# Ontario Family Law Monthly

O.F.L.M. 2024-3

A monthly review and discussion of family law in Ontario

**In the March 2024 issue:**

**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").

## Adjourning a trial: The "balancing act" in *Angle v. Angle*

Christina Hinds

### *Overview*

Trial is a significant step in a family court proceeding and therefore there are many reasons that a party may wish for their upcoming trial to be adjourned. One such reason might be to retain counsel, as was the case in *Angle v. Angle* (2024 ONSC 622). In *Angle,* Justice *Pazaratz* granted the adjournment, but a much shorter adjournment than the party had requested. *Angle* reminds us that in these situations, the court needs to balance the need for matters to be dealt with quickly and efficiently (especially matters involving children) and the need for both parties to have a fair opportunity to advance their positions.

### *The relocation request*

In *Angle v. Angle*, the most contentious issue to be determined at trial was the Respondent mother's request to relocate with the parties' four-year-old child to Ireland. The mother originally proposed the issue of relocation in time for the child to start school in Ireland in September 2023. Unfortunately, the litigation was significantly delayed, and the matter did not reach trial before the child started school.

After five previous trial management conferences, a final trial management conference was held in November 2023 and the matter was set down for a 10-day trial in March 2024. At that time, both parties were represented by counsel. A few weeks later, the father's lawyer brought a motion to be removed from the record. That motion was heard by Justice *Pazaratz* on January 2, 2024 and the father's lawyer was removed from the record.

On January 24, 2024, the father brought a motion seeking an adjournment of the trial to October 2024. With the child set to start full-time school in September 2024, the

mother argued that the trial needed to be heard and a decision rendered prior to September 2024. Justice *Pazaratz* agreed with the mother and referred to the child starting full-time school as a "real and immovable deadline" (at para. 22). The adjournment proposed by the father would result in the trial being heard after this deadline.

The father argued that he was actively seeking to retain new counsel and that he needed a reasonable opportunity to retain experienced counsel given the issues at stake. The mother argued that despite her continued efforts to move the matter forward, the litigation had been delayed. She also argued that since the father was a civil lawyer, his legal training would equip him to represent himself.

### *Legal principles regarding adjournments*

In deciding whether to grant an adjournment, the court must consider the primary objective of the *Family Law Rules*, that being to deal with cases justly (at para. 14).

At paragraph 15, Justice Pazaratz reviewed the law with respect to adjournments (citing *Lakhtakia v Mehra*, 2022 ONSC 201):

> In *Konstan et al. v. Berkovits et al.,* 2021 ONSC 6749, at paras. 14-15, Diamond J. set out the legal test that a trial judge must apply when faced with an adjournment request. Although *Konstan* was a civil case and not a family law decision, I find that the same test applies:
>
> > [14] All parties agree that a judge's decision to adjourn or not adjourn a trial is highly discretionary. In *Ariston Realty Corp. v Elcarim Inc.* 2007 CanLII 13360(ONSC), Justice Perell set out a helpful list of factors and principles for the Court to consider when exercising its discretion to grant or refuse an adjournment:
> >
> > > "Depending on the circumstances of each case, to judicially exercise the discretion to grant or refuse an adjournment, a judge or master may need to weigh many relevant factors including:

> • the overall objective of a determination of the matter on its substantive merits;
>
> • the principles of natural justice;
>
> • that justice not only be done but appear to be done;
>
> • the particular circumstances of the request for an adjournment and the reasons and justification for the request;
>
> • the practical effect or consequences of an adjournment on both substantive and procedural justice;
>
> • the competing interests of the parties in advancing or delaying the progress of the litigation;
>
> • the prejudice not compensable in costs, if any, suffered by a party by the granting or the refusing of the adjournment;
>
> • whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused;
>
> • the need of the administration of justice to orderly process civil proceedings; and
>
> • the need of the administration of justice to effectively enforce court orders…

While a self-represented party is not entitled to a "pass", the fact that a party is self-represented is a relevant factor. At paragraph 16 (citing Justice Epstein in *Toronto-Dominion Bank v. Hylton*, [2010] O.J. No. 4725), Justice *Pazaratz* stated:

> Once again, the fact that a party is self-represented is a relevant factor. That is not to say that a self-represented party is entitled to a "pass". However, as part of the court's obligation to ensure that all litigants have a fair opportunity to advance their positions, the court must assist self-represented parties so they can present their cases to the best of their abilities.

***Justice Pazaratz's balancing act***

Justice *Pazaratz* acknowledged the significant delay in the matter reaching trial. The child, four years old at the time of the motion, was two years old when the parties separated – "more than half of his life has been uncertain while his parents fight about everything" (at para. 18).

Citing *Rigillo v. Rigillo*, 2019 ONCA 647, *Pazaratz* J. stated that "[d]elay in family proceedings is antithetical to the best interests of the children who require finality and peace".

On the other hand, His Honour agreed that the father was entitled to legal representation and stated that "[t]he fact that he is a lawyer does not dimmish his entitlement to proper legal representation".

While he mother's frustration with respect to the delay and concerns about procedural fairness were more than justified, Justice *Pazaratz* found that it was reasonable for the father to want to retain experienced counsel, stating "what could be more important than permanent relocation of a child, out of Canada?" (at para. 21).

Justice *Pazaratz* found that the question of relocation had been long-delayed and that a decision needed to be made before the child starts full-time school in September 2024 – referring to this as an "immovable deadline".

At paragraph 22, the Court considered the following:

- The father was largely responsible for the previous delay.
- Family law matters should be dealt with quickly and efficiently, especially in matters involving children.
- The court must consider the potential and comparative prejudice to each party.
- Adjourning the trial to October 2024 as requested by the father would create a significant strategic advantage for the father and corresponding disadvantage

to the mother. It would also prejudice the child by pre-empting the court's ability to consider an arrangement which the mother characterizes as being in the best interests of the child.

- While fairness is a theme that transcends all adjournments requests, it should not come at the expense of depriving the other party of the opportunity to have the matter considered fairly and in a timely manner.

- Any adjournment will result in some prejudice the mother. A shorter adjournment is more likely to be compensable in costs. An adjournment extending beyond September 2024 (the start of school) would result in serious prejudice and not be compensable in costs.

At paragraphs 23 - 25, Justice *Pazaratz* considered the Court's "three basic choices":

1. The trial is not adjourned and remains on the March 2024 trial list. His Honour noted that the importance and complexity of the issues mitigated in favour of an adjournment so that the father has a reasonable opportunity to retain counsel.
2. The trial is adjourned to October 2024. His Honour held that such a lengthy adjournment was unreasonable. The father was responsible for previous delay and it would be unfair to the mother and the child to have such an important issue decided by default (by virtue of the trial occurring after the intended departure date).
3. The trial is adjourned to Summer 2024. Justice *Pazaratz* determined a June 2024 trial would provide the father with a reasonable amount of time to retain and instruct new counsel and would give the trial judge more time to render a decision (prior to September 2024).

In making the decision to adjourn the trial to June 2024, his Honour noted that "[a]s with everything else on this motion, it's a balancing act, trying to maintain fairness for both parents, while also giving primacy to this young child's need for timely resolution of important issues." (at para. 25)

***Conclusion***

Justice *Pazaratz* granted the father's request for an adjournment (albeit a much shorter adjournment) and made the trial peremptory on the father.

A few takeaways/reminders:

- Parties who are also lawyers are entitled to the same accommodation as any other self-represented litigation. As noted by Justice *Pazaratz*, "[b]eing a lawyer isn't the same as having a lawyer" (at para. 1).
- Adjournment requests will be determined in the context of the primary objective of the *Family Law Rules*.
- In determining such requests, the court will balance the need for matters to be resolved quickly (especially matters involving children) and the need for both parties to have an opportunity to advance their position. The court will also consider if any prejudice is not compensable in costs.

### *Costs, penalties, fines: What is the difference?*

Amruta Ponkshe

### *Overview*

Rule 1(8) of the *Family Law Rules* empowers the court to deal with a party's failure to obey a previous order by making any order that it considers necessary for a just determination of the matter, including striking pleadings and dismissing a claim, to name a few.

However, the court's most commonly used mechanism to redress a party's non-compliance of a court order is still an order for costs.

But can a court order a party to also pay a penalty or a fine? If so, what is the difference, if any, between costs, penalties and fines and what are the requirements to obtain them?

The following article explores these issues.

### *Failure to provide disclosure*

In *Monga v. Monga* (2024 ONSC 761), Justice Kraft heard a motion brought by the applicant father to redress the respondent mother's failure to provide complete financial disclosure. The disclosure was required pursuant to a consent order made by Justice Vella at the party's case conference. The applicant father sought the following orders:

a. sanctions be imposed on the wife of $250 a day until she cured her breach of a previous disclosure order made by Justice Vella on consent at the party's case conference;

b. the wife be prohibited from seeking further relief of the court until the disclosure was provided;
c. the wife produce additional disclosure; and
d. the wife pay him costs.

The wife submitted that any penalty would be punitive and requested the husband's motion be dismissed.

Justice Kraft had to determine two issues:

1. Was the wife in breach of the disclosure order made by Justice Vella?
2. If so, was the appropriate remedy to (a) order sanctions of $250 a day, and (b) not permit the wife to seek further relief until the breach was cured?

***Breach of the disclosure order***

The husband provided the court with an updated schedule of what disclosure requested had not been answered by the wife. The wife did not argue that there was disclosure outstanding to the husband. However, her explanation was that she had made best efforts to provide her disclosure. For bank statements the wife was unable to produce, she provided an authorization and direction to the husband and his counsel to obtain missing back statements.

Accordingly, at paragraph 28, Justice Kraft held that the wife was in breach of the disclosure order.

***Remedies available to the court***

The next question before her Honour was to determine the appropriate remedy to cure this breach.

At paragraph 30, Justice Kraft recognised that there must be consequences to the wife for failing to provide the ordered disclosure. Her Honour reiterated that the remedies listed in Rule 1(8) are not exhaustive and discussed the factors put forth in *Owen v. Owen* (2018 ONSC 1083) that the court must consider in determining the appropriate remedy in such situations.

In *Owen*, at paragraph 12, Justice Faieta held that –

> In making this assessment a court must consider: (1) the disclosure provided; (2) an itemization of the disclosure that the impugned party has failed to provide; (3) whether there has been wilful disobedience; (4) proportionality.

Justice Kraft also discussed the factors set out by the Ontario Court of Appeal in the seminal case of *Mullin v. Sherlock* (2018 ONCA 1063). In *Mullin*, at paragraph 45, Justice Pepall held that –

> …In assessing the most appropriate remedies, a judge should consider the following factors:
>
> - the relevance of the non-disclosure, including its significance in hindering the resolution of issues in dispute;
> - the context and complexity of the issues in dispute, understanding that an uncomplicated case should have little tolerance for non-disclosure, whereas a case involving extensive valuation of assets may permit some reasonable delay in responsiveness;
> - the extensiveness of existing disclosure;
> - the seriousness of efforts made to disclose;
> - the explanations offered by a defaulting party for the inadequate or non-disclosure; and,
> - and any other relevant factors.

At paragraphs 34 and 35, Justice Kraft held that the wife's failure to provide full disclosure was not egregious or a willful non-compliance with a court order. In reaching this conclusion, her Honour considered the following facts:

a. there was only one order for disclosure, and it was made on consent;
b. the wife did not argue that the disclosure requested was not relevant or it was a fishing expedition, or not proportional – rather she agreed to provide the requested disclosure;
c. she made clear attempts and best efforts to produce the requested disclosure;
d. the husband controlled the parties' finances during the marriage and the wife did not have access to many of her accounts;
e. the wife provided the husband with authorizations and directions to obtain missing bank statements directly.

***Penalty versus Fine***

The husband characterised the payment of $250 per day as a penalty rather than a fine. Justice Kraft reiterated the decision made in *SNC-Lavalin Profac Inc. v. Sankar* (2009 ONCA 97) that this characterization was appropriate given that a fine for civil contempt is to be paid to the Treasurer of Ontario rather than to a party in the proceeding.

In *SNC-Lavalin Profac Inc.*, Justice Laskin held that "Contempt of court for breach of a court order is an offence against the authority of the court and the administration of justice." The court referred to section 143(2) of the *Courts of Justice Act* which stipulates that a fine for contempt of court should not go to the plaintiff in the lawsuit, but to the Crown.

In *Macnamara v. Weaver* (2023 ONSC 192), at paragraph 53, Justice Price restated Justice Faieta's clarification in *Altman v. Altman* (2022 ONSC 4479) of the distinction between a "fine", which can be imposed after a finding of contempt, under Family Law Rule 31(5)(b) and a "penalty" which, under Rule 31(5)(c), can be ordered to a party after a finding of contempt.

***Penalty only when contempt found***

In *Shapiro v. Feintuch* (2018 ONSC 6746), the court dismissed the respondent's request for a payment of $2,500 in "costs" over and above any of his legal fees and disbursements as a consequence of the applicant's failure to comply with a parenting order. In arriving at this conclusion, Justice Monahan stated at paragraph 38 that:

> There is legal authority in the *Family Law Rules* for ordering one party to make a payment to another party, but only in circumstances where the court finds a person in contempt of court. Rule 31(5)(c) provides that where a finding of contempt is made, the person in contempt may be ordered to pay "an amount to a party as a penalty"…

In *Belcourt v. Charlebois* (2020 ONSC 4124), at paragraph 33, the court discussed that:

> …rule 1(8)(g) states that in the event of a breach of a court order, the court may, *on motion*, make a contempt order. In the present case, there is no motion for a contempt order, only for a penalty.

To conclude, a penalty under Rule 31(5)(c) can only be imposed on a contempt motion, after a finding of contempt is made.

***Does the court have jurisdiction to impose a penalty under Rule 1(8)?***

Justice Kraft answered this question in the negative after reviewing case law and analysing the facts at hand.

For example, in *Granofsky v. Lambersky* (2019 ONSC 3251), Justice Diamond ordered that a 'monetary penalty' of $500 per day be paid. His Honour explained, at paragraph 28, the grounds for the Court's authority to impose a penalty under Rule 1(8) as follows:

> … the Court has jurisdiction under the *Family Law Rules* to order a fine or monetary payment as part of its role to control and enforce its own process. Such a remedy places a price on non-compliance with court orders and disclosure obligations commensurate with that process. … a remedy of a fine or monetary payment should be reserved to exceptional and/or egregious circumstances… ….

Similarly, in *Di Poce v. Di Poce* (2022 ONSC 2099), Justice Shore relied on Rules 1(8) which states that if a person fails to obey a court order, "the court may deal with that person's breach by making any order that it considers necessary for a just determination of the matter". Her Honour ordered the respondent to pay to the applicant $2,500 for each day his disclosure under previous orders remained outstanding.

In *Nodder v. Wasserman* (2023 ONSC 6982), while referring to *Granofsky* and *Di Poce* discussed above, Justice Vella noted that:

> While the list of enforcement remedies do not expressly include the assessment of a monetary penalty for non-compliance with a court order (unless by motion for contempt which does provide for a monetary penalty), the court in these two decisions have in fact added a monetary penalty as part of the court order enforcement arsenal, without the need to bring a motion for contempt of court.

In *Altman* (above), Justice Faieta had to determine whether the court had jurisdiction under Rule 1(8) to impose a penalty on the respondent father for his failure to deliver income and business valuation reports and other financial information to the applicant mother as required by a previous court order. His Honour declined to impose a monetary penalty for the breach on the basis that ordering a monetary penalty payable to a party is expressly dealt with by Rule 31(5)(c) of the *Family Law Rules* as a remedy for contempt. At paragraph 44, his Honour held:

> There is express authority to order a person to pay fine or penalty under Rule 31(5) of the *Family Law Rules* if that person is found in contempt of the court

> for failing to comply with an Order. A finding of civil contempt requires proof of the following elements beyond a reasonable doubt: (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order must have actual knowledge of it; and (3) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: … "[t]hese three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases". These heightened requirements and the procedural safeguards provided by Rule 31 are avoided if Rule 1(8), which has no such requirements or procedural safeguards, is used to impose a penalty upon a party for non-compliance with an order.

In *Altman v. Altman* (2022 ONSC 6952), the Divisional Court denied the applicant mother's motion for leave to appeal the order of Justice Faieta refusing the imposition of monetary penalty in *Altman* above.

In *Bouchard v. Sgovio* (2021 ONCA 709), the Court of Appeal noted, without deciding the issue, that there are limits to the enforcement remedies a court can impose for non-compliance with court orders under r. 1(8) short of contempt. Contempt, along with the sanctions that can be assessed for contempt, must be proven on the evidentiary standard of beyond a reasonable doubt. Conversely, the remedies for non-compliance set out in Rule 1(8) must be proven on the lower threshold evidentiary standard of a balance of probabilities.

As discussed in *Altman* (above) at paragraph 44, "whether a court may make an order requiring a party to pay a penalty to another party, absent a finding of contempt, pursuant to Rule 1(8) remains an open question at the Ontario Court of Appeal."

Justice Kraft ultimately dismissed the applicant husband's request to impose a penalty of $250 per day on the respondent wife.

At paragraphs 50-54, her Honour also held that an order to prevent the wife the opportunity to seek further relief in the case until the breach was cured would not be

an appropriate remedy either. With the primary objective of the *Family Law Rules* in mind, her Honour gave the wife an additional 30 days to answer outstanding items, failing which the husband would have leave to bring a motion to strike the wife's answer/claim with respect to the financial claims in the matter.

### ***Conclusion***

The *Family Law Rules* offer several ways in which a party may seek redress for breach of a court order.

It is therefore incumbent on the party's family lawyer to analyse the facts of the case carefully and advise their client what the most appropriate way to proceed would be.

The choices include (a) requesting costs under Rule 1(8) which usually only cover reimbursement of legal fess and disbursements, or (b) bringing a contempt motion to seek a monetary penalty under Rule 31(5)(c).

And as noted in *Monga v. Monga*, an order for a monetary penalty requires a party to bring a contempt motion and meet a higher threshold evidentiary standard of beyond a reasonable doubt.

Unfortunately the respondent in *Monga had* not only failed to bring a contempt motion but also failed to meet the lower evidentiary threshold on balance of probabilities for the court to order costs under Rule 1(8).

## ***Patel v. Patel*: The legal framework of setting aside orders made on consent**

Samantha Rich

### ***Overview***

The decision of *Patel v. Patel* (2024 ONSC 49) canvasses the legal framework and grounds upon which an order may be set aside by the court. In *Patel*, the Applicant brought a motion to set aside certain provisions of a final order which was made on consent based on minutes of settlement. The Respondent opposed the motion. The Applicant's reasons for moving to set aside portions of the order included lack of independent legal advice, lack of understanding, unconscionability, lack of judicial oversight, fraud and mistake. The Applicant did not advance sufficient evidence to meet the threshold to have the order set aside and Justice Hilliard dismissed the motion. Ultimately, Justice Hilliard found that the Applicant entered into the minutes rashly and simply regretted signing them.

### ***Background of Patel v. Patel***

The parties married in India in 1996 and had one child. They separated in January 2015 and eventually signed the minutes of settlement setting out the terms of their agreement. The parties both signed waivers regarding exchanging financial statements and receiving independent legal advice, which were attached to the minutes of settlement (at para. 9).

The parties attended a case conference on January 23, 2017. They were both self-represented and appeared in person before Justice Thompson.

Justice Thompson questioned both parties about their failure to file financial statements and about their understanding of their rights and obligations. His Honour specifically indicated to the parties that he did not think they understood their legal

rights and what they were agreeing to. The Applicant responded that he did understand his rights and confirmed that he was giving the Respondent the matrimonial home for her and their child to reside at.

Only after questioning the parties on their understanding and agreement with respect to the proposed settlement, did Justice Thompson endorse the minutes of settlement and make a final order on consent (at para. 12).

Pursuant to the terms of the order, the Applicant transferred both vehicles the parties owned during the marriage to the Respondent. He also cooperated in the transfer of the parties' property in Alberta and the matrimonial home to the Respondent.

The Applicant moved back to India for a period of time. However, when he moved back to Canada, the Respondent permitted him and his new wife to move back into the former matrimonial home. The Applicant built a separate unit for himself and his new family and pursuant to an arrangement between the parties, he contributed to the mortgage payments (at para. 15).

### ***Family Law Rules***

Rule 2(2) of the *Family Law Rules* states that the primary objective of the *Rules* is to enable the court to deal with cases justly.

Rule 2(3) of the *Rules* states that dealing with a case justly includes:

a) ensuring that the procedure is fair to all parties;
b) saving expense and time;
c) dealing with the case in ways that are appropriate to its importance and complexity; and
d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.

Rule 25(19) of the *Rules* sets out the statutory framework for changing an order:

> The court may, on motion, change an order that,
>
> a) was obtained by fraud;
> b) contains a mistake;
> c) needs to be changed to deal with a matter that was before the court but that it did not decide;
> d) was made without notice; or
> e) was made with notice, if an affected party was not present when the order was made because the notice was inadequate or the party was unable, for a reason satisfactory to the court, to be present.

Justice Monahan in *Sarrafian v. Leksikova* (2021 ONSC 2838) affirmed that Rule 25(19) of the *Rules* has a relatively limited scope of application:

> The relatively limited scope of Role 25 (19) is appropriate and necessary given the need for finality and certainly in family law litigation … a party who is dissatisfied with a court order may undertake an appeal in the normal course. But absent an appeal or the limited circumstances provided for in Rule 25 (19), parties are entitled to proceed on the basis that a court order is binding and may be relied upon. Moreover, Rule 25 (19) should not [be] regarded as a form of supplementary or shadow appeal process, to deal with events arising subsequent to the court order. Utilizing Rule 25(19) in this fashion would not only produce needless uncertainty, it would also frustrate parties' efforts to settle disputes, for fear that the matter would be re-opened later because a party had become dissatisfied with the terms of the order. Any such efforts would be inconsistent with the "primary objective" of dealing with cases justly, as set out in Rule 2 (2) and 2 (5). (at para. 38)

Thus, an attempt by a litigant to mask an appeal as a motion under Rule 25(19) of the *Rules* will not likely be successful and a litigant will undoubtedly need to place sufficient evidence to sway the court in their favour.

***Factors to be considered in setting aside a consent order***

Justice Hilliard in *Patel v. Patel* cited Justice Sheard's decision of *Ciraolo (Litigation Guardian of) v. Ricci* (2022 ONSC 420), which summarized the factors to be considered in setting aside a consent order:

a) The court has discretion to set aside a settlement where, in the totality of the circumstances, it would not be appropriate to enforce the parties' agreement. However, as a matter of public policy, a settlement ought to be enforced by the court unless enforcement would create a risk of clear injustice …

b) The fact that a settlement has been implemented by a consent order does not preclude the court from exercising its discretion respecting enforcement of the settlement and a party may move to set aside the court order on a ground set out under rule 59.06 (2);

c) Attempts to reopen matters that are the subject of a final judgment must be carefully scrutinized and the moving party must demonstrate circumstances that warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation …

d) A consent order may be set aside on any ground that invalidates the underlying settlement agreement or on a material change in circumstance after the order was made. Such grounds include common mistake, misrepresentation, fraud, or any other ground which would invalidate contract (*sic*) or, a material change in circumstance occurring after the consent order …

e) The court in *Joshi* also endorsed the principle that a consent judgment is binding and final, and that finality is important in litigation because the parties reached their bargain on the premise of an allocation of risk and the implicit understanding that they would accept the consequences of the settlement. For those reasons, r.59.06 limits the avenues to set aside a settlement and consent dismissal;

f) Even where a material change in circumstances is established, the court has discretion to refuse to set aside the order based on factors such as prejudice to the other parties or unreasonable delay in bringing the motion …

g) In all cases, the onus is on the moving party to show that circumstances warrant making an exception to the fundamental rule that final Judgments are, in fact, final.

Justice Hilliard affirmed that all court orders are assumed to be correct, "Other than in the circumstances set out in FLR 25(19) and the caselaw regarding setting aside consent orders, a judge has no jurisdiction to review the order of another judge at the same level of court. A motion to set aside a consent order must not be allowed to become an appeal in disguise." (at para. 21)

Her Honour acknowledged that it has long been established that the test to set aside consent orders differs from the test to set aside an order where that has been judicial adjudication of one or more issues. As Justice Patrick Monahan in *Sonia v. Ratan* (2022 ONSC 6340) at paragraph 29 stated, "Because the basis for a consent order is simply the parties' agreement, such an order may also be set aside on the same grounds as the underlying agreement that gave rise to it."

Justice Hilliard affirmed that the starting point remains that a final order is final, subject to the moving party demonstrating, with evidence, that the order should be set aside based on the legislation and case law. She stated that, "It is only in exceptional circumstances that a court order should be set aside. Courts have long recognized the importance of upholding agreements reached by parties based on the need for finality in litigation." (at para. 23)

***Decision in Patel v. Patel***

The Applicant's reasons for moving to set aside portions of Justice Thompson's order were based on arguments relating to lack of independent legal advice, lack of understanding, unconscionability, and lack of judicial oversight (at para. 24).

Justice Hilliard held that a lack of independent legal advice is not a ground upon which a consent order can be set aside. Moreover, the Applicant specifically advised Justice Thompson that he did not wish to obtain legal advice before the minutes of settlement were endorsed (at paras. 25-26).

The Court held that the failure to exchange financial disclosure alone also cannot form the basis upon which a consent order can be set aside, failing evidence to demonstrate fraud or mistake. Again, Justice Thompson questioned the parties extensively regarding the lack of financial disclosure exchanged and the parties' understanding of the agreement prior to endorsing the minutes of settlement.

The Applicant also tried to advance an argument that the Respondent made a false statement regarding her pension. Justice Hilliard found that there was no evidence for this allegation that could form a case for the order being set aside on the basis of mistake or fraud (at para. 28).

Her Honour affirmed that in order for an agreement to be set aside on the basis of unconscionability, "There must be an aspect of inequality between the parties and that inequality must have been utilized by one party to prey upon the other." On the evidence, no unconscionability was found between the parties (at paras. 29-30).

Justice Hilliard also did not accept the Applicant's argument that there was minimal judicial oversight. Justice Thompson took time to review the minutes of settlement with the parties and ensured that they understood their legal rights as well as the agreement reached, prior to endorsing the minutes.

Ultimately, Justice Hilliard found that the Applicant entered into the minutes of settlement rashly and simply regretted signing the agreement. The Applicant did not advance sufficient evidence to set aside the order, on the basis of unconscionability, mistake, or fraud. Accordingly, she dismissed the Applicant's motion and held that Justice Thompson's order shall remain final.

### *Conclusion*

*Patel v. Patel* is a good illustration of how the court applies the statutory framework and case law regarding setting aside an order, particularly an order reached by consent.

Justice Hilliard assessed the Applicant's claims of a lack of judicial oversight, a lack of understanding, unconscionability, not receiving independent legal advice, fraud and being pressured to sign the agreement.

The decision of *Patel* reaffirms the court's unwillingness to set aside final orders in the absence of sufficient evidence supporting one of the grounds upon which an order may be set aside.

We see the court uphold the principles of autonomy and finality in family law settlements and endorse the high threshold required to be met in order to have an order set aside, particularly an order reached by consent. The notion of justice plays an integral role in assessing whether an order should be set aside.

Challenging final orders is a particularly delicate exercise. While the court appreciates that family law litigation is stressful, the court will not set aside agreements unless there is sufficient evidence to show that the agreement was in fact obtained by fraud, mistake, duress, etc. Spurious claims unfounded on evidence will not likely be successful.

The court will also not assist a party with settlement remorse to set aside an agreement, as this would be contrary to the principles of autonomy and finality.

To paraphrase Justice Hilliard, *Patel* was a case of "buyer's remorse" where a party made some "rash decisions" and simply regretted the agreement made.

Therefore, counsel with similar cases should carefully review, not just their client's motivations and the full background behind a purported claim, but also the evidence supporting the claim. This way, counsel's advice will not only be sound and

thoughtful, but will also help a client to avoid a futile attempt at fixing their own wrong.

## Applying the law of resulting trust to matrimonial homes

Ainsley Doell

### *Overview*

In *Sarafova v. Sarafov* (2024 ONSC 733), Justice Sharma addresses the law of resulting trust and unjust enrichment as it relates to the parties' matrimonial home. This article will discuss the legal scheme that applies where one spouse is claiming that a property is being held for their benefit, and consider different questions that arise in this context.

### *Introduction*

A resulting trust may occur where there is a mismatch between the legal and beneficial ownership of a property, as evidenced by the transfer of that property from one party to another for no consideration.

Situations often arise, in family law and elsewhere, where this arrangement results in a dispute over who rightfully has an interest in the property.

This article will first look at the recent case of *Sarafova v. Sarafova*, as an introduction into the topic of the presumption of resulting trust. Justice Sharma's decision is clear cut, but there are some interesting peripheral questions that arise around this topic that are not fully discussed.

As will be discussed, the actual intention of the transferor of a property is what governs the finding of a resulting trust.

But, what about when that intention is fraudulent or designed to defeat creditors? And, what happens to all of the expenses that one party has paid thinking that the

property is their own? Using *Sarafova* as a starting point, these questions will be explored looking at other case law from Ontario.

### ***Sarafova v. Sarafov: Overview***

The Applicant wife and the Respondent husband separated in 2010 after an approximately 21-year marriage. A number of issues remained outstanding in these proceedings, but this article will focus on the Applicant's resulting trust claim relating to the matrimonial home.

The matrimonial home was sold in 2022, 12 years after the parties' separation. Despite the fact that title was held solely by the husband, he vacated after separation and the wife and their two children continued to live there for the next 11 years. It becomes relevant that the husband did nothing during this period to try to assert his ownership or right of possession over the property: The home was treated as the wife's.

It was the wife's position that title to the matrimonial home was taken only in her husband's name in order to limit her potential liability, as she had recently purchased a dentistry practice. She did so at the advice of her accountant.

Her evidence was that she had provided the down payment and made all other payments relating to the home (including mortgage, maintenance, utility bills, etc.) from the time of purchase to Fall 2021, when she no longer had the means to do so. There was no evidence that the husband had financially contributed to the purchase or maintenance of the home.

***The law of resulting trust***

Justice Sharma's analysis in *Sarafova* begins with section 14 of the *Family Law Act* (R.S.O. 1990, c. F.3), affirming that the presumption of resulting trust "continues to apply to questions of ownership property between spouses" (at para. 18).

At the heart of the law of resulting trust is the adage "equity presumes bargains, not gifts" (*Pecore v. Pecore*, 2007 SCC 17 at para. 24). Where there is a dispute over the characterization of an allegedly gratuitous transfer, the relevant inquiry is into the "actual intention of the transferor at the time of the transfer" (*Pecore* at paras. 4-5).

This idea was applied to common law spouses in *Kerr v. Baranow* (2011 SCC 10), wherein Justice Cromwell looks at the law of unjust enrichment in the context of a resulting trust claim. He notes that the principle of resulting trust operates to return interest in a property to its rightful owner (at para. 16).

Due to the distinction between "legal" and "beneficial" ownership of property, the fact that title to property is held in one party's name is not necessarily determinative of ownership. While legal title may be held by one person, equity may operate to recognize that the title is held for the benefit of another. Otherwise, the party with legal title may be unjustly enriched, depending on the circumstances.

In the case of *Sarafova*, this means that in order to determine whether the matrimonial home was properly characterized as belonging to the wife, the question was *what was the wife's intention when she purchased the home and registered title in her husband's name*?

As stated above, the wife's position was that title was in the husband's name to protect it from potential claims against her dentistry practice. However, as the onus for demonstrating that the transfer was a gift lies on the person claiming that it was gratuitous (*Kerr* at para. 19), it was up to the husband to demonstrate that a gift was intended, and he failed to do so.

If the husband advanced an argument attempting to rebut the presumption of resulting trust, this is not shared in the *Sarafova* decision. Presumably, he was relying on the fact that title was in his name. Justice Sharma does note repeatedly, however, that there was no evidence before the court that rebutted this presumption.

Further, Justice Sharma notes that finding that the matrimonial home properly belonged to the husband would result in unjust enrichment: he did not contribute to the purchase or maintenance of the property. The wife had made all payments relating to the home both during marriage and after separation.

### *Brief note: treatment of the matrimonial home*

As we know, the treatment of the matrimonial home in family law is distinct from the treatment of other property. When it was found in *Sarafova* that the wife was the beneficial owner of the matrimonial home, this did not disentitle the husband from sharing in the increase in the value of the matrimonial home during the marriage (see section 4(2) of the *Family Law Act*). Rather, this finding confirmed that the wife was entitled to 100% of the increase in the property's value from the date of separation until the property's sale (which, being approximately 12 years, would likely have been considerable). This is confirmed by Justice Sharma at paragraph 23.

### *Intention matters, but does the intention have to be 'good'?*

An interesting question that did not get a lot of attention in *Sarafova* is whether it should be relevant that the intention of the transfer was to protect the property from potential creditors.

Generally, courts want to see that a person seeking equitable relief is coming with "clean hands", which may not be the case if a property transfer occurred with fraudulent intention.

Justice Sharma deals with this question swiftly, stating that the wife provided a "sensible reason" for why title was put in the husband's name, and that "the purpose was not to defeat existing or real creditors", as "there were no creditors, just the potential of future creditors" (at para. 21).

At paragraph 21, Justice Sharma indicates that the facts of *Sarafova* closely align with the decision in *Nussbaum v. Nussbaum* (2004 CanLII 23086). In *Nussbaum*, Justice Karakatsanis, then at the Ontario Superior Court of Justice, took a closer look at this question.

Justice Karakatsanis noted that there is case law that highlights a specific intention to evade creditors as depriving a party of their entitlement to beneficial ownership, as "courts appear reluctant to allow the claimant to have it both ways" (at para. 32). Otherwise, the court would be allowing a party to deny having an interest in the property when creditors may be involved, while allowing them to claim that same interest in a family law context.

Importantly, however, having this intention to evade creditors does not itself rebut the presumption of resulting trust. *Nussbaum* suggests that the court must look at the totality of the evidence, and assess whether the party who transferred the property intended to deprive themselves of beneficial ownership:

> While evidence that someone intended to fully evade creditors can be evidence that they intended to gift their entire interest in the property, the intention of the parties is a question of fact to be determined from all the evidence (see paras. 32-33).

It is noted by Karakatsanis J. that there is case law that states that "the intention to truly evade creditors was necessarily an intention to gift **all** interest in the property" (at para. 31, emphasis added).

While the case law may be clear that an intention to evade creditors does not rebut the presumption of resulting trust on its own, *London-Shiffman v. Shiffman* (2020 ONSC 8006) confirms that it can certainly be a relevant consideration. This case helpfully lays out all of the evidence that was reviewed by an arbitrator in correctly finding that it was a party's intention to gift his interest in property to his wife (see para. 33).

The arbitrator had found that based on the cross-examination of the husband, he was "well aware" that, in order to protect the matrimonial home from creditors, "he needed to transfer both the beneficial and legal title" (at para. 34). In this case, the creditors were also hypothetical rather than real, but the court upheld the arbitrator's decision.

**Impact of resulting trust on liability for post-separation expenses**

The wife in *Sarafova* had an alternative argument that if a finding of resulting trust was not made, the husband would owe her a post-separation adjustment for half of the expenses related to the upkeep of the matrimonial home from the date of separation until its sale (see para. 26).

Because a finding of resulting trust was made, it was not necessary for Justice Sharma to assess this claim. However, a similar question was addressed by the Ontario Court of Appeal in *Korman v. Korman* (2015 ONSC 578).

In *Korman*, the court of appeal found that a husband did in fact have a 50% interest in the matrimonial home which was placed solely in the wife's name, with the intention of protecting it against potential creditors. However, since separation, the husband

had not contributed to the "upkeep" of the home, and was therefore liable for 50% of these expenses (at para. 78).

Post-separation adjustments are not uncommon, but it is good to keep in mind that a party's entitlement may depend on the outcome of a resulting trust claim.

## Conclusion

The presumption of resulting trust can operate in a family law context to return legal interest in a matrimonial home to a spouse who transferred it to another spouse for no consideration. The relevant inquiry is the actual intention of the spouse who transferred the property, contemporaneous with the transfer, and the onus is on the spouse claiming the gift to demonstrate gratuitous intent.

If the intention of the spouse seeking to rely on the presumption of resulting trust was to defeat creditors, it is worth taking a closer look at the case law in this area, beginning with *Nussbaum*. While it seems clear that an intention to evade creditors is not an absolute bar on this kind of claim, there are cases supporting this intention as evidence of an intention to gift all interest in a matrimonial home.

When bringing a claim for resulting trust, it is also worth taking a look at who has been paying the expenses for the upkeep of the asset (matrimonial home or otherwise). At the end of the day, whoever is found to have an interest in the home may be on the hook for some or all of these expenses.