SMHI LEGAL NOTES
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Think Before You Text

An order for exclusive possession is highly prejudicial to a dispossessed spouse. Such orders should not be lightly given.
Justice H. McGee
Menchella v. Menchella

The house that is ordinarily occupied by legally married spouses is considered to be the matrimonial home. The general rule pursuant to the *Family Law Act of Ontario*, is that both spouses have an equal right to possession (i.e. to reside in) of the matrimonial home (even if owned by only one of them). Generally speaking, this right to equal possession does not end unless a separation agreement or court order provides otherwise or the spouses divorce.

While it is possible for one of the spouses to petition the court for exclusive possession of the matrimonial home, only in circumstances that warrant it will it be granted. The following are the criteria that the court will take into consideration in deciding whether to make an order for exclusive possession.

- The best interests of the children affected;
- Any existing orders under Part I (Family Property) and any existing support orders;
- The financial position of both spouses;
- Any written agreement between the parties;
- The availability of other suitable and affordable accommodation; and
- Any violence committed by a spouse against the other spouse or the children.

In this issue

Employers, Employees & Aging Parents. . . . . .p. 2

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A recent request to the Ontario Superior Court of Justice for an order of exclusive possession raised the question of whether text messages sent from one spouse to the other could constitute violence or alternatively if it affected the best interest of a child.

The Facts
The parties had been married for 15 years and had a daughter who was 12 at the time the marriage broke down. Although the 50 year old wife owned the matrimonial home, at the time of the hearing the 53 year old husband was still living in the home, as was his right.

The wife's initial application for exclusive possession was denied. The reasons that supported the denial included that the husband had proposed to live quietly and discretely within 500 square feet of the 6,000 square foot home. In addition, he raised a concern that his relationship with his daughter was at risk were he to leave the home. He also claimed that he wanted joint custody and cooperative parenting.

A number of months later, the wife brought a second application for exclusive possession. As part of her evidence, she submitted a series of text messages to demonstrate both the nature of the spousal relationship and the husband's view of joint parenting. The texts, primarily sent by the husband, concerned the Thanksgiving holiday.

The texts began with the wife texting the husband to let him know that she would be away the Thanksgiving weekend and to let him know about their daughter's schedule, since it was his weekend to have her. The husband proceeded to call the wife pathetic, to tell her to stop contacting him except through his lawyer and to get out of his life.

Almost four hours later and unprovoked, the husband sent a lengthy text to the wife in which she was very personally attacked, her friends were vilified and her counsel was mocked. The judge described the communication as obnoxious and threatening and wholly non-responsive to the question of caring for their daughter over the Thanksgiving weekend. The

see **TEXT** on page **4**

Employers, Employees & Aging Parents

Seniors are projected to become more numerous than children in Canada by 2017-a milestone in the country's history.
Statistics Canada

As our population continues to not only age but to live longer, elder care is likely to become a significant issue affecting many, including employers. As employees face the demands of caring for their aging parents, employers must begin to think in terms of how to accommodate these employees.

The Human Rights Tribunal of Ontario recently shed some light on the obligations of employers in such situations in *Devaney* v. *ZRV Holdings Limited*, 2012 HRTO 1590.

The Facts
Francis Devaney was an architect with ZRV and had worked for the company for approximately 27 years. During the two years prior to this termination, he had been working primarily with his team as the Principal-in-Charge on a major project, the Trump International Hotel and Tower in Toronto.

In addition to his demanding workload, Devaney was his 73 year old mother's primary caregiver. His mother had a number of serious health problems, including osteoarthritis and osteoporosis. During his testimony, Devaney described her condition as tremendously disabling and requiring a great deal of care.

Although he had some outside help, the majority of his mother's care was done by him. In November 2008, she had to be hospitalized to have her quadriceps tendon fixed. Following that operation in December 2008, Devaney's mother was finally admitted into a long-term care facility.

In order to look after his mother, Devaney spent a lot of time working from home. His team on the Trump project was aware of his care giving responsibilities for his mother. He availed himself of various technologies to be able to work at home and made himself available via phone and email when not in the office.

Despite this, the partners requested on many occasions that he work from the office. Following a number of letters on the subject, on January 9, 2009, Devaney was given a letter terminating his employment because of his "abysmal" attendance record.

Devaney filed a complaint with the Human Rights Tribunal of Ontario. He alleged that his employer's refusal to allow him to maintain a flexible work schedule, in order to care for his ailing mother, resulted in a serious interference with a substantial family duty and that this amounted to discrimination.

The Law
The Ontario Human Rights Code states that "Every person has a right to equal treatment with respect to employment without discrimination because of… family status." and that "Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of… family status." The Code defines "family status" as "the status of being in a parent and child relationship". "Harassment" is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

The Issues
The issues were whether the employer's requirement that Devaney be in the office during certain set hours, except when he had a business meeting outside of the office, as well as the termination of his employment for failing to attend the office as required, resulted in discrimination against Devaney on the basis of family status.

The employer's position was that Devaney could have hired someone to care for his mother, and could have admitted his mother to a long-term care facility long before he did, but he simply chose not to. They also argued that he chose to spend time with his mother, rather than attend at the office as required. The employer alleged that these absences were creating problems for Devaney's team and others in the office, particularly with respect to morale. However, little evidence was presented to substantiate the allegations.

The Test for Proving Discrimination
Step One
The first step of the test is for the complainant to show a prima facie case of discrimination. A prima facie case of discrimination is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." The fact that a complainant is adversely affected by a respondent's policy is sufficient to establish this prima facie case of discrimination

In this particular set of facts, Devaney had to establish that his employer's attendance requirements had an adverse impact on him because of absences that were required as a result of his responsibilities as his mother's primary caregiver.

Contrary to what the employer alleged, the Tribunal found that many of Devaney's absences were a requirement rather than a choice. This distinction is important because if it was

see **EMPLOYERS** on page **3**

EMPLOYERS continued from page 2

his choice to be his mother's primary caregiver and to absent himself from the office, then a prima facie case of discrimination on the basis of family status would not be established.

Step Two
Once a prima facie case has been made out, the onus shifts to the respondent employer to establish on a balance of probabilities that its policy has a reasonable and bona fide justification, including proving that the respondent could not have accommodated the applicant employee's Code-related needs without incurring undue hardship.

The duty to accommodate has been described as follows:

"A respondent is not required to accommodate past the point of undue hardship, and sometimes, little or no accommodation may be possible. However, the person with a duty to accommodate must make a real effort to accommodate Code-related needs. Accommodation is a collaborative process: the person with a duty to accommodate has a duty to actively seek the information he or she needs, and must be prepared to consider and explore the possibilities. The person requiring accommodation must also cooperate in the attempt to find suitable accommodation."

The Decision
The Tribunal found that Devaney had a number of absences from the office, both before and particularly after mid-October 2008, that were required due to his family circumstances involving care for his mother. The result was that the employer's requirement that Devaney be in strict attendance at the office each day did have an adverse impact on him. The Tribunal also found that Devaney's employment was terminated based on his absences, a significant portion of which were required due to his family circumstances. Devaney had established a prima facie case of discrimination on the basis of family status.

With respect to the duty to accommodate, the Tribunal found that the employer had a duty to consider and explore the possibilities of accommodating Devaney's needs related to his elder care responsibilities, something they had clearly failed to do. Despite being aware of Devaney's responsibilities, the employer simply continued to insist that he be in the office daily from 8:30 a.m. to 5:00 p.m., or some equivalent. In fact, Devaney was specifically told that "work at home does not count."

While the Tribunal accepted that Devaney's absences may have caused some problems for his team, there was insufficient evidence to establish that accommodating his Code-related absences would have resulted in undue hardship within the meaning of the Code.

As for the question of morale, which the employer had raised, the Tribunal felt this was not a criteria to be taken into account in assessing undue hardship under the Code. In making the determination, section 11 of the Code indicates the following is to be considered:

- The cost,
- Outside sources of funding, if any, and
- Health and safety requirements, if any.

The Tribunal found that Devaney suffered a considerable loss of self-respect, dignity and confidence, particularly in light of the fact that he had essentially spent his entire career with this employer.

The Tribunal did lay some of the responsibility at the feet of Devaney in that many of the absences were not accepted as Code-related. In addition, neither Devaney nor the employer ever initiated a meaningful dialogue in relation to accommodating Devaney's elder care responsibilities.

The Remedy
The employer violated Devaney's right to equal treatment and freedom from discrimination on the basis of family status, contrary to sections 5(1) and 9 of the Human Rights Code. The employer was ordered to pay Devaney $15,000 to compensate him for the impact of the discrimination, including the failure to accommodate him, on his dignity, feelings and self-respect. (Devaney's client with the Trump project offered him employment a week after his employment was terminated.)

The employer was also ordered to develop and implement an anti-discrimination and anti-harassment policy, that included the duty to accommodate in the workplace, and to distribute the policy to all partners and staff. Finally, the employer was to provide a mandatory human rights training program for all partners and staff who perform supervisory and/or human resources functions.

The Lessons
Our world is constantly changing and therefore it is crucial that employers be vigilant and ready to adapt to these changes. With respect to the specific issue of elder care, employers need to be alive to the shifting demographics in this country and the new responsibilities facing many of their employees. It would be wise to consider a policy to deal with employees who find themselves in this situation, while bearing in mind that each employee's situation is unique.

Employees who are their parents' caregivers need to make their employers aware of their family situation and discuss openly their needs as well as working with their employer to find a way of accommodating this new reality.

TEXT continued from page 1

texts continued the following day. He then took a break for five days before starting up again. Part of one of the texts read, "I will NEVER forgive what you have done to Alexia! Know this, I am witness to this…and your day is coming soon…that you will regret everything you did to us." The wife made one short response: "Why can't you be a father? Everyone thinks your (sic) pathetic, you haven't watched your daughter ever".

At the hearing, the wife was described by her lawyer as being in a state of constant anxiety, never certain when she would next be a target for the father's rage. The husband's lawyer submitted that the husband had been uncharacteristically ill-tempered during these exchanges, and that it would not happen again. There was never any physical violence.

The Decision

The Court concluded that there could be no doubt that the vitriolic communications of the husbnad constituted "violence" as intended within Section 24(3)(f) of the *Family Law Act*. The Court stated, "They are threatening, intimidating and were intended to be taken seriously. They occurred over the course of a full week, and were not provoked in any manner proportionate to the response given. Much of the father's texts were not even responded to by the mother. A reasonable person could not view the father's texts as either jestful or ambivalent." The Court went on, "they cannot be excused as a harmless excess of personality."

The Court further concluded that even if the text messages did not amount to violence, it was no longer in the daughter's best interest for her parents to continue to reside together. The criteria that were taken into account included the following:

- there was conflict in the home that is adversely affecting the child;
- the stress in the home had become unbearable and leaving the home would be disruptive to the child;
- it was not in the child's best interests for the parents to continue living under the same roof.

The Court found that it was of critical importance that the daughter not be exposed to adult conflict and that there had been violence between the parents in the form of text communications from the husband to the wife. The relationship dynamic evidenced in the texts suggested that she was at risk. The Court concluded that "the text messages clearly preclude any prospective potential that the father can live 'quietly and discretely' in the mother's home."

An order for exclusive possession was granted to the wife.

The Lesson

There has been some concern over the finding that text messages alone can meet the definition of violence as intended within Section 24(3)(f) of the *Family Law Act* and in fact, the husband has filed for leave to appeal the decision. Whether this concern is warranted or not, what this case does make clear is that this type of behaviour and language toward the other parent may have serious repercussions.

Divorce can be an emotional and stressful time. So it is particularly important not to simply react. Once words have been put out into cyberspace, they are very likely to be used as evidence in future court proceedings.

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