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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").

Mind the gap: Implications of the "gap year" on child support

Christina Hinds

Overview

Many children choose to take a break between graduating from high school and starting post-secondary education. This break is often referred to as a "gap year." *Rodriguez v. Bell* (2024 ONCJ 302) is a recent decision wherein the court determined whether an adult child was entitled to child support during a gap year. Justice Sherr determined that the child was not entitled to child support during the gap year but held that the child's entitlement to child support was "revived" when the child started post-secondary education.

Facts

In *Rodriguez v. Bell*, the father paid child support pursuant to a 2012 final order. The child graduated from high school in June 2022. The child did not attend school from June 2022 until September 2023, at which point she started post-secondary education. The father brought a motion to change seeking to terminate child support as of June 2022 when the child graduated from high school and was 18 years old.

The mother argued that the child remained entitled to support after graduating from high school because she was unable to withdraw from the charge of her parents. In the alternative, the mother argued that child support should be revived when she returned to school in September 2023.

Entitlement of an adult child to support

Subsection 31(c) of the *Family Law Act* sets out that a parent is obligated to provide support for a child who is unable to withdraw from parental charge (at para. 18). Referring to *Rebenchuk v. Rebenchuk* (2007 MBCA 22), Justice Sherr noted that the

onus of establishing an adult child's entitlement to support is on the party seeking support (at para. 19).

At paragraph 20, Justice Sherr referred to Nicholas Bala's and John Abrams' recent paper, *Child Support for Adult Children in Canada: When Does Childhood End?:*

> Generally, if an adult child without disabilities ceases to attend school, and has only vague plans to return, the support obligation ends. **However, if the child leaves school for a year or less, where there is a clear plan to return, the support obligation may be continued during that period, especially if the child is earning income and the child's saving from that period may reduce later parental obligations.** If the support obligation has ended and the period out of school is less than two years, the courts will usually allow the support obligation to be reinstated, and in some cases, reinstate support when a child has been out of school for up to three years. (emphasis added)

The three approaches taken by courts

Justice Sherr considered the three approaches courts have taken when a child takes a break or "gap year" between graduation from high school and starting post-secondary education.

1. Child support ordered during the gap year

Some courts have ordered that child support will continue during a child's break between high school and post-secondary school (at para. 21) including Justice Charney in *Edwards v. Edward*s (2021 ONSC 1550) and Justice Trousdale in *Leonard v. Leonard* (2019 ONSC 4848).

In *Edwards*, Justice Charney noted that there are many cases where courts have found that a child taking a "gap year" may remain entitled to child support and that other cases have found that a child may require a "modest transition period" after completing an educational program to search for employment (at paras. 37 & 38). Justice Charney explained that:

> Apart from these brief periods, however, and in the absence of "illness or other disability", courts generally require attendance at school for an adult child to maintain his or her dependant status. Adult children cannot simply choose to remain economically dependant on a parent, they must be "unable" to withdraw from the parent's charge. Nor can adult children accumulate multiple gap years to forestall their independence. (*Edwards*, at para. 39).

In *Edwards,* Justice Charney found that both children should be permitted to take a gap year to "figure out" what they want to do (at para. 44). However, an adult child cannot indefinitely postpone starting post-secondary education and remain entitled to child support (at para. 45). One of the children attended a post-secondary education following his gap year but did not finish the program. Justice Charney held that the child was entitled to child support during his gap year and while attending the post-secondary program. The second child did not attend post-secondary education following his gap year. Justice Charney held that his eligibility for child support ended following his gap year. As both children had plans to start post-secondary education, Justice Charney stated that this decision was without prejudice to the mother's right to apply for child support when the children start school (at para. 49).

In *Leonard,* Justice Trousdale found that the child "formulated a reasonable plan" for her post-secondary education (at para. 60). The child discussed her plans to take a year off from school and both parents were supportive. Aside from two short trips, the child resided full-time with the mother. She also worked during the gap year and Justice Trousdale noted that the child would be expected to use some of her earnings toward the cost of her post-secondary education.

The child remained dependant on the mother during the gap year. At paragraph 63, Justice Trousdale stated:

> [i]f the father is not required to pay any child support to the mother during this period as requested by the father, the mother will be obliged to bear the burden of those expenses even though the mother makes substantially less income than the father.

2. Child support terminated/suspended during gap year and revived upon return to school

Some courts have terminated or suspended child support for adult children when they stop attending full-time school and revive child support when they return to school (at para. 22) including *Stephenson v. Thomas* (2014 ONCJ 669) and *Haley v. Haley* (2008 CanLII 2607 (ON SC)).

In *Stephenson*, the child took a 14-month break from school. At paragraph 32, Justice Sherr considered that the child was still young and had a "reasonable and practical education plan that is supported by both parents" and that the child had never been independent.

In *Haley*, Justice Pazaratz permitted child support to be reinstated for a 21-year-old child following a two-year gap. During the two-year period when the child was not in school, he lived on his own and worked various low paying jobs. At paragraph 33, Justice Pazaratz found that the child "went through a relatively short period of trying to organize his life and devise a realistic plan for the future."

3. Discretionary child support amount

The court does not have to make a "binary choice" between approach number one and approach number two. At paragraph 24, Justice Sherr explained that the court has the discretion to "determine that the guidelines approach is inappropriate and order a different amount if it finds the adult child remains eligible for support during a gap year."

The court's authority to do this is set out in subsection 3(2)(b) of the *Child Support Guidelines* which states the following:

> (2) Unless otherwise provided under these guidelines, where a child to whom an order for the support of a child relates is the age of majority or over, the amount of an order for the support of a child is,
>
> > (a) the amount determined by applying these guidelines as if the child were under the age of majority; or
> >
> > (b) **if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent or spouse to contribute to the support of the child**. (emphasis added)

Decision

Justice Sherr held that the fairest approach in the circumstances was approach number two (at para. 25). Justice Sherr suspended child support during the child's 14-month gap and reinstated child support when the child started post-secondary school.

Justice Sherr noted that at the time of the child's high school graduation, she did not meet the eligibility criteria set out in subsection 31(1) of the *Family Law Act*. She was not a minor and she was not enrolled in a full-time education program (at para. 25)

At paragraph 25, Justice Sherr noted that the child took time off from school to "decompress from her studies and travel the world." His Honour referred to this as an adult choice.

The father did not approve of the child's plans and did not agree to contribute to her travel costs. The child did not work during her 14-month break from school. The father did not agree with the child's choices.

Both parents had limited financial means. The father earned a modest income and the mother had not worked for several years. At paragraph 25, Justice Sherr found that "it

is not fair, given this family's economic circumstances, to require the father to pay child support for these 14 months when the adult daughter was not in school, traveling the world, and not contributing anything towards her own support."

Sherr J. also held that the 14-month gap after high school was not unusual, "as young people often take a pause to consider their future". He further noted that the child's education path was a reasonable one and that it should be encouraged by her parents.

Conclusion

There are three approaches that courts have taken when dealing with child support during gap years:

1. Continuing child support throughout the gap year;

2. Suspending/terminating child support during the gap year and reinstating/reviving child support when the child returns to school; and

3. Ordering child support at an amount that it considers appropriate.

However, lawyers and clients should keep in mind the following:

- The onus of establishing an adult child's entitlement to support is on the party seeking support.
- A parent's approval or support of the child's plans to take a gap year may be considered by the court.
- The court will consider whether the child's education plan is reasonable or practical.
- The court will consider the financial means of the parents.
- The court will consider whether the child remained dependant on the parent or parents during the gap year/break from school.

When bringing a motion to enforce a purported settlement, don't forget to check the jurisdiction

Amruta Ponkshe

Overview

What happens when parties believe that they have reached a full and final settlement, but in actuality they have not? What happens when the terms of settlement do not provide sufficient clarity to complete the settlement?

Justice Chown in *Mumtaz v. Ali* (2024 ONSC 3216) addresses these issues and reminds us that when going to court, do your legal research. Specifically, show the judge the jurisdiction they have to make the orders that you are requesting.

Otherwise, you may meet the same fate the applicant husband met in *Ali* by having his motion to enforce an agreement dismissed.

Introduction

In *Mumtaz v. Ali*, the parties signed minutes of settlement to reflect what they believed to be a full and final settlement at a settlement conference held in July 2023. The minutes were incorporated into a consent order of Justice Doi.

Cut to March 2024, the applicant husband brought a motion to enforce the July 2023 settlement. The motion was heard by Justice Chown. The husband sought an order for the distribution of the net sale proceeds of the matrimonial home between the parties after paying back Legal Aid Ontario for the wife's legal fees. He also sought an order compelling the respondent wife to "return" the car that she had been using but that was registered in the husband's name.

The wife opposed the proposed distribution of funds. She claimed that the disclosure she received from the husband was incomplete. She also alleged that at the time of entering into the minutes of settlement she was not aware that, two days after separation, the husband had unilaterally withdrawn $160,000 from the parties' joint line of credit.

Consequently, she requested a distribution of funds from trust on a different basis. She also requested an order that the car be transferred to her for $19,000. However, she did not bring a motion to set aside the July 2023 settlement. She simply indicated in her affidavit what order she was seeking.

The settlement

Justice Doi's consent order mirrored the parties' minutes of settlement which dealt with equalization and spousal support.

In terms of equalization of the parties' net family properties, the order confirmed that the wife would receive $50,000 from the net sale proceeds from the parties' matrimonial home in equalization. Thereafter, the remaining proceeds were to be divided equally between the parties.

The order failed to address any specifics regarding how the $50,000 equalization was calculated.

The order also stated that the husband would pay the wife an "inflated amount of spousal support" in the amount of $3,000 per month indefinitely. In lieu of this payment, there would be no child support for the parties' two adult children.

At paragraphs 14 and 15, Justice Chown inferred that both parties had compromised to reach the settlement. The parties also chose not to provide the basis of the equalization in their minutes. While their reasons to do so may have been strategic or

simply result-oriented, the conclusion was that the settlement had to be taken as a complete package. Each party may have compromised more than they wanted to on some aspects because they were satisfied with the compromise by the other party on other aspects. Justice Chown concluded that in such circumstances, it was not possible to unwind only part of the settlement, such as equalization.

His Honour referred to paragraph 10 of the Supreme Court of Canada's decision in *Rick v. Brandsema* (2009 SCC 10) which states that "the best way to protect the finality of any negotiated agreement in family law is to ensure both its procedural and substantive integrity in accordance with the relevant legislative scheme".

At paragraph 16, Chown J. commented that:

> Where there is a trade-off resulting in a departure from substantive compliance with the legislative scheme (*e.g.*, more on spousal support in exchange for less on child support and equalization), there is a greater risk that the settlement will not be upheld. That is not to say, however, that trade-offs are unacceptable. Settlements that do not strictly follow the legislative regime because they involve trade-offs can of course be valid and are frequently approved and upheld, but the point is that settlements involving such trade-offs may be more vulnerable to attack.

The incomplete settlement

What the parties believed to be a full and final settlement was, in fact, only a partial settlement.

Justice Chown took issue with the fact that the settlement did not deal with the Legal Aid lien relating to the wife's legal fees. The lien was registered against the matrimonial home at the time of its sale. However, neither the minutes of settlement nor the consent order discussed its payment out of the sale proceeds.

The minutes and the consent order also did not deal with possession or transfer of ownership of the car. Although the car was registered in the husband's name, it was purchased prior to separation and was paid for at least in part out of the joint line of credit.

Jurisdiction to enforce a purported settlement

The husband's notice of motion did not refer to any rule or legislative position. Similarly, the wife did not bring any motion, only stating in her affidavit what order she sought. Neither party laid down the basis for the court's jurisdiction to make the order they requested.

In such circumstances, Justice Chown had to determine the jurisdiction and the rules under which the court could make the requested orders. At paragraph 35, His Honour held that the question as to which rules are applicable was important because the applicable rules would govern the test to be applied.

After considering various provisions under the *Family Law Rules*, including Rule 18(13) (offers to settle) and Rule 16 (summary judgment), his Honour analyzed Rule 25(19) which dealt with changing an order. Justice Chown concluded that the issue of the possession and ownership of the car could have potentially fallen under Rule 25(19)(b) on the basis that the failure to address this was a mutual mistake, or under 25(19)(c) on the basis that the order "needs to be changed to deal with a matter that was before the court but that it did not decide."

Justice Chown held that to obtain the relief the respondent wife requested in her affidavit, she should have brought a motion under rule 25(19) to change the order on the basis that the order contained a mistake.

His Honour concluded that the failure of both parties to define the basis for the relief requested in the motion was, on its own, a sufficient basis to dismiss the applicant husband's motion.

Test to enforce a purported settlement

Justice Chown relied on the statement of law regarding the enforcement of settlement agreements as found in *Zaidi v. Syed, Estate of, et al* (2023 ONSC 1244), and affirmed in the recent appeal decision (2024 ONCA 406). *Zaidi* involved a settlement agreement parties reached in connection with an estates dispute.

In *Zaidi*, at paragraphs 13 to15, Justice Perell held the following:

> A settlement agreement is a contract, and the court has jurisdiction at common law and under rule 49.09 to enforce settlements. **A motion to enforce a settlement involves two elements. The first element is whether or not there is any genuine issue about the existence of an agreement to settle, and the second is to determine whether there is any reason not to enforce the settlement.**
>
> For there to be a binding settlement agreement, there must be a mutual intention to create a legally binding agreement and the essential terms of the agreement must have been agreed upon. However, it is not necessary to have reached agreement on incidental matters, such as the method of payment or the exchange of releases.
>
> There is a strong presumption in favour of the finality of settlements; however, a settlement agreement is a contract and is subject to the law of contract formation, and a settlement agreement can be set aside in the same way that a contract may be rescinded for mistake, fraud, innocent misrepresentation, duress, undue influence, or unconscionability. (emphasis added)

Simply put, in order to enforce a purported settlement, the court should satisfy itself that there was in fact a settlement, and then ask where there is any reason not toe enforce the settlement.

What constitutes a settlement?

His Honour referred to *Olivieri v. Sherman* (2007 ONCA 491) and reiterated paragraph 41, which states the following:

> A settlement agreement is a contract. Thus, it is subject to the general law of contract regarding offer and acceptance. For a concluded contract to exist, the court must find that the parties: (1) had a mutual intention to create a legally binding contract; and (2) reached agreement on all the essential terms of the settlement.

Taking from *Zaidi*, at paragraph 38, Justice Chown stated that:

> The analysis of whether there was a settlement should be treated as a summary judgment motion. That is, it should only be held that there is a settlement if there is no genuine issue requiring a trial on this point. This applies not only in cases of accepted offers… but also in cases involving negotiated settlement agreements.

Justice Chown concluded that the parties had met the first requirement; that is, the parties had intended to conclude and thought they had concluded a binding full and final settlement. His Honour held that the question turned on the second element – whether the parties reached an agreement on all essential terms of settlement. They had not. The parties had failed to address all essential terms of settlement in the minutes they signed, specifically with respect to the ownership and transfer of the car and the legal aid lien.

Since there was no real settlement, there was no real possibility of enforcing it.

His Honour dismissed the husband's motion without costs. It was held that the messy circumstance of the parties could only be resolved on a full factual record after a trial or if the parties attempted to reach a compromise.

Conclusion

Ali v. Mumtaz reminds to full-proof the settlements we help our clients to reach. This would be true whether it be by way of a separation agreement, an offer to settle or

minutes of settlement. It is safer to err of the side of "too much detail" when drafting settlement terms than "too little".

While there may be strategic or result-oriented reasons to not spell out every compromise or detail, it is imperative that a "full and final" settlement include resolution of all substantive issues arising out of a couple's separation.

Paws and Effect: How the courts determine ownership of the family pet

Samantha Rich

Overview

Trigger warning for animal lovers: pets are in fact considered personal property under Ontario law.

As confirmed in a recent decision by Justice Stewart in *Carvalho v. Verma* (2024 ONSC 1183), who gets the family pet in a separation will not be determined by emotional ties, it will be determined much like any other personal property: who has the better claim for ownership.

Historically, the issue of pet ownership focused specifically as to who purchased the animal; however, the courts have since taken a more nuanced approach and will look at a non-exhaustive list of factors to determine pet ownership.

The modern approach recognizes that pet ownership cannot simply be determined by looking at who made the initial purchase of the pet. The courts now also look at the relationship between the parties and the dog.

While the courts avoid making "custody" orders for pets akin to those for children, they do have jurisdiction to determine ownership and thus who gets to keep the family pet when parties separate.

Dogs are considered personal property

Justice Stewart, in her decision of *Carvalho Estate v. Verma* (2024 ONSC 1183), affirmed that dogs are considered personal property in the eyes of the law. She writes at paragraph 24:

> Dogs are personal property much like other chattels (albeit indivisible), even when purchased during the course of a relationship. The question is one of ownership, not who wants the dog more, who loves the dog more or who would be the best owner.

Courts have jurisdiction to determine ownership of the family pet where ownership of the family pet is in dispute during a separation. However, it should be noted that, "…The court has no general discretion to redistribute property or alter ownership, but as with other kinds of property there may be issues as to whether a particular piece of property was made a gift or whether it is held in trust for another party, by way of constructive or resulting trust…" (*Duboff v. Simpson*, 2021 ONSC 4970, at para. 16).

A seminal case in this area of law, which was also affirmed by the Court of Appeal, is the Ontario Superior Court of Justice decision of *Warnica v. Gering* (2004 CanLII 50065 (ON SC)). Justice Timms discussed the unique nature of pet ownership disputes at paragraph 19 of the decision:

> Of course, any pet is somewhat different, in that it does not readily lend itself to physical division. A pet could be sold, with the proceeds to be divided in accordance with any determination as to the parties' respective interests therein; however, that is something that few would want. Certainly it is something that no one wants here. A pet could be shared, as happened in the case of *Rogers v. Rogers*. In my view that would be akin to a custody access/order. Whether in the Family Court or otherwise, **I do not believe that any court should be in the business of making custody orders for pets**, disguised or otherwise. To the extent that any of my colleagues may feel otherwise, I respectfully disagree. Obviously, I acknowledge that pets are of great importance to human beings. Strong bonds develop between them and the human beings that look after them. To some people, the relationship with their pets takes on a significance exceeding that of any other. They go to extraordinary lengths to preserve that relationship; even at a cost that some would say is disproportionate. **Some may consider them to be children; however, they are not children.** (own emphasis added)

The unfortunate reality is that while one may consider a family pet to be akin to a child, "pet custody" as it were, is not an option when seeking assistance from the court. "Pet

custody" is awarded to the person who has the strongest entitlement to ownership of the family pet based on a non-exhaustive list of factors.

Factors to determine ownership

Traditionally, the question of pet ownership focused narrowly on who purchased and paid for the pet. The courts have since taken a broader approach by looking at the relationship between the parties and the dog (*Carvalho Estate v. Verma*, 2024 ONSC 1183, at para. 25). This is more in tune with the current social landscape where people have formed close emotional ties with their pets.

Justice Baltman's decision of *Coates v. Dickson* (2021 ONSC 992) summarized a list of non-exhaustive factors at paragraph 8 of the decision to be considered in determining ownership of the family pet where two people contest ownership:

a. Whether the animal was owned or possessed by one of the people before the relationship began;
b. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;
c. The nature of the relationship between people contesting ownership at the time the animal was first acquired;
d. Who purchased and/or raised the animal;
e. Who exercised care and control of the animal;
f. Who bore the burden of the care and comfort of the animal;
g. Who paid for the expenses related to the animal's upkeep;
h. Whether at any point the animal was gifted by the original owner to the other person;
i. What happened to the animal after the relationship between the litigants changed; and
j. Any other indicia of ownership or evidence of agreement relevant to who has or should have the ownership of the animal.

It is important to note that ownership of a dog is not solely determined by who purchased the dog. As stated by Justice Baltman:

> In my view, this broader approach is the correct one. Ownership of a dog is an investment that goes beyond the mere purchase price. It includes the care and maintenance that are an integral part of "owning" the dog. I agree with Hoegg J.A. and Miller J. that separating the purchase price from the upkeep is both artificial and unfair. That is particularly so where, as here, there are two dogs in issue and, assuming the facts support joint ownership, they can be divided. Though in a perfect world, dogs who co-reside would remain together, litigation, by definition, almost always involves some compromise. (*Coates v. Dickson*, 2021 ONSC 992, at para. 17)

A few arguments were unsuccessfully raised in *Carvalho* in an attempt to obtain ownership of the dog. Arguments were raised relating to maintaining the status quo of care of the animal, the best interests of the animal and the fact that the animal is a "companion animal" (*Carvalho Estate, a*t paras. 45 – 48).

Accordingly, claimants will need to be careful with advancing best interests of the animal arguments. Justice Stewart held that, "The best interests of Rocco Jr. should not be confused or conflated with which party wants or loves the dog more. There is no evidence in this case that either party would be a poor or unfit custodian for the dog." (*Carvalho Estate,* at para. 47)

Therefore, if a party wishes to successfully prove that the pet is a companion animal or emotional support animal, they will have to provide sufficient evidence to the court with enough detail confirming diagnosis and thus a legitimate need for a companion animal or emotional support animal. "Vague platitudes" will not be sufficient to advance this argument (*Carvalho Estate,* at para. 48).

Establishing whether ownership changed

If a claimant wishes to advance the argument that ownership of the family pet changed during the course of the parties' relationship, the claimant will have to prove this on a balance of probabilities (*King v. Mann*, 2020 ONSC 108, at para. 71).

It should be noted that spending time with the dog, spending money on the dog, and/or treating the dog generally as the family pet, would not necessarily result in a change in ownership. Choosing the name of the family pet alone also does not necessarily result in a change in ownership. (*King v. Mann*, at paras. 71 & 77).

Possession of the pet is a factor which the court will consider, but not if possession is improperly taken, i.e., removing the dog without the other party's knowledge or consent (*Carvalho Estate,* at para. 45).

In order to establish that one party gifted the family dog to the other party, they will have to prove the three elements required to establish a gift:

1. Intention of the donor to give;
2. Delivery of the gift, and
3. Acceptance of the gift. (*King v. Mann*, at para. 72).

Interim Motions

In addition to the broader issue of pet ownership, courts have also addressed the more specific issue of interim motions relating to the return of an improperly taken family pet.

In *Dorka v. Kumar* (2016 ONSC 8226), the husband brought a motion for the wife to return Casper, the family dog, as the wife had taken matters into her own hands and removed the dog from the husband's residence when he wasn't home.

Justice McSweeney did not look favourably upon the self-help actions taken by the wife. The court also disagreed with the wife's arguments that in law, a dog was

equivalent to a chattel such as a "toaster" and that there was no basis for the court to order the return of the dog on an interim basis.

Rather, McSweeney J. referred to the *Family Law Rules* and held that courts are required to promote resolution of cases in a manner which is fair, just, and proportionate to the issues between the parties.

Accordingly, the court ordered the return of Casper to the care of the husband pending final resolution of the matter.

Conclusion

While an emotional issue, the law is clear: pets are personal property. The issue of "pet custody" will be determined by legal ownership, not sentimental attachment.

Practically speaking, it may be prudent to include terms regarding pet ownership in a marriage contract or cohabitation agreement. That way, in the event that parties separate, the parties' intentions regarding ownership of the family pet are clearly set out.

Ownership disputes are resolved based on legal principles, rather than subjective emotions. For that reason, a written agreement clearly setting out who will retain "custody" of the family pet upon separation will provide parties with peace of mind and certainty.

In terms of preparation of a separation agreement, terms relating to the "custody" of the family pets should be included to avoid a 'he-said she-said' situation that could arise where the parties simply reach a verbal agreement regarding who will retain possession of the family pet upon separation.

For many clients, the law regarding pet ownership will be jarring and will need to be navigated with sensitivity and understanding. The notion that the family pet could be moved or removed like a piece of furniture will be a tough pill to swallow.

Accordingly, you will need to manage your client's expectations and explain the limitations of the court regarding "pet custody" disputes in the most sensitive and empathetic manner possible.

The Double-Dipping Dilemma: When Will Courts Permit Double-Dipping? An Examination of post-*Boston* Case Law

Lesley Singer

Overview

Double-dipping remains a central concept in family law pertaining to support. While the landmark *Boston* case underscores the unfairness of double-dipping by paying spousal support from an equalized asset, the Supreme Court left the door open for circumstances where it is permissible. This article considers those circumstances, drawing upon post-*Boston* case law and reviews a recent decision by Justice Vella in *Nithiaraj v. Sellapu* (2024 ONSC 2058) where support was claimed from an already equalized pension.

Introduction: Revisiting *Boston*

In *Boston v. Boston* (2001) 2 S.C.R. 413, the Supreme Court of Canada addressed the concern about potential double recovery in circumstances where a portion of a spousal support payor's pension income has been or will be equalized, and then the entire amount of the pension is later considered as income for spousal support (as succinctly summarized by Justice Chappel in *A.E v. A.E.,* 2021 ONSC 8189, at para 158). Accordingly, the Supreme Court in *Boston* held that, "To avoid double recovery, the court should, where practicable, focus on that portion of the payor's income and assets that have not been part of equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown…" (at para 64).

This is particularly the case where the recipient spouse receives capital assets in exchange for his or her half-interest in the value of the payor spouse's pension, which is then retained to grow the support payee's estate (at para 63):

> It is well recognized that a borrower should not be compelled to continue monthly loan payments to the lender if the borrower has previously paid the full amount owing. "Double dipping" is analogous to such a situation and is logically and mathematically indefensible.

The directive of the Supreme Court of Canada has generated much litigation. That is because at para 65 of *Boston* it is made clear that the prohibition against double recovery is not etched in stone:

> Despite these general rules, double recovery cannot always be avoided. In certain circumstances, ***a pension*** which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, ***an economic hardship*** from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based **mainly on need** as opposed to compensation… (emphasis added)

Pension is a special asset – double-dipping does not apply to equalized business income

Courts have distinguished *Boston* on the basis that the asset at issue was a pension. For example, in *Halliwell v. Halliwell*, 2017 ONCA 349, the Court of Appeal distinguished a potential double-dip from a business versus that of a pension (at para 57):

> …The trial judge distinguished a pension from business assets that continue to produce income without devaluing the assets themselves. This is particularly true with after-acquired capital assets that continue to produce income. ***The pension analogy does not apply*** to cases in which the payor ***would not have to liquidate assets*** to pay ongoing support. The trial judge held (at para 128) that it was not proper to consider double recovery "when dealing with assets that are ***not liquidating*** assets or special assets of the nature of a pension."(emphasis added)

In other words, if a business continues to generate income without encroaching on the capital value of that business, then there is no offense against double-dipping. Of course, not all businesses are self-sustaining, and if retained earnings in a business were being eroded by salary from which support was being paid, then the principle set out in *Halliwell* may not apply. Similarly, if a business is valued based on the value of its assets rather than future cash flows, the reasoning in *Halliwell* may not be engaged.

Double-dipping does not apply (at minimum) to the unequalized portion of the pension

In *Meiklejohn v. Meiklejohn* (2001 CanLII 21220 (ON CA)), the Ontario Court of Appeal was faced with the following facts in the husband's request to reduce spousal support because of his early retirement:

a) The husband was a teacher and the marriage was 22 years. The wife was economically dependent on the husband, who had remarried. The wife had health considerations that prevented her from full time employment.

b) ***After equalization*** of NFP, the pension rules were changed to allow early retirement on an unreduced pension where years of service + age at retirement = 85 ("the 85 factor"), whereas when the pension was valued that arithmetic in play was 90, and not 85 ("the 90 factor"). The husband utilized the 85 factor (owing to stress) and retired with an unreduced pension on the earliest possible date. This post-facto change in retirement rules substantially increased the value of the husband's pension that had been divided with his first wife, because the sooner the retiree has access to an unreduced pension, the greater the value.

Significantly, the husband's decision to retire was found to be made in good faith.

c) The husband's pension was fully indexed against the cost of living;

d) The husband also received a "retirement gratuity" of $40,000 which had also not been included in his NFP;

e) The wife had health problems;

f) The husband cancelled his health insurance without notice to the wife and he also designated his new wife as his beneficiary under his life insurance policy. This was a triple whammy because (i) the support recipient/wife had to spend $300 per month to obtain replacement health coverage and comparable insurance on the husband's life; (ii) the husband breached the separation agreement by cancelling his health insurance; and (iii) the husband's annual pension income was (modestly) reduced because the husband granted his new wife survivor benefits; and,

g) The wife was in financial straits herself; she needed to maintain her RRSPs for retirement because of the husband's choice to make his new wife the beneficiary under his old life insurance. Consequently, the wife was excused from having to generate any present income from her RRSPs.

Meiklejohn is an excellent example of where the rule against double-dipping is not offended when the payor is asked to pay support (in part) from an unequalized slice of an equalized asset. The court set out a list of factors that lead to that conclusion.

First, the husband's pension was most likely undervalued at the time of the agreements suggesting that a significant portion of it was not equalized. Next, a portion of the pension was earned post-separation, and the husband's employer had subsequently 'sweetened' the pension (the court estimated that the unequalized portion of the pension could be over 50 percent). Crucially, the support was needs-based, given the wife's poor health, her limited ability to generate income, her receipt of a relatively small amount from equalization, and that most of her wealth was in the matrimonial

home, which "at this point in her life [was] … not unreasonable for her to retain" (at para 15). The wife only had one other significant asset, her RRSPs, which the court also found it would be "not unreasonable" for her to retain. Additionally, the husband had cancelled his life insurance (meaning she had no entitlement to any survivors' benefits if he were to predecease her), and the court held that "spousal support must continue *even if a portion of it will have to come from the equalized part of the husband's pension*" (at para 15).

In *Dishman v. Dishman* 2010 ONSC 5239, Justice Nolan drew directly on *Meiklejohn* in ruling on the husband's Motion to Change attributable to early retirement. The case concerned a 20-year marriage. The husband had previously made an equalization payment of $25,591.50. However, this was predicated on him retiring much later than what in fact unfolded. Mr. Dishman accepted an early retirement after he was told by his employers that the plant he worked at would be shutting down. Evidently, the NFP was based on a retirement-age assumption (in valuing the pension) of 59.5, though the husband ended up retiring early at age 52.5. He also received a lump sum payment of $125,000 and a $35,000 'automobile voucher'.

Furthermore, the support recipient, Mrs. Dishman "had every reason to plan on receiving spousal support in the amount of $750.00 per month until Mr. Dishman retired at age 59.5" - but given that he retired early, the pension equalization had not taken this into account (*Dishman,* at para 35). Mrs. Dishman was entitled to plan on receiving support until the retirement date identified in the pension valuation.

Drawing on *Meiklejohn*, Justice Nolan cited a list of other circumstances that would allow for an exception to double-dipping, such as the unequalized portion of the pension exceeding 50 percent, spousal support was needs-based rather than compensatory, and that the support recipient continued to suffer from economic hardship post-marriage breakdown. Her most recent income tax return was for $17,500 and she was unable to achieve full time employment (at paras 25-26).

The needs and hardship exceptions to double-dipping trumping ability to pay

In the recent decision *Nithiaraj v. Sellapu*, 2024 ONSC 2058, Justice Vella considered a 36-year marriage where the payor husband retired at age 68 and after the date of separation. He was 70 years old at the date of trial. Upon retirement, he began receiving his OMERS pension which was valued at about $420,000. The pension was equalized, as it was included in the husband's NFP. There was no indication in the facts that the husband had retired to shirk his support obligations, rather, the husband only retired after receiving medical advice from his doctor.

Justice Vella determined that the husband's income from his defined benefits OMERS pension would have $1,807 per month as at the date of separation, subject to indexing. He also had a small pension from Somalia. In retirement, the husband had an annual deficit (not disputed) of about $20,000 per year. The husband noted that the SSAGs set out a minimum income of $20,000 per year for payment of spousal support and since his income was slightly over $30,000 per year "requiring him to pay any support will have the cliff effect" (at para 206).

The wife was 62 at the date of separation and 65 by the time the trial was heard. She had been out of the workforce entirely for 5 years, had no pension of her own, and although eligible to obtain half of the husband's CPP, she had not yet applied. The husband did not suggest that the wife should be seeking employment at this stage of her life. Justice Vella determined the wife had grounds for compensatory and needs - based support.

Justice Vella acknowledged the "sad reality… that there is not enough income, when combining the Husband's total pensions, CPP and OAS, together with the Wife's OAS and future GIS to meet the combined yearly expenses of the two parties" and that both parties would need to "adapt to their new fiscal realities" (at para 211).

Justice Vella held that the needs and hardship exception from *Boston* applied and that it would be appropriate to base the husband's spousal support on his entire income, including his OMERS pension. Her Honour observed that neither party would be returning to employment, the husband would be receiving the benefit of an indexed pension wholly intact, and that he was receiving the entire CPP benefit and his Old Age Security benefit. As such, it was fair that the husband paid spousal support to the wife until she turned 65 years of age.

Justice Vella ordered retroactive spousal support for 4 years in the low range of the SSAGs until the wife turned 65, totalling $37,684.50. Thus, even where the pension was equalized, and where the payor had his own financial hardship, the length of the marriage, and the more profound needs of the elderly recipient spouse were enough to warrant an exception to the double-dip rule.

The Rule Against Double-Dipping Doesn't Always Apply to Child Support

Another exception to the rule against double-dipping pertains to child support, as child support is different in nature to spousal support. This difference is captured by Justice De Sousa in *Musgrave v. Musgrave* (2014 ONSC 1367) , starting at para 5 that the "…arguments of unfairness or "double dipping" do not apply to the facts of this case where a consideration of such funds as income is the right of the child and not for enriching the asset holding or lifestyle of the mother".

Similarly, while a Saskatchewan case, the court in *Boutin v. Boutin,* (2023 SKCA 41 at para. 50) reinforces this point succinctly, stating:

> …the rule against double dipping or double recovery does not apply in determining income for the purposes of child support. Child support is the right of the child. Parents have an obligation to support their children according to their needs, based on their respective incomes and ability to pay… The Guidelines are not optional, despite their name. They are mandatory. They

> provide that pension income must be included when calculating spousal incomes, absent a basis in the Guidelines for its exclusion.

In *Fraser v. Fraser*, 2013 ONCA 715, the Court of Appeal considered whether RRSPs that had been equalized and later cashed should be exempt from inclusion of income for support purposes. The Court of Appeal noted that "equalization was a matter between the parents" and that child support should not be excluded because of "dealings between the parents". (at para 102)

It is important to note, however, that the court in *Fraser* left open the possibility that double-dipping could be considered unfair in the context of child support. As stated by Justice Simmons:

> Although I would acknowledge the possibility that the facts of a particular equalization could in theory reach the threshold of unfairness, I have no evidence about the specifics of the equalization calculation that occurred in this case and cannot so conclude. (at para 103).

Hybrid cases where double-dipping is treated differently for child support vs. spousal support

As noted, in cases involving RRSPs, the case law has established that the inclusion of an RRSP in determination of an equalization payment is not in and of itself a basis to exclude it from income for child support purposes. Equalization is a matter between spouses, and child support is not paid to increase a spouse's lifestyle.

However, in these circumstances, the court must consider the particulars of the equalization payment to decide if the inclusion of income from an equalized asset would reach a level of unfairness that would justify determining the party's income pursuant to s. 17 (1) of the *Child Support Guidelines*, SOR/97-175. Under s.17(1), if the Court determines a party's annual income under s. 16 (Total Income in the T1 General Income Tax Return) would not be the fairest determination of that income, it may have

regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. That would allow for disregarding income generated from an equalized asset for purposes of child support.

In *Brennan v Lander*, 2020 ONSC 1696, Justice Nakonechny excluded the portion of the wife's RSUs that had been previously part of equalization from her income for spousal support purposes, ***but included*** the income generated by the RSUs and reported in her line 150 income for the purposes of child support. Her Honour found that the wife had significantly higher income available to her because of the increase in the value of the RSUs and that her full line 150 income was a fair determination of her income to calculate her ability to contribute to the children's support (at para 129). Therefore, there are different incomes for child vs. spousal support based on the double-dip principle.

Conclusion

There are many exceptions to the prohibition against double-dipping with respect to spousal support. Needs-based support seems to be pivotal. If an equalized asset has been undervalued during the equalization process, that is also a powerful argument in favour of allowing the double-dip. If a business is a non-depleting asset, it seems to be outside of the double-dip rule. Child support is not a matter between the spouses, and so generally speaking, if an asset (typically an RRSP) has been equalized but subsequently brought into income by the payor spouse, usually child support will be payable on that income.

Ultimately, the court will strive to accomplish what is fair, keeping in mind the circumstances of the spouses and ability of the recipient spouse to utilize capital received as *quid pro quo* for the equalized pension in trying to come to the fairest

determination of whether to make use of an asset for equalization and support purposes.