

JURISDICTION OF ALBERTA COURTS

TO ORDER EXCLUSIVE POSSESSION OF FOREIGN REAL PROPERTY

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When couples separate or divorce, determining which party continues to reside in the matrimonial home can become a point of contention. In Alberta, courts are empowered under s 19 of the *Family Property Act* and s. 68 of the *Family Law Act* to make orders granting one of the parties the right to exclusive possession of the home. Both statutes also identify criteria to be weighed by courts in determining the appropriateness of such an order in any particular case.

However, neither statute specifically speaks to the situation where the matrimonial home is located outside of Alberta – and therefore, potentially, outside the jurisdiction of Alberta courts. A limited number of Canadian decisions have dealt with applications for exclusive possession of extra-territorial properties, and although outcomes have differed, a general framework for assessing jurisdiction to make such orders has been articulated. In cases where a court found it had jurisdiction to order exclusive possession, the authority to do so was based on factors supporting the court’s *in personam* jurisdiction over the parties. Case law in Alberta has adopted this approach.

General Principles Governing Jurisdiction over Foreign Real Estate

There is a general rule, well recognized in Canadian law, that while Canadian courts do not have jurisdiction to adjudicate title to real property located in a foreign jurisdiction, they may enforce *in personam* rights affecting foreign land. A leading decision recognizing this rule is *Catania v Giannattasio*, [1999] OJ No 1197, 174 DLR (4th) 170 (CA), which dealt with the validity of a deed to property located in Italy. The Court explained the *in personam* exception and the criteria required for it to apply, drawing on commentary from McLeod (*Conflicts of Laws*):

10 [...] **The general rule is that Canadian courts have no jurisdiction to determine title to or an interest in foreign land.** This rule, long recognized in Anglo-Canadian law, was applied by the Supreme Court of Canada in *Duke v. Andler*, in which Smith J. wrote at 738 and 741: "The general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not disputed ... The title to real property therefore must be determined by the standard of the laws relating to it of the country where it is situated".

11 [...] Thus, ordinarily a judgment by a Canadian court on a disputed title to foreign land would be ineffective. If Canadian courts cannot grant an effective judgment or an enforceable remedy concerning land in a foreign country, they should decline jurisdiction to decide these disputes. [...].

12 [...] Admittedly, as Smith J. points out in *Duke v. Andler*, a long line of authorities has held that **Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if these rights are based on contract, trust or equity and the defendant resides in Canada.** In exercising this jurisdiction, Canadian courts are enforcing a personal obligation between the parties. In other words, they are exercising an *in personam* jurisdiction. This *in personam* jurisdiction is an exception to the general rule that Canadian courts have no jurisdiction to decide title to foreign land. **The exception recognizes that some claims may have both a proprietary aspect and a contractual aspect. Canadian courts, however, will exercise this exceptional *in personam* jurisdiction only if four criteria are met.** These four

criteria, of which the second is central to this appeal, are discussed by McLeod:

In order to ensure that only effective *in personam* jurisdiction is exercised pursuant to the exception, the courts have insisted on four prerequisites:

- (1) **The court must have *in personam* jurisdiction over the defendant.** The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.
- (2) **There must be some personal obligation running between the parties.** The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it ... An equity between the parties may arise in various contexts. In all cases, however, **the relationship between the parties must be such that the defendant's conscience would be affected if he insisted on his strict legal rights ...**
- (3) **The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment ...**
- (4) Finally, **the court will not exercise jurisdiction if the order would be of no effect in the situs ...** The mere fact, however, that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order. [Emphasis added]

On the facts in *Catania*, the Court held that the criteria were not met, and Ontario courts did not have jurisdiction to adjudicate the validity of title to the property in question in that instance.

The Alberta decision in *Mitrovic v. Mitrovic*, 2007 ABQB 44, [2007] AJ No 69 is also frequently cited. That case dealt with the treatment of real property located in Croatia, of which the husband was a half owner with his sister. Veit J held that while the court could not order the sale of the property, it did have *in personam* jurisdiction to order that the wife had a beneficial interest in the Croatian property, and that the husband held half of his interest in the property in trust for the wife. Veit J did not refer to *Catania*, but did cite the McLeod text, and held that the husband had not only a moral obligation to his wife, but a legal obligation created by the *Matrimonial Property Act* that grounded the court's exercise of jurisdiction:

25 As the citations noted above demonstrate, in weighing what should be done with the Croatian property, the court's starting point is its recognition that its jurisdiction, as a domestic court, to deal with immovables in a foreign country is tenuous. **However, this court does have *in personam* jurisdiction over Mr. Mitrovic: he resides in Alberta, and is likely to continue to do so because of the presence of his daughter in this province. Therefore, the court is in a position to order Mr. Mitrovic to do things and to proceed in contempt against him should he wilfully refuse to do so. Moreover, according to the factors identified by Professor McLeod, Mr. Mitrovic has an obligation to his wife; this is not only the moral obligation imposed by the marriage itself but the legal obligation imposed by the *Matrimonial Property Act*.**

26 Taking all of those factors into account, I have concluded that the fairest way to distribute Mr. Mitrovic's interest in the Croatian property would be to make Ms. Mitrovic a 1/4 owner of the property, (1/2 of Mr. Mitrovic's 1/2 interest) with an obligation to pay reasonable management fees and expenses while the property is still owned by the Mitrovices, but a right to 1/4 of the net rents obtained from the property and 1/4 of the net proceeds of any sale of the property. [...] [Emphasis added]

Applying the Principles to Exclusive Possession

Both the *Catania* and *Mitrovic* decisions were applied in *Welsh v Welsh*, 2011 ABQB 686, 9 RFL (7th) 409, in the context of an application for exclusive possession over property located in British Columbia which had been purchased shortly before separation, with the intention that it would be the couple's matrimonial home. Read J found that the criteria for *in personam* jurisdiction were met in that case, and granted the wife's application for exclusive possession of the property.

The analysis provided by Read J is helpful in identifying factors that might satisfy each of the criteria for jurisdiction in the context of an application for exclusive possession. In particular: (i) attornment to the jurisdiction of Alberta courts was found to satisfy the first criterion even where the defendant is not residing in the jurisdiction, (ii) the remedy of exclusive possession was held to be based on equitable principles satisfying the second criterion, (iii) the presence in Alberta of assets belonging to the defendant was sufficient to enable the court to supervise execution of the judgment, and (iv) the absence of an impediment to the order sought in the foreign law satisfied the fourth criterion:

18 I conclude, however, **that this Court has jurisdiction over Mr. Welsh because he agreed on the record to attorn to Alberta.** In addition, he is the Plaintiff in these proceedings and the party who brought the action for divorce and division of matrimonial property in Alberta.

19 Historically, a contractual or equitable obligation between the parties met the second requirement: that the parties have a personal obligation running between them. Here the requirement is complicated by the fact that unlike most cases, where the parties have a contract or trust relationship, in this case a statute, the *Matrimonial Property Act*, R.S.A. 2000 c. M-8 ["MPA"], grants the Court the ability to distribute property or assign rights between the parties.

[...]

21 In *Mitrovic*, the order was made under s. 7 of the MPA which expressly provides that the court is to distribute the property "in a manner that it considers just and equitable." Ms. Welsh seeks a matrimonial possession order under s. 19 of the MPA. **This provision does not contain a specific reference to equity. However, when read in the context of the rest of Act, particularly the factors set out in s. 20, it seems clear that the court is to grant an order for matrimonial home possession on equitable principles.**

22 Based on the reasoning in *Mitrovic*, I find that Ms. Welsh meets the second requirement, and there is a personal obligation between the parties.

23 The third factor concerns the Court's ability to supervise the judgment. This depends upon Mr. Welsh's presence in Alberta. Currently, Mr. Welsh lives in British Columbia. However, his corporation, R. J. Welsh Holdings is registered in Alberta and Mr. Welsh also has family in Alberta. In addition, he has bank accounts in Alberta.

24 Mr. Welsh has not obeyed all of this Court's orders in the past. Indeed, he has now questioned the jurisdiction of this Court. **However, in my view, he has a sufficiently significant connection to Alberta that the execution on the judgment can be supervised by this Court.** Therefore, the third requirement is satisfied.

25 The fourth requirement has created some confusion. Although it sounds limiting, it merely requires that the defendant have the ability to transfer an interest in the immovable according to the laws of the *lex situs*. In other words, such a transfer must not be illegal or impossible according to the laws where the property is situated: *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102 at paras. 175-77.

26 **Nothing in British Columbia law prevents Mr. Welsh from giving exclusive possession of the home in Osoyoos to Ms. Welsh. Such a transfer is neither illegal nor impossible.** [Emphasis added]

In another Alberta decision, *LC c PG*, 2019 ABQB 664, [2019] AJ no 1142, Grosse J affirmed the *in personam* jurisdiction of Alberta courts in relation to exclusive possession in circumstances where the parties have attorned. However, since the parties in that case had reached agreement concerning exclusive possession of the New Brunswick property, Grosse J was not required to examine the *Catania* criteria (as set out in *Welsh*):

[unofficial translation]

72 As I already decided in the context of a mid-trial application by LC, the property located outside the province is relevant to the division of matrimonial property under Alberta law and the court has jurisdiction to take it into account: Matrimonial Property Act, art. 9. In addition, although the Alberta court does not have in rem jurisdiction with respect to the house in New Brunswick, it does have in personam jurisdiction over the two parties. **PG and LC have acquiesced to the jurisdiction of this court by filing their procedural documents with the court, including their applications for division of property. Therefore, the court can issue an in personam order with respect to the house in New Brunswick.** Given PG's consent to temporary exclusive possession and the attempt at refinancing, I do not need to address the criteria indicated in *Welsh v Welsh*, 2011 ABQB 686. [Emphasis added]

[original judgment]

72 Comme je l'ai déjà décidé dans le contexte d'une requête à mi-procès de LC, les biens situés en dehors de la province sont pertinents au partage des biens matrimoniaux selon la loi en Alberta et le tri-

bunal a la compétence d'en tenir compte :. De plus, bien que la cour en Alberta n'ait pas la compétence in rem sur la maison au Nouveau-Brunswick, elle a la compétence in personam sur les deux parties. **PG et LC ont acquiescé à la compétence de cette cour en déposant leurs actes de procédures au greffe de cette cour, y compris les demandes de partage des biens matrimoniaux. Alors, le tribunal peut prononcer une ordonnance in personam relative à la maison au Nouveau-Brunswick.** À la lumière du consentement de PG pour la possession exclusive temporaire et à la tentative de refinancement, je ne dois pas adresser les critères énoncés dans l'arrêt *Welsh v Welsh*, 2011 ABQB 686. [Emphasis added]

Outside Alberta, the case law is more equivocal on the question of jurisdiction to order exclusive possession. The decision in *Forsythe v Forsythe*, [1991] BCJ No 2101, 33 RFL (3d) 359 (SC) is a favourable case in which Donald J held that the BC court did have jurisdiction to make an order for exclusive occupancy of a property located in Palm Springs, California, but declined to do so, since the property was owned by a corporate entity of which the husband was part owner, rather than by the husband or the parties directly:

The plaintiff answers this point by maintaining that she does not claim an interest in the land per se but rather a right in personam founded in the contract and for a determination of the equities as between her and the defendant. This is a well recognized exception to rule that "... [a] local court has no jurisdiction to entertain proceedings for the determination of right, title or interest to a foreign immovable": J.G. McLeod *The Conflict of Laws* (Calgary: Carswell, 1983). The learned author states the exception thusly:

Exception 1: Where the court has *in personam* jurisdiction over the defendant, it has jurisdiction to entertain proceedings against him in respect of a contract or equity running between the parties, even though the contract or equity **indirectly affects foreign land.**

[...]

[...] The fact that the *situs* has ultimate control over the immovable really has very **little to do with the enforcement of the court order, since the remedies for enforcement operate not against the property but against the person.** Some substance may be given to the principle where it would be illegal in the *situs* for the defendant to comply with the rule. Such points, however, are better dealt with in the context of the enforcement of contracts...

J.-G. Castel in the second edition of *Canadian Conflict of Laws* (Toronto: Butterworths, 1986) discusses the exception in this way at pp. 407-408:

The recognition by Canadian courts of the exclusive jurisdiction of the courts of the *situs* has not prevented them from exercising equitable jurisdiction *in personam*. They will grant decrees imposing a personal obligation on a defendant with respect to a contractual or equitable obligation arising out of a transaction involving a foreign immovable.

This approach is based on the distinction between interests in an immovable created directly by a transaction between the parties thereto and personal obligations arising out of a transaction, of which the foreign immovable is the subject matter. The exercise of jurisdiction *in personam* with respect to foreign immovables depends on the existence between the parties of an obligation legal or equitable. Support for this view is to be found in an old English decision which held that courts of equity have jurisdiction *in personam* in relation to a foreign immovable against persons resident within the jurisdiction, in the case of a contract, fraud, and trust. **The judgment operates in personam and does not adjudicate upon the title to the immovable, although it may have that effect incidentally. It affects the foreign land only through the medium of a person, and this is why jurisdiction depends on the existence of some personal obligation between parties to the suit.**

I find the circumstances of the case meet the four prerequisites: the parties are in the jurisdiction; personal obligations arise from the contract; the court could supervise the kind of order sought; and, it has not been shown that the order would be ineffective in California. Accordingly, the first objection going to jurisdiction is dismissed. [At pp 3-4 (QL), emphasis added]

In *MacKenzie v Barthol*, 2005 BCSC 485, [2005] BCJ No 724, a prior decision had found the parties to be equal owners as tenants in common of a property in Washington, and gave the husband 60 days to purchase the wife's share, which he failed to do. Ralph J provided little analysis, but held that the court's *in personam* jurisdiction permitted him to make an order granting exclusive occupancy and conduct of the sale of the property to the wife::

25 Ms. MacKenzie and Mr. Barthol are both resident in British Columbia and both submitted to the jurisdiction of this court. **Pursuant to the courts *in personam* jurisdiction I am satisfied that it is appropriate to now make the following orders** with respect to the Oroville property:

- 1) The plaintiff is **granted exclusive occupancy**, possession and use of the property at Oroville, Washington;
- 2) The plaintiff will have conduct of the sale of the Oroville property for seven months and may list the property for sale with one or more duly licensed real estate agents and pay any such real estate agents a commission of not more than 7% of the gross selling price;
- 3) If the Oroville property is found to be locked, vacant or abandoned, the duly authorized agents of the plaintiff may force entry to the premises on the property to effect exclusive possession and show it to prospective purchasers;
- 4) The defendant, Mr. Barthol will have until April 30, 2005 to remove his personal effects from the Oroville property. [Emphasis added]

However, in *Potter v Boston*, 2014 ONSC 2361, 43 RFL (7th) 339 (Div Ct), the Court granted leave to appeal an order that had given the wife exclusive possession of a condo located in Florida for one week per month. The

Court held that the trial decision had not examined the four criteria from *Catania*, and an appeal was necessary to evaluate whether Ontario courts were entitled to order exclusive possession over foreign property. There is no record of an appeal decision having been rendered. Note also that the Court does not appear to have been aware of the *Welsh* decision:

22 It is clear that Justice Mullins was not referred to the above mentioned prerequisites and principles and thus they are absent from her endorsement. She did not indicate in her endorsement that an *in personam* order was being made against the husband. Her order simply states "the applicant shall exclusive possession of the condo located at 970 Egrets Run #201, Naples, Florida, USA for one week per month".

23 Although the wife's counsel argues that the four prerequisites have been met in the order of Mullins, J., there was no analysis done to determine that was the case. **There was no evidence that the order would have effect in Florida. There was no analysis of the second criteria, which is whether there is a personal obligation running between the parties.** The wife's counsel argued that there is a personal obligation between them for the continuation of the agreement made during the marriage, that the wife would have monthly access to the property for a period of one week each visit. In order to establish such a personal obligation, **it seems to me that the wife would have had to prove the existence of a contract between the two spouses**, as opposed to a domestic arrangement that worked for the parties' lifestyle during the marriage. **No evidence was proffered that could lead to a finding that the parties had the intention to form an agreement having legal effect in the terms advanced by the wife.**

[...]

27 As earlier indicated, there are many decision rendered by the courts in Ontario and throughout Canada which cast doubt upon the jurisdiction of a court to order a legal interest in property located outside of Canada. It is the general rule that courts do not have the jurisdiction to deal with rights in foreign property. Second, **there are cases in which *in personam* orders have been made that affect property rights in foreign jurisdictions, although no case has dealt with such an order in the context of exclusive possession.** These conflicting decisions must be analyzed to provide clarity to the issue of whether an Ontario court is entitled to order exclusive possession of a property located in a foreign jurisdiction, and to reconcile s. 28(1) of the Act in such a decision if necessary.

28 It is desirable, in my view, to have clarification of these important issues. [Emphasis added]

In *Nauth v Bijai*, 2017 ONSC 2022, [2017] OJ No 2214, Jarvis J dismissed the husband's application for exclusive possession of a property located in Florida. In that case, the parties had divorced but continued to have some form of relationship, including financial dealings. Jarvis J held that since the husband's application was brought after the parties were divorced, the *Family Law Act*, including the provisions governing exclusive possession, did not apply. Jarvis J also dismissed the husband's arguments based on unjust enrichment, finding that it was not clear the criteria to ground in personam jurisdiction were met. In particular, Jarvis J appeared to consider that the wife's US residency and predominant ties to that jurisdiction might prevent the court from

effectively supervising the execution of any judgment it might render:

86 In reviewing the parties' claims as framed by their pleadings and as otherwise developed in the proceedings leading up to, and during, trial the court has considered the following:

- a) despite the fact that the Florida property was acquired when the parties were married, none of the provisions of the *Family Law Act* applies. **The parties were not spouses, and had been divorced for over two years when these proceedings were started.** Moreover, Part II of the Act dealing with exclusive possession of a matrimonial home applies only to spouses and to a matrimonial home located in Ontario;

[...]

93 The only issue for trial was the applicant's trust claim. Even if this court was to consider the claims made by the respondent and even though there was evidence about expenses incurred and paid for the property and chattels, neither party directed their attention to quantifying their respective post-purchase contributions and detailing what inter-personal credits should be factored into, or affect, those calculations. **Not considered either was the issue whether an Ontario court has the jurisdiction to make an Order affecting title to foreign realty.** As noted by the Ontario Court of Appeal in *Catania v. Giannattasio*, "the general rule is that Canadian courts have no jurisdiction to determine title to or an interest in foreign land". A limited *in personam* jurisdiction over foreign property may apply provided that four prerequisites are satisfied: [...]

94 The respondent is married to a US citizen and resides with her spouse in Florida. **Regardless whether the respondent has attorned to the jurisdiction of this Court, that jurisdiction should not be exercised if the Ontario Court cannot supervise the execution of the judgment:** see also *Potter v. Boston*. [emphasis added]

In *Spagnola v Romanelli*, 2021 ONSC 4236, [2021] OJ No 3431, which involved a common-law relationship, the husband's application for exclusive possession and partition of Quebec properties jointly owned by the parties was refused. After noting that the relevant provisions of Ontario legislation expressly applied to Ontario properties only, Boswell J also found that while the first two *Catania* criteria were met since the parties had attorned to the jurisdiction of the Ontario courts and there was likely some personal obligation running between them, the third and fourth criteria were not satisfied. In this regard, Boswell J noted in particular the absence of any ability for Ontario courts to compel the wife to respect a possessory order or carry out steps for partition:

41 The respondent seeks an order that the two properties co-owned by the parties in Quebec be sold under the provisions of the *Partition Act*, R.S.O. 1990 c. P.4. He also seeks orders that he be granted exclusive possession of both 1452 and 1456 and that he be able to dispose of the properties without the applicant's consent or signature.

42 The court's jurisdiction to do what the respondent seeks is not immediately apparent.

[...]

45 The respondent asserts that what he is seeking is an *in personam* order to enforce a personal obligation between the parties. In support of that assertion, he relies on the ruling of the Court of Appeal for Ontario in *Catania v. Giannattasio* (1999), 174 D.L.R. (4th) 170, 1999 CanLII 1930. [...].

[...]

47 In the circumstances of this case, I accept that the first of the four *Catania* criteria is met. **Both parties have attorned to the jurisdiction of this court. The second of the four *Catania* criteria is likely met as well, though the respondent did not specifically articulate what personal obligations run between co-owners of real property.**

48 I am not satisfied, however, that the third and fourth of the *Catania* criteria are met. I have a number of concerns, principally:

- (a) The judgment being sought is for a sale of the Quebec properties. I do not know what my jurisdiction is to make such an order, when the *Partition Act* does not apply to those lands. The respondent did not provide me with any common law authority for such jurisdiction. **The court cannot supervise the execution of a judgment it does not have the jurisdiction to make;** and,
- (b) Even if I have the jurisdiction to make an order that the properties be sold, **I do not see any means by which I could supervise or enforce the order, apart from perhaps the general contempt powers of the court.** The respondent asks that the court grant him exclusive possession of the properties and the sole authority to sign whatever documents are necessary to dispose of them. Again, as I have noted, **I have no statutory authority to grant orders of that nature. And again, I have not been provided with any common law authority to make such orders. I certainly have no means of compelling the local authorities in Quebec to enforce a possessory order.**

49 In the result, I am not satisfied, on the record before me, that I have the jurisdiction to make an interlocutory order for the sale of the Quebec lands. [Emphasis added]

In *Hull v Hull* (1981), 12 ManR (2d) 134, 22 RFL (2d) 409 (CA), the Court struck out an order by the trial judge granting exclusive occupancy of a jointly owned residence in British Columbia to the wife. The Court gave little reasons, other than to opine that the matter should be governed by the laws of British Columbia:

8 As to the exclusive occupancy provision, it is our opinion that the learned trial judge lacked jurisdiction to order that the wife be allowed the sole right of occupancy of the jointly owned family residence in British Columbia. We agree with him that this property should be governed by the laws of British Columbia in the event that any dispute respecting it cannot be settled.

Hull was followed in *Loewen v Loewen*, 2004 MBQB 225, [2005] 4 WWR 702, where the court granted the

husband's application to strike the wife's claim for exclusive possession of a property located in BC. Allen J held the court was bound by *Hull*, but in any event, exclusive possession was not an in personam remedy as it went to the heart of an owner's rights of title, and therefore had to be dealt with by courts in the jurisdiction where the property was located:

9 The husband argues that the Manitoba court has no jurisdiction to deal with the wife's claims for exclusive occupancy and postponement of sale [...]

[...]

13 As a general rule, a court has no jurisdiction to entertain proceedings for the determination of title to or right to possession of land situated outside the territorial boundary of the forum: *Br. South Africa Co. v. Companhia de Moambique*, [1893] A.C. 602 (H.L.).

14 However, the wife argues an exception to the general rule. She says that in this case the power of the court can be exercised out of the jurisdiction because possession and sale rights are rights *in personam* and not rights *in rem*.

15 She relies on an exception set out in *The Conflict of Laws*, James G. McLeod, (Calgary: Carswell, 1983), at page 327, where Professor McLeod cites *Findlay v. Rose*, [1938] 2 D.L.R. 334 (Man. C.A.). In that case, the court found, although the dispute was over land sold in Florida, that the claim for breach of contract was a claim *in personam* and accordingly, could be heard by the Manitoba court. By analogy, she says that her claim for exclusive occupancy and postponement of sale are personal rights directed only to her joint tenant and not to the world at large and accordingly, are personal to the husband.

16 However, in *Hull v. Hull* (1981), 22 R.F.L. (2d) 409 (Man. C.A.), the court found that the Manitoba court did not have jurisdiction to order exclusive occupancy of a jointly owned residence in British Columbia. The court held that the property was to be governed by the laws of British Columbia.

17 While the wife argued that it appeared that the Court of Appeal did not consider its ruling in *Findlay v. Rose* or the question of whether the right was one *in personam*, **I find I am bound by *Hull v. Hull*. The facts in that case are on all fours with the facts here.**

[...]

19 However, **even without *Hull*, I would find that claims for exclusive occupancy and an order prohibiting sale fall within the general rule set out in the *Moambique* case. They are claims going to the heart of the other owner's rights of title to and possession of land and must be dealt with in accordance with the law in the jurisdiction where the land is located.** [Emphasis added]

There may be grounds to question the reliability of some of the authorities discussed above that declined to consider that the court had jurisdiction to make an order for exclusive possession. Some of them (eg, the Manitoba decisions) are dated, and the courts did not appear to undertake any serious analysis giving consideration to the difference between *in rem* rights and *in personam* rights that indirectly affect title.

In the case of the Ontario decisions, the outcome was influenced by unfavourable facts, and by express language in Ontario's *Family Law Act* that restricts the statutory exclusive possession remedies to properties located in Ontario (see s. 28 of the Act). No such language exists in Alberta's *Family Property Act* or *Family Law Act*.

In Alberta, it seems clear that the applicable framework of analysis is the four-part test described in *Catania*, which was adopted in *Welsh*. In addition, the above cases provide helpful guidance as to how the four criteria may be satisfied, including:

- The first criterion (*in personam* jurisdiction over the defendant) may be satisfied where the defendant has attorned to the jurisdiction, even if they are not resident there;
- The second criterion (a personal obligation between the parties) may be satisfied as a result of obligations arising under the *Family Property Act* (formerly the *Matrimonial Property Act*), as well as through a contractual or equitable obligation;
- The third criterion (ability of the court to supervise execution of the judgment) may be satisfied where the defendant has assets in the jurisdiction, or there are other factors tying the defendant to the jurisdiction, since the remedies for enforcement operate not against the property but against the person;
- The fourth criterion (effectiveness of the order) is not met where it would be illegal in the *situs* for the defendant to comply with the rule; however, where there is nothing in the law of the foreign jurisdiction that would prevent an order for exclusive possession, this criteria may be satisfied.

- END -