



Family Law News

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Family Law – Quick and Easy to Extraordinarily Complex

So what's being going on at 55 Main Street West in the last little while? Of the decisions that came across my desk, there were two that caught my attention for a number of reasons. The first deals with a situation that we often encounter when considering net family property. When a spouse puts inherited monies into a joint account, can the funds still be excluded from the calculation of net family property? This one is a nice and easy decision which may be of interest to those of you who work with people who have money and assets. It is an interesting little case that you can add to your arsenal of cases to help people who foolishly and regrettably put inherited funds into joint accounts – we see it all the time!

The second decision is much more difficult on many levels. It is a child welfare case that will not only be of interest to those of you who practise in this area but also to those, like me, who do not. The issue in this case is whether fully involved and cooperative, albeit imperfect parents, who are marginally intellectually delayed, should have their two and a half year old daughter, who is also developmentally delayed, permanently taken away from them and made a crown ward. My comments about this case must be viewed as being made by an

outsider, as I don't practise in the child welfare area. However, this case was thought-provoking for me and raised some complex issues about how such cases are processed by the society in their attempts to permanently sever the bonds between a child and her parents. This case has also opened my eyes to how difficult child welfare work is for all the players – from lawyers, to society workers, to the mental health professionals, to judges and most importantly to the families and their children.

Let's start with the easy case. In *Kosterewa v Kosterewa*, a decision of Mr. Justice B.H. Matheson dated October 10, 2008, the issue was whether an inheritance that the husband received from his mother's estate should be included as his asset or excluded. The parties opened a joint bank account and deposited the husband's inheritance. Prior to the separation, the wife withdrew approximately \$18,000 from this account for her own use without the knowledge of the husband. Approximately a month after separation, when he learned that she withdrew the funds, he withdrew the balance of \$112,908 and put it into an account in his own name. The wife's position was that the funds must be included as they were placed into a joint account, whereas the husband's position was that the funds must be excluded from the equalization

process as they came from an inheritance.

Mr. Justice Matheson reviewed the law regarding the presumption of resulting trust and s.14 of the *Family Law Act*. He considered what would be necessary to rebut the presumption of gift, i.e. the funds were held in a joint account being evidence that the spouses intended to own the property as joint tenants. He considered *Belgiorgio v. Belgiorgio*, (2000) 10 R.F.L. (5th) 239, which held that how a person feels about funds that were put into a joint bank account after the fact is not relevant. The court must consider the intention of the person at the time the funds were placed in the account. The fact that a person regrets placing the funds in a joint account after the fact is insufficient to rebut the presumption.

In this decision, Justice Matheson held that the facts as they existed at the time that the funds were placed in the joint account were sufficient to rebut the presumption i.e. the parties had opened another joint account where previous inherited monies had been placed and used for family purposes which account was included in the equalization process; there was no activity in the joint account under dispute other than the deposit from the inheritance, and the wife's secret withdrawal; the monies were just "parked" there until the husband figured out what he wanted to do with the funds. It was held that the husband had rebutted the presumption, had not intended on gifting one half to his wife and therefore, the funds were excluded.

When compared to the next case, the *Kosterewa* decision and outcome for the parties was a piece of cake, i.e. Mr. Kosterewa got to keep his \$112,908 and didn't have to give half

to his wife. In *CCAS v. L.H. and P.M.*, the parents were at risk of permanently losing their two and a half year old daughter. Losing \$56,000 seems quite trivial compared to the risk of losing your child forever, don't you think?

The Catholic Children's Aid Society v. L.H. and P.M. is a 361 paragraph, 61 page decision of Justice Pazaratz. It was released on January 11, 2008 after a 15 day Status Review Hearing entailing 17 witnesses, four volumes of affidavits, a psychiatric assessment of the father, a psychological assessment of both parents, and a parenting capacity assessment. The Catholic Children's Aid Society of Hamilton insisted the child was still in need of protection, and her best interests mandated an order of crown wardship with no access. The parents disagreed. They admitted that they had problems – and their daughter had problems. But they insisted their care for their daughter had been much better than the society alleged and that they were loving involved parents. They wanted their daughter back, under a supervision order.

Rather than give you an outline of this case for its potential legal precedent value (which I must add, I would not be able to do as I have woefully little background or experience in child welfare work) I wanted to give you my thoughts and impressions as a lawyer and as a parent.

The primary focus of the CCAS's case was that the parents did not fully comprehend the child's long-term developmental challenges. One worker testified that the parents realized that the child had delays, but they didn't fully understand the nature or extent of those delays. However, under cross-examination, she admitted that when she first became involved with the child, she herself

wasn't aware of the extent of the child's delays and she only gradually came to fully understand. This worker stated both parents were consistently open-minded to receiving suggestions or feedback. She described them as eager to learn, and she noted their attitude made her job easier. She said the mother asked lots of appropriate questions, and noted both parents had a good sense of humour, which made interacting and working with them more pleasant and productive.

Contrary to some of the other society witnesses, this witness testified that generally the parents were able to "read the child's cues", and most of the time they were able to react and respond to those cues appropriately.

Another society witness, under cross-examination agreed that the mother was inquisitive, generally asked relevant and appropriate questions, and asked for clarification if she didn't understand something. She agreed with counsel for the mother that mom appeared to be genuinely and consistently interested in learning so she could help her daughter and indicated that she got the impression the mother was not simply trying to portray herself as interested, or make herself look good.

Notably, while several society workers testified that one of their primary concerns was the parents' lack of insight on the topics of feeding and weight gain, the speech and language therapist stated that from what she had seen the parents were adopting appropriate feeding techniques for the child, and she did not regard feeding as a current concern.

The physiotherapist testified that the parents were always cooperative, they asked appropriate questions,

they interacted well with the child, and they attended all appointments (more than the foster mother, and much more frequently than any of the society workers). She said the parents seemed to understand the child's problems and the strategies being implemented, and generally they were "very good at reporting the new skills the child was attaining." She could not recall any concerns about the parents' comprehension, participation or response to the ongoing physiotherapy program. She explained that parental follow-through is vitally important to the success of her work with children, and she complimented D.M.'s parents for being completely compliant and following through as required.

The paediatrician did not appear to have serious concerns about the parents' level of comprehension regarding D.M.'s problems.

A fundamental component of the society's request for crown wardship is the child's designation as "failing to thrive". In this respect, the society appeared to be attributing primary responsibility for feeding and weight problems to the parents. However, some society witnesses questioned whether any feeding problem even existed. Further, one society worker testified that the mother appropriately sought clarification about the child's dietary needs.

One society worker testified that of the approximately 60 times she attended at the parents' home (during the seven months preceding the trial), she could recall eight occasions when the mother had difficulty feeding D.M. (How many of you can score 100% on getting your 2½ year old to eat what you put in front of them??) Regarding the safety concerns that the society had, the current foster

mother testified that D.M. has very high energy, and it was difficult for any adult to constantly watch her. She admitted on one occasion while D.M. was under *her* care, the child fell in a church nursery and cut her chin (requiring stitches).

The workers testified that the the parents have consistently and appropriately addressed the child's medical issues. As for the parent-child relationship, the society workers themselves admitted that the parents had consistently shown love, affection and devotion to the child.

Remember, the above testimony regarding the positive attributes and capabilities of D.M.'s parents relate to people who have been diagnosed as functioning intellectually in the mild mentally deficient range. Further, these parents have been under microscopic scrutiny by the CCAS and for over 2.5 years, have lived with the threat of losing their daughter forever. Under these circumstances, in my

humble opinion, these parents have done remarkably well.

Justice Pazaratz found that, contrary to the position of the society, the parents had at least a basic, functional understanding of their daughter's special needs. He found that notwithstanding the problems relating to supervision, cigarette smoke, hygiene, etc., the parents had shown an ability to meet their child's instrumental needs. They had demonstrated that they were able to understand and respond appropriately to their child's global delays. With a list of conditions that were appropriate for facilitating the best outcome for this child, Justice Pazaratz ordered that the child be returned to her parents under a 12-month society supervision order.

The society wanted to take this little girl permanently away from parents who love her and who have demonstrated the ability to care for her with assistance.

As a parent and lawyer, I have to ask why? With all the evidence that was known to the society and presented during this 15-day trial, why did the society continue to so vigorously pursue their case for crown wardship? Prior to trial, the parents had agreed to a protection finding and to a supervision order for 12 months. Why put the child, the parents, the lawyers and health professionals involved, the court and the taxpayers through the ordeal of a 15-day trial when the society's own evidence supported the parents' position?

Does anyone have the answer to this question? If so, let me know. ■

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