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*face uncertain times*



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Courts can now award an unequal division of family property to separated spouses based on market-driven, post-separation changes in property values, according to the Ontario Court of Appeal — and the courts' discretion to do so creates major uncertainty for the family law bar.

The harsh economic downturn has created serious problems for separating couples. Many people are unable to sell their homes due to uncertainty in the real estate

market. Separated couples cannot resolve support issues, or even live in separate households in some cases, because of lost jobs or dramatically reduced incomes.

Many spouses, who must equalize their net family properties as of the date of separation, have experienced such huge post-separation declines in the value of their assets that it would literally bankrupt them to comply with their obligations as dictated by family

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Court strips custody  
from alienating parent

CRISTIN SCHMITZ OTTAWA

It isn't every day that a Canadian family law lawyer is contacted by The Dr. Phil Show — but then parental alienation isn't your everyday custody dispute.

Toronto family law specialist Harold Niman drew headlines last month when he won a rare judgment in Ontario Superior Court that strips custody away from an alienating mother, denies her access and recommends that her three daughters, ages 14, 11 and 9, be sent for specialized psychological counseling for alienated children: *A.G.L. v. K.B.D.*

Niman didn't appear on the hit U.S. pop-psychology talkfest, which features family-conflict-driven topics like "Is the economy responsible for your affair?", "Does your husband need man-camp?" and "Octuplet mom: Incredible or insane?"

But the veteran family law practitioner does see the expanding public awareness of parental alien-

ation — one parent trying to destroy the child's relationship with the other parent — as fueling the legal profession's resolve to find effective remedies for the pernicious phenomenon.

"I haven't seen any exponential growth in [parental alienation cases but] judges are now more prepared to deal with it, there's more [academic] literature and there are more people who are prepared to look at the situation and devise a remedy for it," says Niman of Niman Zemans Gelgoot.

Niman has a track record of success in high-conflict family law cases of various stripes. He told *The Lawyers Weekly* that how he handles parental alienation complaints turns on timing.

"If it's something that appears to be in the early stages — that it's starting to smell like parental alienation — then you need to nip it in the bud... by getting a court order for access, and, if there is a breach of that order, by following it up in a fairly timely way with a

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## FAMILY LAW

# Pension valuation rules contain nasty surprises



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If you've read the press releases, skimmed the blogs and hunted down the expert analyses, you're likely quite excited about the proposed changes to the rules regarding pension valuation and division under Ontario's *Family Law Act*. Although the new options for division at source will be welcome, all is not as rosy as it seems.

Picture a couple, Tom and Sally, looking forward to the March vacation that their travel agent is organizing for them. Sally is thrilled because, in a few weeks, they'll be skiing down a sparkling white mountain under a bluebird sky. Tom is dreaming of

palm trees and powder-soft beaches. When the itinerary arrives, one of them is going to be very, very disappointed.

The family law bar likes Bill 133 because they expect the to-be-drafted regulations to specify pension values that include early retirement and other not-yet-vested benefits, based on the "hybrid-termination" method long endorsed by the courts and confirmed by both the Ontario Law Reform Commission report in 1995 and the Law Commission of Ontario's 2008 report. On the other hand, plan sponsors and administrators like Bill 133 because they

expect the regulations to limit pension values to the minimum vested "termination commuted value."

Like Tom and Sally, someone is going to be severely disappointed. And, it won't just be lawyers or administrators. The spouses of plan members have a big stake in the outcome.

Let's look at a typical 45-year-old teacher with 20 years of teaching service going through a separation. According to the Ontario Teachers' Pension Plan, the average retirement age for a teacher in 2005 was 57. The actual gross value of this individual's pension, taking into

account the pension earned to separation at age 45 and assuming retirement at age 57, is \$405,000. The termination commuted value is \$255,000. A typical "intermediate" value under the hybrid-termination method is \$340,000.

If the termination commuted value basis is adopted in place of the hybrid-termination method, the spouses of plan members will be very seriously prejudiced.

So why are plan sponsors and administrators keen on this approach?

Bill 133 introduces the ability to divide a pension (if the member See *Pension* Page 9

## 'Every spouse with a decline in assets will argue *Serra*'

### Unequal

Continued From Page 7  
law legislation.

The role of family law practitioners has changed significantly with the turn of the market. Our clients are facing new challenges. We are required to think creatively. Out of necessity, we have been negotiating open-ended support settlements and compromised property settlements based on what our clients may actually expect to receive, and concepts of "fairness," instead of what they may be entitled to.

The law in Ontario has traditionally not provided relief for spouses who have experienced significant post-separation declines in the value of their assets. Under

Ontario's *Family Law Act*, the property accumulated by the spouses during marriage is "equalized" upon the breakdown of the marriage. An equalization payment is made by one spouse to the other, so that each spouse leaves the marriage with an equal share of any growth in the parties' net worth from the date of marriage to the date of separation.

In exceptional circumstances, a court may direct an unequal distribution. Subsection 5(6) of the Act provides that the court "may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable,

having regard to" certain factors.

In *Serra v. Serra*, [2009] O.J. No. 432 (Ont. C.A.), the husband had argued at trial for an unequal division of net family property based on a decline in the value of his business assets following the parties' separation. *Serra* predates the recent downturn, but is a perfect example of the situation many spouses are in at the present time as a result of the recession. The trial judge rejected the husband's claim on the basis that the circumstances under which an order for unequal division can be made do not include a market-driven decline in the value of property subsequent to separation.

The husband appealed, arguing that the court does have discretion

to award an unequal division based on a post-separation date market decline pursuant to s. 5(6)(h) of the Act, which provides that a court may order an unequal division of net family property in "any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property."

The Ontario Court of Appeal overturned the trial judge's decision, ruling that judges do have the power to divide property unequally where the equal division of net family property would be unconscionable as a result of a market-driven post-separation date change in the value of a spouse's assets. The court reduced the equalization payment owing

by the husband to the wife from \$3.2 million dollars to \$900,000, mainly because of the dramatic drop in the value of the husband's business due to the marked downturn in the textile industry.

There were many other unique circumstances cited by the Court of Appeal as reasons why an adjustment was appropriate in this case, including a preservation order obtained by the wife, her ongoing claim for a trust interest in the assets and the significant interim payments, which the husband was ordered to make and the court found could only be made if he kept his business viable.

While the Court of Appeal's decision in *Serra* may have been fair in the circumstances, the practical result is problematic for family law lawyers. In which cases should an adjustment be permitted? What would the appropriate adjustment be? If post-separation decreases are to be shared, why not post-separation increases?

Although the Court of Appeal was careful to note that the decline in the husband's assets post-separation was a result of an industry collapse, not the current "temporary economic recession," every spouse who has experienced a decline in assets post-separation because of the current market downturn will now use this decision to argue that an equalization of net family property would be unconscionable without an adjustment.

The floodgates are open. The uncertainty that results from the court having discretion will make cases much harder to settle. As a result, the family law bar will continue to struggle to advise our clients during these trying times. ■

*Jodi Kovitz practises all aspects of family law as an associate at Torkin Manes in Toronto. She has advanced training in family arbitration and collaborative law.*

## Needed: family law remedies in hard times

The law has many ways of assisting separating spouses to achieve fair results in good times. These include:

- Prejudgment interest at higher than normal rates to reflect real returns;
- Trusts resulting in monetary awards reflecting current value;
- Trusts giving the non-owning spouse a legal and beneficial interest in the property.

The imagination of family law judges and counsel seems to have been focused on how to achieve fairness when values are going up. It is, of course, relatively easy to spread money around to solve a problem, "like it was going out of style." But it has gone out of style, at least for



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many people. The courts should assist parties to achieve a fair result in these drastically changed circumstances. Yet they rejected an opportunity to interpret family law legislation to allow for flexibility in bad times in *Simon v. Simon*, (1999) 46 O.R. 3rd 349.

In *Simon*, the Ontario Court of Appeal overturned a decision that allowed some of the monthly child support of \$9,000 to be paid into trust for the child. The payor, a professional hockey player, had income that could fluctu-

ate dramatically over the years he would be paying, and might even suddenly end due to injury or other cause.

It was sensible to create a cushion to smooth out the amount available monthly. Like all of us, it makes sense to put aside money in good times to meet a potential shortfall in bad times.

Not only hockey players have jobs and incomes that are in flux this year. Many payors will lose their jobs or have substantially reduced remuneration. These reductions in income should lead to reductions in child support, some drastic. A child whose lifestyle included private school and the best of camps now faces a sudden and, in

some cases, dramatic lowering of his or her lifestyle.

It may be too late to protect these children from the economic agonies of 2009, but there will be other downturns. The courts should reverse *Simon* and, in appropriate cases, allow money to be put aside for specified purposes to benefit the children.

Recently, the Ontario Court of Appeal took a step toward flexibility in hard times — it allowed an unequal property division between separated spouses based on post-separation declines in assets (see *Separating couples* on p. 7).

*Gerald Sadvari has been a partner in the litigation department of McCarthy Tétrault in Toronto since 1984.*