kostrinsky v. Nasri*, 2022 ONSC 2926 at para. 148)
    - The child's private school expenses were not reasonable and necessary. Prior to separation, the child attended daycare until grade one, then started attending the local public school. It was only after separation that the child started attending private school.
- **RESP contributions**
  - (*Brun v. Fernandez*, 2023 ONSC 4787 at para. 54)
- **school fees & supplies**
  - (*M.B. v. B.,* 2023 ONSC 125 at para. 91)

  - These expenses were "not normally extraordinary" and could not be found to be extraordinary without significantly more supporting evidence.
- **skating**
  - (*El Quazzani v. Chabini*, 2022 ONSC 5773 at para. 85)
  - The court found this not to be an extraordinary expense and that they should have been discussed. The court found these expenses not essential and not rising to the level of daycare and dental expenses. They were an "extra expense".
- **skiing** (club membership dues and lessons)
  - (*S.C. v. C.C.,* 2022 ONSC 1763 at para. 430)
  - The husband did not seek wife's consent and the children only used the ski club during their time with the father. The husband also did not justify why the expenses were reasonable and necessary.
- **summer camp**
  - (*R. v. R.*, 2022 ONSC 965 at para. 19)
  - The reasons for not allowing this expense included (1) the mother was not currently working outside of the home and the necessity of this expense was questionable, (2) the net cost would be minimal, and (3) the special expenses the father was contributing to were already quite significant.
- **traffic ticket** (while child away at university)
  - (*O'Neill v. Cutler*, 2023 ONSC 1143 at para. 16)
- **ultimate frisbee**
  - (*J.L. v. D.L*, 2022 ONSC 1003 at para. 20)
  - The wife registered the kids because they wanted "to try it out" for one season. The husband was not in agreement and voiced his objection at the time.
- **uniforms** (for school)

  - (*St Cyr v. Deveau*, 2022 ONSC 480 at para. 22)
  - But see *Bakker v. Bakker* (2023 ONSC 3025 at para. 67) where uniforms were allowed as a s.7 expense.
- **volleyball**
  - (*Lobban v. Lobban*, 2022 ONCJ 163 at para. 78)
  - The wife was able to reasonably cover this expense, taking into account her income and the *Guidelines* table amount of support.
- **winter hat**
  - (*C. v. D.,* 2023 ONSC 3984 at para. 65)

Conclusion

As can be seen from the above summary of principles and the competing lists of allowable and not allowable s.7 expenses, courts have discretion to award s.7 expenses based on the child's best interests and the specific family circumstances.

Therefore, parents should be mindful when incurring s.7 expenses prior to determining whether they are in fact eligible s.7 expenses.

It should be noted that children, mostly relating to post-secondary expenses, may also be expected to contribute to their expenses. It is therefore good practice for parents to consult one another regarding expenses incurred for the children as this will help to reduce unnecessary friction and avoidable trips to court.

Therefore, when dealing with issues relating to s.7 expenses, it will be best to proactively keep tabs on which expense is and will be claimed and collect the necessary evidence to support any claims or counter claims. Otherwise, trying to look back in time and address these issues may result in a situation that occurred in *Jefic v. Jefic (Grujicic).* In *Jefic,* Justice Madsen was not prepared to make any adjustments to amounts paid to special and extraordinary expense and noted as follows:

> Given his strategic choice not to bring his variation application until he thought the duration of support outweighed any shortfall, I also do not think the burden falls on the court to prepare micro-calculations to ascertain minor adjustments. The court is being asked to unscramble the egg. The best I can do, on the evidence presented in this trial, is an omelet. (*Jefic v. Jefic (Grujicic),* 2022 ONSC 7240 at paras. 107 & 110)

So, to paraphrase Justice Madsen's wise words of wisdom, when going to court with respect to s.7 expenses, don't make an omelet.

Ignorance isn't bliss: A story of a failure to read a marriage contract

Christina Hinds

Overview

The recent decision by Justice Black in *Singh v. Khalill* (2023 ONSC 6324) sets out the applicable factors when determining if a marriage contact is valid and enforceable.

Introduction

Singh v. Khalill (2023 ONSC 6324) is recent decision concerning the validity of a marriage contact wherein it was accepted that the party seeking to set aside the marriage contract did not read it prior to signing.

After consideration of section 56(4) of the *Family Law Act* and the circumstance surrounding the marriage contract, Justice Black held that the marriage contact was valid and enforceable.

Facts

The parties met in February 2016 and were married in March 2016. The Applicant, Mr. Singh, was 44 years old and the Respondent, Ms. Khalill, was 55 years old. Ms. Khallil had two adult children from a previous marriage. Mr. Singh was also previously married and had six children form his previous relationships. Justice Black noted that "Given their ages and stages, both parties entered the relationship with life experience and, at least in the case of Ms. Khalill, with assets."

There were difficulties early in the marriage. Ms. Khalill deposed that she paid for all the parties living expenses and felt that Mr. Singh was not contributing to the household.

After the parties were already married, Ms. Khalill raised the idea of a marriage contract with Mr. Singh and told him that she wanted to protect her assets – she had acquired multiple properties prior to her marriage.

Her friend who was a lawyer prepared the marriage contract which Ms. Khalill brought home for Mr. Singh's review. The contract was intended to protect each party's assets and not require either of them to support each other in the future.

The parties gave conflicting evidence as to when Mr. Singh was provided a copy of the marriage contact. Mr. Singh deposed that he was provided a copy of the marriage contact the night before Ms. Khalill insisted that he sign it. Ms. Khalill deposed that she provided the agreement to Mr. Singh several weeks before it was signed. Justice Black ultimately accepted Ms. Khalill's evidence.

Justice Black accepted Mr. Singh's evidence that he did not review the marriage contact prior to signing it. Mr. Singh deposed that he was given an ultimatum – to "sign or get out" and that he felt he needed to sign the contact to save the marriage. He also deposed that he was educated, understood contracts, and was capable of understanding the terms of the marriage contract.

The parties met at a local lawyer's office to sign the agreement in March 2017. The lawyer signed a Certificate of Acknowledgement confirming that Mr. Singh understood the contents of the marriage contract and that he was signing voluntarily.

Ms. Khalill deposed that after the parties signed the marriage contact, they acted consistent with the contract, keeping their finances and assets separate.

The problems in the parties' marriage continued and Mr. Singh left the home in February 2020. The parties were divorced in May 2021. In June 2021, Mr. Singh commenced an application for equalization of the parties' net family properties.

However, Mr. Singh did not mention the existence of a marriage contract in his court application.

Law

Justice Black reviewed the relevant provisions of the *Family Law Act* – specially sections 51 and 56(4).

Section 51 of the *Family Law Act* sets out the burden of proof to set aside a marriage contact, which is the party seeking to set aside the marriage contact.

Section 56(4) of the *Family Law Act* provides that:

> (4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

Justice Black also considered Justice McGee's summary in *Harnett vs. Harnett,* 2014 ONSC 359 at paragraphs 87 – 94:

> [87] As a general rule, courts will uphold the terms of a valid enforceable domestic contract: *Hartshorne v Hartshorne*, 2004 SCC 22 (CanLII), 2004 CarswellBC 603 (SCC.)
>
> [88] It is desirable that parties settle their own affairs: *Farquar v. Farquar* (1983), 35 R.F.L. (Ont. C.A.) and courts are generally loathe to set aside domestic contracts. See page 297:
>
> > "the settlement of matrimonial disputes can only be encouraged if the parties can expect that the terms of such settlement will be binding and will be recognized by the courts ... as a general rule ... courts should enforce the agreement arrived at between the parties.... The parties to the agreement need to be able to rely on [them] as final in the planning and arranging of their own future affairs"
>
> [89] **Parties are expected to use due diligence in ascertaining the facts underlying their agreements. A party cannot fail to ask the correct questions and then rely on a lack of disclosure**: *Clayton v Clayton* 1998 CanLII 14840 (ON SC), 1998 CarswellOnt 2088.
>
> [90] A domestic contract will be set aside when a party was unable to protect his or herself. Such cases are generally predicated upon a finding that one party has

preyed upon the other, or acted in a manner to deprive the other of the ability to understand the circumstances of the agreement.

[91] **The court is less likely to interfere when the party seeking to set aside the agreement is not the victim of the other, but rather his or her own failure to self-protect**. The Ontario Court of Appeal in *Mundinger v. Mundinger* (1968), 1968 CanLII 250 (ON CA), [1969] 1 O.R. 606 (Ont. C.A.) says that the court will step in to "protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so because of their position."

[92] The court must look not at which party made the better bargain but rather, to whether one party took advantage of their ability to make a better bargain. In that taking of advantage is to be found the possibility of unconscionability. See *Rosen v. Rosen* (1994), 1994 CanLII 2769 (ON CA), 3 R.F.L. (4th) 267 (ONCA)

[93] The test for unconscionability is not weighing the end result, but rather the taking advantage of any party due to the unequal positions of the parties. See *Mundinger v. Mundinger* (1968), 1968 CanLII 250 (ON CA), [1969] 1 O.R. 606 (Ont. C.A.); *Rosen v. Rosen* (1994), 1994 CanLII 2769 (ON CA), 3 R.F.L. (4th) 267 (Ont. C.A.).

[94] The onus is on the party seeking to set aside the domestic contract to demonstrate that at least one of the circumstances set out in subsection 56(4) has been met; **then the court must determine whether the circumstances complained of justify the exercise of the court's discretion in favour of setting aside the contract**. It is a discretionary exercise. See *LeVan v LeVan*. 2008 ONCA 388 (CanLII), 2008 CarswellOnt 2738, ONCA. (emphasis added)

Decision

Justice Black held that Mr. Singh "falls short at every turn" (para. 59) and that there was "no reasonable basis on which to find the Marriage Contract invalid, or to set it aside." (para. 72)

While it was accepted that Mr. Singh did not read the marriage contact, he was aware of its potential effect, and still made the decision not to read the contact. Justice Black noted that Mr. Singh had previous experience with legal proceedings, including family law in British Columbia.

Justice Black held the following:

- […] **the Marriage Contract does not appear to be unfair or the product of unequal bargaining power**. On its face it seems to be a valid domestic

> contract, signed by both parties. I start from the proposition that the court should be loathe to interfere where parties are settling their own affairs. (at para. 64) (emphasis added)

- By his own admission, Mr. Singh failed to undertake due diligence is relation to the Marriage Contract… As McGee J. wrote, a party cannot fail to ask the correct questions and then rely on a lack of disclosure. Here, having not even read the agreement, **Mr. Singh exercised no diligence whatsoever**. (para. 65) (emphasis added)

- **There is no credible evidence that Ms. Khalill had or exploited any financial or other advantage over Mr. Singh, or took advantage of any inequality of bargaining power between them**. Mr. Singh's own evidence is that at the time he was at least as financially well-off as Ms. Khalill. His purported vulnerability was that he had to sign whatever Ms. Khalill wanted in order to save their marriage. This alleged basis of vulnerability has been considered and rejected by at least one court in the past and has been found not to amount to duress (*Campbell v. Campbell*, 1990 NLSC 7150). I find that there is no evidence of duress here. (para. 66) (emphasis added)

Ms. Khalill was ultimately successful and was awarded $15,000 in costs (on a scale higher than partial indemnity but not full indemnity.)

A few takeaways:

- Counsel should test their own client's credibility before bringing a claim to set aside a marriage contract to court (see paras. 67 to 71).

- Prior to signing a marriage contact, parties are expected to undertake due diligence – what this is may depend on their level of sophistication.

- The failure to read a marriage contract prior to signing it does not, in and of itself, invalidate the marriage contract.

- Feeling forced to sign a marriage contact in order to "save the marriage" is not sufficient to invalidate or set aside the contract.

Unequal property division for short marriages

Amruta Ponkshe & David Frenkel

Overview

Section 5(6)(e) of the *Family Law Act* permits a court to order an unequal division of property in situations where married parties have cohabited for a period less than five years.

When parties have lived together less than five years, there is a body of case law that uses a mathematical formula that reduces the equalization payment inversely proportionate to the period of cohabitation. One year of cohabitation equals 1/5th of the total equalization, two years of cohabitation equals 2/5th of the total equalization, etc. However, there are also cases that do not automatically apply this formula.

Therefore, this article discusses these two streams of cases and attempts to clarify the differing approaches.

Introduction

Section 5(6) of the *Family Law Act* is an exception to the general rule of equalization of net family properties. Specifically, courts can rely on this section to implement uneven sharing of wealth as a result of 8 different factors as listed at 5(6)(a) to (h). These factors include (a) a spouse's failure to disclose debts, (b) recklessly incurred debts, (c) gifts from a spouse, (d) intentional depletion of property, (e) cohabitation lasting less than five years, (f) incurring large debts for the support of the family, (g) a written agreement other than a domestic contract, or (h) other circumstances relating to property.

Pursuant to subsection 5(6)(e) of the *Family Law Act*, the court has the discretion to award a spouse an amount that is more or less than half the difference between the

net family properties. To do this, the court must be of the opinion that equalizing the net family properties would be unconscionable, having regard to the fact that the amount a spouse would otherwise receive is disproportionately large in relation to a period of cohabitation that is less than five years.

In *Serra v. Serra* (2009 ONCA 105), the Ontario Court of Appeal, at paragraph 47, discussed that the test for "unconscionability" under section 5(6) is a high bar. The jurisprudence is clear that circumstances which are "unfair", "harsh" or "unjust" alone do not meet the test. To cross the threshold, an equal division of net family properties in the circumstances must "shock the conscience of the court".

In *M.N.B. v. J.M.B.* (2022 ONSC 38 at para. 135), the court held that to make an unequal division of net family property, the court must find that:

> (a) the parties cohabited for less than five years;
>
> (b) payment of the presumptive amount would be unconscionable; and
>
> (c) that the presumptive amount is disproportionately large in relation to the length of cohabitation.

In the recent case *Daciuk v. Daciuk* (2023 ONSC 70), Justice Kurz raised the fact that the parties' marriage lasted only about 3.5 years and questioned whether that fact itself would be sufficient to reduce the wife's claim for equalization considering section 5(6)(e). However, the parties had cohabited for approximately 3.5 years prior to being married, and the total period of cohabitation was, in fact, seven years.

After considering *Pope v. Pope* (1999 CanLII 2278 ON CA) and *Janjua v. Khan* (2013 ONSC 44), Kurz J. concluded that section 5(6)(e) allows the court to consider unconscionability within the context of "a period of cohabitation that is less than five years", not just the length of marriage.

Booth v. Bilek **(2021 ONCA 128)**

In the 2021 Court of Appeal decision of *Booth v. Bilek* (2021 ONCA 128), the parties separated after four years of marriage. Prior to the marriage, the parties had cohabited for four years. The trial judge declined to award the wife an amount that would equalize the parties' net family properties and instead awarded her $10,627, or 10% of the full amount ($106,274) that would equalize the parties' net family properties.

In the trial decision, the court acknowledged that the threshold for unconscionability is high and determined that strict equalization would be inappropriate, given the circumstances of the case, noting that:

- the wife had benefited financially from the comparatively short marriage, and her net family property was mostly derived from gifts given to her by her husband;
- the wife had received one half of the proceeds of sale of the matrimonial home, despite having made no direct financial contribution to its purchase;
- the difference between the parties' respective net family properties was attributable largely to the growth of the husband's investments during the marriage;
- the husband was 69 years old, retired, and was solely dependent on the income generated through his investments;
- the wife was 46 years old and had become self-supporting;
- there were no children of the marriage; and
- the wife was much better off financially than she was at the beginning of the marriage, "with little if any financial contribution on her part".

The wife appealed the original decision, disagreeing with the finding that a full equalization would be unconscionable, and alleging that the trial judge did not

properly explain how she determined that an equalization figure of 10% would be appropriate.

The Court of Appeal disagreed and noted that:

> Section 5(6)(e) of the Act specifically identifies that a period of cohabitation less than five years is relevant to whether full equalization may be unconscionable. This promotes certainty about equalization for marriages longer than five years. It also provides notice to parties who have been married for less than five years that a court may take a closer look at whether equalizing would be unconscionable in the specific circumstances of a shorter marriage. (at para. 13)

The wife further argued that, if unequal division was appropriate, the trial judge should have applied a formula that prorates the equalization according to the length of the cohabitation. As the parties cohabited for 52 months, the wife suggested that any unequal division should be calculated at 87% of full equalization (52/60 months), which would have entitled her to $92,458.80.

The Court of Appeal did not agree with the wife's argument and stated that while applying a mathematical formula based on the length of the marriage provides the benefit of certainty, neither the *Family Law Act* nor relevant case law requires the court to do so. The Court concluded that the trial judge's decision to award the wife 10% of the total equalization was reasonable in the circumstances of the parties' marriage.

When to apply the mathematical formula

Whether a court applies the mathematical formula or not will depend on the circumstances of the case.

For example, in *Gomez v. McHale* (2016 ONCA 318), the Ontario Court of Appeal recognised that courts have looked at the actual period of cohabitation and then fixed an unequal division of net family property using that period as a percentage of

the five-year statutory period. However, it held that section 5(6) requires only that the court carefully look at the backgrounds of both parties and that judges have the discretion to fix reasonable values for equalization if they determine that an equal division would be "unconscionable" based on the backgrounds of the parties. The courts have the flexibility to determine whether an equal division would be unconscionable and, if so, fix what it regards as a reasonable figure that is fair, just and equitable in consideration of all the evidence.

In *Gomez*, the court upheld the trial judge's finding that the appellant wife was only entitled to the payment of $60,000 rather than her 4/5 entitlement of otherwise entitlement of $268,000 (i.e., $214,000) because of their four-year period of cohabitation.

In contrast, in *Dworakowski v. Dworakowski* (2022 ONSC 7209), Justice Sharma applied the mathematical formula. The court considered that the parties cohabited for 34 months and that the bulk of the value of the equalization payment arose from the husband's acquisition of a property before marriage. His Honour determined that the application of the presumptive equalization payment would result in a shocking windfall to the wife that was not representative of her contributions. Accordingly, he concluded that 34 months of cohabitation would result in 57% of the equalization payment, or $139,553.41, being paid to the wife. His Honour found this amount to be fair and equitable under section 5(6) and that it appropriately compensated the parties for their respective contribution and the growth in value of their most significant assets during the marriage.

Similarly, *Kruschenske v. Kruschenske* (2018 ONSC 4342) was a case where the parties cohabited for 50 months and the husband brought almost all of his assets into the marriage, including the matrimonial home. After considering *Gomez*, Justice Kane used the mathematical formula in determining division of the parties' net family property. At para. 137, his Honour discussed that:

> While not a legal requirement as determined on appeal in *Gomez*, use of the length of cohabitation in circumstances which are unconscionable to determine what is a fair and just equalization is logically consistent with the *Act*'s use of time, namely the 5-year threshold in s. 5(6) after which full equalization is required. The customary use of a time-based formula for cohabitation for less than 5 years provides separated couples with the certainty …which encourages settlement and potentially avoids costly litigation.

Applying a time-based formula to a period of cohabitation that was one year less than the five-year threshold, Justice Kane concluded that the husband had to pay 80% of what he owed the wife as per the net family property equalization calculation, that is, $170,127.08 (instead of $212,658.85), less payments made pursuant to previous order(s).

In *Kucera v. Kucera* (2005 CanLII 12854), the parties separated after only 10 months of marital cohabitation. The central issue was whether it would be unconscionable for the wife to receive the full equalization payment after such a short marriage, a payment which was almost entirely generated by the fact that the husband brought the matrimonial home into the marriage and was unable to claim a credit for the date of marriage value due to the *Family Law Act* prohibiting deduction of its value as of the date of marriage.

Justice Heeney discussed that marriage is a form of partnership, and it is inherently fair that wealth accumulated during the life of that partnership should be shared equally. However, where application of the legal framework potentially becomes unfair, the special provisions under section 5(6) come into play.

His Honour further commented that:

> …the equalization process does not only share wealth accumulated during the marriage, but also shares the value of one specific asset, the matrimonial home, that was accumulated prior to the marriage. In very short marriages, this represents an unjustifiable windfall to the non-titled spouse. (at para. 19)

His Honour confirmed that section 5(6) can be used to redress such unfairness and concluded that based on the mathematical formula, payment of one-sixth of the full equalization payment was fair and reasonable in the given circumstances. In reaching this decision, Justice Heeney considered the following factors:

- the home was purchased by the husband well before the marriage, with no contribution from the wife;
- the home was not improved during the marriage in any way;
- the husband paid all the bills to maintain the house, as well as all other living expenses for both parties, during cohabitation;
- the bulk of the presumptive equalization payment had not been generated from any significant increase in the value of the husband's assets during cohabitation, but from the value of the matrimonial home he brought into the marriage;
- the wife had improved her financial position without receiving an equalization payment; and lastly,
- there were no children of the marriage.

Though almost two decades old, Kucera is still good law and continues to be routinely cited by courts when discussing treatment of matrimonial homes in cases of separation subsequent to a short-term cohabitation for married couples.

Conclusion

A short period of cohabitation does not automatically guarantee unequal division of property. It is a fact-specific exercise and involves careful analysis of the contributions made by each party to the marriage.

As family lawyers, while it is important to be mindful of the high threshold of unconscionability, we should not shy away from using this very effective provision in

relevant circumstances – a provision that exists to redress a wrong that may occur due to an indiscriminate application of the equalization principle.

However, whether one uses the 5-year mathematical formula, as adopted by some courts, will depend on the circumstances and the specific facts of the case.

There also does not appear to be a clear direction from the bench as to when to use the 5-year formula and when not to.

For example, in a cohabitation period of 4 years, 4/5th of the equalization may be too generous, and thus, arguments should be made as to why the formula is not applicable. Since there is jurisprudence that supports using and not using the formula in such a case, it may be best to collect the best cases for your client's position and discern the unsupportive jurisprudence. However, be mindful that that the opposing counsel will use the other set of cases to argue the other side of the coin – but hopefully not more effectively than you.

Therefore, it appears that what is more important than the 5-year mathematical formula in an unequal division case is the substance of the arguments and the reasons supporting one position over another.

And as the American mathematician William Thurston once said, "Mathematics is not about numbers, equations, computations, or algorithms: it is about understanding."

Nice quote, and equally applicable to family law calculations as well.

Gift or loan: how your money is characterized matters

Ainsley Doell

Overview

The categorization of an advance of funds during a parties' marriage as a gift or a loan can have a considerable impact on their net family property, in some circumstances. In *Darmantchev v. Darmantchev* (2023 ONSC 5754), Justice Shore goes through the factors to be considered in determining whether an advance of funds is properly classified as a gift or as a loan, as well as the equitable presumption of resulting trust.

Introduction

Couples often receive financial assistance from their family when starting their new lives together. It may not always be clear whether this helping hand was gratuitous or requires repayment, and it is not uncommon for this to become a source of dispute upon separation.

Depending on the financial circumstances of the couple and the size of the advance, this characterization can have a considerable impact on their net family property.

This was the case in *Darmantchev v. Darmantchev* (2023 ONSC 5754), where Justice Shore was tasked with determining whether money advanced to a couple by the husband's parents was properly characterized as a loan or as a gift.

Ultimately deciding that the money was loan, Justice Shore offers a succinct overview of the presumption of resulting trust and the onus that must be met to demonstrate that this sort of advance of money is gratuitous.

***Darmantchev v. Darmantchev*: Facts**

In *Darmantchev,* through the course of the parties' marriage, the Respondent father's parents ("the grandparents") advanced various sums of money to the couple to enable them to purchase various homes. The grandparents were not wealthy by any means and had to take out loans themselves in order to do so.

There was no formal loan agreement, but there was evidence that the parties had been paying the grandparents various sums at different points in time. It was the father's position that these payments were repayments of the loan, and that there was always an expectation that the parties would repay the loan, along with any interest that the grandparents incurred as a result of having borrowed the money themselves.

It was the mother's position that these funds were intended as a gift, and that there was no expectation or discussion of their repayment.

Following separation, the father repaid the grandparents in full from the proceeds of the sale of the matrimonial home. The mother insisted that the grandparents pay this amount back into trust pending a determination of whether the initial advances of money were in fact a gift rather than a loan, as she claimed.

The grandparents did so, but they had already used some of the funds to pay off their own debt. This meant that they had to borrow further money in order to return the full amount into trust.

The issue before Justice Shore was *"whether the money advanced from the Grandparents was a gift or a loan*".

Equitable presumption of resulting trust

In arguing that the funds were a loan, the father relied on the law of the presumption of resulting trust. Per *Pecore v. Pecore* (2007 SCC 17), "where a transfer is made for no

consideration, the onus is placed on the transferee to demonstrate that a gift was intended" (at para. 24).

This is the case because "equity presumes bargains, not gifts" (*Pecore* at para. 24; *Foley (Re)*, 2015 ONSC 382 at para. 26).

In *Darmantchev*, this law operates to reverse the onus onto the Applicant mother: As the person alleging the gift, it fell to her to try to demonstrate that a gift was intended.

Justice Shore found that she was not successful in doing so.

When is an advance a loan?

Justice Shore sets out factors to consider in determining whether an advance was a loan at paragraph 42, as articulated in *Chao v. Chao* (2017 ONCS 701) and *Locke v.* Locke (2000 BCSC 1300):

1. Whether there were any contemporaneous documents evidencing a loan;
2. Whether the manner for repayment is specified;
3. Whether there is security held for the loan;
4. Whether there are advances to one child and not others or advances on equal amounts to various children;
5. Where there has been any demand for payment before the separation of the parties;
6. Whether there has been any partial repayment; and
7. Whether there was any expectation or likelihood of repayment.

The following facts were accepted by Justice Shore in determining that the advance was in fact a loan:

- While there was no written agreement, there were **ongoing discussions** between the parties and the grandparents regarding the need to repay the loan, as well as the interest incurred by the grandparents;
- The **intention** of the grandparents **at the time of the advance** was that it would be repaid. Note that the mother tried to argue that their intention was

gratuitous using as evidence texts between the parties following their separation. Justice Shore noted that these messages were irrelevant, as the relevant intention is as of the time that the gift or loan was made;

- The **financial position of the grandparents** was such that they would not have been able to gift this sum of money to the parties: They had to incur debt in order to advance the funds;
- There was a **history of repayment**: Justice Shore did not accept the mother's evidence that these transfers were due to the family's "structure and custom" to loan each other money back and forth as needed without any expectation of repayment;
- The property that the parties were able to purchase with the advances acted as **security** for the money loaned;
- The grandparents **had not made similar advances** to their other children; and
- **Repayment was expected** or likely.

Outcome

Justice Shore found that the funds advanced by the grandparents were a loan that needed to be repaid. The parties were also required to pay the interest that the grandparents incurred on the loan that they themselves had to take out, as well as the further interest generated on the loans that were required in order to pay the money into trust pending a final determination of this issue.

Conclusion

While it is always preferable to paper any loan between parties, *Darmantchev* demonstrates that even absent documentation, intention of a loan can be very clear on the facts.

While this is a clearer case than many, Justice Shore helpfully goes through the factors to be considered in making this determination.

This issue can become important when determining the equalization that a spouse may be entitled to on separation. In this case, the facts suggest that neither the grandparents nor the parties were in a fantastic financial position. Separation often has a negative impact on a family's finances, and even more so where litigation is involved. In situations like these, it may be helpful to review the considerations outlined by Justice Shore to assess whether it is worthwhile to pursue a claim that an advance of funds is a gift or a loan.