Family Law: A Year in Review

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I Got Drunk and Accidentally Amended My Marriage Contract

Part of what we do is keep our readers abreast of recent important cases from across the country in family law. But we also like to keep readers informed of cases from other practice areas that might impact family law. *Edges Contracting* is one such case.

Since the outbreak of COVID-19, people have been asking "what constitutes a signature?" Do we need a "wet" signature? Is a cut and paste photo of an actual signature a "signature"? Or how about something "signed" in script font? Is that a signature? And then there's the text message. Is it possible that a message sent by text can constitute a "signature" at law? Let's find out.

The plaintiff did renovation work for the defendants. The defendants did not make the final payment owing. For some reason, this upset the plaintiff.

The plaintiff did not commence an action to recover the amount owing within the two-year limitation period under the *Limitations Act, 2002*, S.O. 2002, c. 24., Sched. B (the "*Limitations Act*"). However, within the limitation period (on June 2, 2016), the defendants' principal sent the plaintiff a text message acknowledging the amount was still owing.

When the plaintiff commenced a claim (on May 30, 2018), the defendants argued that the plaintiff's claims were statute barred. The plaintiff, however, argued that the June 2, 2016 text exchange constituted an acknowledgment of the debt. Therefore, argued the plaintiff, the limitation period was reset on June 2, 2016, such that the action was timely.

Section 13 of the *Limitations Act* reads as follows:

> 13(1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, **the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made**.
>
> . . . . .
>
> 13(8) Subject to subsections (9) and (10), this section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing.
>
> . . . . .
>
> 13(10) Subsections (1), (2), (3), (6) and (7) do not apply **unless the acknowledgment is in writing and signed** by the person making it or the person's agent. [emphasis added]

The issue, therefore, turned on whether the defendant's text message constituted an "acknowledgment" under s. 13.

Although the text message clearly did not meet the express requirements of an "acknowledgment" under the *Limitations Act* — nothing was "in writing" and nothing was "signed" — the Small Claims Court trial judge accepted that the text message was nevertheless an "acknowledgement" under s. 13. Even though the text messages were not signed, the trial judge found they were unquestionably authentic, and such authenticity effectively equated to a signature.

The defendants appealed the decision to the Ontario Divisional Court, an intermediate appellate court, and generally the final appellate court from the Small Claims Court. The defendants argued that the trial judge unreasonably interpreted s. 13, and that an "acknowledgment" had to be (a) clear and unequivocal and (b) include a signature.

Justice Boswell found there was "no question" that the text counted as an acknowledgment "in writing." However, the fact that the text was authentic did not negate the clear requirement for a signature. So, the question was — was is "signed?"

Ultimately, Justice Boswell found as follows:

> [46] I agree that the signature requirement of s. 13(10) is grounded in concerns about authenticity. But the plain wording of the section cannot simply be ignored, in my view, even if the court is satisfied about authenticity by a means other than a signature.
>
> [47] On the facts of the case at bar, [the defendant's] texts were obviously not "signed" in the traditional sense. **But s. 13(10) does not prescribe any particular type of signature.**
>
> [48] The world is changing. Everyone knows that. We live in a digital world now, much more than was the case when the Act came into force in 2002. It is incumbent upon the court to consider not just traditional means of affixing one's signature to a document, but other, more modern means, including digital signatures.
>
> [49] In this instance, there is no question about the authenticity of the text messages. There is no question that [the defendant] was the author of the June 2, 2016 texts in issue. **From that perspective, the underlying purpose of s. 13(10) has been satisfied.**
>
> [50] **I would also find that the express requirement of a signature is met in this case.** [The defendant] used his cellular telephone to send and receive texts with [the plaintiff]. [The defendant], like all other cellular telephone users, has a unique phone number linked with his phone. In fact, there will undoubtedly be other unique identifiers associated with [the defendant's] phone including, without limitation, an International Mobile Equipment Identifier (IMEI) number. These unique identifiers provide, in effect, a digital signature on every message sent by the user of that particular device. Again, there is no dispute that the user of the device was [the defendant] and that he sent the texts in issue. **In my view, that digital signature is sufficient to meet the requirements of s. 13(10) of the Act.** [emphasis added]

Therefore, it appears that a text message, at least where the sender is not in question, can constitute a signature.

Will this new definition of "signature" be limited to the need for a signed acknowledgement under the *Limitations Act*? Or might it apply to anything that requires a signature to be effective? For example, many contracts — including domestic contracts and spousal contracts — often state that the document can only be amended by a document "in writing" that is "signed" by the parties. Putting aside the requirement that such a document be witnessed for a moment, might parties unwittingly amend a domestic contract by text message? And if a text message can be a signature, could someone seeing the text message being sent or received be a "witness?"
We've all heard of the phenomenon of "drunk texting." Is "drunk accidentally amending my Marriage Contract" a legitimate concern? We shall have to wait and see.

Kaur v. Singh, 2021 CarswellBC 2680 (C.A.) - *Annullments*

Kaur v. Singh addresses the relatively recent (in the last decade or so) incremental change in the law of annulment with respect to psychological incapacity to consummate. Here, the B.C. Court of Appeal held that a true aversion to consummation arising from religious beliefs constituted a genuine psychological incapacity.

The wife had come to Canada as a student in late 2017. She met the husband at school. They decided to marry, and had a civil ceremony in February 2019. Their plan was to delay consummation of the marriage until after the Sikh religious ceremony, in accordance with their tradition. They wanted the civil ceremony so they could live together, which would otherwise have been contrary to their religion.

After the civil marriage, the parties lived in the same house, but separately, and shared the home with friends. However, things got difficult, and the parties began to fight regularly.

The wife moved out in May, with the marriage still unconsummated. And that was the end of the very short marriage.

The wife sought to annul the marriage based on non-consummation. Although the husband did not oppose the application, parties cannot consent to an annulment that does not meet the test for annulment.

Although the court below accepted there had been no consummation of the marriage, it found that the wife had not met the common law requirement of non-consummation resulting from physical *inability* or psychological *incapacity* (when asked by the judge if there were any physical or psychological or psychiatric reasons for not consummating the marriage, the wife replied that there were not).

In *Jomha v. Jomaa* (2010), 85 R.F.L. (6th) 91 (Alta. Q.B.) and *Sahibalzubaidi v. Bahjat* (2011), 11 R.F.L. (7th) 222 (Ont. S.C.J.), the courts held that consummation could be rendered psychologically impossible on account of religious beliefs. However, despite considering *Jomha*, and correctly citing the applicable law, the wife's claim was initially dismissed:

> [7] In *Jomha v. Jomaa*, 2010 ABQB 135 the parties entered into a civil ceremony, did not consummate the marriage. At para. 6, the Court set out the test for annulment:
> To support an application for an annulment the law requires proof that the marriage is unable to be consummated, which is also referred to as proof of impotence. In other words, at least one of the parties is unable to engage in intercourse. In law, impotence can arise from physical inability or a psychological incapacity.
>
> [8] The Court accepted that in accordance with Ms. Jomha's religion, consummation cannot take place before the wedding banquet or a second ceremony took place. Ms. Jomha and Mr. Jomaa went before a religious leader in their Islamic community and had the Islamic bond between them severed. The court granted the annulment, stating at para. 12:
> I accept the evidence of Ms. Jomha that the marriage was never consummated, that in her mind it was impossible for the marriage to be consummated before the wedding banquet or second

ceremony took place and that the marriage can now never be consummated as the religious bond between them has been severed. I grant the annulment on the basis that her belief about the impossibility of consummation is akin to an invincible repugnance or psychological abhorrence to the act of consummation.

[9] In *Grewal v. Sohal*, 2004 BCSC 1549, Mr. Justice Davies reviewed the jurisprudence and set out the test for inability to consummate at para. 61:
Having considered all of the authorities to which I have referred, I am satisfied that the present law in British Columbia concerning the granting of an annulment of a marriage on the basis of non-consummation with a specific spouse (but not to sexual intercourse generally), which is due to psychological aversion can be stated as follows: The applicant must establish on a balance of probabilities that:

> (1) there has been no consummation of the marriage;
>
> (2) the refusal to consummate has been persistent and is not due to obstinacy or caprice;
>
> (3) the applicant has an invincible aversion to sexual intercourse with the specific spouse;
>
> (4) the applicant's invincible aversion to sexual intercourse with that spouse has been brought about by circumstances that have resulted in a "paralysis of the will" that is consistent with incapacity; and
>
> (5) the applicant's incapacity may be based upon normal, predictable reactions that need not be expressed in pathological terms.

[10] Ms. Grewal and Mr. Sohal entered into an arranged marriage. After the marriage Ms. Grewal learned that the husband had an addiction to drugs. The court was satisfied that Ms. Grewal had a psychological incapacity to the consummation of this marriage. Davies J. continued at para. 72:

> In my opinion, her reaction was a normal and predictable reaction to the contemplation of consummation with a spouse who was fundamentally different than the person he had represented himself to be. I also find that the defendant's deceit and manipulation of the plaintiff for immigration purposes both exacerbated and deepened her normal and predictable reaction that led to her understandable and natural psychological aversion to consummation.

[11] Mr. Justice Davies granted the wife a declaration of nullity.

[12] When I apply the principles to the case before me, I am not satisfied that they are met.

[13] Annulment is not granted based on the agreement between the parties, or where the parties decide not to consummate a marriage despite an ability to do so. There is no evidence of either party having an aversion to consummating the marriage. While I accept that there does not have to be a pathological reason for non-consummation, it appears that the parties here simply decided that they would not consummate the marriage and made an agreement that the marriage should be annulled.

[14] Neither am I satisfied that the facts in *Johma* [*sic*] have application here: [The wife] said that the parties decided to wait until their religious ceremony before consummating the marriage, but

> she did not say that the marriage was unable to be consummated because one of the parties is unable to engage in intercourse arising from physical inability or a psychological incapacity.
>
> [15] While I am prepared to find that there has been no consummation of the marriage, these parties have not met the test that the non-consummation is a result of a physical inability or a psychological incapacity.

The wife appealed, and again relied on both *Jomha* and *Grewal*.

The Court of Appeal affirmed that an order for annulment requires an incapacity amounting to an invincible aversion or a physical or psychological incapacity to consummate. There must be a real incapacity that is not "a mere capricious refusal", and that incapacity may arise from various causes, including impotence or other physical disabilities, and psychological and emotional causes — even a psychological impotence that develops after the marriage has commenced.

Justice Grauer, for a unanimous Court of Appeal, then proceeded to incrementally expand the law:

> [17] In my view, in the multi-cultural society that our nation reflects, the common-law principles at issue here must be applied contextually, in accordance with the cultural norms of the parties seeking annulment. This was explored in *Jomha*. **I consider that a psychological incapacity consistent with the principles discussed in these cases can arise as meaningfully from sincerely held religious and cultural beliefs** as from other forms of psychological aversion, both being, contextually, a "normal, predictable reaction" as discussed in *Grewal*. [emphasis added]

The Court of Appeal found that the court below focussed too much on the physical and psychological aspects of capacity in the traditional sense, and failed to appreciate the role that an honest and sincerely held religious belief can play in the incapacity determination. Here, the wife had clearly testified that the parties had decided to delay consummation until after their Sikh religious marriage, because that was their tradition. The evidence established that:

> [20] . . . the parties' decisions about how to manage their relationship were based on religious and cultural considerations. They wished to live together, but in accordance with their cultural norms, could not do that without a ceremony. Hence the civil ceremony. But once living together, they could not consummate the marriage in accordance with their religion until they had undergone the traditional Sikh Gurdwara ceremony, and so did not consummate it. Though they had other reasons, including avoiding pregnancy, those did not require non-consummation. The true aversion to consummation arose from their religious beliefs, creating a genuine incapacity.

The Court of Appeal also thought the court below fixated on the parties' *agreement* not to consummate, and gave insufficient weight to the fact that the agreement reflected an underlying aversion to consummation before completion of a religious ceremony.

However, to ensure not to overly expand the ability to claim an annulment, the Court of Appeal offered the following advice for future parties claiming an annulment:

> [23] It would have been helpful to the judge, and would be helpful for any such cases in the future, to have more precise evidence concerning the parties' cultural and religious norms and,

> importantly, the manner and extent to which those norms impacted non-consummation of the marriage. The applicant for annulment based on a psychological incapacity to consummate, whether grounded in a sincerely held religious belief or otherwise, must establish an incapacity on a balance of probabilities.

The appeal was allowed. The annulment was granted. And the marriage was declared *void ab initio*.

Will this expansion of the notion of psychological repugnance based on religious beliefs increase the number of annulment claims in the future? Hard to tell.

A.C. v. L.L., 2021 CarswellOnt 13587 (S.C.J.) – *Presumption of Vaccination*

COVID-19 Vaccination Update — A General Presumption in Favour of Vaccination: More about Needles

Another week, another COVID-19 vaccination case. Hopefully we are close to the point where everyone understands that, absent truly exceptional circumstances, a court is going to find that it is in a child's best interests to be vaccinated.

The parties in *A.C. v. L.L.* had 14-year-old triplets. One of the triplets, E, attended school in person, while the other two, P and J, attended online.

The parents agreed that P and J should attend school in person. However, the father insisted that they had to get the COVID-19 vaccine before they could go to school in person, while the mother was adamantly opposed to vaccination, and withheld the children's health cards and other government ID from the father to try to prevent him from having the children vaccinated.

In granting the father's motion to let the children be vaccinated, Justice Charney found that there is a "general presumption" that it is in a child's best interest to be vaccinated against COVID-19 before attending school in person, and that the mother had not adduced the type of "compelling evidence" that would be necessary to rebut the general presumption. This is a welcome development, as too much court time has been wasted arguing over vaccination issues:

> [28] . . . The responsible government authorities have all concluded that the COVID-19 vaccination is safe and effective for children ages 12-17 to prevent severe illness from COVID-19 and have encouraged eligible children to get vaccinated. These government and public health authorities are in a better position than the courts to consider the health benefits and risks to children of receiving the COVID-19 vaccination. **Absent compelling evidence to the contrary, it is in the best interest of an eligible child to be vaccinated.**
>
> [29] This analysis and conclusion is consistent with the approach taken by other courts addressing vaccinations prior to COVID-19: *C.M.G. v. D.W.S.*, 2015 ONSC 2201, at para. 105; *A.P. v. L.K.*, at para. 276; *B.C.J.B. v. E.-R.R.R.*, 2020 ONCJ 438, at para. 180, aff'd, *B.C.J.B. v. E.-R.R.R.*, 2021 ONSC 6294, at paras. 49-53; *Chambers v. Klapacz*, 2020 ONSC 2717 at para. 7.
>
> [30] The issue is not, as argued by the respondent mother, whether obtaining the vaccination is "crucial" to in-person attendance. That is not the legal test. **The question is whether it is in the best interests of the child. Given the government statements above, there can be no dispute that, as a general presumption, it is in the best interest of eligible children to get vaccinated before they attend school in person.**
>
> [31] The respondent mother has adduced no evidence to contradict this general presumption or displace its application to P, J, and E. She certainly has adduced no evidence to suggest that it is in the children's best interest to not be vaccinated. [emphasis added]

Justice Charney also considered whether the mother's consent was actually necessary for the children to be vaccinated. In finding that parental consent was ***not*** actually required, Justice

Charney relied on s. 4 of the *Health Care Consent Act*, S.O. 1996, c. 2 ("*HCCA*"), which creates a presumption that a person, *regardless of their age*, is capable of consenting to treatment:

> [39] . . . While medical decision making is an incident of parental custody, **if the minor is a "mature minor" and capable of providing informed consent under s. 4 of the *HCCA*, decisions regarding medical treatment may be made by the minor**. As indicated, the question is whether the health care provider administering the vaccine is satisfied that the young person is capable of understanding information about the vaccine. [emphasis added]

Since both of the parents agreed that the children in this case had capacity for the purposes of the *HCCA*, and as both parents indicated that they were prepared to abide by the children's wishes vis-à-vis the vaccine, it was not necessary for Justice Charney to consider the issue of capacity any further.

In the end, Justice Charney ordered that the children were authorized to receive the COVID-19 vaccine, and ordered the mother to give the father copies of the children's health cards. It would then be up to each child to decide whether or not they wanted to get the vaccine (P and J apparently both wanted the vaccine, but E did not).

This, of course, raises the interesting question as to how a court will deal with a situation where a parent wants to compel a child to get the vaccine against the child's wishes. The Supreme Court of Canada has previously decided that a "mature minor" can decide to refuse far more serious medical treatment: *Manitoba (Director of Child & Family Services) v. C. (A.)* (2009), 65 R.F.L. (6th) 239 (S.C.C.).

On the other hand, in *A.M. v. C.H.* (2019), 32 R.F.L. (8th) 1 (Ont. C.A.), the Ontario Court of Appeal determined that s. 4 does *not* prevent a court from ordering a child to undergo a therapeutic process, which is likely also a form of treatment for the purposes of the *HCCA*, without the child's consent. Arguably, the Court's reasoning in *A.M. v. C.H.* could be extended to vaccination cases. [For further discussion about *A.M. v. C.H.*, see Philip Epstein's comment in the 2019-40, October 7, 2019 edition of *TWFL*.]

That being said, even if a court were prepared to order a non-consenting child to get the COVID-19 vaccine, we strongly suspect that no health professional would be willing to administer it without the child's consent and/or in the face of active resistance to it from the child.

ES v. Shillington, 2021 CarswellAlta 2211 (Q.B.) – *Public Disclosure of Embarrassing Private Facts*

Public Disclosure of Embarrassing Private Facts in Wild Rose Country

In *Racki v. Racki* (2021), 52 R.F.L. (8th) 1 (N.S. S.C.), Justice Coughlan of the Supreme Court of Nova Scotia concluded that the tort of public disclosure of embarrassing private facts is part of the law of Canada (well, at least part of the law of Nova Scotia). In that case, the husband self published a book that contained personal information about the wife. The Court found that the husband had, in fact, committed the tort, and ordered him to pay the wife $18,000 in general damages and $10,000 in aggravated damages.

In assessing the wife's damages, Justice Coughlan appears to have relied on (or at least been influenced by) the Ontario Court of Appeal's finding in *Jones v. Tsige* (2012), 6 R.F.L. (7th) 247 (Ont. C.A.), that "damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done" should generally not exceed $20,000.

However, as we discussed in the 2021-23, June 14, 2021 edition of *TWFL*, it is not clear that the $20,000 limit on general damages for intrusion upon seclusion actually applies to public disclosure of private facts (see also Justice Kristjanson's discussion about this issue in *Yenovkian v. Gulian*, 2019 CarswellOnt 21614 (S.C.J.) at paras. 187-188).

We now have an answer. In *ES v. Shillington*, Justice Inglis confirmed that the tort of public disclosure of private information is part of the law of Alberta, and that non-pecuniary damages for this tort are ***not*** limited to $20,000.

The parties in *ES* were in a romantic relationship for 11 years and had two children together.

They separated in 2016.

The Defendant physically and sexually abused the Plaintiff during the relationship. Towards the end of the relationship, he also admitted that, without her consent, he had posted intimate and private photographs of her online. The Plaintiff found some of these postings online, including on various pornography sites.

After the parties separated, the Plaintiff commenced an action for damages. The Defendant did not defend the claim, and the Plaintiff had him noted in default. The matter then proceeded to an uncontested hearing before Justice Inglis.

Alberta has a statute (the *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, R.S.A. 2017, c. P-26.9) that creates a cause of action for non-consensual distribution of images. However, the Plaintiff could not rely on the statutory regime because it only came into force after the events that gave rise to her claims had already occurred, and the rule against retrospective application of statutes prohibited the Plaintiff from relying on this statutory cause

of action. Without recognition of the tort in common law, the Plaintiff would have no civil remedy even though it is now recognized as conduct requiring a legal response. Furthermore, the *Act* only protected distribution of intimate images, and the term "intimate image" is narrowly defined in the *Act*, limiting the availability of this remedy to specifically defined images. While that definition would apply to the Plaintiff in this matter, the proposed tort could protect information not contemplated by this legislation in other cases. For example, the *Act* does not protect privately sharing such images, which is a potential gap in the statutory framework.

Accordingly, the only way that the Plaintiff could claim damages against the Defendant for distributing her private photographs was if the court was prepared to recognize a new privacy tort.

That is precisely what happened. Justice Inglis found that the tort of public disclosure of private information was part of the law of Alberta and that liability under the tort was governed by the following test:

a) the defendant publicized an aspect of the plaintiff's private life;

b) the plaintiff did not consent to the publication;

c) the matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff; and,

d) the publication was not of legitimate concern to the public.

On the facts of the case, Justice Inglis had no difficulty concluding that the Plaintiff had established liability against the Defendant:

> [72] . . . By uploading the Plaintiff's explicitly sexual images to accessible websites the Defendant publicized an aspect of her private life; the Plaintiff did not consent to this action; the publication of the images is highly offensive to a reasonable person in the position of the Plaintiff; and, there is no legitimate concern to the public that warranted the publication.
>
> [73] The Defendant is liable for this tort against the Plaintiff.

With respect to damages, Justice Inglis confirmed that the $20,000 limit on non-pecuniary damages for intrusion upon seclusion should *not* apply to claims for public disclosure of private information:

> [91] In *Jones*, the Ontario Court of Appeal determined that if the plaintiff in a privacy tort case has not suffered a pecuniary loss, general damages should range from $0 and $20,000, . . .
>
> [92] In *Racki* the court considered the misconduct and the defendant's refusal to remove the private information from the book and awarded general damages of $18,000, along with $10,000 in aggravated damages (as the motive appeared to be malice). The private content in question was not photographs nor sexual in nature.

> [93] That award and **the range that *Racki* cited does not parallel these three causes of action or the facts in this case. The torts here are not just breaches of privacy or confidence. The Defendant attacked the personal and sexual integrity of the Plaintiff in a grossly public way with disregard for her dignity and the potential and real consequences she experienced.** He appears to have done so repeatedly and there is no evidence to suggest he has taken steps to rectify what he has done. [emphasis added]

The Plaintiff asked the Court for $80,000 in general damages, $50,000 in punitive damages, and $25,000 in aggravated damages. Justice Inglis granted this request in its entirety to compensate the Plaintiff for the significant pain, suffering, and embarrassment she had experienced at the hand of the Defendant and to condemn the Defendant's malicious and harmful conduct.

In *addition*, her Honour also ordered the Defendant to pay the Plaintiff $175,000 in general damages, $50,000 in aggravated damages, $50,000 in punitive damages, and $30,000 in special damages for assault and battery and sexual assault, and to make all the best efforts to return any images of the Plaintiff to her, and remove any images that he posted online. This is a total damages award of $460,000 for this abhorrent conduct.

While no amount of money could ever compensate the Plaintiff for what the Defendant put her through, the availability of a civil remedy to deal with this type of horrific conduct that allows a court to order significant damages will deter others from engaging in similar behaviour, and at least help to provide some compensation for victims.

N. v. F., 2021 CarswellOnt 12685 (C.A.) – *Abduction from a non-Hague Country*

Sometimes Hard Facts Make Bad Law. And Sometimes Hard Facts Are Just Hard Facts.

Cases involving a request to return a child to a foreign jurisdiction that is not a signatory to the *Hague Convention on the Civil Aspects of International Child Abduction* are complicated. And cases to return a child to a non-*Hague* signatory with a system of law that may not be based on our own North American views are even more complicated.

These complexities are on clear display in the Ontario Court of Appeal's recent 88-page judgment in *N. v. F.* The majority in *N. v. F.* upheld the trial judge's decision (2020 CarswellOnt 18401 (S.C.J.)) to order the return of the parties' two young children to Dubai in the United Arab Emirates, while the dissent would have reversed the trial judge's decision, and found that Ontario should have taken jurisdiction to decide the case based on the best interests of the children.

They say that hard facts make bad law. In this instance, that is not *necessarily* the case. Sometimes hard facts are just hard facts.

Given the length and importance of this decision (and the fact that people have asked that we not do 20-page *Newsletters*), we have devoted most of this week's edition of *TWFL* to it.
The Appellant mother was born in Pakistan and immigrated to Canada when she was 15 years old. She is a Canadian citizen. The Respondent father was born in Pakistan and is a Pakistani national.

The parties were married in Pakistan in February 2012, but lived in Dubai for their entire marriage. They had two young children under the age of five when they separated, both of whom were Canadian citizens. Neither the parties nor the children were UAE citizens or permanent residents.

The mother regularly visited her parents in Ontario during the marriage. And, on June 19, 2020, with the father's permission, she took both children to Ontario for a month-long trip. However, and despite having purchased return tickets for herself and the children, within two weeks of arriving in Canada the mother told the father that she had decided not to return, and that she intended to stay in Ontario with the children indefinitely.

The father started proceedings in both Dubai and Ontario. In the proceeding in the Ontario Superior Court of Justice, the father sought an order under s. 40 of the *Children's Law Reform Act*, R.S.O., 1990, c. C.12 (the "*CLRA*") to have the children be returned to Dubai.
The mother responded by asking the Ontario court to take jurisdiction over the parenting issues pursuant to ss. 22 and 23 of the *CLRA*. She also raised a host of arguments about the constitutionality of the return order provisions of the *CLRA*.

The Trial Judge's Decision

The trial judge heard evidence and submissions about the jurisdiction issues over 11 days in November 2020. The Attorney General of Ontario also intervened with respect to the mother's constitutional claims. Both parties testified, and they both called family and friends as witnesses on their behalf. Both parties also called experts about family law in Dubai, and the mother called a psychotherapist.

Prior to the trial, the father served a "with prejudice" settlement offer that was disclosed to the trial judge. The terms of the offer provided that the children would return to Dubai on the following terms

- The mother would be the children's primary residential parent, but that major decisions would be made jointly;
- The father would secure a visa for the mother so that she could remain in Dubai; and
- The father would purchase a house in Dubai in the mother's name that she would hold in trust for the children.

The offer also provided the mother with the alternative of pursuing her remedies in the UAE court if she was not satisfied with the proposed custody and support arrangements, and that its terms could be incorporated into a s. 40 order under the *CLRA*.

[As an aside, we're not sure how a settlement offer was disclosed to the trial judge, unless both parties consented. There is no such thing as a "with prejudice" settlement offer such that it can be unilaterally disclosed to the court: *Leonardis v. Leonardis* (2003), 43 R.F.L. (5th) 144 (Alta. Q.B.); *1021018 Alberta Ltd. v. Bazinet*, 2015 CarswellAlta 439 (Q.B.) . . . But we digress.]

The trial judge found that the father was more credible than the mother, and was satisfied that:

- a court in Dubai would determine custody by making the best interests of the children its paramount consideration;
- a court in Dubai would be able to incorporate, approve, and enforce, as a valid order, the with prejudice settlement proposed by the father if it was agreed to by the mother; and
- while infants could face adverse emotional and psychological impacts when they are separated from their primary caregiver, it was unknown whether the particular children in this case would suffer serious harm if they were separated from the mother.

The trial judge concluded that the Court did not have jurisdiction over the children under ss. 22 or 23 of the *CLRA*. Furthermore, pursuant to s. 40 of the *CLRA*, he was satisfied on the balance of probabilities that the children's best interests would be served by their return to Dubai so that a Dubai court could decide the custody and access issues. The trial judge also declined to exercise the Court's residual *parens patriae* jurisdiction pursuant to s. 69 of the *CLRA*, and dismissed the mother's constitutional challenge.

As a result, the trial judge ordered that the children were to be returned to Dubai forthwith pursuant to s. 40 of the *CLRA*, which permits a court that has declined jurisdiction under ss. 22 and 23 to make various orders, including ordering "a party to return the child to such place as the court considers appropriate[.]"

The Court of Appeal's Decision

The mother appealed the trial judge's decision to the Ontario Court of Appeal, and obtained an order staying the trial judge's decision pending the appeal.

In dismissing the mother's appeal, Justice Hourigan, writing for himself and Justice Brown, started by emphasizing the very exacting standard of review that applies in family law cases:

> [1] Trial courts are frequently called upon to make difficult decisions about the future care of children due to the break-up of parental relationships. Trial judges are parachuted into a family, made privy to its most intimate details, and charged with determining the best course for the children's future in the face of the parents' opposing viewpoints. On appeal, considerable deference is paid to those decisions because trial judges have the opportunity to observe first-hand both the witnesses and the family dynamic. This case raises squarely the role of appellate courts in reviewing family law decisions.
>
> . . . . .
>
> [5] On appeal, the [mother] invites us to retry the case. However, she does not offer any persuasive reasons for why we should do so, and cannot articulate any errors of law or palpable and overriding errors of fact or mixed fact and law. Instead, she asserts that we should effectively consider her case *de novo* and rule in her favour.
>
> [6] These reasons explain why I would decline to interfere with the trial judge's decision. When an appellate court trespasses into the domain of a trial court and redoes its analysis, it runs the risk of rendering a results-based decision. Such decisions do not serve the cause of justice; they pervert it by creating uncertainty in the law for other similarly situated parties. This concern is particularly acute in family law cases where there may be sympathetic facts. Appellate courts must resist the temptation to conduct what is essentially a second trial on appeal.

[As another aside, the standard of appellate review in family law cases is one of the issues the Supreme Court of Canada will be considering on December 1, 2021 and December 2, 2021, when it hears oral arguments in the appeals from *Alansari v. Kreke*, 2020 CarswellSask 522 (C.A.), *J.D. v. DCP, et al*, 2020 CarswellPEI 73 (C.A.); and *Barendregt v. Grebliunas* (2021), 50 R.F.L. (8th) 1 (B.C. C.A.).]

Justice Hourigan also noted that the standard of appellate review in Ontario on questions of foreign law and its proper interpretation is correctness: *Grayson Consulting Inc. v. Lloyd*, 2019 CarswellOnt 1812 (C.A.). [However, this *may* not be the rule in all provinces. For example, in British Columbia it appears that conclusions as to the foreign law constitute findings of fact subject to the palpable and overriding standard: *Friedl v. Friedl* (2009), 67 R.F.L. (6th) 239 (B.C. C.A.).]

The majority then turned to considering the merits of the mother's appeal.
Under ss. 22(1)(a) and 22(1)(b) of the *CLRA*, a court in Ontario can only take jurisdiction to make a parenting or contact order if:

> (a) The child was habitually resident in Ontario at the start of the proceeding;
>
> **OR**
>
> (b) **All six** of the following requirements are met:
>
> i. the child is physically present in Ontario at the commencement of the application for the order,
>
> ii. substantial evidence concerning the best interests of the child is available in Ontario,
>
> iii. no application respecting decision-making responsibility, parenting time or contact with respect to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> iv. no extra-provincial order respecting decision-making responsibility, parenting time or contact with respect to the child has been recognized by a court in Ontario,
>
> v. the child has a real and substantial connection with Ontario, AND
>
> vi. on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

[See *Wang v. Lin* (2013), 29 R.F.L. (7th) 1 (Ont. C.A.) at para. 50, where the Ontario Court of Appeal confirmed that the requirements of s. 22(1)(b) are conjunctive.]

The mother conceded that s. 22(1)(a) of the *CLRA* did not apply because the children were not habitually resident in Ontario at the start of the proceeding. However, she argued that the trial judge erred in not taking jurisdiction under s. 22(1)(b), and in finding that four of its six requirements had not been met.

Justice Hourigan quickly disposed of this aspect of the mother's appeal on the s. 22(1)(b) issue, as he was not persuaded that the trial judge erred in finding that she had not met her onus of establishing that there was substantial evidence about the best interests of the children in Ontario under s. 22(1)(b)(ii):

> [48] . . . the trial judge noted, among other things, that the children had only lived in Ontario for six months, that neither the parties nor the children had spent significant time in Ontario during the period from February 2012 to June 2020, and that "nobody in Ontario testified except for . . . [the mother] and her mother". These findings were well-grounded in the evidence and free of error. They are immune from appellate interference.

Having found that one of the six requirements of s. 22(1)(b) had not been met, there was no need for the Court to go further and consider the rest of the mother's arguments about s. 22(1)(b).

The most interesting issue in this case, however, was whether the trial judge had erred by declining jurisdiction under s. 23 of the *CLRA*, which provides that even if the court does not have jurisdiction under s. 22, it can still make parenting orders and contact orders if it is satisfied that:

> (a) the child is physically present in Ontario; **AND**
>
> (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
>
> i. the child remains with a person legally entitled to decision-making responsibility with respect to the child,
>
> ii. the child is returned to a person legally entitled to decision-making responsibility with respect to the child, or
>
> iii. the child is removed from Ontario.

In this case, the trial judge was not satisfied that the children would suffer serious harm if they were returned to Dubai because:

- There was no evidence that the children were at risk of being physically harmed if they returned to Dubai;
- There was only circumstantial evidence that the children would be at risk of emotional and psychological harm;
- There was no evidence that the children had specific views or preferences about whom or where they resided; and
- There was no reliable evidence that the court system in Dubai would not decide the parenting issues based on the children's best interests, and would not approve the father's "with prejudice" settlement proposal.

On appeal, the mother argued that the trial judge had "erred in his consideration of (a) her uncertain residential status in Dubai; (b) the [father's] proposed settlement offer and consent order; (c) the law of the UAE that she says disadvantages her; (d) the adequacy of the [father's] parenting plan; and (e) the nature of the potential harm to the children."

The majority rejected the mother's arguments, and found that she was really just asking the Court of Appeal to reweigh the evidence and to draw different conclusions. And that, according to the

majority, is something an appellate court cannot do, and it reiterated this point multiple times throughout its decision (see paras. 58, 61-62, 68, 73. 75, 82, 85, and 95).

The majority was also clearly concerned that not sending the children back to Dubai would serve as an invitation to other parents to abduct very young children to Ontario:

> [83] . . . if [the dissent's] analysis were to be followed . . . , the precedent established would be concerning. Such a decision would send a message to parents living in the UAE that if they unilaterally come to Ontario with their children, they will not be required by the Ontario courts to send their children home. Instead, they can avoid the s. 22 analysis and reduce the s. 23 analysis to a question of whether they would be subject to the law of the UAE. Thus, the underlying objective of the *CLRA* to reduce child abductions would be jettisoned in the wake of the rather provincial view that unless Ontario law is applied, children will suffer serious harm.

As a matter of comity, public policy, and common sense, such a precedent leaves much to be desired.

With respect to s. 40 of the *CLRA*, which allows, but does not require, a court in Ontario to order that a child be returned to his/her habitual residence, the majority declined to consider this issue, as the mother had not raised it in her Notice of Appeal or her Factum.

Justice Lauwers, in dissent, would have allowed the mother's appeal. He was of the view that. "the trial judge failed to take into account the Mother's peculiar vulnerability as a foreign national, and as a woman undergoing a divorce process in Dubai under the laws of the UAE, with its effects on the children." Both parties' expert evidence showed that the mother's residency status in Dubai was clearly precarious, and the dissent was of the view that the father's arrangements in his "with prejudice" offer "to address her precarious residency status were all unacceptably contingent."

Furthermore, the dissent took serious issue with the trial judge's conclusion that the risk of harm of returning the children to Dubai and separating them from the mother was unknown, as "the risk of this harm was precisely what the trial judge had to assess in order to make determinations under ss. 23 and 40 of the *CLRA*."

Having found that the trial judge made these errors, Justice Lauwers then turned to the issue of whether the mother had met her onus of establishing a serious risk of harm if the children were ordered to return to Dubai.

Unlike the majority, which deferred to the trial judge's decision that the mother had not established a serious risk of harm on the particular facts of this case (notwithstanding the children's ages and the mother's precarious status in Dubai), the dissent was prepared to accept that, *as a general principle*, "an indefinite separation of two quite young children, one under two years and the other only four, from the parent who has always been their primary caregiver, constitutes a risk of serious harm."

Although it is hard to disagree with this general proposition, the majority expressed serious concerns about essentially establishing a general principle that separating very young children

from their only primary caregiver who has tenuous legal status in the children's habitual residence and refuses to return will rise to the level of a risk of harm for the purposes of s. 23 of the *CLRA*:

> [93] . . . According to [the dissent's] logic, to succeed on a s. 23 argument, all that a primary caregiver needs to establish is: (1) that the children in issue are under the age of five; (2) that they refuse to return the wrongfully retained children to the children's home jurisdiction; and (3) that they refuse to return to the children's home jurisdiction if the children are required to go back there.
>
> [94] This logic is problematic for several reasons. First, it encourages child abductions, contrary to one of the public policy purposes underlying the *CLRA*. Second, it calls for an analysis that focuses solely on the preferences of the custodial parent and not on the best interests of the children. Third, it uncritically accepts that there will be serious harm regardless of the circumstances in a particular case, which are ignored entirely. Fourth, it comes dangerously close to reviving the long-discredited tender years' doctrine. Fifth, it replaces the discretion to be exercised by the trial judge with a hard-and-fast rule.

While we agree with these policy concerns, it is nevertheless hard to conceive a scenario where the possibility of permanently separating a very young child from the only primary caregiver s/he has ever known would *not* create a risk of serious harm.

In any event, having accepted that indefinitely separating the children in this case from the mother would place them at risk of serious harm, the dissent concluded that the real issue it had to decide was whether "the court is convinced on a balance of probabilities that this separation will occur." In finding that such a separation was, in fact, more likely to occur than not, the dissent considered the following factors:

> 1. The mother's residential status in Dubai was precarious, as she had no legal right to remain there, and her residency permit was, and always had been, contingent on the father's residency permit. Although the father's "with prejudice" offer stated that he would help the mother obtain a new residency permit, there was no evidence to show that he actually had the ability to do this, or that the mother would have any recourse if he was ultimately unable to fulfil his promise or subsequently changed his mind.
>
> 2. While the father's "with prejudice" offer stated that the mother would be the children's primary residential parent, and that major decisions would be made jointly, there was no evidence that the mother would actually be able to enforce the offer in Dubai if the father decided not to abide by these terms.
>
> 3. If the mother could not enforce the "with prejudice" offer, the court in Dubai would apply the UAE's *Personal Status Law*. Although the *Personal Status Law* used wording that *sounded* like a "best interests" test, in substance the law in Dubai actually represented a "pronounced departure from Ontario's understanding of the best interests of the child in determining parenting arrangements." For example, although the *CLRA* provides that both parents are equally entitled to custody of a child, both parties' experts agreed that in Dubai, "the initial allocation of parenting responsibility is

> automatic, with custody (care of the children) going to the mother and guardianship (decision-making) to the father."
>
> 4. The evidence strongly suggested that, under UAE's *Personal Status Law*, it was extremely unlikely that the mother would be able to take the children with her if she could not obtain residency status and was forced to leave Dubai.

As a result, the dissent would have taken jurisdiction to decide the question of what parenting orders would be in the children's best interests (as that term is understood in Canadian law).

The dissent also concluded that it did not need to address s. 40 of the *CLRA* given its finding that the court should take jurisdiction. However, it still took the opportunity to discuss how to decide what Orders can/should be made if Ontario decides not to take jurisdiction in abduction cases where the *Hague Convention* does not apply:

> [331] Where a court finds no risk of serious harm, and so refuses to exercise jurisdiction under s. 23, a return order under s. 40, cl. 3 does not automatically follow. Section 40 lists things that a court "may" do. While art. 12 of the *Hague Convention* obliges a court that does not find a grave risk under art. 13 to order a child's return, s. 40 does not operate in the same manner, because "unlike under the *Hague Convention*, the court is given broad discretionary powers when determining what order will remedy a wrongful removal to or retention in Ontario": [*Geliedan v. Rawdah*, (2020), 38 R.F.L. (8th) 261 (Ont. C.A.) at para. 69].
>
> . . . . .
>
> [338] The implementation of a return order under s. 40, cl. 3 could have a deep and lasting impact on a child, particularly, but not only, where that order is enforceable by police. In my view, before making such an order, the court must determine that doing so is in the best interests of the child, focussing, as called for by s. 24(2) of the *CLRA*, on "the child's physical, emotional and psychological safety, security and well-being" and having regard to the list of factors in s. 24(3). Other factors may be relevant in the circumstances, including the citizenship and residency status of each child and each parent in all of the relevant countries.
>
> [339] To repeat, the best interests of the child analysis conducted under s. 40, cl. 3 need not mirror the analysis required to make a parenting order.

That the dissent suggests that citizenship of each child is a relevant factor brings to mind *Yassin v. Loubani* (2006), 39 R.F.L. (6th) 51 (Ont. C.A.). In *Yassin*, the British Columbia Court of Appeal considered whether, among the obligations of citizenship (the parties to that case both being Canadian citizens) was the obligation to submit to the jurisdiction of one of the Queen's courts (there, the Supreme Court of British Columbia), with respect to custody of children who were themselves Canadian citizens. Or, alternatively, do Canadian courts have a right, founded both on the duty of allegiance of the parents and on the Crown's *parens patriae* jurisdiction over children who are themselves Canadian citizens, to exercise jurisdiction by making an order for custody when the children at the time were neither "habitually resident" nor physically present within the jurisdiction. In a decision that has not been free of criticism, the Court in *Yassin* answered "yes."

However, in *N. v. F.*, only the mother was a Canadian citizen, and even the B.C. Court of Appeal did not extend the principle from *Yassin* to a foreign national: *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 59 (Ont. C.A.) and *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 91 (Ont. C.A.).

What a perfect segue into the constitutional issues.

The Constitutional Issues

The mother raised numerous constitutional issues, and argued that s. 40 of the *CLRA* was *ultra vires* the province because it dealt with the removal of a citizen of Canada, and that is a matter that falls within exclusive federal jurisdiction. She also argued that s. 40 infringed multiple provisions of the *Charter*.

Writing for both the majority and the dissent, Justice Brown rejected the mother's arguments, and confirmed that:

1. Section 40 of the *CLRA* is **not *ultra vires*** the legislative authority of Ontario. Since a removal order under s. 40(3) "involves the enforcement of custody rights, protecting a child from the harm of a wrongful removal, and ensuring that the custody of a child is determined by the most appropriate state, it falls within the established provincial power to legislate with respect to child custody and welfare as a matter of 'property and civil rights in the province'."

2. The mother's rights under s. 2(a) (freedom of conscience and religion), s. 7 (security of the person), and s. 15(1) (equality) of the *Charter* had not been infringed.

3. Although s. 40 of the *CLRA* infringed on the mother and children's right to remain in Canada under s. 6(1), the infringement was justified under s. 1.

Some Concluding Thoughts

To repeat what we said at the start (and in the title), sometimes hard facts are just hard facts.

On the one hand, the mother's decision to keep the children in Canada without the father's consent or prior judicial authorization was clearly problematic.

On the other hand, what other choice did the mother *actually* have? She had no independent legal status in Dubai, and we suspect it would have been impossible to persuade a court in Dubai to let her move to Canada with the children against the father's wishes no matter how strong her claim is on the merits. Furthermore, if the father decides to resile from his "with prejudice" offer or is unable to fulfil its terms after the children return to Dubai, there is a serious risk that the children will not see their mother again for many years, if ever. Even a very small risk of a catastrophic outcome is worth serious consideration.

We also wonder what would happen if the facts of this case were reversed, and one of the parents had removed the children from Canada and taken them to Dubai. Would Dubai have ordered the

children to be returned to Canada? While we don't know for certain, we have our doubts. And comity without reciprocity is not comity at all.

In any event, the majority's decision may not be the last word about these very difficult questions, as the mother is in the process of seeking leave to appeal to the Supreme Court of Canada, and her motion for a stay pending her application for leave was granted by Justice Paciocco of the Ontario Court of Appeal on October 1st. We will let you know of any further developments in this fascinating case as they arise.

JLZ v. CMZ (2021), 58 R.F.L. (8th) 313 (Alta. C.A.) – *Custody Reversal*

The Interim Alienation Switch-er-oo Two Step

It is relatively rare for a court to order a full custody reversal as a remedy for parental alienation. And while courts regularly refer to the fact that alienation must be addressed early [*Ene v. Ene* (2015), 56 R.F.L. (7th) 332 (Ont. S.C.J.); *Williamson v. Williamson* (2016), 74 R.F.L. (7th) 18 (B.C. C.A.); *Kwan v. Lai* (2016), 98 R.F.L. (7th) 437 (B.C. S.C.); *Hazelton v. Forchuk* (2017), 93 R.F.L. (7th) 254 (Ont. S.C.J.); *MacLeod v. MacLeod*, 2019 CarswellOnt 5172 (S.C.J.); *Hajji v. Al-Jammou* (2020), 48 R.F.L. (8th) 401 (Ont. S.C.J.)], it is almost unheard of for this type of relief to be granted on an interim basis.

But in *JLZ v. CMZ*, the Alberta Court of Appeal is clear that, where a motion judge is satisfied that such extraordinary relief is necessary to protect a child's best interests, it can and should be done.

The parties were married. Their children were only four and one when they separated in 2019.

After separation, the mother engaged in a campaign to alienate the children from the father, and repeatedly interfered with the father's court-ordered parenting time.

In August 2020, the case management judge found the mother in contempt of two parenting orders, and made a specific finding that the mother was trying to alienate the children from the father. She ordered the parties to engage in reunification therapy, and set up a schedule for the father's parenting time. [2021 CarswellAlta 1142 (Q.B.)]

The mother appealed the case management judge's order to the Alberta Court of Appeal, but her appeal was dismissed. [2020 CarswellAlta 2303 (C.A.)]

The parties next appeared before the case management judge on February 8, 2021. By that point, the father had not seen the children since June 2020. The case management judge stayed the father's court-ordered parenting time with the older child while the reunification counsellor tried to deal with the situation, but gave the father parenting time with the younger child on February 11, 19, and 25, 2021.

On February 11, 2021, instead of facilitating the father's access with the younger child as ordered, the mother went to the police station, and alleged that the father had sexually abused the younger child. In an email exchange with the reunification counsellor, the mother claimed she had decided to pursue a "formal avenue" because she had "not successfully leveraged the case management sessions as a mode of dealing with matters of safety and concern" and had instead "been accused of 'parental alienation' in interim findings, which has not been substantiated by tested evidence, and attempting to delay the process."

The RCMP investigated the mother's allegations, but were unable to corroborate them, and advised the parties that it had no concerns about the children's safety with the father.

As a result of the mother's failure to comply with the February 8, 2021 Order, the father brought a further application for contempt. The case management judge heard the application, and found the mother in contempt of court. She also determined that it would be in the children's best interests to be placed in the father's primary care pending a further hearing that had been tentatively scheduled for late April 2021, and ordered accordingly.

The mother appealed. After quickly disposing of the mother's claims that she had been denied due process and that the case management judge was biased against her, the Court of Appeal considered the mother's arguments that: (a) she had a "reasonable excuse" for not complying with the February 8, 2021 Order; and (b) changing the parenting schedule was not an appropriate way to sanction the mother's contempt.

Pursuant to rule 10.52(3) of the *Alberta Rules of Court*, a judge may find a person in contempt of court if s/he does not comply with an order, other than an order for the payment of money, "without reasonable excuse". For further discussion of the "without reasonable excuse" defence to contempt in Alberta, see *Envacon Inc v. 829693 Alberta Ltd*, 2018 CarswellAlta 2097 (C.A.) at paras. 30-41.

Other jurisdictions across Canada allow for similar defences when dealing with allegations of contempt. See, for example, *Janowski v. Zebrowski* (2019), 29 R.F.L. (8th) 186 (Ont. S.C.J.), where Justice Trimble explained that when a parent argues justification as a defence to an allegation that s/he has breached an access order:

There must be clear and compelling reasons to legally justify violation of an order. In order to do this, the parent must show, by admissible evidence, that he or she has a reasonably held belief that there is a good reason to defy the order, such as imminent harm to the children. Putting it another way, the defaulting parent's belief must be sincerely held. A sincere belief of immanent harm or danger, alone, is not sufficient. There must be a validly objective justification for the breach based on the child's needs and interests, based in evidence (*Kassay v. Kassay*, [2000] O.J. No. 3373 (Ont. S.C.J.), at para. 25; *Docherty v. Catherwood*, 2015 ONSC 5240 (Ont. S.C.J.), at para. 19; and *Houben v. Maxwell*, 2016 ONSC 2846 (Ont. S.C.J.), at p. 12 and 23, *Jackson v. Jackson*, 2016 ONSC 3466 (Ont. S.C.J.), at para. 59 to 61).

If a parent can show they did not act with the intention of disobeying a court order, but both subjectively ***and*** objectively in the best interests of the child, a finding of contempt may be avoided. See also *Gaudet v. Soper* (2011), 95 R.F.L. (6th) 32 (N.S. C.A.); *L. (A.G.) v. D. (K.B.)* (2009), 65 R.F.L. (6th) 182 (Ont. S.C.J.); *Campo v. Campo*, 2015 CarswellOnt 3130 (S.C.J.); *Paton v. Shymkiw* (1996), 26 R.F.L. (4th) 22 (Man. Q.B.); *Docherty v. Catherwood*, 2015 CarswellOnt 12595 (S.C.J.).

In this case, the Court of Appeal was not persuaded that the mother had a reasonable excuse to not comply with the February 8, 2021 Order. The case management judge had found that after the Order was made, the mother "commenced a series of actions to provide her with an excuse to breach the order", and there was ample evidence in the record to support this conclusion.

The Court of Appeal then turned to the mother's argument that the case management judge had erred in changing the parenting arrangements as a punishment for her contempt. However, this argument ignored the key distinction between changing parenting arrangements to punish a parent for contempt, versus changing them in order to protect a child from a parent who refuses to comply with court orders:

> [60] Although the [Ontario Court of Appeal] was clear [in *Chan v. Town* (2013), 34 R.F.L. (7th) 11 (Ont. C.A.) at para. 6] that a change in parenting is not an appropriate punishment for contempt, we do not read this decision as foreclosing the possibility that a change in parenting may be required to protect the best interests of the child when a parent fails to comply with court orders and is found in contempt. **A change in parenting where required to protect the children's best interests is available, not as a punishment per se, but as a consequence of a parent who fails to comply with court orders. Failure to comply with a court order made in the children's best interests is not in their best interests. Nor is persistent failure to do so.**
>
> . . . . .
>
> [62] In summary, **a change in parenting is available following a finding of contempt. It should be used with restraint. It must be proportionate** to the gravity of the conduct and the personal culpability of the contemnor and the court must consider other, less drastic measures. **The overriding principle is whether the order is in the best interests of the child**. Two of the courts' fundamental obligations form the foundation of this case: the obligation to safeguard the dignity of the courts and the force of their orders, and the obligation to safeguard the best interests of children. The primary mechanism by which the courts protect children is the making of orders. **A parent's wilful and repeated contempt of court orders may force the court to consider whether it can effectively maintain its *parens patriae* role while the children are in that parent's care. In rare circumstances, a change of parenting might be necessary in service of the children's best interests and the courts' ongoing obligation to protect them.** [emphasis added]

In this case, the Court of Appeal was of the view that the case management judge placed the children with the father, not to punish the mother, but because it would be in their best interests to live with the father, at least for the time being. Accordingly, the Court of Appeal dismissed the mother's appeal from the contempt finding.

That being said, the Court of Appeal was still required to determine whether the mother had raised any basis for overturning the case management judge's finding that it would be in the children's best interests to reside with the father.

The Court started by explaining that when dealing with alienation cases, there are usually only four options available to the court

> [63] In the context of parental alienation generally, although not specific to contempt, there are four options available to the court:
>
> > Do nothing and leave the child with the alienating parent;
> >
> > Direct a custody reversal by placing the child with the rejected parent;

> Leave the child with the favoured parent and order therapy; or
>
> Provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.
>
> *B(RM) QB* at para 112; Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 8th ed, (Toronto: Irwin Law, 2020) at 622, citing *WC v CE*, 2010 ONSC 3575 at para 129.

In this case, the case management judge had considered the provisions of s. 16 of the *Divorce Act*, including the mother's refusal to facilitate a relationship between the father and the children, and concluded that it would be in the children's best interests to be placed with the father (at least temporarily). And, given the high standard of review that applies in parenting cases (see *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) at para. 13), there was simply no basis to interfere with the case management judge's order in this case.

As a result, the appeal was dismissed.

Hopefully, this decision will serve as a wakeup call to the mother to stop trying to prevent the children from having a relationship with their father. But if it doesn't, and we suspect that it won't given the mother's conduct to date, she is now at very serious risk of losing her children.

Capar v. Vujnovic, 2021 CarswellOnt 10572 (S.C.J.) – *Setting aside domestic contracts*

Ohhhh . . . You Mean *that* House . . .

This case involves section 56(4) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 — the steam engine that drives the Ontario cottage industry of claims to set aside domestic contracts.

Now, full disclosure is, of course, of *fundamental* importance. Without proper disclosure, parties to a domestic contract — such as a marriage contract — cannot truly understand the effect of the contract on their rights and entitlements. Full disclosure is, indeed, the most basic obligation in family law: *Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.); *Arenburg v. Arenburg*, 2016 CarswellNS 937 (C.A.); *Smith v. Smith* (2016), 84 R.F.L. (7th) 1 (Alta. C.A.); *Burke v. Poitras* (2018), 22 R.F.L. (8th) 266 (Ont. C.A.). And courts are asked to set aside domestic contracts all the time.

But with great power comes great responsibility.

There are too many cases where one party looks to set aside a valid contract in the hopes of shaking loose a more favourable settlement — this causes a chilling effect on the legal profession: *Balsmeier v. Balsmeier* (2016), 80 R.F.L. (7th) 274 (Ont. S.C.J.). Courts should strive to uphold domestic contracts without presumption or hesitation, and there is no presumption that courts should be hesitant in enforcing a proper contract: *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.); *Butty v. Butty* (2009), 75 R.F.L. (6th) 16 (Ont. C.A.); *Hojnik v. Hojnik* (2010), 81 R.F.L. (6th) 288 (Alta. C.A.); *Bradshaw v. Bradshaw* (2011), 7 R.F.L. (7th) 441 (B.C. S.C.); *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.).

It has even been suggested that the court should treat the reasonable best efforts of parties to address their affairs in a contract as presumptively dispositive: *Ramdial v. Davis (Litigation guardian of)* (2015), 68 R.F.L. (7th) 287 (Ont. C.A.); *Cheng v. Li* (2015), 69 R.F.L. (7th) 306 (Alta. C.A.); *Toussaint v. Toussaint*, 1982 CarswellNB 70 (C.A.).

In this case, Justice Emery gave effect to these principles.

The parties started dating in 2011. At that time, the wife owned a home on Grey Owl Run that she had owned since 2004. When the parties married in 2012, *the husband moved into the Grey Owl Run property with the wife* such that it became the matrimonial home. They had a child in 2013.

The parties signed a Marriage Contract in 2016. In the Contract, the Grey Owl Run property — the wife's only material asset — was excluded from equalization, along with any assets into which the proceeds of that property could be traced.

When the parties separated in 2019, the husband contested the validity of the Marriage Contract on the basis that the wife had not disclosed the *value* of the Grey Owl Run property in 2016, or the significant increase in its value since 2004.

There was no question that the husband had signed the Marriage Contract, and with the benefit of Independent Legal Advice. There was no question of duress, misrepresentation, or any misunderstanding. The only issue was whether or not the wife had provided "full disclosure."

After concluding that the issue of the enforcement of the Marriage Contract lent itself to a motion for summary judgment, Justice Emery considered the issue of disclosure. A challenge to set aside or to nullify a marriage contract in Ontario is brought under s. 56(4) of the *Family Law Act*:

> **Setting aside domestic contract**
>
> 56.(4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party **failed to disclose** to the other **significant assets**, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract. [emphasis added]

Notably, s. 56(4)(a) makes no mention of the "value" of assets or liabilities. Nor, for that matter, does it refer to income disclosure — but both requirements have, to a certain extent, been "read in" to the section: *Underwood v. Underwood* (1994), 3 R.F.L. (4th) 457 (Ont. Gen. Div.), var'd (1995), 11 R.F.L. (4th) 361 (Ont. Div. Ct.); *Dewling v. Dewling* (2009), 72 R.F.L. (6th) 405 (N.L. U.F.C.).

The first consideration in the process is whether the party looking to set aside the marriage contract can demonstrate that one of the listed circumstances within s. 56(4) has been engaged. Second, the court must then consider whether it is appropriate to exercise its discretion to set aside the contract (or a provision within it): *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (Ont. C.A.).

The husband argued that the wife did not disclose the value of the Grey Owl Run property at the time they entered into the Marriage Contract. This was the sole asset at issue regarding the Marriage Contract in the application and on the motion.

The wife argued that *awareness* of the other's assets is sufficient to avoid setting aside a marriage contract. This is probably a slight overstatement of the law. The present state of the law seems to be that a party cannot enter into a marriage contract knowing of shortcomings in disclosure at the time, and then rely on those very shortcomings in a later effort to set aside the contract: *Quinn v. Epstein Cole LLP* (2007), 44 R.F.L. (6th) 337 (Ont. S.C.J.); *Butty v. Butty* (2009), 75 R.F.L. (6th) 16 (Ont. C.A.); *Golton v. Golton* (2018), 19 R.F.L. (8th) 129 (Ont. S.C.J.); *Hartshorne v. Hartshorne* (2004), 47 R.F.L. (5th) 5 (S.C.C.); *P. (J.L.) v. R. (J.)*, 2014 CarswellSask 754 (Q.B.).

There are also cases that suggest there is no need to provide specific financial disclosure where the other party was *aware* of the specific assets **and had as much ability to value those**

assets: *Armstrong v. Armstrong* (2006), 32 R.F.L. (6th) 244 (Ont. C.A.); *Bhupal v. Bhupal* (2009), 69 R.F.L. (6th) 43 (Ont. C.A.); *Faiello v. Faiello* (2019), 30 R.F.L. (8th) 1 (Ont. C.A.).

In this case, it was not necessary for the wife to provide the husband with the value of the Grey Owl Run property at the time the Marriage Contract was entered into; the husband was aware of it (he was living in it), and he was just as capable of determining the value, or alternatively, he could have asked questions.

As a result, Justice Emery concluded there was no genuine issue requiring a trial to determine that the husband had adequate disclosure of the wife's interest in the Grey Owl Run property at the time they entered the Marriage Contract. There was no failure to disclose a significant asset.

Nor did his Honour accept that the husband "did not understand" what he was signing or that the legal advice he received was not truly "independent". For the husband, there was also the problem of the Certificate of Independent Legal Advice provided by the husband's lawyer, which was, absent evidence to the contrary, dispositive evidence of the fact of independent advice. As the Court explained in *Mantella v. Mantella* (2006), 27 R.F.L. (6th) 57 (Ont. S.C.J.):

> [39] But even in the unique and complex area of family law, a solicitor's duty is to her own client, and not to the other side. If the solicitor fails to provide competent legal advice, that is an issue for her own client. **Where a solicitor certifies that she has provided independent legal advice, so far as the opposite party is concerned that should end the matter**: *non est factum* will not be available unless the opposite party knew or was willfully blind to the fact that the other party did not understand the agreement. The solicitor's certification is **dispositive evidence** of comprehension on the part of the signatory, and not a representation from the solicitor herself to the opposite party. . . . [emphasis added]

The word "dispositive" is never good when used against you. And as the husband did not put forward any contradictory evidence from his lawyer, that was the end of that

Finally, the husband alleged duress on the ground that he believed that the marriage would end if he did not sign the Marriage Contract. But, unfortunately for the husband, that is not duress. Duress or illegitimate pressure cannot come from within. One's own perceptions cannot amount to duress: *M.D. v. A.C.*, 2017 CarswellOnt 16333 (S.C.J.) at paras 82-83. Furthermore, most cases suggest that "sign or no marriage" is not illegitimate pressure: *Melnyk v. Melnyk* (2010), 84 R.F.L. (6th) 137 (Man. Q.B.); *Toscano v. Toscano* (2015), 57 R.F.L. (7th) 234 (Ont. S.C.J.); *Verkaik v. Verkaik* (2009), 68 R.F.L. (6th) 293 (Ont. S.C.J.), aff'd (2010), 85 R.F.L. (6th) 233 (Ont. C.A.); *Balsmeier v. Balsmeier*, 2016 CarswellOnt 1794 (S.C.J.). Were it otherwise, many contracts would be susceptible to being overturned on this basis.

Ultimately, Justice Emery concluded (properly, in our view) that the husband regretted signing the Marriage Contract. But that was not sufficient to set it aside. A marriage contract should not be set aside because one of the parties later regrets signing it: *McCall v. Res*, 2013 CarswellOnt 5865 (C.J.).

And that, as they say, was that — or at least for the husband it was.

Moncur v. Plante, 2021 CarswellOnt 10774 (S.C.J.) – *Arbitration or Court?*

We Concur with *Moncur*

We recently discussed the Ontario Court of Appeal's decision in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), in which they set aside a finding that a mother was in contempt of the parenting provisions of a consent order, and replaced it with a declaration that the mother had breached the order (see the 2021-34 edition of *TWFL* (September 6, 2021)).

As it so often happens in high conflict parenting cases, the parties' trip to the Court of Appeal did not end their dispute. Far from it. The parties are now fighting over whether the case should be heard by an arbitrator (the mother's position) or a judge (the father's position).

Paragraph 43 of the parties' 2018 Consent Order, which was based on comprehensive Minutes of Settlement that were negotiated and signed with advice from counsel, required the parties to arbitrate any future disputes about parenting:

> 43. If the parties are unable to resolve the [parenting] dispute through negotiation and/or mediation within 30 days of the request for review or variation, they shall arbitrate the issue with Carol Bartels or if Carol Bartels is unavailable, with an alternate mutually agreeable mediator. The arbitration shall be binding on the parties and the parties shall share up-front cost of arbitration equally. The arbitrator shall have the ability to determine the proportion for payment of costs (if any) by either party in his or her arbitration award.

However, for reasons that are not explained in the decision, the parties never actually signed a formal arbitration agreement.

In 2020, the *wife* commenced a Motion to Change the parenting provisions of the 2018 Consent Order. She was self-represented at the time. However, after she retained counsel, she took the position that her own Motion to Change should be stayed, and that the parties' dispute should be arbitrated in accordance with the terms of the Consent Order.

But the husband did not want to arbitrate. He wanted the Court to dismiss the wife's motion to stay the Motion to Change, and then dismiss the Motion to Change on the basis that the mother could not establish a material change in circumstances. He argued that the Consent Order alone was insufficient to require the parties to arbitrate their dispute, as it did not meet the formal requirements for a binding family arbitration agreement under the *Family Law Act* and the *Arbitration Act, 1991*.

Up until 2007, there was no question that paragraph 43 of the Consent Order would have been sufficient to require the parties to arbitrate their dispute. The case law at that time was clear that if the parties had previously agreed to arbitrate a family law dispute, neither party could resile unilaterally from arbitration.

For example, in *Marchese v. Marchese* (2007), 35 R.F.L. (6th) 291 (Ont. C.A.), the Court of Appeal determined that the parties were bound to arbitrate based on a written consent simply stating that, "[t]he parties shall attend for mediation/arbitration with Phil Epstein regarding all

issues in the action." And, as a result, it stayed the court proceeding pursuant to s. 7(1) of the *Arbitration Act, 1991*, which provides that "[i]f a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced **shall**, on the motion of another party to the arbitration agreement, stay the proceeding." [emphasis added] (See also s. 7(2) of the *Arbitration Act, 1991*, which provides a narrow list of exceptions to s. 7(1).)

Similarly, in *Dormer v. McJannet* (2006), 35 R.F.L. (6th) 418 (Ont. S.C.J.), Justice Mackinnon found that even though the parties had not signed anything, the correspondence between the parties and their lawyers established that they had, in fact, reached an agreement to arbitrate their custody and access issues. And, having found that the parties had agreed to arbitrate their dispute, Justice Mackinnon directed the parties to proceed with that process.

The situation changed in 2007 when the Ontario Government amended the *Family Law Act* and the *Arbitration Act, 1991* to add specific rules for family arbitrations. One of the new rules, which is found in s. 59.6 of the *Family Law Act*, is that a family arbitration award will only be enforceable if the parties have signed a written family arbitration agreement that complies with the regulations under the *Arbitration Act, 1991*. The applicable regulation states that a family arbitration agreement must:

- Confirm that the arbitration will be conducted in accordance with the law of Ontario or another Canadian jurisdiction;

- Confirm the parties' appeal rights, subject to the caveat that parties in family law cases *cannot* contract out of the right to appeal entirely, and at a minimum must always be able to appeal on a question of law with leave of the court; and

- Name the arbitrator.

The regulation also requires the named arbitrator to confirm, in writing, that they will treat the parties equally and fairly, that they have received the necessary prescribed training, and that the parties have been screened for power imbalances (and that the results of the screening will be considered throughout the process).

While these requirements sound simple enough, they are actually quite inconvenient and cumbersome to implement in practice (and *that* is what we want — a settlement process that is highly cumbersome and inconvenient — forgive the sarcasm). As we noted in our comment on *Giddings v. Giddings* (2019), 35 R.F.L. (8th) 418 (Ont. S.C.J.) in the 2020-06 edition of *TWFL* (February 10, 2020):

The difficulty is that it is sometimes very inconvenient to take those steps when parties want to settle their case "now" — at a Settlement Conference or four-way meeting, for example. As a result of the amendments to the *Arbitration Act, 1991* and the *Family Law Act*, it is not (or, subject to what we suggest below, may not be) possible for parties in a four-way meeting, before a motion, in a Settlement Conference or pretrial — or at the courtroom door — to settle their

matters in any way that includes a binding commitment to arbitration without actually signing an Arbitration Agreement at that time (and having the chosen arbitrator sign it as well).

As there was no dispute in *Moncur* that the parties' agreement to arbitrate did *not* comply with the regulation, Justice Laliberté had to consider whether the failure to comply with the prescribed formalities was a sufficient reason to let the father escape the clear wording of the Minutes of Settlement and Consent Order (and his clear intention at the time) that required the parties to arbitrate their dispute. As we also discussed in our comment on *Giddings*, the case law that has considered this issue thus far is hopelessly conflicted:

> There are now a few decisions that go each way on this issue. In one corner, we have cases like *Giddings and Lopatowski* [where courts have held parties to agreements to arbitrate that did not meet the formal requirements of the *Family Law Act* and the *Arbitration Act, 1991*]; and in the other corner, we have cases such as *Horowitz v. Nightingale* (2017), 94 R.F.L. (7th) 151 (Ont. S.C.J.), *Wainwright v. Wainwright* (2012), 21 R.F.L. (7th) 415 (Ont. S.C.J.), *Davies v. Davies* (2011), 11 R.F.L. (7th) 348 (Ont. S.C.J.) (where an Arbitration Agreement was found invalid for want of a Certificate of Independent Legal Advice), *Imineo v. Price* (2011), 14 R.F.L. (7th) 193 (Ont. C.J.) and *Michelon v. Ryder*, 2016 CarswellOnt 8764 (Ont. C.J.) (which suggests arbitration cannot even be awarded on consent).

That being said, as we suggested in our comment about *Giddings*, there may be a simple solution to this problem based on the Court of Appeal's decision in *Geropoulos v. Geropoulos* (1982), 26 R.F.L. (2d) 225 (Ont. C.A.):

> In the meantime, consider this. Again, s. 55(1) of the *Family Law Act* requires that all Domestic Contracts be in writing (and signed by the parties and witnessed). The section could not be more clear: "A domestic contract and an agreement to amend or rescind a domestic contract are **unenforceable** unless made in writing, signed by the parties and witnessed." A Family Arbitration Agreement is a Domestic Contract [s. 51].

In *Geropoulos v. Geropoulos*, 1982 CarswellOnt 253 (Ont. C.A.), the Court of Appeal confirmed that this section [at the time, s. 54(1)] was not intended to apply to agreements between counsel in the resolution of pending litigation between spouses. That is, counsel (and parties) are always free to resolve litigation — and that resolution need not comply with the formalities of (now) s. 55(1). This is because such agreement required the intervention of the court to be effective and their authenticity was assured by the court's supervision and control over them. That is, whether they were to be enforced or not was, ultimately, a matter for the discretion of the court. The Court of Appeal further noted that no purpose would be served by requiring that such agreements comply with the formalities of (now) s. 55(1).

See also *Owers v. Owers* (2009), 65 R.F.L. (6th) 1 (Ont. C.A.), where the Court of Appeal applied *Geropoulos* to uphold a pre-2007 family arbitration agreement that had not been signed by the parties, but refrained from considering whether the result would have been different had the agreement been made after 2007.

In any case, if family law litigants can settle litigation without signing a separation agreement (which is prescribed), why can those same parties not agree to arbitrate (or to mediate/arbitrate) without signing a family arbitration agreement? Notably, both separation agreements and family

arbitration agreements are "domestic contracts" to which the writing requirement otherwise applies. There does not appear to be a reasoned basis for treating them differently.

In addition to providing a way to prevent parties from escaping a clear agreement to arbitrate based on a technicality, *Geropoulos* also makes it clear that the court still retains discretion not to enforce family law agreements, but only in appropriate circumstances:

> [18] . . . The court's jurisdiction to enforce settlements or refuse to do so, notwithstanding any agreement between solicitors or counsel, is well established; whether they should be enforced or not, in the final analysis, is a matter for the discretion of the court and, in litigation under the *Family Law Reform Act*, a matter that would be subject to the court's overriding jurisdiction with respect to domestic contracts: *Scherer v. Paletta*, *supra*; 3 Hals. (4th) 650-51, paras. 1182-83; and ss. 18(4) and 55 of the Act.

The wife in *Moncur* raised the *Geropoulos* argument before Justice Laliberté, and his Honour agreed. And, since the parties had clearly agreed to arbitrate their dispute, his Honour stayed the proceeding in favour of the arbitration. He also ordered the parties to take the necessary steps to implement the terms of the Minutes and Consent Order, including entering "into a formal and secondary arbitration agreement with the required standard provisions set out in the *Family Arbitration Regulation* 134/07."

Unfortunately, his Honour did not explain how he had jurisdiction to compel the parties to *sign* an arbitration agreement that complied with the regulations; he merely stated that, "[t]he Court must have the power to require parties subject of a court order to live up to their obligations". While we are not aware of any authority for the proposition that a court can order a party to sign a particular form of agreement (or to actually *sign* anything for that matter), perhaps the authority to do so in this context could be derived from the court's inherent jurisdiction to control its own process and/or through s. 6 of the *Arbitration Act, 1991*, which provides that:

> 6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. **To assist the conducting of arbitrations.**
>
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
>
> 3. To prevent unequal or unfair treatment of parties to arbitration agreements.
>
> 4. To enforce awards. 1991, c. 17, s. 6. [emphasis added]

As the father did not appeal to Justice Laliberté's decision, we are going to have to keep waiting for either the Legislature to fix this problem by amending the legislation, or for an appellate court to decide the issue once and for all. In the meantime, if you are going to agree to resolve a matter through arbitration, you can and should avoid this issue entirely by ensuring that the parties and the arbitrator sign a proper arbitration agreement that complies with all of the

necessary formalities. But even if you don't, it appears the Court may very well hold parties to their bargains — as they should.

Charlesfort Developments Limited v. Ottawa (City), 2021 CarswellOnt 10606 (C.A.) – *Expert Fees*

Experts. Where Would We Be Without Experts. And Their Fees.

While this is not a family law case, family law cases frequently involve experts, and in *Charlesfort*, the Ontario Court of Appeal offers some helpful comments regarding experts and costs.

There is a distinction between legal fees and expert fees, the latter of which are disbursements. As such, "reasonably necessary" expert fees should not be arbitrarily reduced even though a costs award is generally not meant to provide substantial or full indemnification. Expert fees are subject only to the test of reasonableness.

In *Charlesfort*, the plaintiff successfully sued the City of Ottawa for misrepresentation with respect to land it purchased for a condominium development. It was awarded damages of $4.5 million. However, the City's appeal was allowed, and the claim dismissed. The Court of Appeal then asked for written cost submissions from the parties.

The City of Ottawa claimed a bit over $560,000 in expert fees for Deloitte & Touche, their experts. As one might expect, Charlesfort argued that figure was excessive, particularly since no one from Deloitte actually gave evidence at trial. (The parties ultimately agreed on damages.)

The Court of Appeal opined that a party is entitled to be reimbursed for expert fees that were "reasonably necessary" — even where the expert was not actually called to give evidence. Just because the expert was not called at trial did not mean that the expert did not "add value" to the advance of the litigation. The fact that the expert was not called could be, at most, a factor in the reasonableness analysis.

As suggested by the Court of Appeal:

> [4] The fees of experts are subject to a reasonableness test, just as are the fees of counsel. The fees of experts are not, however, subject to further reduction based on the distinction between substantial indemnity costs and partial indemnity costs: *3664902 Canada Inc. v. Hudson's Bay Co. (c.o.b. Bay Department Stores)*, (2003), 169 O.A.C. 283, at para. 17. Put another way, the fact that a party may have paid its expert an exorbitant fee for their services does not mean that the other party must pay that amount. The other party must only pay what the court views as reasonable for the services provided: *Yip v. HSBC Holdings plc*, 2018 ONCA 626, 141 O.R. (3d) 641, at paras. 89, 91.

The Court of Appeal considered the following factors when determining the reasonableness of expert fees:

- the complexity of the matter;
- the amount claimed in the action;

- the precedential value of the case, if any;
- whether the expert report helped advance the claim or defence;
- whether the expert report helped narrow the issues;
- whether the overall amount of expert fees was reasonable; and
- the general principle of proportionality.

Here, the Court of Appeal thought the experts fees to be "more than is reasonable for the other party to bear." Ultimately, the Court reduced the expert fees by about $37,000, noting that the difference in expert fees (when the expert had to only deal with one issue) and the legal fees (where counsel had to deal with all issues) was slightly unbalanced.

Acquilini v. Gunsten (2021), 58 R.F.L. (8th) 161 (Alta. Q.B.) – *Transfers for Consideration*

The plaintiff, Acquilini, was a judgment creditor of one of the defendants, Mr. Gunsten. Acquilini wanted to set aside the transfer of Mr. Gunsten's interest in the matrimonial home to his co-defendant and spouse, Ms. Gunsten.

Master Prowse began his decision in *Acquilini* with the following quote from the Alberta Law Reform Institute's report with respect to reviewable transactions:

> Current law offers one set of rules for attacking all transfers of property that have the effect of hindering or defeating creditors. This produces uncertain and unfair results in some cases, the most significant of which are those involving payments of money and transfers of property in satisfaction of legally recognized spousal claims to support and division of property. Questions abound. Is a transfer of property pursuant to a spousal property settlement void or valid according to whether a debtor-transferor was not conscious of its effect on his or her creditors rights of recovery? Can a transfer of property under a bona fide settlement agreement or court order be undone if it is subsequently challenged by creditors of the transferring spouse?

At the time, the Uniform Law Conference of Canada was proposing that this type of "spousal transfer" only be set aside where the spouses colluded to defeat one of their creditors. While this recommendation has not been incorporated into the statutory law of any of the provinces (to the best of our knowledge), Master Prowse considered the issue in *Acquilini* taking this theory into account.

In rendering his decision, Master Prowse relied on two specific Alberta cases: *Laventure, Re* (1985), 44 R.F.L. (2d) 158 (Alta. Q.B.) and *Exelby & Partners LLP v. Gibson*, 2005 CarswellAlta 24 (Q.B.).

In *Laventure*, the spouses were married in 1961, separated in 1979 and divorced in 1980. In February 1980, the husband transferred his interest in the matrimonial home to the wife, who assumed the mortgage, in settlement of her rights to spousal support and property division. The husband filed for bankruptcy in January 1981. His Trustee applied to have the transfer declared void.

The Court in *Laventure* declined to declare the transfer void:

> [8] The evidence as a whole . . . satisfies me that the parties acted in good faith in making the transfer as part of a marriage breakdown settlement and that the wife's assumption of the mortgage on the land constituted "valuable consideration", particularly since the evidence shows she has made approximately $10,000 in payments on that mortgage and one might readily consider those payments as being part performance of her undertaking to assume the mortgage. Further, I find that the wife's undertaking to accept the home in settlement of her matrimonial property rights (thereby in effect undertaking not to sue therefor, in fact) constitutes valuable consideration. The court need not inquire into the adequacy of the valuable consideration. It is sufficient if the consideration is not grossly inadequate. . . .

. . . . .

> [11] Still further it is clear from the evidence that the intent of both parties in making the transfer was to settle the matrimonial property between them on their separation. Such being the case, it cannot be said that the transfer was given with a view to giving a preference.

Again the motion must fail under these sections.

Exelby presented a similar situation. The bankrupt, Mr. Gibson, and Ms. Gibson were married in 1995. They purchased a matrimonial home in joint names in March 1998. The parties separated in early January 5, 2003, and in October of 2003, Mr. Gibson transferred his interest in the home to Ms. Gibson for a stated consideration of $1.

Mr. Gibson's Trustee moved to set aside the transfer based on a lack of consideration on the basis it was a fraudulent preference and, therefore, void under what are now ss. 95 to 98 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

The Court upheld the Registrar's refusal to set aside the transfer of the home:

> That Judgment [*Laventure*] demonstrates an analysis of the same sort of arguments that have been raised by the Trustee in argument before me. See paragraphs 23, 24 and 25. The same sort of analysis applies to this case, the evidence relied upon by the Registrar overcomes all those objections, demonstrating **a lack of intent on the part of the wife to defraud, a lack of knowledge of insolvency** and overcoming the presumption raised by the relationship between the parties. [emphasis added]

Using similar reasoning to *Laventure* and *Exelby*, Master Prowse decided that the transfer to Ms. Gunsten should not be set aside:

- The separation agreement between Mr. and Ms. Gunsten resulted from a long-standing breakdown in their marriage, which marriage was in any event coming to an end. The separation was not a contrived event, designed to avoid creditors.

- The value provided to Ms. Gunsten under the separation agreement was reasonable and proportionate in the circumstances. Mr. Gunsten's equity in the home was about $15,000 to $20,000. In return for the transfer of this equity, Ms. Gunsten released all claims for future alimony.

- Ms. Gunsten was not aware of Acquilini's status as a creditor when she entered into the separation agreement, and there was no evidence that she knew Mr. Gunsten was insolvent at the time of the conveyance.

This decision falls in line with similar decisions in other provinces. For example, in B.C., it is also clear that where a disposition is made for valuable consideration, for the disposition to be set aside, both the transferor and transferee must have the requisite fraudulent intent: *Chan v. Stanwood*, 2002 CarswellBC 1982 (C.A.); *Sutton v. Oshoway*, 2011 CarswellBC 1220 (C.A.); *Mawdsley v. Meshen* (2012), 14 R.F.L. (7th) 251 (B.C. C.A.).

For those readers that may be interested, *Feher v. Healey*, 2006 CarswellOnt 5203 (S.C.J.), aff'd 2008 CarswellOnt 1400 (C.A.) offers a good discussion of the law of consideration as it applies to fraudulent conveyances. And *Ni v. Zheng*, 2010 CarswellOnt 5547 (S.C.J.) and *Liu v. Wang*, 2009 CarswellBC 3545 (S.C.) make it clear that the settlement of matrimonial dispute may be good and valuable consideration.

Some older cases also suggest that where the transfer is for good and valuable consideration, even knowledge of fraudulent intent does not void a transfer unless the *transferee* was actually a party to the fraudulent intent and purpose: *Meeker Cedar Products Ltd. v. Edge*, 1968 CarswellBC 6 (C.A.). Therefore, good and valuable consideration — including the reasonable settlement of a matrimonial dispute — appears to be key.

Albaum v. Albaum (2021), 57 R.F.L. (8th) 418 (Ont. S.C.J.) – *SSAG in High Income Cases*

To SSAG, or Not To SSAG? That Is the Question.

The Applicant sought an order for interim spousal support of $82,551 a month, retroactive to August 1, 2019. This ask was based on the mid-range of the SSAGs and the Respondent's average income for support purposes over the previous four years of $2.264 million. But even with that income, $82,551 a month in spousal support is a lot of money.

The Respondent agreed that the Applicant was entitled to spousal support. However, he argued that it was not possible to properly review and assess the voluminous affidavit evidence and the competing and untested expert reports within the confines of a one-hour motion. He wanted a trial.

The 56-year-old Applicant and the 57-year-old Respondent were married in November 1989, and separated in September 2018. They had two adult children.

They enjoyed a traditional marriage, in which the Applicant had given up her career for the children and to manage the home. The Respondent was the primary income earner, and his business had been very successful over the past few years. The Respondent's own expert acknowledged that over the past three years, the Respondent's annual income for support purposes had averaged approximately $1.8 million.

The couple enjoyed a very high standard of living. The children attended private schools and studied abroad. They took frequent family vacations to a wide variety of international destinations, travelling first class or business class and staying in luxury hotels.

Justice Monahan cited the usual case law and principles regarding interim spousal support (*Driscoll v. Driscoll*, 2009 CarswellOnt 7393 (S.C.J.); *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 CarswellOnt 14841 (S.C.J.)):

- On a motion for interim support, the court does not engage in a comprehensive review and analysis of the parties' circumstances, which is better left for trial. The court achieves "rough justice" at best;

- The purpose of interim support is to provide the parties with reasonable arrangements to meet the needs and means of the parties until trial. Therefore, on applications for interim support, the recipient's needs and the payor's ability to pay assume greater significance; and

- An interim support order should be sufficient to allow the recipient to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay allows for it.

Each of the parties retained experts who, shockingly, differed as to the Respondent's income for support purposes:

Year	2017	2018	2019	2020	4-year average	3-year average
Applicant's expert	$2,690,000	$1,996,000	$2,733,000	$1,638,000	$2,264,000	$2,122,000
Respondent's expert	$1,786,000	$2,327,000	$2,333,000	$758,000	$1,801,000	$1,806,000

It was evident that the Respondent's income varied significantly from year-to-year. For this reason, the Respondent's stated practice was to maintain significant working capital in his operating company to fund expenses. He also said it was his practice to keep a "cushion" to pay for family expenses during slow periods.

However, despite the volatility, it was clear that the Respondent had consistently earned very substantial income through his business.

The Respondent's company had pre-tax corporate income of $2.191 million in 2020. The Respondent argued that none of that pre-tax corporate income was available for support. He said that the company required an annual float of approximately $1.5 million to fund operating and personal expenses. He also claimed that because the company began the year with no retained earnings (2020 was the first year the business operated through a corporation), none of the pre-tax income was "available."

Notwithstanding the Respondent's position, his expert opined that $496,000 of pre-tax corporate income was available for spousal support purposes, which was a key consideration leading him to conclude that the Respondent's total income for 2020 was only $758,000.

In contrast, although the Applicant's expert fairly recognized the need to build up substantial working capital in the company, she nevertheless attributed $1.256 million of corporate pre-tax income to the Respondent and calculated his 2020 income as $1.638 million — about $900,000 higher than the Respondent's expert.

The Respondent argued that, given the volatility in his income, the Court should take a cautious approach in determining his income for support purposes. For example, argued the Respondent, in the 2021 fiscal year, the company had not earned any income and had been operating at a loss. And if he was required to make substantial spousal support payments based on historic income, he would be required to draw on corporate capital and thereby risk the success of the company — a "don't kill the goose that lays the golden egg" argument: *Kowalewich v. Kowalewich* (2001), 19 R.F.L. (5th) 330 (B.C. C.A.).

Justice Monahan agreed that he should be cautious in determining the Respondent's income on a motion for interim support — particularly where the Court had not had the benefit of a complete record or cross-examinations. For that very reason, his Honour accepted the conclusions of the Respondent's expert. While the Respondent's expert took into account the Respondent's view that

it was necessary to build up retained earnings for working capital in the company, at the end of the 2020 fiscal year, the company had approximately $1.344 million in working capital. Even being conservative, these retained earnings were sufficient to fund corporate operations for quite some time. In addition, the value of the Respondent's personal investments had increased by over $1 million since January 2020.

Therefore, Justice Monahan determined the Respondent's income for support purposes was $1.8 million a year. That had been his average income over the past three years and the past four years as determined by his own expert. As for the fact that the Respondent had not yet earned any income in fiscal 2021, he had been in the same position in March of 2020, but still ended the year with pre-tax corporate income of nearly $2.2 million
.
This does not seem to be an unreasonable conclusion, especially as the business (if not the corporation) had been earning significant income for many years and given that the three- and four-year averages were both $1.8 million. While s. 17 of the *Guidelines* does not mandate income-averaging, the *Guidelines* do rely on the recent past to predict the near future, and averaging is permitted when it results in a fair determination of income: *Mason v. Mason* (2014), 47 R.F.L. (7th) 173 (Ont. S.C.J.), rev'd (2016), 83 R.F.L. (7th) 1 (Ont. C.A.); *Harras v. Lhotka* (2016), 83 R.F.L. (7th) 272 (B.C. C.A.). But it is important to understand that the *Guidelines* do **not** adopt averaging as the default methodology. And remember, using an average income, *by definition*, means that the average income used will be higher than some years in the recent past.

While corporations placed in the Applicant's name by the Respondent (for liability purposes) had earned income in previous years, for the purposes of the motion it was clear that the Applicant has not earned any employment income since separation. Her income was, therefore, determined to be zero.

Based on an income to the Respondent of $1.8 million and an income of zero to the Applicant, Justice Monahan determined mid-range SSAG support to be $65,625 a month, which would provide the Applicant with net disposable income of $33,674 per month.

Justice Monahan noted that, in considering the appropriateness of this level of support, the primary considerations were the Respondent's ability to pay and the Applicant's need. On an income of $1.8 million, the Respondent certainly had the ability to pay. As for "need", the Applicant's most recent Financial Statement suggested a monthly budget of $33,660.15 — perfectly aligning with the after-tax income she would have available from a support payment of $65,625.

That said, the Applicant's budget included over $8,300 per month for clothing for herself and the two adult children, over $5,000 per month for health-related expenses, and $5,000 per month for vacations, amongst other items. As Fitzgerald said, "The rich are different from you and me." (Well, at least different from me/us.)

Therefore, Justice Monahan ordered interim support of $65,625. This is a very high interim support amount, and it would have been helpful for Justice Monahan to have set out why he felt

the SSAGs were strictly applicable to an income so very much in excess of $350,000 and, more importantly, why he selected the mid-range SSAG value.

Although it does happen, it is rare to apply the straight SSAG ranges to an income in the range of $1.8 million — and even more rare to use the resulting SSAG mid-range in such circumstances. The mid-range is **not** the default and any tendency to simply default to the mid-range must be avoided. In fact, it has been described as an error to simply default to the mid-range. *L. (R.) v. L. (N.)* (2012), 22 R.F.L. (7th) 82 (N.B. Q.B.); *Brown v. Brown* (2013), 44 R.F.L. (7th) 403 (N.B. Q.B.); *Mason v. Mason* (2016), 83 R.F.L. (7th) 1 (Ont. C.A.).

Where income is far above the $350,000 "ceiling", as it was here, support will *usually* be below the low end of the SSAG range: *Climans v. Latner* (2019), 21 R.F.L. (8th) 96 (Ont. S.C.J.), aff'd (2020), 45 R.F.L. (8th) 283 (Ont. C.A.); *Derbyshire v. Derbyshire*, 2016 CarswellOnt 11992 (S.C.J.), aff'd 2017 CarswellOnt 16594 (C.A.); *M.T. v. J.S.*, 2018 CarswellBC 909 (S.C.). While there are always exceptions (and exceptions to exceptions), very respectfully, something more was needed here than just "he can afford it" and "it meets her stated needs."

The Applicant argued that support should be retroactive to August 2019. Before then, the parties' personal expenses had been funded through the Respondent's company. The Applicant argued that she had been required to deplete her capital in order to fund her living expenses.

Justice Monahan pointed to three main problems with the Applicant's claim for support retroactive to August 2019:

1. Since the date of separation the Applicant's net worth had increased by over $450,000.

2. If the monthly support order was made retroactive to August 2019, it would require a payment of well over $1 million, and Justice Monahan was rightly concerned that requiring a payment of that magnitude would cause difficulties with the ongoing funding of the company.

3. His Honour was also not persuaded that the Applicant had any need for a payment of that magnitude at that time.

In the end, as the motion was originally scheduled to be argued in February 2021, but had been adjourned, his Honour fixed the commencement date for the interim support payments at February 1, 2021.

Lavender-Smith v. Smith, 2021 CarswellNB 355 (C.A.) – *Lawyers as Witnesses*

You Can Be a Lawyer. Or You can be a Witness. But Don't Risk Being Both.

In the civil justice system, a lawyer cannot be both counsel and witness. This is one such story: Tum Tum! (That is supposed to be the "Law & Order" Tum Tum.)

Suffice it to say that it is *never* a good idea for counsel to swear an affidavit in a contested proceeding. As exemplified by this case, no good can come of it.

In a contentious divorce proceeding, the court below removed the solicitor of record for one of the parties because the lawyer filed his own affidavit. The Court of Appeal allowed the appeal, and reinstated counsel.

While a lawyer cannot act as both counsel and witness, the rule is not absolute. Counsel may offer affidavit evidence with respect to formalities or procedural matters: *Hughes v. Moncton (City)*, 2006 CarswellNB 477 (C.A.); *Garrick v. Dalzine*, 2015 CarswellOnt 5260 (S.C.J.). This case did not call this general rule into question. In this case, the issue related to the consequences of a violation of the rule. Was the rule a "bright line" such that a violation of the rule mandated removal (or possibly a new trial), or was removal a matter of discretion?

Ultimately, the New Brunswick Court of Appeal decided that the matter is one of judicial discretion. Therefore, in applying a bright line test in this case, the judge of the Court of Queen's Bench erred. Let's see how they got there.

The parties each had counsel: JCK and SD for the husband, and HM for the wife.

The parties were ordered to select a counsellor for their children, but they could not agree. The husband brought a motion to appoint his proposed counsellor. In responding to the motion, the wife's lawyer, HM, swore an affidavit about his professional experience with the husband's proposed counsellor in another case, and suggested the counsellor had given false and improper evidence. HM also swore that the husband's proposed counsellor had offered evidence outside the scope of his/her opinion. In short, HM's evidence was that the husband's proposed counsellor had not been impartial in the other case.

Recognizing he could not be both a witness and counsel on the motion, HM arranged for another lawyer, PH, to argue the motion for the wife as agent. Despite this, the husband's counsel called for HM to be removed as the wife's solicitor of record on the ground that he could not be both a witness and counsel in the same proceeding.

The Court of Appeal started by noting that the rule against being both witness and counsel in the same proceeding had been around for the last 175 years: *Shields v. McGrath*, 1847 CarswellNB 32 (C.A.). Uh-oh for HM.

Historically, this rule was absolute and required automatic removal as counsel if not a new trial. Double uh-oh for HM.

Fortunately for HM (and the wife), however, this automatic consequence had been ameliorated over time.

In considering the current state of the law, the Court of Appeal examined the justification for the rule in the first place — and who better to look to than the Man, the Myth, the Legend — Wigmore — who offered three reasons for the rule:

> 1. **The general principle that those with an interest in the cause cannot give evidence.** While the general prohibition has long since been abrogated, the principle itself remains important. Quite simply, a lawyer giving evidence gives at least the appearance of a conflict of interest. A lawyer owes his/her duty to their client, and this could all-too-easily conflict with a witness's duty to give truthful evidence. A lawyer may — maybe even unknowingly — adapt his or her testimony to best suit the client's interests.
>
> 2. **Public Perception.** Justice must be seen to be done, and the public could easily question any weight being given to the evidence of counsel whose primary duty is to the client. This damages the public's perception of the administration of justice, and may require a court to prevent counsel from continuing to act if s/he is going to testify. The importance of public confidence in the rule of law cannot be overstated.
>
> 3. **Potential to Confuse the Trier of Fact.** Evidence is evidence. Argument is argument. Allowing the same person to be both a witness and counsel could lead to confusion about which statements are evidence and which are not. And this could result in decisions that are not based solely on the evidence.

The Court of Appeal also noted a more modern justification not directly considered by Wigmore. A lawyer who acts as a witness puts his or her own credibility in issue, as does any other witness. Unlike other witnesses, however, the lawyer is being relied upon by the court. A lawyer whose testimony is found to have been inaccurate may have his or her credibility generally diminished in the eyes of the court. This impairs the lawyer's ability to persuade the court on behalf of his or her client.

In counterbalance is the principle that all relevant evidence is admissible, and that a client has a right to tender relevant evidence from anyone, including lawyers: *Phoenix v. Metcalfe*, 1974 CarswellBC 180 (C.A.).

The middle ground between these positions (always ordering a new trial or ordering the lawyer off the record; or always prohibiting evidence from counsel) is the removal of the lawyer as solicitor of record if the justice of the case requires it. When a lawyer "sheds the robe" and steps into the witness box, either literally or figuratively, the risk for the lawyer and the client is removal of the lawyer from the matter.

As noted by the Court of Appeal, the administration of justice is the primary consideration. Ultimately, the Court determined that the "ultimate question" is whether, in the circumstances, considering both the purpose of the rule against a lawyer being both a witness and counsel in the

same proceeding and the competing interests involved, the proper administration of justice requires the removal of counsel. That is the test. A judge may, in the exercise of discretion, remove a lawyer from the record when the lawyer is, or might become, both a witness and counsel in the same proceeding.

While the husband argued that there should be a bright line test requiring exclusion, the Court of Appeal did not accept that submission (which would have actually been taking a step backwards in history). The Court of Appeal required that the test continue to be flexible and discretion-driven.

As far as procedure goes, the Court of Appeal said as follows:

> [23] As stated in *Hughes*, "as a matter of professional courtesy, and as an officer of the court, counsel should draw to the attention of opposing counsel who have submitted affidavit evidence in support of a contentious issue, the common law rule and the Law Society's Code of Professional Conduct" (at para. 3). This should be done whether, or not, counsel for the opposing party intends to raise the question before the court, as it is, as Robertson J.A. explained, "a simple method for avoiding delay and embarrassment for all concerned."

Then, if despite the warning, counsel still intends to give evidence, a proper motion should be brought. The matter requires procedural fairness and an oral motion for removal at the substantive motion in issue.

When a lawyer gives, or plans to give, evidence in a proceeding that is not just formal or procedural while also acting as counsel, either the opposing party or the presiding judge may raise the question of the lawyer's removal as solicitor of record. When the issue is that the lawyer *may* give (or *might* be required to give) evidence, the court must carefully consider whether removal might be premature. After all, it may not happen. In *Essa (Township) v. Guergis*, 1993 CarswellOnt 473 (Div. Ct.), the Ontario Divisional Court offered the following list of factors to consider when there is only the possibility that counsel may have to offer evidence:

> [48] . . . A variety of factors should be considered. These will include:
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> - the stage of the proceedings;
> - the likelihood that the witness will be called;
> - the good faith (or otherwise) of the party making the application;
> - the significance of the evidence to be led;
> - the impact of removing counsel on the party's right to be represented by counsel of choice;
> - whether trial is by judge or jury;

- the likelihood of a real conflict arising or that the evidence will be "tainted";

- who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising; and

- the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

Therefore, there are two threshold issues to consider:

1. Is it sufficiently certain that the lawyer will give evidence in the same proceeding in which the lawyer is also solicitor of record?

2. Will the purported evidence be admitted (if the evidence is not likely to be admitted, then the dangers are not present)?

In this case, everything went wrong. The motion judge did not follow any type of framework or principled approach when deciding whether to remove HM from the case. One denial of natural justice.

There was not a proper motion; the issue was simply raised at the hearing of the substantive motion to appoint the counsellor. Two denials of natural justice.

And then, it appeared that the motion judge applied a bright line test. One error of law.

Here, it was hard for the Court of Appeal to understand why counsel was removed when the motion to appoint a counsellor would have no real impact on the divorce proceeding itself. It did not appear that the Court of Appeal struggled to find that the wife's counsel should not have been removed from the record.

As for the first question, was it "sufficiently certain" that the wife's lawyer would give evidence in the proceeding in the future? Here, as the lawyer's affidavit had already been filed, there was no issue of prematurity. However, "had the rule of civility been respected and had [HM] been informed of [SD's] intention to seek his removal for the entire proceeding, he might well have withdrawn his affidavit."

The second question, regarding the admissibility of the lawyer's evidence, was a challenge for the Court of Appeal because they did not have the full record. However, HM's affidavit was simply his interpretation of a previous encounter he had with the husband's proposed counsellor. It is hard to see how such evidence could have been relevant or admissible in any event. In all likelihood, HM's affidavit should have been struck from the record instead of being used as a basis to remove him as counsel.

Then there was the fact that the interlocutory motion did not address any of the substantive issues in the case. This strongly weighed against removal. There was no real risk HM would have been

required to testify at trial. And given how the issue was raised (without a proper motion), the Court of Appeal seriously questioned the *bona fides* of the removal request. It smacked of tactics, and "[t]he courts are reluctant to disqualify solicitors where the motion is driven by tactical considerations." For good reason, courts do not like removal motions for tactical reasons: *Tauber v. Tauber* (2009), 79 R.F.L. (6th) 156 (Ont. S.C.J.); *Moffat v. Wetstein*, 1996 CarswellOnt 2148 (Gen. Div.); *Hermant v. Secord* (2010), 3 R.F.L. (7th) 426 (Ont. S.C.J.); *Stern v. Bondi*, 2014 CarswellOnt 5278 (S.C.J.); *S.B v. J.M.*, 2019 CarswellOnt 17989 (S.C.J.); *Brewer v. Brewer* (2010), 86 R.F.L. (6th) 321 (N.B. Q.B.).

The Court of Appeal was careful to clarify that the fact that evidence on an interim motion would not likely be relevant to the ultimate issues in dispute does not mean that a lawyer should never be removed in such circumstances. To suggest otherwise would mean that a lawyer could give evidence on almost any interim motion without issue. So, there is still serious danger in counsel offering evidence.

The appeal was allowed. HM was reinstated as wife's counsel. Wife was happy. Wife got costs of $1,000 below and $5,000 on appeal. Enough for two large Frappuccinos and a breakfast sandwich at Starbucks.

Save for the most formal or perfunctory affidavits, counsel should not be giving evidence: *Farooq v. Hawkins*, 2018 CarswellOnt 13288 (S.C.J.). It is bad form, and it is dangerous. And, while we're at it, counsel should also ***not*** be the source of material "information and belief" in a client's affidavit. That is also improper, and is really no different than the lawyer being the deponent. A lawyer cannot avoid the rule that s/he cannot be a witness and counsel before the court through the "subterfuge" of having someone else swear the affidavit based on information and belief from him/her. [See *Trempe v. Reybroek*, 2002 CarswellOnt 324 (S.C.J.); *Zanewycz v. Zanewycz*, 2009 CarswellOnt 149 (S.C.J.); *Manraj v. Bour*, 1995 CarswellOnt 1335 (Gen. Div.); *Gage v. Janse*, 2010 CarswellOnt 6247 (S.C.J.)]

Assayag-Shneer v. Shneer (2021), 53 R.F.L. (8th) 349 (Ont. S.C.J.) – *Pre-estimating Damages*

At Least for Now . . . Keep on Pre-Estimating Damages

In family law cases, parties often want to include wording in agreements and orders setting out what will happen if one party defaults on his or her obligations. However, Justice Hood's decision in *Assayag-Shneer v. Shneer* provides an important reminder that a predetermined remedy for a default may be unenforceable unless it constitutes a genuine pre-estimate of the innocent party's actual damages in the event of a breach.

The parties married in 1994 and separated in 1997. They did not have any children together. When they separated, the husband was the CEO of his own company and earned about $200,000 to $250,000 a year, while the wife was in her second year of chiropractic college.

In 1999, the parties signed a Separation Agreement that provided, among other things, for the husband to pay the wife a total of $388,000 in spousal support, with $100,000 payable by October 1, 1999, and $4,000 a month payable for the next 72 months (starting on November 1, 1999).

The Separation Agreement also provided that in the event of a default, the husband would owe the wife ***twice*** the outstanding amount, plus an extra $50,000.

The support provisions of the Separation Agreement were then incorporated into a Consent Order.

The husband paid the initial $100,000, and made the first 15 payments of $4,000 a month. However, he defaulted on the 16th payment, and never made another payment. Accordingly, in addition to the $228,000 in support he still owed, the terms of the Order and the Separation Agreement required him to pay an additional $278,000.

Neither party took any steps to deal with the matter until 2017, when the Family Responsibility Office started trying to collect the money that the husband owed the wife. At that point, the husband started a variation proceeding, and took the position that the default provisions were unenforceable because they constituted a "penalty clause", and that the support provisions of the Order and Separation Agreement should be varied because he claimed that his health and finances had declined precipitously since 1999.

Given the husband waited almost 20 years to seek a variation, Justice Hood, unsurprisingly, resoundingly rejected the husband's request to reduce his outstanding support obligation:

> [32] [The husband] has made choices along the way. In my view these choices were not forced upon him by his circumstances. He chose to stop paying support and made no efforts to pay it after January 2001. He chose to move to a country where he knew he could not work. He chose to start a new family and life ignoring his first wife's needs and the divorce order. His health issues have not truly impacted his earning capacity. His own evidence discloses that this is not the case.

> The failure of [his business] AdvantEDGE was a possibility in 1999 and its demise in 2000 was not unforeseen. In my view the company's success or failure was specifically contemplated at the time of the divorce judgment. It was therefore not a material change as that term was defined by the Supreme Court in *Willick v. Willick* [1994] 3 S.C.R. 670, at p. 688, where the Court explains, "if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation." See also *L.M.P.* at para. 67 . . .
>
> [33] Moreover, the failure of AdvantEDGE took place in 2000, when [the husband] was 39 years old. There has been ample time since then and well before his health issues, even if they were material, for [the husband] with his self-acknowledged business experience and acumen to find alternative employment so as to put himself in a position to pay the support. As mentioned above, there have been several years where he succeeded in doing just that, and nonetheless declined to pay support.

The more interesting issue, however, was whether the wife could actually enforce the default provisions of the Order and Separation Agreement, or whether these terms constituted an unenforceable penalty clause.

The classic rule against penalty clauses provides that a contractual provision stipulating what would happen in the event of a future breach is unenforceable unless it constitutes a genuine pre-estimate of damages: *Canadian General Electric Co. v. Canadian Rubber Co.*, 1915 CarswellQue 15 (S.C.C.) at paras. 3-5. We all learned that in law school.

The classic rule has been heavily criticized over the years, most recently in Justice Wakeling's dissent in *Capital Steel Inc v. Chandos Construction Ltd*, 2019 CarswellAlta 125 (C.A.). In that case, Justice Wakeling would have abolished the classic rule, and replaced it with a rule whereby a term of a contract that stipulated the consequences for a breach should be enforced unless "it is so manifestly grossly one-sided that its enforcement would bring the administration of justice into disrepute." Justice Wakeling's reasons also include a comprehensive history of the classic rule and an analysis of the fundamental problems with it, including the following:

> [161] **First, it is not clear what constitutes a penalty**. "The test for distinguishing penal from other principles is unclear". This is a significant drawback. If an adjudicator does not know what the core element of a principle is, it is impossible to apply it rationally and consistently.
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> . . . . .
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> [167] **Second, because the penalty rule is confusing, it produces inconsistent results that cannot be rationally explained**. This is not a trait of a useful norm. It is the mark of a misleading and suspect measure.
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> [168] **Third, even if the benchmarks of a penalty term were universally acknowledged, it is not readily apparent that the penalty concept captures the essence of judicial reluctance to enforce some contract terms and provides much assistance in deciding whether a contested term should be enforced or not**. A determination that a provision is a penalty provides little assistance to an adjudicator who must decide whether it is appropriate to relieve a promisor of a contractual obligation. How does the knowledge that a term is a penalty assist a court to decide whether it should be enforced? Characterizing a stipulated-consequence-on-breach term as a penalty is no more helpful than describing it as a remedial term or written in English . . .

> [169] **Fourth, the distinction between a penalty and a pre-estimate of damages is of limited value.** There are fact patterns which make it exceedingly difficult, if not impossible, to estimate damages. This might mean that a stipulated-consequence-on-breach term is unenforceable even though it makes sound business sense.
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> [170] **Fifth, the penalty aspect of a provision can often be camouflaged by clever drafting.** An onerous obligation can be transformed into a beneficial option, as Justice Heath explained more than 200 years ago in *Astley v. Weldon* . . .
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> . . . . .
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> [173] **Sixth, it is not obvious why a promisor's commitment in a commercial agreement to pay a sum for breach of another term of the agreement that may bear no relationship to the damages that a court would award for nonperformance is contrary to public policy.** A stipulated-consequence-on-breach term in a commercial contract and the common law damages principle serve completely different purposes. The former is adopted to avoid the need to utilize the common law damages protocol to resolve the consequences of nonperformance of a contract promise. The latter is resorted to because the parties have been unable to resolve the obligation of the promisor to the promisee on the former's breach of a contractual obligation. [footnotes omitted; emphasis added]

The Supreme Court of Canada granted leave to appeal in *Capital Steel Inc*, but it unfortunately ultimately declined to decide whether the rule against penalty clauses should be reformulated (2020 CarswellAlta 1754 (S.C.C.) at para. 22).

It appears that the courts in British Columbia may also be "relaxing" the strict rule regarding penalty clauses. In B.C., a specific negotiated term to provide for a specific payment is not a penalty clause — it is just part of the contract and a term specifically negotiated by the parties: *Do v. Nichols*, 2016 CarswellBC 706 (C.A.). (Query, however, what would happen if the negotiated sum was so large as to be a clear penalty.)

However, in most of the country, the strict rule still applies, and the question of whether a clause is a penalty clause depends on its construction and on the circumstances at the time of contracting: *Dundas v. Schafer* (2012), 17 R.F.L. (7th) 307 (Man. Q.B.), rev'd (2014), 50 R.F.L. (7th) 37 (Man. C.A.) (leave to appeal to SCC ref'd); *Mortgage Makers Inc. v. McKeen*, 2009 CarswellNB 422 (C.A.); *Haas v. Viscardi*, 2019 CarswellOnt 2547 (C.A.) (a liquidated damages clause will continue to be struck as a penalty if it was not a genuine pre-estimate of actual losses).

But back to the case at hand.

The wife in *Assayag-Shneer* tried to argue that the default provision of the Order and Separation Agreement constituted a genuine pre-estimate of her damages in the event of a default, because it recognized the legal fees that she would have to incur, and it implicitly supported her position that the support she had agreed to in the settlement already constituted a sizeable discount over the amount to which she was actually entitled.

Justice Hood disagreed. In finding that the default provision was "a penalty and unenforceable", Justice Hood noted as follows:

> [44] **The doubling of the outstanding support plus an additional $50,000 bears no relationship to any loss or damage that [the wife] could suffer through a default in payment**. It is simply a lump sum payable regardless of the loss or damage. I do not accept her argument that this amount is an attempt to recognize the legal fees that she would necessarily incur upon default and is thus a genuine pre-estimate of her loss. **The clause bears no relationship to what her costs might be in the event of a default. Moreover, costs are a separate issue**. If successful in seeking to enforce payment she might be entitled to some indemnity of her legal costs, but to suggest that this was the intention of the clause in the first place and that it is a valid liquidated damages clause or genuine pre-estimate of loss is untenable. [emphasis added]

As a result, Justice Hood dismissed the husband's Motion to Change, but also dismissed the wife's request to enforce the default provisions of the Order and Separation Agreement.

Corner Brook (City) v. Bailey, 2021 CarswellNfld 258 (S.C.C.) – *Interpreting Releases*

Nothing Much Here . . . Just a Fundamental Doctrinal Shift in the Way Releases Are To Be Interpreted

Pretty much every Domestic Contract and Spousal Agreement contains releases. Therefore, this recent case from the Supreme Court of Canada — that fundamentally changes how releases are to be interpreted — is of interest to family lawyers. The Supreme Court also commented on principles of contract interpretation generally, and signaled possible changes to come, especially with respect to the use of evidence of negotiations in the interpretation of contracts. Again, this is not a family law case, but it's important.

The case resulted from a car accident. While Mrs. Bailey was driving her husband's car, she hit an employee of the City of Corner Brook (the "City"). The employee sued Mrs. Bailey. Separately, Mrs. Bailey and her husband started a claim against the City for damage to the car and her injuries. Mrs. Bailey and her husband settled with the City, and in doing so they released the City from liability relating to the accident. The release was with respect to " . . . all demands and claims of any kind or nature whatsoever arising out of or relating to the accident . . . and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [action] . . . "

Years later, Mrs. Bailey brought a third-party claim against the City for contribution and indemnity in the action brought against her by the employee. The City brought a motion for summary judgment on the basis that the release barred the third-party claim.

Mrs. Bailey argued that the release did not bar the third-party claim because that claim was not specifically contemplated by the parties when they signed the release.

The Court at first instance granted summary judgment, agreeing that the release barred Mrs. Bailey's third party claim against the City. The Newfoundland and Labrador Court of Appeal unanimously allowed the appeal. And off to Ottawa everyone went (virtually, that is).

A unanimous full bench of the Supreme Court of Canada allowed the appeal. In dismissing Mrs. Bailey's third-party claim, the Court fundamentally altered the rules regarding the interpretation of releases which, for 150 years, had been interpreted narrowly.

For the Supreme Court, Justice Rowe noted that courts may be inclined to narrowly interpret even broadly-worded releases. However, going forward, the "ultimate question" is whether the claim at issue is the type of claim to which the release was directed, depending on the wording and surrounding circumstances of the release in each case.

Justice Rowe wrote as follows (sorry for the long quote — but we can't possibly say this more clearly):

[3] **There is no special interpretive principle that applies to releases**. The decisions below refer to the rule from the House of Lords decision in *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610, in which Lord Westbury stated, at p. 623: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given." As I will explain, **this "Blackmore Rule" has been overtaken by the general principles of contract law in [*Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.)]. The Blackmore Rule has outlived its usefulness and should no longer be referred to. Any judicial tendency to interpret releases narrowly is not a function of any special rule, but rather a function of releases themselves.**

. . . . .

[17] ***Sattva* marked a significant change in the jurisprudence**. Traditionally, the interpretation of contracts was a matter of law, not mixed fact and law. This was because interpretation was seen primarily as an exercise in giving meaning to words. Circumstances were generally relevant to interpretation only where there was an ambiguity.

[18] **The Blackmore Rule was formulated in the traditional period to which I have just referred. In that view, courts were reluctant to have regard to the facts surrounding the formation of a contract, as an aid to its interpretation. The words of a contract were given their "black letter" meaning. This was problematic from the view of releases; the Blackmore Rule addressed this problem.**

[19] But 150 years after the *Blackmore* decision, things have changed. The facts surrounding the formation of a contract are relevant to its interpretation. The jurisprudential concerns that gave rise to the rule in *Blackmore* no longer exist. **It is no longer needed. It has outlived its usefulness and should no longer be referred to.**

. . . . .

[20] This Court set out the current approach to contractual interpretation in *Sattva*. *Sattva* directs courts to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. This Court explained that "[t]he meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement", but that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement": paras. 48 and 57. "While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement": para. 57. This Court also clarified that the relevant surrounding circumstances "consist only of objective evidence of the background facts at the time of the execution of the contract. . . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": para. 58.

. . . . .

[43] Distinctions can be drawn between claims based on facts known to both parties (as in this case) and claims based on facts that were not known to both parties (as in [*Biancaniello v. DMCT LLP*, 2017 CarswellOnt 6974 (C.A.)]). Such distinctions may be relevant when interpreting a release and assessing whether the claim at issue is the kind of claim the parties mutually intended

to release. **The ultimate question is whether the claim is of the type of claim to which the release is directed. This will depend on the wording and surrounding circumstances of the release in each case.** Lord Bingham's cautionary principle from [*Bank of Credit & Commerce International SA (In Liquidation) v. Ali (No. 1)*, [2001] 1 All E.R. 961 (Eng. H.L.)] should be understood not as a rule of interpretation, but rather an observation as to the issues that releases will tend to give rise to given their subject matter. **Any judicial tendency to narrow the meaning given to broad wording is not the function of any special rule, but rather a function of the context in which releases are given. Thus, the ordinary rules for contract interpretation set out in *Sattva* apply to releases as they do to other contracts.**

. . . . .

[44] In *Sattva*, this Court also explained that contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an "extricable question of law" . . .

. . . . .

[56] I make one final observation. The application judge also considered the pre-contract negotiations in reaching his conclusion that the parties mutually intended to release Mrs. Bailey's claim: paras. 30-38. The Court of Appeal did too, but reached a different conclusion: paras. 67-68. Neither party argued that there was anything wrong with this approach by the courts below. **However, there is a longstanding, traditional rule that evidence of negotiations is inadmissible when interpreting a contract**: see *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, at para. 100, per Côté and Brown JJ., in dissent; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 1 A.C. 1101; *Hall*, at pp. 423-32; A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 745-48; K. Lewison, *The Interpretation of Contracts* (7th ed. 2020), at pp. 117-31; J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 809-13. **Justices Côté and Brown observed in *Resolute* that this rule "sits uneasily" next to the approach from *Sattva* that directs courts to consider the surrounding circumstances in interpreting a contract**: para. 100. **Hall and the authors of Canadian Contract Law both emphasize the difficulty in drawing a principled distinction between the circumstances surrounding contract formation and negotiations.**

[57] **I leave for another day the question of whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract.** That issue needs to await a case where it has been fully argued and is necessary in order to decide the appeal. In this case, the application judge did not consider the negotiations to be determinative in interpreting the contract one way or the other: see paras. 37-38 and 41.

[58] To conclude, there is no reviewable error in the application judge's conclusion that the release includes Mrs. Bailey's third party claim. The claim comes within the plain meaning of the words of the release, **the surrounding circumstances confirm that the parties had objective knowledge of all the facts underlying Mrs. Bailey's third party claim when they executed the release**, and like *Biancaniello*, the parties limited the scope of the release to claims arising out of a particular event. [emphasis added]

Therefore, henceforth releases are to be interpreted pursuant to the general principles of contractual interpretation. Releases, like any other contract, must be read "as a whole, giving the

words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."

Justice Rowe did note that the circumstances in which releases are signed often do lead courts to interpret them more narrowly. While parties usually draft and sign broad releases, the surrounding circumstances often suggest the parties objectively intended the release to only cover claims arising in relation to a particular situation. And then there is the fact that parties to a release are generally trying to deal with risks that are, at the time, unknown.

Therefore, the surrounding circumstances may, in some instances, cause courts to narrowly construe the words of a release simply because the broad wording of releases conflicts with the circumstances, particularly for claims not considered at the time the release was signed. However, Justice Rowe confirmed that, with sufficiently clear language, a release can absolutely apply to unknown claims. While the release need not list every possible claim, for a release to cover unknown claims it should so specify, and it should detail whether it applies to only claims related to a particular area or subject matter or more broadly, and whether there are any time limits.

Given that almost all Domestic Contracts and Spousal Agreements include some form of release — perhaps it is time we all have a look at our standard form releases so as to ensure we mean what we say and say what we mean.

CAS v. J.J., C.M. and Six Nations of the Grand River, 52 R.F.L. (8th) 306 (Ont. S.C.J.) – *Zoom pitfalls*

The Opposite of "You're on Mute"

We were recently involved in a case where a party was being questioned on Zoom and clearly did not appreciate that turning off their video during a break did not also mute their microphone. Hilarity ensued. And then there was the "I am not a cat" lawyer. Although the widespread use of Zoom as a replacement for in court attendances has resulted in some very funny moments, the consequences of these types of technological mistakes can also be very serious. Justice Bale's recent decision in *CAS v. J.J., C.M. and Six Nations of the Grand River* highlights the importance of ensuring that everyone is on mute when the court is on recess.

On the eighth day of a child protection trial, the Court took a brief recess while the mother was being cross-examined. The mother did not mute her microphone, and the other participants in the trial (including Justice Bale) heard the following statements from an unidentified male voice through the mother's microphone:

- "how much longer will you be" (or similar words to that effect).
- "hook some people up with some soft" (or similar words to that effect).

The mother then realized her microphone was still on, and pressed the mute button.

These off the record statements, and the clear presence of someone else in the room, raised serious concerns about whether an unknown third party was influencing the mother's testimony, and whether the statement "hook some people up with some soft" meant that the mother and/or the unidentified person she was with was involved in selling cocaine or other drugs.

The mother, supported by the Six Nations, brought a motion for a mistrial, and argued that a fair trial was no longer possible. She claimed that no one had been with her during her cross-examination, and the Court had heard a "voice clip" that was inadvertently sent to the mother and opened on her phone during the break. She also argued that the trial judge and/or court staff had become potential witnesses with respect to what had actually been said during the break.

The Children's Aid Society of Haldimand and Norfolk (the "Society") and the father opposed the mother's motion for a mistrial.

Justice Bale started by pointing out that she, as a judge of the Superior Court, was not a compellable witness [*MacKeigan v. Hickman*, 1989 CarswellNS 391 (S.C.C.), *R. v. Valente (No. 2)*, 1985 CarswellOnt 129 (S.C.C.), *R. v. Beauregard*, 1986 CarswellNat 1004 (S.C.C.), and *Condessa Z Holdings Ltd. v. Brown's Plymouth Chrysler Ltd.*, 1993 CarswellSask 332 (C.A.)]. Furthermore, while court staff may technically be compellable witnesses, the practice of calling court staff to give evidence should generally be avoided. As the Court noted in *R. v. Toutissani*, 2007 CarswellOnt 9737 (S.C.J.), aff'd 2007 CarswellOnt 7289 (C.A.), "[i]t

should be the rare case where a court official such as a court reporter is compelled to participate in the trial itself[.]"

Justice Bale then provided a helpful summary of the principles that apply when considering a request for a mistrial and recusal for reasonable apprehension of bias:
[Mistrials]

> [21] . . .
>
> a. **Mistrial orders are in the discretion of the trial judge**;
>
> b. **A mistrial may be declared where a judge that is seized of a matter is satisfied that, for any reason, there is a reasonable apprehension that either party will not have a fair trial if the current trial continues** (and that a fair trial would be possible if it were to begin afresh before another judge);
>
> c. **Mistrials should be ordered only in the clearest of cases, where there has been a 'fatal wounding' of the trial process**;
>
> d. **Mistrials should be granted only as a last resort**, where no other curative measure could salvage a just and fair trial; and
>
> e. **Parties are entitled to fair trials, not perfect trials**: *R. v. Khan*, 2001 SCC 86, *Forsythe v. Tone*, 2018 ONSC 3598 CanLII, *Van Ooyen v. Carruthers*, 2018 SKQB 73, *R. v. Toutissani*, 2007 ONCA 772 CanLII.
>
> . . . . .
>
> [Recusal for reasonable apprehension of bias]
>
> [24] . . .
>
> a. Bias or prejudice refers to a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. **Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case**: *R. v. Bertram* [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)* 1997 CanLII 324 (SCC) [1997] 3 S.C.R. 484 (S.C.C.), at para. 106);
>
> b. The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that **test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the**

> **decision-maker], whether consciously or unconsciously, would not decide fairly"**: *Committee for Justice and Liberty v. National Energy Board* 1976 CanLII 2 (SCC) at p. 394;
>
> c. Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. It is key to the judicial process and must be presumed. While the requirement for judicial impartiality is a stringent one, **the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified**: *Wewyakum Indian Band v. Canada*, 2003 SCC 45 (CanLII), at para. 59;
>
> d. **The threshold for a finding of real or perceived bias is high**: *R. v. S. (R.D.)* 1997 CanLII 324 (SCC) at para. 113. [emphasis added]

For further discussion about the general principles that apply when the court is considering a request for a mistrial in a family law case, see Philip Epstein's discussion of *Forsythe v. Tone*, 2018 CarswellOnt 9340 (S.C.J.) in the 2018-26 edition of *TWFL* (July 2, 2018).

After considering these principles, Justice Bale dismissed the mother's motion for a mistrial.

Even if it was open to the court to consider the statements that it had heard during the break, and it was not, the statements would not have a determinative impact on the outcome of the trial given that:

- The mother was not seeking to have the child placed with her, and accepted that her time with the child should be supervised.
- Justice Bale was satisfied that the mother's explanation that she had inadvertently played a recording of a voice clip over the break was "plausible", and did not place the mother's credibility in issue. She was also satisfied that the mother's evidence had not been tainted by outside influence.
- The allegations against the mother related solely to alcohol abuse, and not drug abuse or drug dealing.
- The Society had already investigated the events that had taken place during the recess, and the investigation had not resulted in any changes to the child's current placement (with the maternal grandmother).

Justice Bale was also satisfied that she could disabuse herself of the inadmissible statements that had been made during the break:

> [31] **It is a function of a trial judge to be able to be unaffected by inadmissible evidence. Trial judges are routinely entrusted with the task of hearing and rejecting information that should not be entered into the court record**. If this were not the case *voir dires* as to the admissibility of evidence in all proceedings would routinely be heard by someone else. Likewise, family court judges presiding over temporary care hearings would be precluded from hearing any

> subsequent child protection trial in the same proceeding as a result of their previous consideration of a lower threshold level of 'credible and trustworthy' evidence: see for example *Children's Aid Society of Ottawa v. A.*, 2015 ONSC 38 at para. 6. **Trial judges can and routinely do disabuse their minds of potentially prejudicial information. The circumstances before me, although unique in fact, are not different in principle.**
>
> [32] This court will disabuse itself of the discussions overheard in the virtual courtroom during the court recess. **A reasonable, thoughtful, and informed person, viewing the matter realistically and practically, would presume that a judge of this court who has sworn the judicial oath of office could and would faithfully perform this requisite judicial function.** [emphasis added]

While the idea that a judge can simply "ignore" evidence or facts that should be ignored seems an impossibility to many, speaking from experience, it is actually not difficult for a judge or arbitrator to do exactly that.

The father and the Society also tried to argue that the mother should not be permitted to cause a mistrial through her own carelessness. In rejecting this argument, Justice Bale noted that what had happened was simply an unfortunate and inadvertent mistake, and that "[a]ttributing fault does not assist in the legal analysis in this matter or impact this court's decision."

Finally, given that this was a child protection case that had already been outstanding for more than two years, and that the trial was close to being finished, Justice Bale was satisfied that "[t]he collective interests of the parties, the child, and public at large all weigh in favour of continuing with this trial", and ordered the trial to continue without calling further evidence about the statements in question.

This is not going to be the last time that this type of situation occurs. But the risk can be curtailed significantly by ensuring that the registrar reminds everyone to ensure that they are on mute when the court takes a break, and/or simply having the registrar mute everyone during breaks in a proceeding. It also behooves counsel to make sure clients know to mute themselves on recess.

Huitt v. Huitt, 2021 CarswellAlta 1506 (C.A.) – *Practice Directions*

And Just When You Thought a Practice Direction Was a "Direction"

This short, but important, case from the Alberta Court of Appeal serves as a good reminder that "Practice Notes", "Notices to the Profession", and "Practice Directions" are not actually legislated or law.

In Alberta, Practice Note 7 addresses the possible interventions available in family law cases where the court must make a decision about children and where the family is engulfed in conflict. Interventions are conducted by parenting experts who are generally psychologists or clinical social workers. The interventions can be evaluative or therapeutic. The purpose of the intervention is to have the expert report to the court and to assist the court in identifying family-specific challenges. However, the expert cannot offer an opinion or recommendation regarding parenting time, parental responsibilities, decision making, or relocation. The expert can generally only describe what they observe and what they view is happening with the family dynamic.

In contrast, Practice Note 8 deals with what most of us think of as (or what used to be known as) custody/access assessments.

In *Huitt*, in June 2020, following a Practice Note 7 intervention, an order was made giving primary care of one of the children to the Respondent/father. The Appellant/mother was to have parenting time every second weekend and every other Wednesday.

In November 2020, the mother applied for a police enforcement clause and for the child to be eventually returned to her care. The father cross-applied for an order requiring supervised access. The matter came before a chambers judge in morning chambers (i.e. a regular motions list). The judge (who happened to be Associate Chief Justice Rooke) varied the parenting arrangements on an interim basis. He ordered a Practice Note 8 assessment of the parenting arrangements that would serve the long-term best interests of the children. He also ordered that, effective June 1, the mother's parenting time would be reduced to one overnight visit per month pending completion of the Practice Note 8 assessment.

The sole ground of appeal was that Justice Rooke had erred by making a material change to the parenting arrangements in morning chambers. The mother referred to Practice Note 2:

> **Restrictions on Morning Family Law Chambers**
>
> 9. Applications for a change of custody or substantial changes to a parenting arrangement will not be heard in Morning Family Law Chambers; rather, these applications must go to Special Chambers.

The mother argued that the Order under appeal improperly made such "substantial changes."

In dismissing the mother's appeal the Court of Appeal "recognized the general desirability of this provision of the Practice Note" and agreed that, unless there is some urgency or other

satisfactory reason, significant changes in parenting should not be made in morning chambers: *G. (H.) v. G. (R.)*, 2017 CarswellAlta 439 (C.A.) at paras. 8-9; *M. (L.D.) v. T. (W.F.)*, 2017 CarswellAlta 558 (C.A.) at para. 7.

However, the Court of Appeal then went on to note that while Practice Notes should generally be followed, they do *not* have the full force of law as do the *Rules of Court*, which are legislated. Such Practice Notes have been described as "informational statement[s] published by the Chief Justice for the guidance and assistance of the registry staff, the legal profession and the public": *R. v. Sharpe*, 1999 CarswellBC 2504 (C.A.).

While not "law", Practice Notes (or Notices to the Profession, etc.) provide guidance to litigants and the Bar as to what they can expect of each other and, more importantly, what the court expects of them, and what they can expect of the court. And if the court routinely undermines the efficacy of a Practice Direction, counsel and the litigants will be tempted to do the same: behaviour tolerated is behaviour encouraged. Procedural uncertainty does not assist in resolving disputes, and indeed can divert attention from the substantive issues.

However, paragraph 9 of Practice Note 2 is not jurisdictional. "While it signals that substantive changes to parenting should not generally be made in morning chambers, it does not limit the mandate of a chambers judge to make such changes in that forum in appropriate circumstances."

And whether a proposed change is "substantial" or not, and whether the chambers judge should depart from the general guidance in Practice Note 2, are matters that are within the discretion of that judge.

Here, Justice Rooke, in chambers, was satisfied that the change he made was appropriate. After hearing submissions and reviewing the evidence, he was satisfied that a Practice Note 8 assessment was required. His specific concern was that he did not want any emotional harm to come to the child, and he decided to change parenting on an interim basis pending the receipt of that report. Whether he had sufficient resources before him to enable him to make that assessment of the best interests of the children was within his discretion.

Here, any "irregularity" in the procedure followed did not result in an order that was so unreasonable that appellate intervention was justified — and the appeal was dismissed.

W.Z. v. L.K. et al (2021), 55 R.F.L. (8th) 34 (Ont. S.C.J.) and *Dosanjh v. Lalli* (2021), 56 R.F.L. (8th) 270 (B.C. C.A.) – *A Tale of Two Sales*

A Tale of Two Sales: It Was the Best of Times; It Was the Worst of Times

The matrimonial home is often seen as the "crown jewel" of the marital relationship, and both spouses will often jockey for position to be the ultimate owner of the home — or to make sure that the other spouse cannot be the ultimate owner. These two cases offer two such stories, but with different results.

***W.Z. v. L.K. et al* (2021), 55 R.F.L. (8th) 34 (Ont. S.C.J.)**

In *W.Z.*, the parties separated in January 2018, and the Respondent/wife moved out of the matrimonial home. The Applicant/husband and the child continued living in the home (and still lived there at the time of the motion).

At the return of a motion in March 2020, the parties entered into a Consent Order which included the following terms:

1. The matrimonial home would be listed for sale by a mutually agreed listing agent;

2. The list price would be as recommended by the agent; the listing period would be for 60 days; and the listing agreement would be executed by both parties;

3. The listing agent would recommend a real estate lawyer;

4. The net proceeds of the sale of the matrimonial home would be held in trust after satisfying the encumbrances, commissions and legal fees;

5. Until closing the parties would continue to pay their equal share of the mortgage payments; and

6. **The parties were free to make an offer to purchase the other's interest in the home before it was listed for sale. If either party made an offer to purchase the other's interest *after* listing, there would be no right of first refusal.** [emphasis added]

Although the parties agreed on a listing agent, there were significant delays in listing the property as a result of COVID-19.

In October of 2020, the home was listed for $1,275,000.

On November 5, 2020, the parties received an offer to purchase the property from "Mr. K." The offer was for $1,180,000 and was conditional on financing and inspection. There were verbal indications that Mr. K would increase his offer to $1,280,000.

The husband said he wanted to accept the offer, but the wife did not. Through counsel, the wife verbally offered to match Mr. K's offer, but the parties could not reach an agreement.

On November 7, 2020, the parties received another offer. This offer was from 2782708 Ontario Inc., and was for $1,285,000 without any conditions.

The husband was suspicious. He had his lawyer run a corporate search, which identified the registered head office and the name of the owner of the company. The husband was satisfied that the results of the corporate search showed that the purchaser was an arm's length third party, and signed the Agreement of Purchase and Sale. The wife signed it as well. The closing date was March 16, 2021.

There were some errors on the executed Agreement of Purchase and Sale. Although all parties at the motion agreed that the errors were "honest mistakes", one of them, in particular, sure seems "fishy" to us.

- The purchase price was listed as $50,000 (which was to be the deposit);
- The deposit was listed as $1,285,000 (which was to be the purchase price); and
- The numbered company was listed as 278**0**708 (which should have been 278**2**708).
- To remedy the errors all parties to the Agreement of Purchase and Sale executed an amendment. The amendment corrected the three errors:
- The purchase price was changed from $50,000 to $1,285,000;
- The deposit was changed from $1,285,000 to $50,000; and
- The numbered company was changed from 278**0**708 to 278**2**708.

On December 3, 2020, after the amendments to the Agreement of Purchase and Sale were initialed, the husband asked his lawyer to complete a new corporate search. If you cannot guess what the corporate search revealed, we commend your childlike innocence and your ability to never assume the worst.

This time, the corporate search revealed that 2782708 Ontario Inc. was owned by the wife's parents.

The husband argued that he was purposefully deceived and that the wife and 2782708 Ontario Inc. colluded and conspired in an orchestrated fraud. The husband refused to close on March 16, 2021, and he brought this motion for an Order that the Agreement of Purchase and Sale be set aside and for $10,000 in punitive damages.

The problem was that there was not really any legal basis to set aside the Agreement of Purchase and Sale. The husband relied on sections 21 and 23 of the Ontario *Family Law Act*, R.S.O. 1990,

c. F.3 to suggest that he had not "joined in the instrument" (the Agreement of Purchase and Sale) or "consented" to the transaction. But he had signed both the Agreement of Purchase and Sale and the Amended Agreement of Purchase and Sale. He had, in fact, "joined in the instrument" and consented to the sale.

Justice MacPherson also noted that even if he had the jurisdiction or authority to set aside the Agreement of Purchase and Sale, he would not have done so.

The property was listed at $1,275,000. The only offer the parties received was from Mr. K for $1,180,000, and it had been conditional on financing and an inspection. And there had been no indications that Mr. K would increase his offer to $1,285,000.

Therefore, the offer from 2782708 Ontario Inc. was better. It was for more money, and it was without conditions. The husband, by signing the Agreement of Purchase and Sale, was clearly content with the terms. And there were no better offers received. Therefore, Justice MacPherson was satisfied that the sale was for fair market value.

Justice MacPherson then considered if the Agreement of Purchase and Sale could be set aside for fraud or deceit.

In *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 CarswellOnt 642 (S.C.C.), the Supreme Court of Canada set out the elements of common law fraud:

- a false representation made by the defendant;
- some level of knowledge of the falsehood of the representation on the part of the defendant whether through knowledge or recklessness;
- the false representation caused the plaintiff to act; and
- the plaintiff's actions resulted in a loss.

However, here there was no false representation — or at least no overt false representation to induce the husband to act. Then, even considering that sometimes a misrepresentation can involve certain kinds of silence, including omissions and half-truths [*Midland Resources Holding Ltd. v. Shtaif*, 2017 CarswellOnt 5740 (C.A.)], there were no damages. And without damages, there was no cause of action: *Holley v. Northern Trust Co. Canada*, 2014 CarswellOnt 1571 (S.C.J.) at para. 118 and *Bruno Appliance* at para. 20.

The test for deceit is similar to that for fraud:

- A false statement made by the defendant;
- The defendant knew that the statement is false or being indifferent to its truth or falsity;
- The defendant having an intent to deceive the plaintiff;

- The false statement being material in that it induced the plaintiff to act; and
- The plaintiff suffered damages due to it so acting.

But, again, there was not really a false statement here. The husband never asked the wife if her parents were behind the corporate buyer, so she did not explicitly make a false statement or representation.

There was no condition in the Consent Order that precluded the wife's parents from purchasing the property. Therefore, Justice MacPherson was not satisfied that the identity of the purchaser was material in the circumstances.

It also could not be said that the wife's silence induced the husband to act. In fact, had the husband cared to look, he would have seen that the deposit cheque had been signed by the wife's parents.

In the end, Justice MacPherson suggested that the husband had "made much ado about precious little." The husband's motion was dismissed.

Dosanjh and Lalli **(2021), 56 R.F.L. (8th) 270 (B.C. C.A.)**

The situation in *Dosanjh* was the same — but different.

Dosanjh and Lalli married on August 30, 2003, and separated on January 3, 2020.

They had three children. After the separation, Dosanjh and the children continued living in the matrimonial home. However, Lalli's parents indicated a willingness to purchase the home.

Dosanjh and Lalli were embroiled in "decidedly acrimonious" family law proceedings.

In July 2020, Justice Masuhara ordered the sale of the matrimonial home. Pursuant to that Order, Lalli had sole conduct of the sale subject to various terms and court approval. One term was that each party would have a listing agent, but if the agents could not agree on a listing price, the default listing price would be the appraised value of the home, which was $1,425,000. Dosanjh was concerned that the $1,425,000 appraised value of the home was unreliable. However, Justice Masuhara stated he made his Order on the basis that "the market will determine whether [the appraised value is] too low or too high and that will be through the offers brought."

The listing agents could not agree on a listing price or the terms of the Listing Agreement. As a result, Lalli gave notice of his intention to list the property unilaterally, as he suggested he was allowed to do under the Order.

Dosanjh's real estate agent was concerned that the draft Listing Agreement was unnecessarily restrictive to potential buyers and would likely prejudice the marketability and sale of the home. For example, the draft Agreement required that all offers be accompanied with proof of funds or

a letter of pre-approval — a fairly unusual term. It also included a no-assignment clause and provided that offers would be dealt with no earlier than July 23, 2020. She was also concerned that the draft Agreement did not allow for sufficient time to expose the home to the market.

Dosanjh did not sign the draft Listing Agreement as demanded by Lalli by 8:30 a.m. on July 17, 2020. Therefore, later that day, Lalli listed the home unilaterally at the default listing price of $1,425,000 on the terms proposed in the draft Listing Agreement.

In a letter to Lalli's lawyer, Dosanjh and her lawyer were clearly concerned that Lalli was purposefully looking to discourage buyers in an effort to buy the home himself for below market value (in fact, Lalli had suggested to the children that he would be buying the home):

Of particular concern are the terms requiring a 10% non-refundable deposit to accompany all offers with the deposit to be paid within 24 hours of acceptance in the form of a bank draft. This term essentially precludes any buyers who are unable or unwilling to make a subject-free offer from purchasing the family home. While our initial concern was that your client was attempting to limit competition on the open market, **it has become clear that he wishes to be the only interested buyer.** We cannot imagine that Mr. Justice Masuhara intended this result when he ordered that your client have sole conduct of sale

. . . In the meantime, Dr. Dosanjh is not agreeable to any showings, including on July 22, 2020, until we are able to address our concerns and your client's conduct with Justice Masuhara. To be clear, no further steps should be taken to sell the family home. [emphasis added]

The same day, Lalli's parents made an offer to purchase the residence for $1,425,000, subject to a 14-day completion date. The 14-day completion date, which was the only condition attached to the offer, was unexplained. As the Listing Agreement required, the offer was accompanied by proof of funds and a bank draft of $300,000.

Lalli accepted his parents' offer to purchase the home. Between July 17, 2020, when the home was listed, and July 23, 2020, when Lalli accepted his parents' offer, there were no showings. And the offer made by Lalli's parents was the only offer that was received.

Lalli sought court approval of the sale to his parents, and brought his application for approval under Rule 15-8 of the B.C. *Supreme Court Family Rules*, B.C. Reg. 169/2009, on the basis that the sale was "necessary and expedient" pursuant to Rule 15-8(1). Relying on the same Rule, Dosanjh opposed the application and sought an order varying Justice Masuhara's Order on the basis that Lalli frustrated the Order and failed to expose the property to the market properly. Dosanjh claimed that Lalli's conduct after the Order amounted to bad faith and a material change of circumstances. She sought an order varying Justice Masuhara's Order and granting her sole conduct of the sale.

It seems that everyone, at that point, lost their minds. The record before the Court on the motion included 29 affidavits.

The chambers judge allowed Lalli's application and dismissed Dosanjh's cross application. The reasons were brief:

> Although I would describe Mr. Lalli's conduct during the listing and sale process as being somewhat aggressive, in causing the order of Justice Masuhara to be implemented in the manner and time frame that it was, I do not find any substantive non-compliance with the order.
>
> I am allowing Mr. Lalli's application, except that the possession date is postponed from August 7 to August 31, with Dr. Dosanjh being entitled to remain at the property until then. Dr. Dosanjh's application, accordingly, is dismissed.
>
> Although there were two applications before me, in substance it was a single application, and I am awarding only a single set of costs to Mr. Lalli at the ordinary scale. Thank you.

Dosanjh appealed on the basis of insufficient reasons and on the basis that, to the extent the reasoning could be discerned, the Court erred by failing to apply the proper test under Rule 15-8, and failing to give proper consideration and weight to the non-arm's length nature of the sale.

Further, given the evidence that Lalli did not expose the property to the market appropriately, the judge was clearly wrong in finding that there was no "substantive non-compliance" with Justice Masuhara's Order.

The starting point for the analysis was Rule 15-8, which was the basis for both Justice Masuhara's Order for sale and Lalli's application for approval of the sale to his parents. Rule 15-8 provides:

1. If in a family law case it appears **necessary or expedient** that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

2. If an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner the person considers appropriate or as the court directs.

3. The court may give directions for the purpose of effecting a sale, including directions

    a. appointing the person who is to have conduct of the sale,

    b. fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff's sale, tender or some other manner,

    c. fixing a reserve or minimum price,

    d. defining the rights of a person to bid, make offers or meet bids,

    e. requiring payment of the purchase price into court or to trustees or to other persons,

    f. settling the particulars or conditions of sale,

g. obtaining evidence of the value of the property,

h. fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or expenses resulting from the sale,

i. that any conveyance or other document necessary to complete the sale be executed on behalf of any person by a person designated by the court, and

j. authorizing a person to enter on any land or building.

4. A person having conduct of a sale may apply to the court for further directions.

5. The result of a sale by order of the court must be certified in Form F70 by the person having conduct of the sale and that certificate must be filed promptly after completion of the sale.

6. The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser. [emphasis added]

Rule 15-8 thus engaged the exercise of judicial discretion. Whether it is "necessary or expedient" for property to be sold will depend on the circumstances of each case. In the family law context, when the court decides whether to order the sale of family property, relevant factors for consideration under Rule 15-8 include, among others, the needs of children, the availability of alternative accommodation and external economic factors. Where necessity is not in issue, to be "expedient" a court-ordered sale of property must be advantageous to both parties: *Anderson v. Anderson*, 2002 CarswellBC 1910 (S.C. [In Chambers]) at paras. 14-16, citing *Bodo v. Bodo* (1990), 25 R.F.L. (3d) 295 (B.C. S.C.), and *Reilly v. Reilly* (1992), 44 R.F.L. (3d) 72 (B.C. C.A.).

As noted by the Court of Appeal, there is a surprising dearth of authority in the family law context on the factors the court should consider when deciding an application to approve a proposed sale where the initial order for sale requires court approval. The Court of Appeal concluded that, "as in other contexts involving a court-ordered sale, if a spouse has been granted sole conduct of the sale of property that spouse 'must go about finding a buyer in a businesslike manner and the court must be satisfied that the proposed sale is provident in all the circumstances'."

The relevant circumstances on an approval application include the terms of the initial order for sale and the manner in which the sale process was conducted, which may well inform the court's assessment of whether a particular proposed sale is provident. In other words, where an order for sale made under Rule 15-8 includes a term that any sale is subject to court approval, the "necessary or expedient" criterion applies to both the initial order for sale and any subsequent order approving a proposed sale.

The Court of Appeal set out the following rule (applicable not just to British Columbia):

> [35] When deciding whether to approve a proposed sale of property, in the absence of exceptional circumstances, **the court should ensure that the property has been exposed to the market.** As

> Justice Southin stated in [*Fright v. Fright* (1996), 22 R.F.L. (4th) 187 (B.C. C.A.)], "[o]nly then can there be any confidence that a proposed sale is prudent": at para. 13. Nevertheless, in some cases, market exposure may not be necessary for a proposed sale to be demonstrably provident. For example, in *Olson v. Miller*, 2019 BCCA 274, in a non-family law context where foreclosure was imminent and the value of the subject property was not in dispute, this Court accepted that exposure to the market would have served no purpose and that it was thus unnecessary. As Justice Frankel explained, circumstances such as those at issue in *Olson* were exceptional in the sense contemplated in *Fright*: at para. 77. [emphasis added]

Taking these principles into account, it was the Court's view that the judge below erred by failing to give any or sufficient weight to the non-arm's length nature of the proposed sale in the overall factual context revealed by the evidence.

Justice Masuhara had granted Lalli sole conduct of sale when the value of the property was contentious. While he set a default listing price in the order for sale, the order *also* contemplated a co-listing involving realtors representing *both* parties, a market-based determination of value, and court approval. However, in the short time between Justice Masuhara's Order and Lalli accepting his parents' offer (at the default listing price), there had been no co-listing, no market exposure, and no other offers.

It was incumbent on the chambers judge to scrutinize the proposed sale to Lalli's parents closely with a view to determining whether it was prudent — not simply to ask whether Lalli had engaged in any substantive non-compliance with Justice Masuhara's Order. When applying the "necessary or expedient" criteria, the Court was obliged to examine and consider the non-arm's length nature of the proposed sale and the manner in which the property was exposed (or not exposed) to the market before approving the sale. Nothing in the reasons suggested that the judge did that. And that was a reversible error.

The Court of Appeal was satisfied it had a sufficient record to form its own conclusions and dispose of the application and cross-application. The Court of Appeal set aside the Order below approving the proposed sale to Lalli's parents, and varied the Order of Justice Masuhara such that both parties were to jointly conduct the sale — which is where the whole problem started.
And there you have it; a tale of two sales. One allowed. One not.

MacDonald-Hills v. Hills (2021), 55 R.F.L. (8th) 46 (Ont. S.C.J.) – *Retirement*

When Retiring Early Is Not "Early Retirement"

The husband brought a motion to discontinue child support for his three adult children, and to terminate spousal support.

The parties married in October of 1992, and they separated in March of 2007. They had three children, who were 27, 25, and 22 years old, respectively, at the time of the motion.

In 2009, the parties signed Minutes of Settlement that dealt with child support, spousal support, and property division. The husband wanted the matrimonial home to be sold, the proceeds divided, and his pension divided at source, but the wife wanted to stay in the home. Therefore, pursuant to the Minutes, the husband transferred his interest in the matrimonial home to the wife, and the wife paid the husband $25,000 and gave up any claims to his pension. The Minutes, which were incorporated into a final order, also provided that the husband's pension income would not be included in any future calculation of the husband's income.

The husband had been employed for 29 years as a registered nurse with a mental health unit. He worked an emotional and demanding job with patients who were suffering from severe mental illnesses. The stress of this work caused personal health issues for the husband, including hypertension, anxiety, depression and "compassion fatigue". He described himself as "burnt out".

The husband's doctor recommended that he retire to try to address and improve his mental and physical health.

While the husband admitted that he could technically do other nursing jobs, his evidence was that he was not prepared to work in other nursing fields as he had devoted himself to the mental health field for 27 years.

In April 2021, the husband notified the wife that he intended to retire (with an unreduced pension) in July 2021, when he would be 56 years old. The wife did not disagree with the husband's evidence (and some written evidence) that, during the marriage, the husband had intended to retire when he was 55 years old.

The husband argued that, upon his retirement, spousal support should terminate. The wife, on the other had, argued that she had been incapable of working since 1996 because of an earlier stroke. She also had rotator cuff and carpel tunnel issues. Her evidence was that she lived with a great deal of daily pain. She also had suffered some memory and word loss from her stroke. The wife's condition was worsening; she certainly was not healthy.

At the suggestion of her employer, the wife resigned from her employment as a Registered Nurse in 1996. Shortly thereafter, she began receiving CPP disability benefits. She had not been able to work since 1996, and she had not made any effort to find employment or investigated any job opportunities since 1996. She had a net worth of about $415,000, including the equity in her home and her retirement savings plan, and she made monthly payments of about $1,350 for her

various debts. Her monthly income from CPP and other government programs was about $1,400 a month.

Given the ages and stages of the children, Justice Sproat found that the husband had been entitled to stop paying child support some years ago. But that still left the question in this rather sad situation of whether the husband could retire and terminate his spousal support.

Justice Sproat accepted that, during the marriage, the parties had discussed the husband's intention to retire at or about age 55. Furthermore, Justice Sproat found that as the husband was entitled to retire at age 55 with an unreduced pension, the wife had always understood it was *possible*, if not *probable*, that he would do so.

Justice Sproat agreed with the following propositions from *Smith v. Smith*, 2013 CarswellOnt 13918 (S.C.J.):

- a person who meets the pension criteria for an unreduced pension is not taking an "early retirement";
- 65 is no longer the presumptive retirement date — many pension plans use retirement dates based on an 80 factor of years and service;
- the decision to retire when a person is entitled to an unreduced pension is a foreseeable event that should have been expected by the support recipient; and
- the fact that the parties had discussed the payor's intention to retire when s/he qualified for a full pension is a relevant consideration.

Justice Sproat also took issue with what he viewed as an attempt by the wife to resile from the Minutes of Settlement, and quoted the following paragraphs from Justice Mazza's decision in *Liberale v. Spadafora*, 2008 CarswellOnt 3319 (S.C.J.):

> [23] When parties, who are represented by counsel as in the case before me, enter into minutes of settlement to resolve all issues, it is presumed that those minutes are the result of the parties weighing the strengths of their respective cases against the risks which they face if they should decide to litigate the issues. Those minutes of settlement almost invariably are a reflection of the compromise the parties are willing to make.
>
> [24] When parties sign those minutes, it is a representation to the court that the parties have deliberated over the terms and are committed to complying with those terms. It is only when a party was coerced, a victim of a fraud, or a victim of a mistake known to the opposing party that the minutes of settlement will be set aside.

Justice Sproat found that the wife had understood when she signed the Minutes in 2009 that the husband might retire at age 55, and that this could cause her spousal support to end. As a result, his Honour concluded that it was reasonable for the husband to retire.

Furthermore, as the husband had by then been paying spousal support for just over 14 years after the 14 $^{1}/_{2}$-year marriage, Justice Sproat thought it was reasonable not to impute the husband with any employment income. Therefore, spousal support was reduced to $1 a month after a transition period of rather meagre ($375 a month) step-down support for about two years.

We are left to wonder if the result would have been the same were it not for the husband's various health issues. Or, even with those facts, query why the Court did not avail of the "significant need" exception to the "Rule Against Double Dipping" (*Boston v. Boston* (2001), 17 R.F.L. (5th) 4 (S.C.C.)) to allow the wife some continued support from the husband's already-equalized pension.

Perhaps the answer is in the nature of the specific Consent Order in this case — that the husband's pension income would not be included in any future calculation of the husband's income. A support order can be varied, but can the same be said for an Order setting out what is *not* to be included in the payor's income? Maybe not so much. If parties can agree about how income should be calculated for child support purposes [*Austin v. Austin* (2006), 29 R.F.L. (6th) 1 (C.A.); *Shields v. Shields*, 2006 CarswellAlta 608 (Q.B.); *Charron v. Charron*, 2015 ONSC 5370], surely they can do so for spousal support purposes. The next time you are representing a payor, you might just want to give that some thought. (But if you're representing a recipient, forget we said anything.)

D.L. v. B.W., 2021 CarswellPEI 35 (S.C.) – *Limitation periods*

"Phew!" — The Husband

The parties separated in 2009 after more than 30 years of marriage. Most of their assets, including the family home, were in the wife's name.

Although both parties initially retained lawyers, they made no progress towards resolving the matter. In the meantime, the wife moved out of the family home, while the husband continued living there.

Nothing happened in the case until March 2020, when the wife retained a new lawyer and took the position that the limitation period for the husband's claim for an equalization payment had expired. She also tried to have the family home listed for sale, and to force the husband to vacate the property.

In Prince Edward Island, s. 7(3) of the *Family Law Act* provides that the limitation period for claiming an equalization payment expires on the earliest of six years from the date of separation, or two years from the date of divorce. As the parties separated in 2009 and were not yet divorced, the applicable limitation period expired in 2015.

In most cases, the expiry of a limitation period would be the end of the matter. The case law is clear that "[l]imitation periods are not enacted to be ignored", and that parties are required to act with due diligence to discover the material facts giving rise to their claims: *Soper v. Southcott*, 1998 CarswellOnt 2906 (C.A.) at para. 21.

In some circumstances, the discoverability principle can operate to delay the start of a limitation period until the claimant has discovered, or ought to have discovered through the exercise of reasonable diligence, the material facts giving rise to his or her claim. However, discoverability could not help the husband in this case, because he was well aware of his own separation in 2009, and title to the family home was in the wife's sole name.

While the husband may not have known about the six-year limitation period, ignorance of the legal significance of the material facts is ***not*** a basis for delaying the commencement of the limitation period: *Nicholas v. McCarthy Tétrault*, 2008 CarswellOnt 6320 (S.C.J.) at para. 27, aff'd 2009 CarswellOnt 5701 (C.A.), leave to appeal refused. Accordingly, although the husband claimed he did not know about the existence of the limitation period until the wife's new lawyer told him about it in March 2020, that did not provide a proper basis for extending the limitation period in this case on the basis of the discoverability principle.

Fortunately for the husband, s. 2(3) of the *Family Law Act* allows the court to extend the limitation period for claiming an equalization payment if the claimant can establish that: (a) there are apparent grounds for relief; (b) the delay was incurred in good faith; and (c) the delay did not cause substantial prejudice to the other party.

As the parties were unable to locate any cases from PEI that had considered s. 2(3), the Chief Justice considered a number of leading Ontario cases that have dealt with s. 2(8) of Ontario's *Family Law Act*, which is identical to s. 2(3) of PEI's *Family Law Act*, including *El Feky v. Tohamy* (2010), 90 R.F.L. (6th) 302 (C.A.); *Taylor v. Taylor*, 2019 CarswellOnt 11608 (S.C.J.); *Paulsen v. Paulsen* (2017), 96 R.F.L. (7th) 395 (Ont. S.C.J.); and *Horner v. Horner* (2014), 53 R.F.L. (7th) 471 (Ont. S.C.J.).

Since the wife owned almost all of the parties' assets, it was clear that, but for the limitation period, she would owe the husband an equalization payment. Accordingly, the Court was satisfied, and the wife conceded, that the "apparent grounds for relief" part of the test was met.

Chief Justice Clements was also satisfied that the husband had established that the delay was incurred in good faith and that the wife would not be substantially prejudiced if the limitation period was extended.

While the husband should have been more proactive, the Court was satisfied that he had acted "honestly and with no ulterior motive". As the Ontario Court of Appeal noted in *El Feky v. Tohamy* (relying on Justice Mendes da Costa's decision in *Hart v. Hart* (1990), 27 R.F.L. (3d) 419 (Ont. U.F.C.)):

> [34] . . . I believe, to establish "good faith", it must be shown that the moving party acted honestly and with no ulterior motive. It does not seem to me that the Legislature, anticipating the general newsworthy nature of the family property provisions of the Act, intended that a mere failure to make enquiries should necessarily negate "good faith", provided that the absence of enquiry does not constitute wilful blindness or does not otherwise, in all the circumstances, fall below community expectations. . . .

Furthermore, while the Court was very concerned about the length of time that had passed, the mere passage of time, in and of itself, does not constitute "substantial prejudice" for the purposes of s. 2(3) of the *Family Law Act*. Neither does the mere fact that an equalization payment would have to be paid if the limitation period is extended. In this context, "prejudice" refers to the underlying claim — not to the extension of the limitation period itself: *El Feky*. There must be evidence to show that the party seeking to rely on the limitation period made "irreversible financial decisions" based on the belief that no equalization payment was being sought, and/or important documentation is no longer available because of the passage of time.

As there was no evidence that the wife would suffer any prejudice for the purposes of s. 2(3), and as the other parts of the test had been met, Chief Justice Clements granted the husband's motion to extend the limitation period.

A.A. v. R.R. (2021), 55 R.F.L. (8th) 68 (Ont. S.C.J.) – *Arbitration Appeals*

If the court finds that a party meets the test for leave to appeal set out in s. 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, does the court retain a residual discretion to not grant leave to appeal?

The parties participated in an arbitration. The award was released on December 24, 2020. The Appellant brought a motion for leave to appeal the award and for an order staying the award, pending appeal.

The main ground of appeal was that the Arbitrator exceeded his jurisdiction when making an award decreasing the Appellant's parenting time. The Appellant argued that the Arbitrator had only two choices: increase the Appellant's time with the child, or leave the current parenting plan.

The main question before Justice Shore was whether or not leave to appeal should be granted.

Paragraph 26 of the parties' Arbitration Agreement was clear that:

The parties have the right to review any arbitration award in accordance with section 46 of the *Arbitration Act* and the right to appeal any award on a question of law, with leave, as provided by section 45 of the *Arbitration Act*.

> Section 45 of the *Arbitration Act* provides:
>
> 45. (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

Therefore, the Appellant had a right to appeal a *question of law*, with leave under both the *Arbitration Act* and the Arbitration Agreement. As the main issue on appeal was one of jurisdiction - whether the Arbitrator had jurisdiction to make an award *decreasing* the Appellant's parenting time — the issue was a question of law.

Justice Shore then went on to consider whether the Appellant met the test for leave to appeal. In doing so, she noted that a narrow scope of appellate review in family law matters promotes finality: *Ojo v. Mason* (2013), 31 R.F.L. (7th) 57 (Ont. S.C.J.) at paras. 19-24; *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) at paras. 8-16; and *Veneris v. Koh Veneris*, 2018 CarswellOnt 11297 (S.C.J.). In that vein, in *Petersoo v. Petersoo* (2019), 29 R.F.L. (8th) 309 (C.A.) the Ontario Court of Appeal noted:

> [35] Mediation/arbitration is an important method by which family law litigants resolve their disputes. Indeed, the courts encourage parties to attempt to resolve issues cooperatively and to determine the resolution method most appropriate to their family. The mediation/arbitration process can be more informal, efficient, faster and less adversarial than judicial proceedings. These benefits are important with respect to parenting issues, which require a consideration of the best interests of children. The decision of an arbitrator, particularly in child related matters, is therefore entitled to significant deference by the courts: see *Patton-Casse v. Casse*, 2012 ONCA 709, 298 O.A.C. 111 (Ont. C.A.), at paras. 9, 11.
>
> [36] The essence of arbitration is that the parties decide on the best procedure for their family. Although the family law of Ontario must be applied, the procedures on an arbitration are not meant to mirror those of the court . . .
>
> [37] Here the parties decided that an appeal would only be based on a question of law. As this court stated in *Alectra Utilities Commission v. Solar Power Network Inc.*, 2019 ONCA 254 (Ont. C.A.), at para. 20:

The starting point in exercising the court's role under the *Arbitration Act, 1991* is the recognition that **appeals from private arbitration decisions are neither required nor routine**. [**emphasis added**]

In *Gragtmans v. Gragtmans*, 2020 CarswellOnt 12927 (S.C.J.), after reviewing the Court of Appeal's decision in *Petersoo*, Justice Czutrin described the role performed by courts in applications for leave to appeal family law awards as that of a "gatekeeper."[1] This, of course, raises an interesting question: what is this "gatekeeping" role — and is it over-and-above the stated test for leave to appeal? Or is a consideration of the test for leave to appeal to be viewed through the lens of this "gatekeeping" role?

Justice Shore suggested that this gatekeeping role meant that the court has a residual discretion not to grant leave, *even if the court finds that the test set out in section 45 of the Arbitration Act is met*. In her words, "[i]n determining whether to grant leave to appeal an arbitration award, this Court must factor in the gatekeeping role played by the court, emphasized by the requirement to obtain leave of the court in the *Arbitration Act*."

The parties had been involved in litigation since 2015. In 2019, on the eve of trial, the parties reached an agreement that resolved the issues in dispute regarding their then four-year-old child.

The agreement was incorporated into a Consent Order. Although the Appellant had wanted equal parenting time, the parties agreed on a residential schedule that had the child living with the Respondent for one extra overnight every two weeks. Paragraph 4 of the Consent Order read:

> The regular residential schedule for A.R. shall be reviewed by April 1, 2020, **with a view to increasing the time** A.R. spends with R.R. **in accordance with her best interests**. If the parties are unable to agree, they shall submit the review to mediation and, if necessary, arbitration with a mutually agreeable professional. [**emphasis added**]

At the arbitration, the Appellant took the position that the child's primary residence should be with him, with much more limited parenting time for the Respondent than the Appellant then had under the Consent Order.

In considering the test in s. 45 of the *Arbitration Act*, the "matter at stake" (s. 45(a)) in the arbitration was the residential schedule of the child. The issue on appeal would be whether the Arbitrator had the jurisdiction to reduce the Appellant's parenting time.

While the Arbitrator had only reduced the time the Appellant spent with the child by one day every two weeks, the test for granting leave to appeal focuses on the importance *to the parties*. It could not be denied that the issue of overnights was important to the parties. But that was not the end of s. 45(a), which goes on to say that the issue must "justify an appeal."

Did the loss of one night every two weeks — some of which was made up by increased time over the holidays — justify an appeal?

Justice Shore thought not. She could not justify the time and cost (both emotional and financial) of an appeal to the parties for the loss of something less than 18 days over the course of a year in the circumstances of this case.

Justice Shore also thought the fact this was a high conflict case had some bearing on whether the issue, albeit important to the parties, justified an appeal. The Arbitrator was concerned about the ongoing cost of the litigation on the child and the fact that the Appellant and his family continued to be angry, resentful, disapproving and mistrustful of the Respondent, and Justice

Shore shared his concerns:

> [26] The parties have a six-year old child who has been caught in the middle of their dispute for her entire life. The cost of this appeal perpetuates the ongoing litigation. It provides no relief to the ongoing litigation, continues to consume limited court resources at a time when court resources are being stretched to the limit, and continues to place the child in the middle of their high conflict dispute, contrary to the best interest of the child. The cost of the appeal is high in these circumstances and I find not justified for a difference of less than 18 days of reduced parental time with the child in a year.

Justice Shore then, quite properly, continued to consider the merits of the appeal. It can be argued that a motion for leave to appeal an arbitration award is not based on the merits of the appeal, but in determining whether an appeal ought to be heard, the merits of the appeal must creep into the analysis. To allow an appeal void of merit to proceed would be a waste of time, even if the issue was important to the parties.

Here, as set out above, the sole issue was one of jurisdiction: did the Arbitrator have jurisdiction to reduce the Appellant's parenting time? The Appellant argued that the Arbitrator decided an issue that was not before him.

It is trite that an Arbitrator's authority comes solely from the Arbitration Agreement (and from the *Arbitration Act*, of course). An arbitrator has no inherent jurisdiction, residual jurisdiction

or *parens patriae* jurisdiction. So what of the wording of paragraph 4 of the Consent Order which provided that the regular residential schedule would be reviewed *with a view to increasing* the Appellant's parenting time in accordance with the child's best interests? Justice Shore deals with it as follows:

> [33] . . . The review clause in the order provides that the schedule shall be reviewed in accordance with the best interests of the child. **The wording "with a view" is not mandatory, but suggestive. The term "with a view to increasing the time" cannot detract from the mandatory obligation both under the contract and the law in Ontario that the review must be decided in accordance with the best interest of the child.** Looking at the language of the Order, nothing restricts the arbitrator from making a decision in the best interest of the child, even if it means reducing the Appellant's parenting time with the child. [**emphasis added**]

The Arbitrator was of a similar opinion:

The May 29, 2019, order provides for a review of parenting time "with a view to increasing the time [the daughter] spend with [the father] in accordance with her best interest." The order was based entirely on the consent of the parties. The wording was a negotiated compromise of the parties' competing interests, under the pressure of an approaching trial date . . . **The language "with a view to increasing . . . " expresses an intention or maybe a presumption that the father's parenting time with the daughter would increase, but it is qualified by "in accordance with her bests interests."** [**emphasis added**]

There was also nothing in the Arbitration Agreement that restricted the Arbitrator's jurisdiction in this regard. The Arbitration Agreement provided that the issues before the Arbitrator included "parenting time" for the child. There was no qualification in the Arbitration Agreement that the Arbitrator could only *increase* the Appellant's time with the child or leave it as it was prior to the review. While the Appellant may have *wanted* the schedule to increase, nothing in the Consent Order or the Arbitration Agreement limited the authority of the Arbitrator regarding parenting time.

This likely came as a bit of a surprise to the Appellant. Again, the Consent Order stated that the review was "with a view to increasing" the Appellant's parenting time in accordance with the child's best interests. One could posit that this was not a "wide open" review. Rather, if the Arbitrator did not think that increasing the Appellant's time was "in accordance with the child's best interests" — perhaps his mandate was to simply make no change. Otherwise, what was the point of the "with a view" language? Why not just leave it at "a review of parenting time?" This was a Consent Order, and words are to have meaning. A Court Order is to be interpreted by giving each term a sensible meaning in harmony with the other terms: *Dhillon v. Jaffer*, 2012 CarswellBC 982 (C.A.); *Shih v. Shih* (2017), 91 R.F.L. (7th) 102 (C.A.).

And with that, the motion for leave to appeal was dismissed. The lesson? Be clear. Mean what you say; and say what you mean.

And, finally, of the question as to whether, in exercising a "gatekeeping role" a court retains residual discretion to refuse a motion for leave to appeal that otherwise meets the test? It is not directly answered. However, it appears there is no such residual discretion. Rather, the

consideration of the test for leave to appeal is to be viewed through the lens of a "gatekeeping" role. And that's probably the way it should be.

British Columbia Birth Registration No. 2018-XX-XX581, Re (2021), 55 R.F.L. (8th) 298 (B.C. S.C.) – *Polyamorous relationships and parentage*

In *British Columbia Birth Registration No. 2018-XX-XX581, Re*, following case law from Ontario and Newfoundland, Justice Wilkinson of the B.C. Supreme Court ordered that a second mother in a polyamorous "triad" relationship be declared a legal parent, in addition to the first mother and the father.

Olivia, Eliza and Bill lived together in a committed polyamorous relationship for several years. Bill and Eliza had been in a committed relationship since the early 2000s. In 2016, they began a polyamorous "triad" relationship with Olivia, which meant, according to the Court, that, "they each [had] a relationship with one another and each of their relationships with each other [were] considered equal." In 2018, Eliza and Bill became the biological parents of a child, Clarke, and the three agreed that Olivia would be another parent to Clarke. In their way, however, was s. 26 of the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*").

Section 26 of the *FLA* reads:

> **Parentage if no assisted reproduction**
>
> 26 (1) On the birth of a child not born as a result of assisted reproduction, the child's parents are the birth mother and the child's biological father.

As a result of s. 26, Bill and Eliza - and *only* Bill and Eliza - were named as parents on Clarke's birth registration. A child conceived through assisted reproduction can have three legal parents, while a child conceived through sexual reproduction cannot.

The application to add Olivia as a parent was opposed by the Attorney General of B.C., a curious position to take given the result of similar cases in Ontario and Newfoundland.

The three putative parents had three main arguments:

- The court could make a declaration as to parentage for Olivia under s. 31 of the *FLA*, which says that if there is a "dispute or any uncertainty" as to whether a person is or is not a parent the court can make an order declaring whether a person is a child's parent.

- The court could make a declaration as to parentage using its *parens patriae* jurisdiction to fill a "gap" in the statutory regime in furtherance of its duty to protect children. [The inherent *parens patriae* jurisdiction of the Court is preserved in s. 192(3) of the *FLA*.]

- The Court could find that s. 26 of the *FLA* violated the *Charter*.

By the time of the application, Olivia had played an extremely active role in Clarke's life for the 2-1/2 years since his birth - to the extent of any parent, including taking unpaid "parental leave" to stay at home.

It was undisputed that, "Clarke [was] being raised by three loving, caring, and extremely capable individuals." Every child should be so lucky. (Although we pity the court that has to determine child support obligations in the event of a separation with a shared 3-way parenting regime; a case for another day.)

The Attorney General argued that the Court could make a guardianship order in favour of Olivia. However, the Court found that a guardianship order does not replace a parentage order because there are clear differences between being a parent and being a guardian:

> [46] As the parties all note, parentage determines lineage and a child's rights on intestacy, citizenship, potential access to parental leave, and certain financial obligations, among other things. However, and perhaps most importantly, the key difference between parentage and guardianship is that parentage is immutable: the relationship between a parent and their child cannot be broken. Accordingly, there are practical and symbolic differences between parentage and guardianship such that guardianship is not a "cure-all" for Olivia.

The Attorney General also used the favourite argument of governments: allowing a declaration of parentage for a third legal parent would "open the floodgates" to parentage declarations in the future - as if all-of-a-sudden all of the population is going to become part of a polyamorous relationship; all they had been waiting for was the ability of the Court to declare parentage. Justice Wilkinson cleverly noted that people usually go to court to *avoid* parental responsibilities, not *embrace* them.

As there was really no "dispute" or "uncertainty" as to Clarke's parentage, s. 31 did not apply. His biological parents were Eliza and Bill, and the *FLA* does not contemplate a child having a third parent, *unless* the child had been conceived using assisted reproduction.

While this case did present a challenging issue, Justice Wilkinson had the benefit of some prior judicial thought.

In *A. (A.) v. B. (B.)* (2007), 35 R.F.L. (6th) 1 (Ont. C.A.), a similar Ontario case, the Ontario Court of Appeal held that parentage is a symbolic indicator of a parent-child relationship, and is a "lifelong immutable status."

In *C.C. (Re)* (2018), 7 R.F.L. (8th) 346 (N.L. S.C.), a similar case in Newfoundland, the Court allowed three members of a polyamorous relationship to be declared "parents."

And, although not considered by her Honour, in *H. (D.W.) v. R. (D.J.)* (2013), 34 R.F.L. (7th) 27 (Alta. C.A.), a similar case in Alberta, the Alberta Court of Appeal held that two separated men (who had been the parents of a child) and the genetic mother could all be parents.

The Attorney General argued there was no gap in the *FLA*. Rather, the legislature specifically intended to limit the parents of a child conceived through sexual intercourse to their biological parents. The legislature could have contemplated polyamorous relationships in the legislation, but they specifically did not.

However, Justice Wilkinson found that she could avail of her *parens patriae* jurisdiction. After a deep dive into Hansard, her Honour determined that there was a "gap" in the *FLA*. When it was enacted, the legislature did not contemplate the possibility that a child might be conceived through intercourse yet have more than two parents. "Put bluntly, the legislature did not contemplate polyamorous families." The *FLA*, Justice Wilkinson determined, did not adequately provide for polyamorous families in the context of parentage.

As a result of this decision, it is now possible for three legal parents to be appointed by the court with regard to a child conceived in a polyamorous relationship.

And, le voilà . . .

Children's Aid Society of the Districts of Sudbury and Manitoulin v. C.R. (2021), 52 R.F.L. (8th) 207 (Ont. C.J.) – *Withdrawing protection applications*

Once a society initiates a protection application, what is the judicial test for leave to withdraw it and terminate all orders with respect to the child in question? That is the question pondered by Justice Kukurin in this case.

The mother supported the society's motion to withdraw. The father opposed it.

The Ontario Children's Lawyer representing the 8-year-old child ("A") opposed leave being granted at the time, but suggested it may consent later.

The Court had to consider the following issues:

a) If the granting of judicial leave to withdraw is an exercise of judicial discretion, what criteria must the court consider?

b) If the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 (the "*CYFSA*") requires the court to hold a hearing to determine whether a child is in need of protection, on what facts or circumstances could, or should, a court rely to decline to hold such hearing and/or make that determination?

c) What prejudice, if any, and to whom, would result if leave to withdraw is granted?

d) If leave is granted, what becomes of the claims made by respondents (or perhaps a child) in any Answer filed in the proceeding?

e) Does the history of the litigation play any role in the decision whether or not to grant leave?

f) Is there a public interest in holding the "finding in need of protection" hearing before granting the society leave to withdraw?

The child's mother had three successive partners and five resulting children, the oldest being 18 and the youngest being 2.

The mother had previous involvement with the society. Her first two children had been in the care and custody of their paternal grandparents for over five years. A had been the subject of family law proceedings since 2013, and the operative order under the *Children's Law Reform Act* (dated May 28, 2018) provided for joint custody with week-about parenting. Despite that Order, and because of the intervening child protection proceeding, A had been living with her father in Sudbury.

The current child protection proceeding arose out of the mother's relationship with her current partner and father of her youngest two children. The society apprehended those two children in September 2018. It was not entirely clear whether A, the focus of the case, was apprehended or

not. Officially, she was not. However, submissions from society counsel at the motion for leave to withdraw suggested that she had been. In any event, A and her two younger half siblings were the subject to the society's child protection application that was first returnable in September 2018.

Less than three weeks later, there was a finding, on the consent of the mother and her partner, that the two younger siblings were children in need of protection. They were placed with the mother's sister, subject to a nine-month supervision order with conditions. The mother was granted access supervised in the discretion of the society. The mother and her partner then separated. A continued living with her father subject to an interim supervision order. No finding was ever made that A was in need of protection. In the meantime, almost 30 months had elapsed from the commencement of the application.

During that time, the mother took some steps to improve her circumstances to the point that the society returned her two youngest children to her, with a supervision order.

The society's motion, if granted, would have left the parties with no child protection order, and revived the domestic family law order that provided for shared week-about care of the child.

The father had filed an Answer and Plan of Care to the society's application. He asked for a deemed order for sole custody of A. He also wanted the mother's access to A to be supervised at a Child and Family Centre. In the alternative, he sought sole care and custody of A subject to a society supervision order. In either case, a finding that A was in need of protection was a pre-requisite.

The mother took the position that an order for leave to withdraw should be granted. As she and the father had not resolved the custody and access issues, the inference was that she wanted the domestic family order to once again become operative. (At the motion, the mother suggested that she and the father should schedule a Settlement Conference and try to negotiate terms of custody and access in the domestic family court.)

The society's position was that no protection concerns existed at the time, as evidenced by the fact that the two youngest children had been returned to the mother (although with a supervision order). The father of the two youngest children was no longer in the mother's life, and he had been, according to the society, a major reason why this case started. The society was content that all child protection orders terminate, and that A's mother and father deal with the issues of custody and access in family court. As noted by Justice Kukurin,

> [16] In a nutshell, this society wants out. It has more needy clients than these and it prefers to expend its limited resources in assisting these more needy families and children. It does not intend to seek a finding that the child A is a child in need of protection and believes that she is not.

On behalf of the child, the OCL opposed the society's request for leave to withdraw. As the mother was then living in Kingston and the father was living in Sudbury, a withdrawal by the society would make the parties and the child subject to an order that provided for joint custody

with a week-about schedule that was wholly unworkable. Furthermore, the child had no representation in the family law proceeding and would be without a voice.

Justice Kukurin was clearly unhappy with the delays in the case. According to the *CYFSA* and the *Family Law Rules*, O. Reg. 114/99, the case involving A should have been completed by the end of January 2019. And his Honour blamed everyone involved, including the Court, for failing to promote the primary objective of the *Family Law Rules*, which is to deal with cases justly. According to Justice Kukurin, "Everyone has dropped the ball."

The society raised an interesting point: while the history of the matter would have, at one point, clearly supported a finding that A was in need of protection, A was no longer in need of protection. The society need not provide services where a child is not in need of protection at the time of the hearing.

With respect to the timing of a need for protection finding, in *Children's Aid Society of Hamilton-Wentworth v. R. (K.)*, 2001 CarswellOnt 5006 (S.C.J.), Justice Czutrin said:

> [73] I have come to the conclusion that the court should be free to consider whether the child is in need of protection at the commencement of the proceedings or at the hearing date, or for that matter some other date, depending on the circumstances. There cannot be an absolute rule as to the relevant date. This is consistent with the [*Child and Family Services Act*, R.S.O. 1990, c. C.11] and certainly consistent with the Supreme Court of Canada decision [*Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)* (1994), 2 R.F.L. (4th) 313 (S.C.C.)].
> While Justice Kukurin accepted this as a correct statement of the law, he noted there was subsequent competing authority. In *C. (N.V.) v. Catholic Children's Aid Society of Toronto*, 2017 CarswellOnt 1376 (S.C.J.), Justice Wilson specifically referred to Justice Czutrin's reasoning and said:
>
> > [57] I conclude that the wording of the section, common sense, and the case law support the interpretation that the finding of risk of harm, and hence the child's need for protection, **must be determined at the time of the hearing**.
> >
> > . . . . .
> >
> > [74] I conclude that section 37(2)(b) of the *CFSA* [the precursor to the *CYFSA*] is clear that the Society's onus is to prove on a balance of probabilities that a risk of harm is present at the time of the trial based upon relevant sufficient evidence. This evidence may date from both pre- and post-apprehension. [emphasis added]

However, Justice Wilson's view had not been adopted by most courts since then and was, more often than not, not followed. See, for example, the critique of Justice Wilson's reasoning in *Children's Aid Society of Toronto v. S.A.* (2017), 98 R.F.L. (7th) 497 (Ont. C.J.) (Justice Pawagi); *Children's Aid Society of Toronto v. S.M.T.*, 2018 CarswellOnt 13354 (C.J.) (Justice O'Connell); *Children's Aid Society of Toronto v. R.M.*, 2018 CarswellOnt 16748 (C.J.) (Justice Paulseth); and *Catholic Children's Aid Society of Toronto v. N.N.*, 2019 CarswellOnt 334 (C.J.) (Justice Zisman). Furthermore, sitting in appeal of Justice Paulseth's decision in *RM*, [*Children's Aid Society of Toronto v. RM* (2019), 24 R.F.L. (8th) 384 (Ont. S.C.J.)], Justice Horkins dismissed as a ground of appeal Justice Paulseth's failure to follow Justice Wilson on this particular issue of timing in *C. (N.V.)*. Justice Horkins was also of the view that the strict rule as

to timing espoused in *C. (N.V.)* did not meet the needs of remedial legislation such as the *CYFSA*.

Justice Kukurin was of the view, as are we, that the more flexible view espoused by Justice Czutrin and Justice Horkins makes the most sense. It makes little sense to constrain the court to focus on *only* the circumstances at the time of the hearing. After all, the protection application was started for a reason. As noted by Justice Kukurin, focussing exclusively on the circumstances at the time of the hearing would also render s. 101(8) of the *CYFSA* redundant as a dispositional option:

> s.101(8) Where the court finds that a child is in need of protection but is not satisfied that a court order is necessary to protect the child in the future, the court shall order that the child remain with or be returned to the person who had charge of the child immediately before intervention under this Part.

Justice Kukurin was concerned about the message the Court would be sending by granting leave to withdraw at this stage - that a society can let a case linger in limbo with a "without prejudice" order for well over two years; that it can delay a finding hearing without limit; and then ultimately ask the court to not hold one at all. Here, "the society should do what it should have done two years ago, and it should permit the court to do what it should have done two years ago."

In *Catholic Children's Aid Society of Toronto v. B. (D.)*, 2002 CarswellOnt 1868 (C.J.), Justice Jones listed several factors to consider when deciding whether or not to grant leave to withdraw. Then, in *Children's Aid Society of Algoma v. S. (A.)*, 2011 CarswellOnt 14131 (C.J.), Justice Kukurin added further factors of his own:

1. whether any continuing protection concerns exist;
2. whether all parties consent to the withdrawal;
3. the reasons for the withdrawal;
4. how the withdrawal would affect the fairness of any other pending custody litigation;
5. what is the real battle in the case about and what are the possible outcomes;
6. at what stage is the litigation, what are the timelines expectations and what demands on judicial resources;
7. if the withdrawal is opposed, what is the reason for the opposition and what is the evidence to support the reason; and
8. is there an alternative venue for resolving the issues.

In this case:

- The parties did not agree to the granting of leave to withdraw.

- The reason for the withdrawal was that the society did not see that there was any protection concern at present for the child. But that was not determinative of whether A was in need of protection under the statute. The timing of that determination, under the predominant case law, was not necessarily "now". A finding that a child was in need of protection could also be made on the facts that existed at the time the application was brought or at any time since then. Furthermore, the society could be wrong based on the evidence before the court.

- "Failing to proceed with a finding hearing with respect to A when a finding was made with respect to her two younger siblings in the same case grates on the court. It is like watching a film where an expected and necessary part of the story is just left out with no ostensible reason provided."

- "If the jurisprudence is correct, and if the factual circumstances at time of intervention can form the basis for a finding in need of protection, then the society's reason that no protection concern exists now is not a good reason to grant leave to withdraw."

- Fairness to the child militated against allowing a withdrawal. A made it clear, through her counsel, that she was opposed to the week-about joint custody regime which was precisely what granting leave to withdraw would bring about. And no one had commenced a Motion to Change the final order in the family case, meaning that a withdrawal would force the parties to start again from the very beginning.

- Given s. 101(8) of the *CYFSA*, all the society would have to do is to persuade the court, after a finding in need of protection was made, that no further court order was necessary, and it would be in the same position that it wanted to reach by withdrawing its application. It would then be entirely out of the case. If no finding in need of protection was made, the society would similarly be in exactly the same position as the case would be effectively ended. "It makes more sense to hold a finding hearing in a case that is this aged."

- The *CYFSA* mandates that the court hold a hearing to make a determination of whether a child is in need of protection when a society commences a child protection application. That "hearing" need not be a full-blown *viva voce* hearing. Other manners of hearing, such as summary judgment, focussed hearings, and mini-trials are also acceptable.

Ultimately, to the presumed chagrin of the society, the Court refused to "hold a finding hearing in the guise of a motion for leave to withdraw a child protection application, particularly on the kind of affidavit evidence that the society presents in this case." The society had to address why the evidence it filed in support of a protection finding for over two years should be ignored or discounted by the court, and why the father's evidence supporting a finding in need of protection should be discounted. Then perhaps the Court might consider granting leave to withdraw.

As a result, the society's motion was dismissed.

Surely, it will be rare for a court not to let a society withdraw a protection application. If a society determines that a child, once arguably in need of protection, is no longer in such need, it seems odd that a court would force the society to expend limited resources on a case that is not, in its view, necessary. However, the court does have supervisory jurisdiction over children, and much like cases where, having invoked the jurisdiction of the court, a court may not allow parties to just withdraw a custody/access application, a court may sometimes not permit the withdrawal of a protection application absent sufficient evidence. [See *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.); *Sicard v. Pinney*, 2020 CarswellOnt 16844 (S.C.J.); *Richardson v. Richardson* (2019), 35 R.F.L. (8th) 265 (Ont. C.A.).]

In reading this particular decision, however, one does get the sense that the Court was effectively slapping the society on the wrist for allowing the case to linger:

> [53] . . . Courts have been said to provide oversight to children's aid societies which are given extensive powers to intervene in the homes and families of our province. The main justification for doing so is to protect the children in this province. This is a laudable and a noble purpose. But the actions of a society are prescribed by the law. The court is also required to comply with the law and in addition, it is entrusted with ensuring that societies act in accordance with the law. The community has an interest in whether a child is in need of protection whenever that determination is placed before the court. This court needs more in this case than the society has provided to grant a leave that will exempt the society and the court from carrying out their respective mandates relating to a finding in need of protection.

Thus endeth the lesson.

Mitchell v. Reykdal, 2021 CarswellAlta 957 (Q.B.) – *Cohabitating*

In Ontario You can Cohabit without Cohabiting . . . and in Alberta You May Not Be Cohabiting While Cohabiting . . . This Is Getting Very Confusing

Mr. Reykdal and Ms. Reykdal were high school sweethearts. They married in 1988, bought a home in Red Deer, and had three children together. They were together for 38 years, including 30 years of marriage. As Mr. Reykdal worked in the oilfield services industry to support the family, and was regularly away from home, Ms. Reykdal was primarily responsible for raising the children.

By all appearances, they were a happily married couple. But there was, however, a small problem: Ms. Mitchell.

Unbeknownst to Ms. Reykdal, for the last 17 years of their marriage, Mr. Reykdal had also secretly been in a marriage-like relationship with Ms. Mitchell, and had financially supported her and her daughter from a previous relationship. (Ms. Mitchell apparently knew that Mr. Reykdal had a wife and children, but Mr. Reykdal told her they were separated.)

Ms. Mitchell and Mr. Reykdal separated in November 2017. A few months later, Ms. Reykdal finally found out that Mr. Reykdal had been deceiving her for almost two decades, and ended the marriage (they were ultimately able to resolve the issues arising out of the breakdown of their marriage by way of a separation agreement).

In March 2018, Ms. Mitchell filed a claim for, among other things, adult interdependent support (i.e. the Alberta equivalent of spousal support for a common law spouse) pursuant to the *Adult Interdependent Relationships Act* ("*AIRA*").

At first glance, Ms. Mitchell appeared to have a strong claim for support. She clearly had standing pursuant to s. 3(1)(a)(i) of the *AIRA*, which provides that "a person is the adult interdependent partner of another person if (a) [s/he] has lived with the other person in a relationship of interdependence (i) for a continuous period of not less than 3 years[.]"

Furthermore, while Mr. Reykdal tried to argue that he had not actually "lived with" Ms. Mitchell "in a relationship of interdependence", he must have realized that this argument was unlikely to succeed given that, among other things:

- Mr. Reykdal financially supported Ms. Mitchell and her daughter during their 17-year relationship;

- They spent significant amounts of time together at the various homes that Mr. Reykdal rented for Ms. Mitchell;

- They regularly travelled together, spent holidays together, and attended Ms. Mitchell's family's events, funerals, and birthdays together;

- They held themselves out as a couple;
- They had a joint email account; and
- Mr. Reykdal gave Ms. Mitchell a ring.

But finding that Mr. Reykdal and Ms. Mitchell had lived together in a relationship of interdependence was not the end of the analysis. In Alberta, s. 5(2) of the *AIRA* provides that "[a] married person cannot become an adult interdependent partner while living with his or her spouse." Thus, argued Mr. Reykdal, he could not be Ms. Mitchell's adult interdependent partner because he had never stopped "living with" his wife, Ms. Reykdal. The law in this regard is different from that of other jurisdictions such as Ontario where a person can have more than one spouse at a time for support purposes: *Su v. Lam*, 2011 CarswellOnt 1030 (S.C.J.); *Blair v. Allair Estate* (2011), 94 R.F.L. (6th) 346 (Ont. S.C.J.).

Justice Loparco started by considering some of the "double life" cases from other jurisdictions, but ultimately concluded that they were of little assistance because of the substantial differences between the *AIRA* and the other provincial statutes that deal with support for common law spouses:

> [273] Specifically, these cases provide limited guidance in the case at bar for three reasons. **First, the *AIRA* is unique in Canada** (see John Fisher, "Outlaws or In-laws?: Successes and Challenges in the Struggle for LGBT Equality" (2004) 49 McGill LJ 1183 at 1188; Alberta, Legislative Assembly, *Alberta Hansard*, 25th Leg, 2nd Sess (19 November 2002) at 1390), **so it is difficult and potentially problematic to import other case law definitions without diligently examining the idiosyncrasies of Alberta's own legislation.**
>
> [274] Second, the factual scenario at hand is also highly distinct. This is a one-of-a-kind factual situation with little to no precedential guidance. I have surveyed the several other "double lives" cases from across Canada, but none deal with the distinctive Alberta legislation that applies here (see e.g. *Nowell v Town Estate* (1997), 35 OR (3d) 415, 1997 CanLII 14545 (CA) (*Nowell*); *Anderson v Anderson* (1994) 50 ACWS (3d) 273, 1994 CanLII 18224 (Ont SC) (*Anderson*); *Boughton v Widner Estate*, 2021 BCSC 325 (*Boughton*)).
>
> . . . . .
>
> [277] Finally, **the term "living with" in s. 5 of the *AIRA* plays a very different role in the case at bar than in the other cases across Canada interpreting "living with" or its equivalent.** In those cases, Courts adopted a broad interpretation of the term to give effect to the remedial nature of the relevant legislation - that is, to receive spousal support or a share of the deceased's estate as a "common law spouse" (see e.g. *Climans v Latner*, 2020 ONCA 554; *Naegels v Robillard*, 2019 ONSC 2662; *Austin v Goerz*, 2007 BCCA 586; *Boyd v Foster*, 2019 BCSC 901; *Coombes Estate (Re)*, 2015 BCSC 2050).
>
> [278] However, s 5 of the *AIRA* presupposes that a person can only *live* with one person for the purpose of assessing entitlement to support. [emphasis added]

After reviewing the Hansard debates about the *AIRA* and the legislative history, Justice Loparco ultimately concluded that the term "living with" in s. 5(2) of the *AIRA* should be interpreted to

mean "that a person can only be living with one person in a marriage or AP-like relationship at a time[.]" Accordingly, she concluded that she had to "conduct a comparative analysis to determine who the party was de facto living with."

Justice Loparco then reviewed the history of Mr. Reykdal's relationship with both Ms. Reykdal and Ms. Mitchell, and concluded that Mr. Reykdal had "preponderantly committed his time and effort to his relationship with [Ms. Mitchell] and therefore was no longer 'living with' his wife after he rented the home in Red Deer [in 2000] and allowed [Ms. Mitchell] and [her daughter] to move in." Accordingly, Justice Loparco was satisfied that Ms. Mitchell did, in fact, have standing to claim adult interdependent partner support from Mr. Reykdal.

Alternatively, if her interpretation of s. 5(2) was incorrect, Justice Loparco indicated that she would have found that there is an implicit exception to s. 5(2) for situations where, as in this case, one party misrepresented to the other that s/he was available to enter into a valid adult interdependent partnership. However, she also made it clear that this implied exception should only apply if one party has actually deceived the other:

> [336] [Mr. Reykdal] represented to [Ms. Mitchell] that he was available to enter into what is, on the facts, a valid AP relationship, and [Ms. Mitchell], after inquiring about his separated status, believed him and relied on what he said. Functionally, from [Ms. Mitchell's] lived reality, her and [Mr. Reykdal] were in the kind of relationship contemplated by the *AIRA*. [Mr. Reykdal] was the only one who knew that the relationship was not in fact exclusive, and that his wife believed he was living with her. **Because [Mr. Reykdal] deceived [Ms. Mitchell] and [Ms. Mitchell] relied on the legitimacy of their relationship, [Mr. Reykdal] is [Ms. Mitchell's] AP and should therefore be subject to these same protections and support obligations.**
>
> [337] I will note here that **my interpretation and application of the *AIRA* in this alternative argument does *not* extend to situations where**: 1) a person enters into an AP-like relationship with someone where one or both parties to the relationship either already have a valid AP or are already married and living with their spouse; and 2) **neither party has deceived the other into thinking that they are in a valid AP relationship.**
>
> [338] **That situation is clearly anticipated by the *AIRA* and runs afoul the key purposes of the legislation that I canvassed above**. Essentially, this means that **if [Ms. Mitchell] knew that [Mr. Reykdal] was in fact still married and living with his wife or already had an AP, her standing as an AP and entitlement to support would fail**. But because I find as a fact that she in good faith believed that her relationship with [Mr. Reykdal] was marriage-like and exclusive, and she otherwise had an AP-like relationship with [Mr. Reykdal], I conclude that she is an AP under the *AIRA* and is accordingly entitled to support. [emphasis added]

While we appreciate that Justice Loparco was trying to avoid depriving Ms. Mitchell of what would otherwise have been a meritorious spousal support claim, we are not sure that her Honour's interpretation of s. 5(2) is correct. Based on a plain reading of the *AIRA*, s. 5(2) provides a person in an intact marriage with a defence against a claim for spousal support by anyone other than the married person's husband or wife. There does not appear to be anything in the *AIRA* to indicate that the statute requires the court to somehow try to assess who the potential payor "lived with" more. The statute could not be more clear: "A married person cannot become an adult interdependent partner while living with his or her spouse."

In this case, there is no question that Mr. Reykdal spent significant amounts of time with Ms. Mitchell. There is also no question that Mr. Reykdal had a job that required him to be away for extended periods of time. However, given that Ms. Reykdal apparently thought that she and Mr. Reykdal were happily married for the entire course of his relationship with Ms. Mitchell, we have difficulty understanding how it can reasonably be suggested that they did not "live together" at all during the last 17 years of their 38-year relationship.

However, this was a very challenging set of facts, and it *may* be that her Honour's interpretation is a better-suited remedy than other possibilities such as the tort of deceit (the damages for which would be the inability, on account of misrepresentation, to claim adult interdependent support). Absent some statutory interpretation gymnastics, Ms. Mitchell may have been stuck without any remedy.

We certainly agree that Ms. Mitchell should have standing to claim spousal support from Mr. Reykdal. But instead of having to find creative ways to ensure that justice is done in individual cases, the better approach might be for Alberta to simply repeal s. 5 of the *AIRA*. While these types of "double life" cases may be relatively rare, there is little reason to deprive the court of the ability to award support to an otherwise meritorious claimant simply because that claimant happened to be in a relationship with someone who was already in another adult interdependent relationship, or married and "living with" his or her spouse.

Jonczyk v. Tilsley, 2021 CarswellOnt 5124 (S.C.J.) – *Assessor's Recommendations on Interim Motions*

Using Assessor Custody/Access Recommendations on an Interim Motion: Being "High Conflict" is "Exceptional"

For years, courts have grappled with the question of whether the report/recommendations of a custody/access assessment can be used on an interim motion or only at trial. That was the question in *Jonczyk*, where the conflict between the parents forced 11 different contacts by the Children's Aid Society (the "Society"), and 13 by local police services since the parents separated in September 2019.

In answering this question, Justice Mackinnon summarized the law, and posited that the question is easier to answer in high-conflict cases.

Originally, courts were generally of the view that assessments were for trial where they could be tested - not for interim motions: *Robinson v. Robinson* (1985), 49 R.F.L. (2d) 43 (Ont. C.A.); *Genovesi v. Genovesi* (1992), 41 R.F.L. (3d) 27 (Ont. Gen. Div.); *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.J.); *Mayer v. Mayer* (2002), 34 R.F.L. (5th) 69 (Ont. S.C.J.); *Kirkham v. Kirkham* (2008), 57 R.F.L. (6th) 120 (Ont. S.C.J.); *Winn v. Winn* (2008), 60 R.F.L. (6th) 203 (Ont. S.C.J.); *Batsinda v. Batsinda*, 2013 CarswellOnt 18635 (S.C.J.).

Over the years, that standard was somewhat relaxed such that assessment reports could be used on interim motions in "exceptional circumstances" - such as when the report itself mandated immediate action: *Genovesi v. Genovesi* (1992), 41 R.F.L. (3d) 27 (Ont. Gen. Div.); *Marcy v. Belmore* (2012), 27 R.F.L. (7th) 412 (Ont. S.C.J.); *Stuyt v. Stuyt*, 2006 CarswellOnt 7783 (S.C.J.); *O'Connor v. O'Connor*, 2017 CarswellOnt 2366 (C.J.); *Krasaev v. Krasaev*, 2016 CarswellOnt 14693 (S.C.J.); *Wang v. Grenier*, 2016 CarswellOnt 13513 (S.C.J.).

And more recently, courts have considered whether "exceptional circumstances" should be required: *Bos v. Bos*, 2012 CarswellOnt 7442 (S.C.J.). In *J.D. v. N.D.* (2020), 50 R.F.L. (8th) 62 (Ont. S.C.J.), the Court considered if it might not be time to reconsider routinely deferring implementation of assessments to trial. In *Horvat v. Cross*, 2010 CarswellBC 2817 (S.C. [In Chambers]), the Court suggested that assessments were, in fact, particularly useful for interim proceedings. And in *Batsinda v. Batsinda*, the Court suggested that the caution applied to the assessor's *recommendations*, but not to the assessor's reported *observations*.

In *Jonczyk*, the Mother sought sole decision making authority, primary residence, and supervised exchanges. She also asked that the Father have parenting time starting at step two as recommended by the assessor (Tuesdays from 8:30 a.m. to 6:30 p.m. and Saturdays from 8:30 a.m. to Sunday at 8:30 a.m.) for three months, and additional access if all went well.

The Society supported the assessor's recommendations.

The Father served his own motion asking to increase his parenting time. He argued that the Court should exercise caution in implementing an untested parenting report on a motion, especially where an interim order is already in place (as it was here). He also argued that an assessment report should not be used to work a strategic gain in the litigation and to create a new *status quo*.

The main issue on the motion was whether the Father's parenting time should be increased gradually or immediately.

This case gave Justice Mackinnon the chance to review her discussion in *J.D. v. N.D.* about the use of an assessment on a motion before trial, which serves as a useful "all-in-one-place" review for all:

> [17] The legal landscape has also changed since *Grant v. Turgeon*, which itself followed an earlier decision in *Genovesi v. Genovesi*, [1992] O.J. No. 1261 (Ont. Gen. Div.). While its traditional test is still applied in some cases, for example *Scutt v. St. Cyr*, 2020 ONSC 1159 (Ont. S.C.J.) (child significantly impacted by parents' inability to make timely decisions for child's mental health); and *Matteliano v. Burt*, 2018 CarswellOnt 12417 (Ont. S.C.) (countless unsubstantiated allegations of abuse giving rise to parental alienation), other cases say that the jurisprudence has evolved. In *Bos v. Bos*, 2012 ONSC 3425 (Ont. S.C.J.) Mitrow J. stated at para. 23 and 27:
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> > [23] . . . In my view, the jurisprudence has evolved to the point that although the general principle enunciated in *Genovesi* continues to be well founded, it is not so rigid and inflexible as to prevent a court on a motion to give some consideration to the content of an assessment report where that assessment report provides some additional probative evidence to assist the court, particularly where the court is making an order which is not a substantive departure from an existing order or status quo. In such circumstances, the court may consider some of the evidence contained in an assessment report without having to conclude that there are "exceptional circumstances" as set out in *Genovesi*.
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> > . . . . .
> >
> > [27] It must be cautioned that the existence of an assessment report should not make it "open season" for parties to automatically bring motions attempting to implement some aspects of the report or to tweak or otherwise change existing interim orders or an existing status quo. Clearly, the facts of each case will be critical and will guide the exercise of the court's discretion.
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> [18] The court in *Bos v. Bos* at para 26 set out the following alternative factors to consider in lieu of requiring exceptional circumstances:
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> > a. How significant is the change that is being proposed as compared to the interim status quo?
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> > b. What other evidence is before the court to support the change?
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> > c. Is the court being asked to consider the entire report and recommendations, or only some parts, including statements made by children, or observations made by the assessor?

> d. Are the portions of the report sought to be relied on contentious and if so has either party requested the opportunity to cross-examine the assessor?
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> [19] Other decisions agreeing with *Bos* include *CHELSOM v. HINOJOSA-CHELSOM*, 2020 ONSC 6926 (Ont. S.C.J.); *Krasaev v. Krasaev*, 2016 ONSC 5951 (Ont. S.C.J.); and *Calabrese v. Calabrese*, 2016 ONSC 3077 (Ont. S.C.J.).
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> . . . . .
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> [21] The mother accurately submits that there are many factual disputes between the parties reflected in the assessment. The question for the motion court ought not to be whether it can determine all the factual disputes between the parties, but whether it can determine essential facts showing whether or not a temporary change in the children's living arrangements is in their best interests.
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> [22] Delaying a change in residential arrangements until trial is not always appropriate. Making a change sooner can be the better option. Courts have found this to be true in parental alienation cases. In *Hazelton v. Forchuk*, 2017 ONSC 2282 (Ont. S.C.J.) (CanLii) the court said:
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> > [75] However, as noted at the outset of these reasons, there is one thing on which all participants agree - where parental alienation exists, it is manifestly important that steps be taken immediately. If they are not, the situation will only get worse. If the alienating parent continues to have unfettered access to the children, there is little doubt that the poisoning of the children's minds will continue. At some point, the restoration of a relationship with the other parent becomes much more difficult, if not impossible.
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> See also *MacLeod v. MacLeod*, 2019 ONSC 2128 (Ont. S.C.J.) (CanLii) where a finding of alienation was made at the interim stage and residential changes were made to address it.
>
> [23] In my view **the law has evolved to the point where the approach of deferring parenting changes to trial in highly conflicted cases characterized by family violence and/or child parent contact issues should be re-examined, along with the related approach of routinely deferring implementation of family assessments to trial.** A reconsidered process of active judicial case management and timely single judge decision making may provide children more hope for better outcomes and at the same time provide procedural fairness to their parents. [emphasis added]

As noted above, in *Batsinda*, Justice Chappel extensively reviewed the case law and the principles that applied in dealing with assessment reports on an interim basis as the law existed at the time, and added the following:

> [32] . . . The caution that applies with respect to the weight to be given to assessment reports at the interim stage of proceedings applies primarily to the conclusions and recommendations of the assessor, rather than the evidence and observations set out in that report. Information such as statements made by children to the assessor, the assessor's observations respecting the parties, and their impressions regarding the parties' interactions with the children may be of considerable value to the motions judge in their attempt to reach a decision respecting the best interests of the children, provided that the evidence appears to be probative . . .

Here, Justice Mackinnon noted that even though the child was only two years old, she had already been impacted by parental conflict and exposed to CAS and police on multiple occasions. Furthermore, the earliest available trial date would be in September 2021, closing in on a year after the assessment was released. Justice Mackinnon also noted that the Father had plenty of time to cross-examine the assessor before the motion. Therefore, at the very least, if an "untested" assessment report is to be used on an interim motion, it behooves the other party to bring a motion to question/cross-examine the assessor before the motion - and it behooves the court to let them do it.

Justice Mackinnon then extends these principles further and suggests that, even though the motion before her could have been decided without relying on the assessor's recommendations and conclusions, "**high conflict parenting disputes generally do meet the test of exceptional circumstances**." Therefore, parents in such cases who dispute the recommendations in an assessment would be well advised to assert their procedural rights *before* the motion rather than simply argue that consideration of the report should be left to trial. On the one hand, this will encourage the additional step of questioning the assessor before the motion; on the other hand, in these days of delay, it also ensures that children are left in possibly unsatisfactory situations for unacceptable lengths of time.

Pousette v. Janssen (2021), 55 R.F.L. (8th) 80 (B.C. S.C.) – *Calculating a non-Canadian resident's income for support purposes*

What is the Difference Between a Tax Rate and an "Effective" Tax Rate? Inquiring Minds Want to Know.

Justice Jackson's decision in *Pousette* provides a welcome, clear and concise framework for calculating a non-Canadian resident's income for support purposes.

The parties were married in 1994 and had one child together. After they separated in 2004, the parties consented to an order that required the husband to pay the wife $385 a month in child support based on an income of $45,500 a year.

In 2011, the husband started working for the US State Department and became a resident of the United States for tax purposes.

In or around 2019, the wife applied for retroactive child support back to 2011. Although the husband had increased his child support payments voluntarily over the years, the wife claimed that he had still not paid what he was supposed to have paid, and argued that his income had to be grossed up to reflect the fact that his taxes in the United States were significantly less than they would have been in Canada.

Pursuant to s. 19(1)(c) of the *Guidelines*, a court can impute income if one of the parties "lives in a country that has effective rates of income tax that are significantly lower than those in Canada[.]" After reviewing some of the leading cases in BC about s. 19(1)(c), Justice Jackson established the following framework for calculating a non-resident parent's income for support purposes:

> [10] In summary, based on the *FCSG* and the interpreting case law, determining total income of a non-resident parent who earns income in a foreign currency involves the following stages:
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> 1. **Determining whether there is a difference in effective tax rates in Canada and the foreign jurisdiction**, which in turn involves the following steps:
>
>   a. determine the annual gross foreign income (GFI) by including all types of earnings that would form part of a payor parent's total income in Canada and making any adjustments to income for deductions as permitted under Schedule III of the FCSG;
>
>   b. determine the foreign tax rate (FTR) paid, which can be calculated by dividing the total amount of foreign tax paid by the GFI;
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>   c. using the average exchange rate over the preceding twelve months or the annual rate where it is available, convert the GFI to Canadian funds (CGFI);
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>   d. determine the Canadian tax rate (CTR) that would be levied on the CGFI; and

e. Compare the two tax rates.

2. **If there is no difference in the effective tax rates, the non-resident parent's GFI can simply be converted to Canadian currency using the average exchange rate over the preceding year**. This will be the parent's total income to which the *FCSG* can simply be applied.

3. **If there is a significant difference in the effective tax rates, an additional amount of income can be imputed where the court considers it appropriate**, which involves the following steps:

    a. Calculate the non-resident parent's net foreign income (NFI, i.e. GFI less tax paid);

    b. Convert the NFI to Canadian currency (CNFI); and

    c. Using Canadian tax rates, determine what Canadian gross income would be required to yield the equivalent of the NFI (CGIENFI, which is calculated by dividing the CNFI by [100% less the Canadian tax rate]). The resulting CGIENFI is the parent's "total income" to which the *FCSG* can be applied.

4. In either scenario, if appropriate, **consider whether, based on a bundle of services analysis, adjustments to the total income should be made**. [emphasis added]

5. After reviewing the applicable tax rates in the United States and Canada, Justice Jackson found that the husband's effective tax rate in the United States had ranged from 10.4 percent to 16.4 percent between 2011 and 2017, whereas it would have ranged from 28.2 percent to 47 percent in Canada over that same period.

Based on the husband's 2017 income of $215,160.55 (in CAD), for example, the husband paid just over $35,000 in tax in the United States, but would have owed more than $100,000 in tax in Canada. A tax savings of approximately $65,000 on a gross annual income of $215,000 is clearly significant for the purposes of s. 19(1)(c).

With respect to the "bundle of services" issue, both parties' experts acknowledged that they "were unable to provide an opinion on the issue with any certainty because the issues are so complex and because a great deal of information that would be required to provide an opinion was not available." Fortunately for the wife, however, although expert evidence can be helpful in trying to compare the public benefits that are available in Canada to those in a foreign jurisdiction, Justice Jackson was satisfied that it is not actually necessary:

> [9] In some circumstances it may also be necessary to examine the "bundle of services" that Canada and the payor parent's foreign jurisdiction each provide in exchange for the tax dollars paid, in order to account for additional expenses a payor parent who earns their income in foreign currency may incur to enjoy tax-funded benefits made available in Canada.

However, **while expert evidence about "bundle of services" comparisons can sometimes be helpful, there is no legal rule that expert evidence on that issue is required for a court to exercise its discretion to impute income under ss. 19(1)(c) and 20, and there may be sound**

policy reasons not to require such an intensive and potentially costly inquiry: *Devathasan v. Devasathan* 2019 BCSC 661 at paras. 265-271, Gomery J. [emphasis added]

Then, as Justice Gomery noted in *Devathasan v. Devathasan* (2019), 27 R.F.L. (8th) 388 (B.C. S.C.):

> [270] In my view, **these cases do not establish a legal rule that expert evidence from an economist who has conducted a "bundle of services" review is an essential foundation in this case for the exercise of my discretion under ss. 19(1)(c) and 20 of the *FCS Guidelines***. The *FCS Guidelines* direct me to consider the difference in effective rates of income tax. **While a broader inquiry may inform the exercise of the court's discretion, it is not essential in every case**: if it were, *Patrick* would be wrongly decided and Newbury J.A. would not have referred to it with apparent approval.
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> [271] For what it is worth, I should add that **a full review of the bundle of government services offered in two different countries strikes me as a large, expensive and probably controversial undertaking**. With respect for what may seem to be contrary views expressed in *Ward* and *Watson*, **I doubt that it would be good policy or consistent with the intention underlying the *FCS Guidelines* to require such an inquiry as a matter of course.**
>
> [272] I **do not think that the absence of expert evidence from an economist addressing the bundle of services is necessary on the evidence in this case to persuade me that the effective tax rate in Singapore is significantly lower than in Canada. The evidence is clear that it is**. It was open to Dr. Devathasan to attempt to persuade me of the contrary by leading evidence of the bundle of services, but no such evidence was tendered. [emphasis added]

In our view, we must be very careful with this reasoning. In some cases, it may be plainly obvious that the "bundle of services" a person receives for their tax dollars in a foreign jurisdiction is significantly less than what they would receive in Canada. But sometimes it is not, and it should not be that difficult to get evidence detailing those differences.

Furthermore, the wording of s. 19(1)(c) of the *Guidelines* seems to require this inquiry: the court may impute income where the spouse lives in a country that has ***effective*** rates of income tax that are significantly lower than those in Canada. The word "effective" must mean something, and we suggest that imports an inquiry as to what residents receive for their tax dollars. In the United States, for example, tax rates are lower, but there is no socialized medicine or "free" health care. Then, there is also the fact that the burden should be on the recipient to show that the spouse lives in a jurisdiction with lower effective tax rates. The evidentiary onus is on the party asking that income be imputed: *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.); *T. (S.L.) v. T. (A.K.)* (2009), 77 R.F.L. (6th) 67 (Alta. C.A.); *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.).

Also of note, the husband tried to argue that various additional payments he received from working for the State Department (danger pay, "post differential earnings" to compensate him for environmental conditions during his postings, and a "post allowance" to compensate him for the higher costs of living during his postings), and income that he had chosen to defer to his retirement plan should not be included in his income for support purposes.

In dismissing these arguments, Justice Jackson concluded that the husband's danger pay, post differential earnings, and post allowance should properly be included in his income for support purposes in order to ensure that, as Justice Sandomirsky noted in *Reynolds v. Andrew*, 2008 CarswellSask 583 (Q.B.), the children of service people "whose parents serve abroad, share the benefits and emoluments for which allowances are paid and deserved. These children endure the hardship of an absentee parent and they endure the risk of losing a parent to injury or death. Thus, they too should be benefactors of such allowances and enhanced income generated therefrom."

Justice Jackson was also satisfied that while Schedule III of the *Guidelines* requires various adjustments to a person's income for support purposes, it does **not** permit a deduction for either mandatory or voluntary retirement savings or pension plans:

> [15] In *T.B. v. R.B* 2015 BCPC 194, Judge Wyatt considered the issue of whether a parent's RRSP contributions ought to be deducted in determining guideline income. In *T.B*, the evidence was that the deductions were mandatory through the parent's employment and the RRSP was locked in. The evidence in this case satisfies me the claimant's contributions and deductions were elective, not mandatory. In *T.B.*, Wyatt P.C.J. concluded that Schedule III of the FCSG does not permit the downward adjustment of a parent's income for pension and RRSP deductions or contributions (whether voluntary or mandatory): at para. 42; see also *Ellacott v. Paliy* 2018 ONSC 3327 at paras. 37-38.
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> [16] I agree that Schedule III of the FCSG does not allow such an adjustment. I find the [husband's] deferred income amounts reported as Thrift Savings Plan and Thrift Savings Plan Loan are to be included in the calculation of his GFI.

In the end, Justice Jackson was persuaded that the husband should be imputed with additional income pursuant to s. 19(1)(c). She was also satisfied that the order should be made retroactive to 2011 because of the husband's "failure to take appropriate steps to correctly determine his ongoing child support obligations, and his failure to provide the information to the [wife] as she requested". As a result, Justice Jackson ordered the parties to calculate the specific amount that the husband owed the wife based on her decision, and gave them leave to seek further directions from her if they could not finalize the matter on their own.

D.M.M. v. E.H.M, 2021 CarswellBC 1153 (S.C.) – *Medical Records*

This case was in the nature of an appeal from the British Columbia Provincial Court, where the petitioner sought to set aside an order in a family law proceeding that required her to produce her "medical records relating to diagnoses or treatment for depression, anger management, mood swings, or memory loss."

The parties lived together from February 2008, until October 2019. They had two children. There was a trial scheduled in April 2021, about parenting issues, guardianship, and child support.

The respondent applied for the order in issue in provincial court. Section 5 of the B.C. *Family Law Act*, S.B.C. 2011, c. 25 requires parties to provide full information for the purposes of resolving a family law dispute. Rule 20(6) of the *Provincial Court (Family) Rules*, B.C. Reg. 417/98 provides:

On application by notice of motion to a judge under Rule 12, the judge may order a person who possesses or controls a record that is relevant to the proceedings and on whom notice has been served in accordance with Rule 12(1)(b) to produce the record for inspection and copying on the date, at the time and place and in the manner the judge thinks is fair.

The judge concluded the records sought were relevant to the main issues in the litigation.

The petitioner, however, claimed that the records in question were not in her possession or control. Rather, she argued, the records were in the possession and control of her treating doctors.

Justice Punnett concluded (correctly) that, as the petitioner had a right to her own medical records, she was caught by Rule 20(6), even if those records were in the actual possession of her doctors.

The petitioner also argued that, unlike the Supreme Court, there was no right of discovery in Provincial Court, and no Rule under which the order in question could have been made. The petitioner further argued that the matter turned on the meaning of "possession or control", and that control "does not mean you can go and get [the records]." Rather, the doctors were in "possession and control" of the records.

The respondent argued that he could not make an application for the production of the records directly from the doctors because he did not know who the third-party medical practitioners were. Further, he argued, the petitioner had control of the records, was entitled to obtain them, and could require her treating physicians to release them to her.

The question, therefore, was whether a party's medical records held by a medical professional were in that party's possession or control within the meaning of Rule 20(6)?

While no Provincial Court authority on point was provided, the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 offered some assistance. Rule 7-1(a)(i) refers to documents "that are or have been in the party's possession or control," and several authorities have considered the meaning of "possession or control."

In *Henry v. British Columbia (Attorney General)*, 2014 CarswellBC 1601 (S.C.), Chief Justice Hinkson stated:

> [22] Possession of a document for the purposes of Rule 7-1(1) requires more than mere access to the document: *Lacker v. Lacker* (1982), 42 B.C.L.R. 188 (B.C. S.C.), at 192-94 [1982] B.C.J. No. 1514 (B.C. S.C.).
>
> [23] Control of a document for the purposes of the predecessor to Rule 7-1(1) has been held to be an enforceable right to a document and as such includes all documents which, though not in the party's possession, that party has a right to obtain from the person who has them: *Royal Bank v. Hale (No. 1)*, (1960), 35 W.W.R. 236, [1960] B.C.J. No. 44 (B.C. C.A.); *Western Union Insurance Company v. Nihill*, [1972] 6 W.W.R. 241, 31 D.L.R. (3d) 124 (Alta. T.D.).
>
> [24] Power over a document for the purposes of the predecessor to Rule 7-1(1) has been held to be broader than mere control and to connote that the litigant has access to the documents: *Net1 Products (Canada) Ltd. v. Mansvelt Estate*, 2001 BCSC 906 (B.C. Master) at para. 14, [2001] B.C.J. No. 1282 (B.C. Master).

Then, Justice Punnett referred to *Cantlie v. Canadian Heating Products Inc.*, 2014 CarswellBC 365 (S.C.):

> [67] The plaintiffs say I should order Monessen Canada to seek out and produce documents from its US parent company, Monessen Systems. The plaintiffs claim it is within Monessen Canada's "power" to get these documents from Monessen Systems notwithstanding that it does not have possession or control of the documents. To support this assertion, the plaintiff argues that "control" in Rule 7-1(1) includes the "power to obtain".
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> [68] The plaintiffs provided me with no case authority supporting this novel argument. Other than inconvenience and cost, which I do not suggest are irrelevant, the plaintiffs provided no explanation as to why they should not be required to apply under Rule 7-1(18) to seek the documents directly from the parent companies. Rather, the plaintiffs suggest that under Rule 7-1(1) I can order Monessen Canada to seek out those documents. They say that only if Monessen Canada returned to say the parent company would not provide the documents would an application under Rule 7-1(18) be necessary.
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> [69] The plaintiffs are wrong. Rule 7-1(1) obligates parties to prepare a list of all documents that have been or are in a party's "possession or control" and that could be used at trial to prove or disprove a material fact, or upon which a party intends to rely. This test is narrower than under the previous Court Rules and it would be inconsistent with the object of the current Rules to essentially broaden the meaning of "control" through inference.
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> [70] Moreover, Rule 7-1(11) to (14) set out specific procedures to be used if a party believes that the list of documents should include additional documents that "are within the listing party's possession, power or control". Rules 7-1(11)-(14) do not apply to this application; it can only be

> invoked after the list of documents is delivered. If Rule 7-1(1) was meant to obligate parties to produce documents in their "power to obtain", I think the Rule would have said so.

Notably, the law in BC is different from Ontario (and elsewhere), where a party can be forced to bring a motion for production from third parties if they have the right to obtain the documents from them. See, for example: *Di Luca v. Di Luca* (2004), 1 R.F.L. (6th) 162 (Ont. S.C.J.); *K. (S.D.) v. Alberta (Director of Child Welfare)*, 2002 CarswellAlta 116 (Q.B.); *Catholic Children's Aid Society of Toronto v. S. (A.)* (2007), 47 R.F.L. (6th) 208 (Ont. C.J.), aff'd (2008), 64 R.F.L. (6th) 219 (Ont. S.C.J.); *Peerenboom v. Peerenboom* (2018), 16 R.F.L. (8th) 451 (Ont. S.C.J.). Or stated more succinctly, disclosure obligations extend to the ability of a party to make a formal request for documents from a non-party with the expectation that the request will be granted: *Matthys v. Foody* (2009), 72 R.F.L. (6th) 376 (Ont. S.C.J.).

The respondent argued that the petitioner had control of her medical file and could request and obtain the records. He referred to *McInerney v. MacDonald*, 1992 CarswellNB 63 (S.C.C.), where the Supreme Court of Canada held that a patient was entitled to examine and copy all information in their medical records relied on by the physician considered in the doctor-patient relationship (including records prepared by other doctors). The actual physical records, however, belonged to the physician.

A patient has the right to access their own medical records. Those records are within the patient's control, and must be produced. Logic really dictates no other result. And it seems Justice Punnett agreed.

J.S.R. v. Children's Aid Society of Ottawa, 2021 CarswellOnt 982 (Div. Ct.) – *Access Orders and Improper Delegation by the CAS*

Can an access order be at the discretion of a society? The case law has been divided, but a panel of the Ontario Divisional Court seems to have finally answered the question.

After a protection trial, the Court ordered that two children were to be placed in the society's care. The mother, an older sibling, and the maternal grandmother were allowed access, which was ordered to be at the discretion of the society and in accordance with the best interests of the children.

The mother appealed. She asked that the children be placed in her custody with society supervision. In the alternative, she asked for specific access to both children if they were to remain in the care of the society.

Section 74(3) of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 (the "*CYFSA*") set out the factors a court is to use when considering the best interests of a child. Section 104 of the *CYFSA* mandates that a court determine access in a child's best interests. Specifically, s. 104(1) states:

> **Access order**
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> 104 (1) The court may, in the child's best interests,
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> (a) when making an order under this Part; or
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> (b) upon an application under subsection (2),
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> make, vary or terminate an order respecting a person's access to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate.

Although a plain reading of the section suggests that "the court" makes orders for, and imposes conditions regarding, access, two streams of case law have evolved on ordering "access at the discretion of the society." The question then became, having found that access in favour of the mother was in the best interests of the child, could the court delegate all aspects of that access - including decisions about type, frequency, and duration - to the society?

The two lines of cases were reviewed by Justice Harper in *C.A.S. v. K.D.D.*, 2020 CarswellOnt 1592 (S.C.J.). The first line of cases found it to be an error in law for a court to delegate a child's access at the discretion of a society. In *K.D.D.*, Justice Harper stated:

> [45] I am of the view that a court cannot and should not delegate its exercise of discretion when ordering access. It is the court that must balance and evaluate the evidence within the consideration of the factors set out in the statute. Expediency cannot override such considerations.

> [46] I am also of the view that in certain circumstances, after the court has made the determination that access is appropriate, it may be necessary to set out certain parameters and guidelines to a party who may be placed in a position of having to facilitate that access given the unique circumstances of each case that is presented a court.

Many other judges of the Ontario Superior Court of Justice agree with this view, believing it to be improper delegation of the jurisdiction of the court: *Children's Aid Society of Toronto v. N.N.*, 2017 CarswellOnt 19171 (C.J.); *Childrens Aid Society of Toronto v. P. (D.)*, 2005 CarswellOnt 11499 (S.C.J.); *Children's Aid Society of Toronto v. O. (B.)* (2003), 45 R.F.L. (5th) 131 (Ont. C.J.); *Children's Aid Society of Toronto v. C.B.* (July 23, 2007), Doc. C32280/05 (Ont. C.J.); and *Children's Aid Society of London & Middlesex v. C. (G.)*, 2001 CarswellOnt 5542 (S.C.J.).

The second stream of cases supported an award of access at the discretion of the society. In those cases, as in this one, the society argued that it is statutorily mandated to supervise children in its care, thereby permitting courts to allow the society to exercise discretion with respect to an individual's access. In support of that position, the society relied on *H. (C.) v. Children's Aid Society of Durham (County)* (2003), 37 R.F.L. (5th) 124 (Ont. Div. Ct.):

> [19] The parent-child relationship is dynamic, always changing. Where an application for protection has been commenced, the relationship may also be difficult. Maximum flexibility is required to respond to the family's ongoing needs on a day-to-day basis. That would not be in the children's best interest.
>
> [20] The Society has the statutory mandate and expertise to deal with these day-to-day issues. It is thus appropriate to leave the day-to-day discretion with it.

This argument is not without some merit. However, the Divisional Court in this case distinguished *H. (C.) v. Children's Aid Society of Durham (County)* on the basis that the decision there was an appeal of a *temporary* order made at a *temporary* care and custody hearing.

And, as noted by the Divisional Court, that discretion cannot simply be delegated to a society - or to anyone else for that matter:

> [51] A judicial decision that delegates the discretionary elements of access including type, frequency, and duration to a Society offends the principle against sub-delegation: *Canada (Attorney General) v. Brent*, 1956 CanLII 5, [1956] S.C.R. 318 (S.C.C.) at 321. It is a decision to delegate discretionary adjudicative authority to a nonjudicial actor where the power is statutorily reserved to a judicial decision-maker. We adopt the comments of Goodman, J. with respect to a previous version of the statute: *Children's Aid Society of Toronto v. P. (D.)*, 2005 CarswellOnt 922, [2005] O.J. No. 930 (Ont. S.C.J.) at para. 40, *rev'd on other grounds*, *Children's Aid Society of Toronto v. P. (D.)* [2005 CarswellOnt 4579 (Ont. C.A.)], 2005 CanLII 34560:
>
> > Yet, I do find it difficult to accept that the legislature ever intended to leave decisions regarding access to children in the hands of one of the litigants, itself, particularly where children have no right of access to their parents unless an order for access is made under Part III . . . While I can certainly understand some of the reasons why it would be efficient, time-and or cost-wise to delegate access issues to the CAS, children and their parents have a right, in my view, to have decisions in respect of access made in an objective and neutral manner. **One would expect that it would be rare, if ever, that**

> **legislation would authorize a court to delegate its judicial functions to any third party who/which is a party to the litigation, when neutrality and objectivity are so vital to the decision-making process**. In my view, simply put and at least on a final basis, the CFSA does not permit, either expressly or by implication, the court to delegate its authority to make orders in respect of access under section 58 to any person or entity, including the CAS. [emphasis added]
>
> . . . . .
>
> [54] We find that granting a Society the discretion to determine the type, frequency and duration of access, including whether access will take place at all, is an inappropriate delegation of the court's role to determine access terms and conditions pursuant to section 104 and 105 of the *CYFSA*.

Therefore, it now appears that different rules may apply for "access at the discretion of the society" depending on whether the order is being made at a temporary or final hearing.

However, the Divisional Court did make it clear that a society does have some discretion once access has been ordered. According to the Divisional Court:

> [55] . . . it is important to distinguish between discretionary "visits" and the right of access resting in access holders. As the Court of Appeal held in *Children's Aid Society of Toronto v. P. (D.)*, 2005 CanLII 34560 at para. 12, a Society has "the right to control who may visit the children and when," as would a custodial parent. For example, **if the access order stipulates in-person visits six times a year for an hour, a Society retains the discretion to grant additional visits, or to supplement in-person visits with additional written communication. In this sense, the right of access granted by a court may be supplemented by a Society's discretionary decisions about visits. But the minimum rights of access must be established by the court**. [emphasis added]

The appeal was allowed and the issue of access was remitted back to the trial judge

Iafolla v. Lasota (2020), 48 R.F.L. (8th) 467 (Ont. S.C.J.) reversed in part (2021), 53 R.F.L. (8th) 259 (Ont. C.A.) – *Judgment Creditors and Child Support*

Rodney Dangerfield: "I tells ya . . . Judgment Creditors . . . They Don't Get No Respect . ."

The applicant, Iafolla, obtained a judgment against the respondent's ex-husband, Antonov, in relation to a motor vehicle accident in which Antonov was uninsured. The judgment was signed on **June 6, 2016** in the amount of $380,071.23.

At the time of the accident, Antonov was married to the respondent, Lasota. They were joint tenants of their matrimonial home, located on Savona Drive in Toronto, where they lived with their child.

On **October 3, 2017**, Lasota commenced divorce proceedings against Antonov in the Ontario Superior Court of Justice.

On **November 28, 2017**, Iafolla filed a Writ of Seizure and Sale against the matrimonial home.

On **July 25, 2018**, following an uncontested divorce trial, Antonov was ordered to pay Lasota child support of $1,429 a month, and child support arrears of $14,290. Antonov was also ordered to pay spousal support of $3,191 a month, and spousal support arrears of $24,360.

The Divorce Order further directed that the matrimonial home be sold and the net proceeds divided into two equal shares. However, the Court directed that Antonov's share should be reduced by the arrears, an equalization payment of $28,408, and costs of $12,279. The Court further ordered that the remaining balance of Antonov's share of the proceeds be held in trust as security for his future child and spousal support obligations. Specifically, paragraph 19 of the Divorce Order stated:

> The remaining balance of [Antonov's] share of the net proceeds of the sale of the Matrimonial Home, if any, shall be held in trust as security for [Antonov's] future child and spousal support obligations.

Justice Backhouse, in granting the Divorce Order, was not made aware of the judgment against Antonov (remember, this was an uncontested trial so Antonov was not present) or the Writ against the matrimonial home. Lasota said that she did not know about the judgment or the Writ.

In **September 2018**, the matrimonial home was sold for $880,000, with a closing on **November 30, 2018**. Prior to the closing, however, it was necessary to have the Writ discharged, which is how Iafolla became aware of the Divorce Order.

The net proceeds of the sale totalled $594,273.30. Lasota and Iafolla agreed that following the payments from Antonov's share as directed by Justice Backhouse, and payment of an additional eight months of support, the $180,670.15 balance of Antonov's share of the proceeds would be

placed in trust without prejudice to Iafolla's right to bring an application to determine priority to those funds.

Antonov did not make any of the ordered support payments. At the time of the motion before Justice Schabas, his arrears were over $100,000.

Iafolla argued that he was entitled to the full amount of $180,670.15 pursuant to s. 2 of the *Creditors' Relief Act, 2010*, S.O. 2010, c.16, Sched. 4, (the "*CRA*"). He urged that the Divorce Order be set aside to the extent that it interfered with his *CRA* rights.

Lasota argued that the court had no jurisdiction to vary the Divorce Order outside the divorce proceedings, and that the Writ and the *CRA* afforded Iafolla no substantive right to the funds.

This area of the law is not well settled, and the parties relied on conflicting lines of cases.

Iafolla relied on the *CRA* to support his argument that Lasota had no priority to the funds, and on decisions in matrimonial proceedings which prevent courts from making retroactive orders to defeat creditors of a spouse.

> Section 2 of the *CRA* states:
>
> 2. (1) Except as otherwise provided in this Act, there is no priority among creditors by execution or garnishment issued by the Superior Court of Justice, the Family Court of the Superior Court of Justice and the Ontario Court of Justice.
>
> . . . . .
>
> **Exception, support or maintenance orders**
> (3) A support or maintenance order has the following priority over other judgment debts, other than debts owing to the Crown in right of Canada, ***regardless of when an enforcement process is issued*** or served:
>
> 1. If the maintenance or support order requires periodic payments, the order has priority to the extent of all arrears owing under the order at the time of seizure or attachment.
> 2. If the support or maintenance order requires the payment of a lump sum, the order has priority to the extent of any portion of the lump sum that has not been paid.
>
> [***emphasis*** added]

The effect of this section is to give priority to support orders that involve a lump sum, or require periodic payments, but only to the extent that those periodic payments are in arrears or the lump sum has not yet been paid. This easily explained why Iafolla consented to the payment of the amounts ordered by Justice Backhouse. However, following that payment which cleared the arrears to that date, Iafolla argued that no further priority existed, and that he was entitled to collect on his judgment.

Iafolla relied on *Maroukis v. Maroukis* (1981), 24 R.F.L. (2d) 113 (Ont. C.A.), aff'd (1984), 41 R.F.L. (2d) 113 (S.C.C.). In *Maroukis*, the judge at first instance ordered that the matrimonial home, previously acquired in joint tenancy, vested with the wife at the date of separation, and that any executions on the property did not affect her title to it. This had the effect of defeating the husband's creditors who had obtained judgments and filed executions on the property *after* the date of separation but *before* the judge's order vesting title retroactively.

The Court of Appeal held that the trial judge had no jurisdiction to make such a retroactive order since the house had been held in joint tenancy when the executions were filed and attached to the husband's interest. The Supreme Court of Canada agreed with the Court of Appeal.

In a similar vein, in *Ferguson v. Ferguson* (1994), 7 R.F.L. (4th) 384 (Ont. U.F.C.) (which followed *Maroukis*) the Court found that a writ of execution for the husband's debt, filed *before* the order that the house be sold and proceeds divided, had priority over any claim that the wife had to the husband's net proceeds of the sale of the matrimonial home. And in *M.J.C. Investment Corp. v. Cole*, 2013 CarswellOnt 19098 (S.C.J.), the Court noted that while the *CRA did* grant priority to orders for support and maintenance over execution judgments, it *did not* do so without regarding to the timing of the support order; a vesting order that provided a spouse with title was, therefore, subject to any valid encumbrancers or registered execution creditors with an interest in the lands at the time the vesting order was made.

These decisions, along with the general tenor of *McCoy v. Hucker*, 1998 CarswellOnt 2919 (Gen. Div.) (a constructive trust should not be used as a tactical tool in family law cases) and *Thibodeau v. Thibodeau* (2011), 5 R.F.L. (7th) 16 (Ont. C.A.), certainly suggest that, with respect to priority, timing is everything.

As a result, Iafolla argued that Justice Backhouse's order that the balance of Antonov's proceeds be held in trust to be available to cover arrears was subject to Iafolla's right to collect on his judgment from that sum. Iafolla argued that, had Justice Backhouse been aware of the writ, she could not have made an order overriding its effect. Consequently, it was not even necessary to vary the Divorce Order, but simply declare that Iafolla had an entitlement to the proceeds at the material time.

Lasota did not contest the authority of the above cases, but argued that Iafolla's motion had to be brought as an intervener in the matrimonial proceeding. Section 17 of the *Divorce Act* provides that a support order "or any provision thereof" can only be varied on application by spouses, unless leave of the court is granted.

Lasota relied on *Stevens v. Stevens* (2005), 20 R.F.L. (6th) 453 (Ont. S.C.J.), in which *Maroukis* and *Ferguson* were distinguished as cases determined under provincial family law statutes which did not permit retroactive orders - whereas the creation of a trust is/was based on the court's equitable jurisdiction. In *Stevens*, a *retroactive* vesting order was found to prevail over a writ filed by a bank. In *Stevens*, it was also held that only a party to a proceeding was entitled to apply for an order to amend or vary a judgment. The Court of Appeal agreed that the judge who had made the vesting order invoked the court's equitable jurisdiction, distinguishing it from *Maroukis* and *Ferguson*: *Stevens v. Stevens* (2006), 28 R.F.L. (6th) 243 (Ont. C.A.). *Silver v. Silver et al*, 2017 ONSC 7749 also suggests that funds placed in trust for future support payments have priority over an execution creditor.

Justice Schabas agreed with Lasota. He determined that Justice Backhouse was rightfully concerned about Antonov's willingness to comply with his court-ordered support obligations and used her equitable jurisdiction to craft her Divorce Order to create a trust to protect Lasota's right

to obtain support from Antonov. That order then had priority over Iafolla's interest, which was subject to "all the equities": *Ontario Development Corp. v. I.C. Suatac Construction Ltd.*, 1976 CarswellOnt 50 (C.A.).

Justice Schabas also accepted that Justice Backhouse had not been operating under Ontario's family law regime, but under the *Divorce Act*, which limits the way in which orders may be varied (as noted above). As Justice Backhouse established a trust, it would be necessary to vary her order if Iafolla had any entitlement to those funds - and that had to be done within the matrimonial proceeding.

As a result, Iafolla's application was dismissed.

This result appeared very unsatisfactory, *especially* in a situation where, as here, the creditor was first in line, but where the trial judge was not told of the creditor's existence or execution. Lasota was, essentially, given a line-pass. In exercising its equitable jurisdiction, a court must ensure fairness to *all* parties: *Evans v. Gonder*, 2010 CarswellOnt 1240 (C.A.). Iafolla, an accident victim and judgment creditor, ought to have been entitled to participate in the doling out of equitable relief.

Iafolla appealed, and argued that he was entitled to the full $180,670.15 pursuant to his rights under s. 2 of the *CRA*. He further argued that, to the extent it interfered with his rights as a creditor, the Divorce Order should be set aside. He argued that the effect of s. 2 of the *CRA* was to only give priority to lump sum support orders and periodic payments in arrears - but not future support - and he relied heavily on *Maroukis* and *Ferguson*, as he did before Justice Schabas.

Lasota again argued that the Court had no jurisdiction to vary the Divorce Order outside the divorce proceedings, and that the effect of Iafolla's appeal would be to vary the Divorce Order. She also argued that neither the writ nor the *CRA* created any substantive right to the funds for Iafolla. And, as she did below, Lasota relied on *Stevens* (where the trial judge distinguished *Maroukis* and *Ferguson* as cases determined under provincial family law statutes which did not permit retroactive orders, whereas the creation of a trust is based on the court's equitable jurisdiction). Again, in *Stevens* a retroactive vesting order was allowed to prevail over a writ filed by a bank.

The Court of Appeal concluded that the motion judge had erred in his interpretation of the jurisprudence and by not considering the court's duty regarding child support.

The Court of Appeal found that *Stevens* did not govern because in *Stevens*, the trial judge had found that a constructive trust operated as of the date of separation so as to vest the matrimonial home in the wife's name. Therefore, the wife in *Stevens* had title to the home *before* the execution was filed. But that was not the case here. Lasota did *not* have title to Antonov's share of the sale proceeds when the writ was filed.

However, the Court of Appeal also did not agree that *Maroukis* assisted Iafolla. There, a writ of execution was filed *before* the trial judge vested property in the name of the wife. On an application to the trial judge to "clarify the judgment" the trial judge vested the home in the

wife's name as of the date of separation - which pre-dated the writ of execution. The Court of Appeal confirmed the vesting order but not the retrospective effect (and the Supreme Court agreed with the Court of Appeal). The Supreme Court dismissed the appeal confirming that, when property is divided on marriage breakdown, it does not vest until the order is made and there is no provision to retroactively vest property. Therefore, the wife's title was subject to a pre-existing execution filed with the sheriff.

The Court of Appeal distinguished *Maroukis* on the basis that the order here was for child support and spousal support, and the limits on retroactivity do not apply to a variation of child support. Child support is the right of the child, and "the presence of a child in divorce proceedings engages special duties for the court to ensure that arrangements are made for support." The trial judge, pursuant to the duties imposed by s. 11 of the *Divorce Act*, secured the sale proceeds of the home for future support including child support. There is no similar duty on the Court for property claims between the spouses or for spousal support. As found by the Court of Appeal, through paragraph 19 of the Divorce Order (above,) the trial judge "clearly intended to secure [Antonov's] share of the matrimonial home proceeds for the benefit of the child." This interpretation of s. 11 really does give retroactive and prospective child support a sort of "super priority."

The Court of Appeal was convinced that, in making her Order, Justice Backhouse had not been aware of the writ. And because the relief sought by Iafolla would effectively have eliminated the security Justice Backhouse put in place, the security the trial judge would have ordered had she known of the writ would likely have been different. For example, she might have considered s. 2(3)(2) of the *CRA* to comply with her obligation to prioritize child support.

The Court of Appeal held that the discovery of the writ of execution was a material change in circumstances giving rise to a variation application. Although the Court of Appeal does not emphasize the point, it is critical to remember *Lasotta's evidence before Justice Schabas was that she did not know about the writ*. Had she known of it, the finding that the writ was a material change would have been a very serious problem. The often-cited test for a "material change", is a change that is substantial, continuing and that *if known at the time*, would likely have resulted in different terms: *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.) at p. 688; *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.) at para. 32. Had Lasotta known about the writ, it could not possibly have been a material change.

Continuing with their material change analysis, the Court of Appeal noted that, on a variation application, the terms of the original order are presumed to comply with the objectives of the *Divorce Act*: *L.M.P.* at para 33. Then, once the material change is established, any variation should reflect the specific change in accordance with the statutory objectives set out in s. 17(4).

Finally, the Court of Appeal noted that the security ordered by Justice Backhouse applied to both the spousal and child support and that it was not apportioned as between them. However, at $17,000/year in child support alone, the child support obligation alone could easily exhaust the disputed amount.

In these circumstances, reasoned the Court of Appeal, the motion judge should have referred the matter back to Justice Backhouse to allow her to consider how knowledge of the writ might change her Order. That Lasota did not move for a variation was not material for several reasons.

Because s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that the Court of Appeal may make any order that ought to or could have been made by the court appealed from, and because Justice Schabas could have referred the matter back to Justice Backhouse, it was appropriate that the Court of Appeal do exactly that.

In closing, we remind you of the sequence of events:

- **June 6, 2016**: Iafolla obtained a judgment against Antonov in the amount of $380,071.23 resulting from a car accident. At the time of the accident, Antonov and Lasota were married. Their matrimonial home was held in joint tenancy.

- **October 3, 2017**: Lasota commenced divorce proceedings against Antonov.

- **November 28, 2017**: Iafolla filed a Writ of Seizure and Sale against the matrimonial home.

- **July 25, 2018**: Antonov was ordered to make monthly child support payments of $1,429 and to pay child support arrears of $14,290; and spousal support in the amount of $3,191 per month, and to pay spousal support arrears of $24,360.

If you are a support claimant, be happy. If you are a judgment creditor of someone that is a parent, be worried.

Colucci v. Colucci, 2021 SCC 24 – *Retroactive reduction in child support obligations*

On June 4, 2021, the Supreme Court of Canada released its long awaited reasons in *Colucci v. Colucci*, about how to deal with a payor's request for a retroactive reduction in his or her child support obligations. This is very much a companion decision to *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.).

We will delve into the decision in more detail in a few weeks. In the meantime, you need to be aware that Justice Martin, writing for a unanimous Court, has established a clear framework for dealing with claims for both retroactive *increases and decreases* in child support and requests to rescind (forgive) arrears that the payor properly owes based solely on an alleged inability to pay:

> [113] To summarize, **where the payor applies under s. 17 of the *Divorce Act* to retroactively decrease child support, the following analysis applies**:
>
> (1) **The payor must meet the threshold of establishing a past material change in circumstances**. The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.
>
> (2) Once a material change in circumstances is established, **a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change** and allow the recipient parent to meaningfully assess the situation.
>
> (3) **Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice**, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.
>
> (4) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors (adapted to the decrease context) guide this exercise of discretion**. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support is decreased). **The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct**.
>
> (5) Finally, **once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified**. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.
>
> [114] It is also helpful to summarize the **principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support**:
> a) **The recipient must meet the threshold of establishing a past material change in circumstances**. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income,

strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.

b) Once a material change in circumstances is established, **a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor**.

c) **Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.**

d) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors continue to guide this exercise of discretion, as described in *Michel*.** If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.

e) **Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified**. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

. . . . .

[138] Accordingly, in this third category of cases, **the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that - even with a flexible payment plan - they cannot and will not ever be able to pay the arrears** (*Earle*, at para. 26; *Corcios*, at para. 55; *Gray*, at para. 58). **Present inability to pay does not, in itself, foreclose the prospect of future ability to pay, although it may justify a temporary suspension of arrears** (*Haisman*, at para. 26). This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor. It also encourages payors to keep up with their support obligations rather than allowing arrears to accumulate in the hopes that the courts will grant relief if the amount becomes sufficiently large. Arrears are a "valid debt that must be paid, similar to any other financial obligation", regardless of whether the quantum is significant (Bakht et al., at p. 550).

. . . . .

[141] While the presumption in favour of enforcing arrears may be rebutted in "unusual circumstances" (*Gray*, at para. 53), **the standard should remain a stringent one. Rescission of arrears based solely on current financial incapacity should not be ordered lightly. It is a last resort in exceptional cases**, such as where the payor suffers a "catastrophic injury" (*Gray*, at para. 53, citing *Tremblay v. Daley*, 2012 ONCA 780, 23 R.F.L. (7th) 91). I agree with Ms. Colucci that the availability of rescission would otherwise become an "open invitation to intentionally avoid one's legal obligations" (*Haisman* (Q.B.), at para. 18, citing *Schmidt v. Schmidt* (1985), 46 R.F.L. (2d) 71 (Man. Q.B.), at p. 73; R.F., at para. 57). Simply stated, how many payors would pay in full when the amounts come due if they can expect to pay less later? The rule should not allow or encourage debtors to wait out their obligations or subvert statutory enforcement regimes that recognize child support arrears as debts to be taken seriously. [emphasis added]

Ladouceur v. Dupuis, 2020 CarswellOnt 19113 (S.C.J.) – *Promotions and Underemployment*

Can One Be Promoted into Intentional Underemployment?

Several years ago, there was a case where, shortly after he separated, a highly paid partner at a major law firm was appointed to the bench, upon which appointment his income reduced by about 75 percent. The wife's counsel argued that, in being appointed to the bench, the husband was intentionally under-employed. Ultimately, common sense prevailed, and the allegation of intentional under-employment was wisely dropped.

Section 19(1)(a) of the *Federal Child Support Guidelines*, SOR/97-175, in providing for the attribution of income in cases of intentional under-employment, was not meant to suggest that anyone earning less than they ever have is to be automatically attributed with income. Rather, the imputation of income for intentional under-employment requires a more nuanced analysis, such as that undertaken by Justice Lacelle in *Ladouceur*. The ultimate question must be: "is it reasonable in the circumstances."

In *Ladouceur*, the father applied to vary a consent interim child support Order (with respect to two children in a shared custody regime) made on October 19, 2019, because his income had declined. The Order required him to pay set-off child support of $415 a month to the mother (based on the mother's income of $104,678 for 2018 and the father's 2018 income of $138,658). The father asked to reduce his child support payments to $89 starting in January 2020. He also asked that he be repaid the resulting overpayment of child support in the amount of $6,048.

The mother opposed the motion. The case was on the trial list for April 2021.

The father argued that his income had clearly reduced so as to meet the test in s. 14(1) of the *Guidelines* because the change in his income between 2018 ($138,658) and 2019 ($98,679) was one that would result in a different order. The complicating factor was that the decrease in income was because the father had successfully applied for a promotion to a managerial position such that overtime was no longer available to him. He argued that a promotion cannot reasonably be considered to result in "under employment".

The mother argued that it was not reasonable for the father to voluntarily reduce his income, and that he was obliged to provide for his children to the best of his ability.

The father was employed with the Federal Government in the House of Commons. He began his career with the Government in 2006 as a Senior Analyst. By 2015, he had reached the top level of promotions available to him as an analyst.

In an effort to advance his career, the father applied to be a Manager. His evidence was that, during the marriage, the parties had discussed this and that the mother had encouraged and supported that decision, because it would mean not only an increased base salary, but also increased retirement benefits.

In 2018, the father earned a base salary of $88,420, but as a Senior Analyst, he was allowed to work overtime. With overtime, his income for 2018 was $138,658. In 2018, he worked nights and weekends, which paid double his usual rate, working on upgrading the network infrastructure in the House of Commons.

In the summer of 2018, the father applied for a promotion to become a "Team Leader" - a management position. He was selected for that position on October 29, 2018. While this new position did not give him the ability to work overtime, his base salary increased by about $5,000 to $93,231.

The father suggested it was ridiculous for the mother to suggest that he accepted a promotion (resulting in lower income) because he did not want to pay child support. The father's evidence was that he took the position because it was higher status and opened opportunities for future career growth. There was no evidence to contradict these assertions. He also argued that, at the time he applied for the position, he and the mother had been in a shared parenting regime, and that because their incomes were relatively close, they had agreed that neither would be seeking support from the other.

The father also expected that the drop in his income would be temporary as he continued to advance his career. His 2019 line 150 income in this new position was $98,679.

The mother denied any discussions with the father about "career advancement" or promotions. She also argued that, for the past several years, the father had been earning over $100,000 annually (his average income over that period was about $135,000), and that he only accepted a management position to avoid his child support obligations.

To the extent it matters, Justice Lacelle accepted that the father had applied for the promotion before he had been served with the mother's Application. We suggest the timing of the application for the promotion is irrelevant. While the *optics* of the father applying for the promotion after being served with the mother's Application may be bad - again, the question, in our view, comes down to reasonableness. If it was reasonable to accept the promotion, it would not matter had he applied for the promotion after being served; and if it was unreasonable, the fact that he applied before being served would not make it reasonable. Ultimately, Her Honour agreed with this reasoning:

> [45] . . . Ultimately, I agree with [father's] counsel that regardless of the timing of the Application and formal notice of the claim for child support in this case, a parent has an obligation to support his or her children and it would be open to a court to find the person was intentionally under-employed based on conduct (or lack of it) that pre-dated any application.

Her Honour accepted that the father's base salary was expected to continue to increase. In support of that conclusion, it was noted that the father's base salary had increased over $5,000 annually in the brief time since he took the position.

The first question for Justice Lacelle was whether or not the father could vary an interim child support order, the test for which seems to be far less onerous than the test to vary an interim spousal support order (the test for which was clarified and re-stated in *Berta v. Berta* (2019), 23

R.F.L. (8th) 201 (Ont. S.C.J.); *Roberts v. Roberts*, 2020 CarswellOnt 6301 (S.C.J.); and *Brown v. Brown* (2020), 50 R.F.L. (8th) 401 (Ont. S.C.J.)).

This matter was governed by section 17(4) of the *Divorce Act*:

> 17 (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

And section 14 of the *Guidelines*:

> 14. For the purposes of subsection 17(4) of the [Divorce] Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> > (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof . . .

Justice Lacelle also referred to the "usual" case law for the proposition that interim orders are not meant to be long-term solutions - they are intended to provide a "reasonably acceptable solution to a difficult problem until trial." Usually, those sentiments are used upon consideration of an *initial* interim Order, not in the consideration of *changing* an interim Order. However, with that note, Her Honour was exactly right; interim orders are not meant to be long-term solutions, and if a change is known, it seems irrational, especially in the case of child support, to wait for trial to effect a retroactive accounting.

There was no doubt that the father's income had changed, and that the change was significant enough that it would significantly reduce the father's support obligation (in fact, to $89 a month). The next question, therefore, was whether the father was intentionally under-employed within the meaning of s. 19(1)(a) of the *Guidelines*.

Ultimately, Her Honour was of the view that the father was not "intentionally under-employed" because she was satisfied that his promotion was taken with a view to advancing his career. While the new position had the immediate impact of reducing overtime that was historically available to the father, it had also increased his base salary - at that point to over $10,000 higher than his base salary as an analyst in 2018.

Ultimately, as we suggested, it all comes down to "reasonableness":

> [47] In any case, the [father] has taken a managerial position with the same employer following a work history of acting in the position while the parties were together. It is **reasonable** to expect that this position will present other opportunities for the [father] which may be of benefit to his children and their future support. . . . [emphasis added]

As Justice Pazaratz noted in *Jackson v. Mayerle*, 2016 CarswellOnt 303 (S.C.J.) at para. 715, "[p]arents are required to act responsibly when making financial decisions that may affect the

level of child support available. They must not arrange their financial affairs so as to prefer their own interests over those of their children." When a payor makes an employment decision that results in a significant reduction in the amount of child support payable, the decision needs to be justified in a compelling way. The payor needs to show that the decision was reasonable in the circumstances. See also *Riel v. Holland* (2003), 42 R.F.L. (5th) 120 (Ont. C.A.) at paras. 22-23; and *Pey v. Pey* (2016), 79 R.F.L. (7th) 107 (Ont. S.C.J.) at paras. 88-91.

As a result, Her Honour dismissed the suggestion that the father was intentionally under-employed and found that he had satisfied the test to reduce his support. Her Honour could find "no principled basis to deny the [father] the variation he requests."

Aside from general considerations of "reasonableness" adopted here, we also like Justice Eberhard's analysis of intentional under-employment in *McNaughton v. Price*, 2006 CarswellOnt 304 (S.C.J.):

> [16] When I consider section 19 of the Child Support Guidelines, in trying to figure out whether an individual is underemployed, **I ask myself this question: Is this person doing what a reasonable person would do if he was in an intact family and he had children to support?** I understand that unemployment happens. I understand that people, especially those with an expensive and specific skill set, cannot always find employment in their field in a short period of time. Many will try private ventures. Ultimately I have to decide whether a reasonable person might have done as the Respondent did, or would a reasonable person have taken other steps to feed his family. [emphasis added]

Stating the test in this fashion puts some "meat" on the bones of "reasonableness." In *Ladouceur*, in taking the promotion, was the father "doing what a reasonable person would do if he was in an intact family and he had children to support"? Probably.

More generally, while payors certainly have an obligation to earn what they are capable of earning to support their children, payors must also be entitled to make decisions about *their* career path as long as those decisions are reasonable in the circumstances. One need not necessarily make career decisions or choose a career path that will maximize income: *Donovan v. Donovan* (2000), 9 R.F.L. (5th) 306 (Man. C.A.); *Léveillé v. Lemieux*, 2002 CarswellOnt 2908 (Ont. S.C.J.); *G. (W.D.) v. G. (D.L.)* (2009), 69 R.F.L. (6th) 221 (Alta. Q.B.). One need only act reasonably in doing so: *Montgomery v. Montgomery* (2000), 3 R.F.L. (5th) 126 (N.S. C.A.).

What was not raised in *Ladouceur* was the question of whether a payor is bound to work overtime post-separation just because overtime was worked pre-separation: *Beier v. Beier* (2011), 62 R.F.L. (7th) 1 (N.S. C.A.). Post-separation, is it fair to expect a payor to work beyond regular employment hours? Maybe. Or maybe not. [See *White v. White* (2015), 62 R.F.L. (7th) 1 (N.S. C.A.); *Penney v. Simmons*, 2016 CarswellNS 874 (S.C.).]

Rusinek & Associates Inc. v. Arachchilage (2021), 51 R.F.L. (8th) 253 (Ont. C.A.) – *Trustees and claims for equalization*

It is settled that a trustee in bankruptcy has authority to ***continue*** a claim for an equalization payment that was started prior to bankruptcy: *Schreyer v. Schreyer* (2011), 1 R.F.L. (7th) 1 (S.C.C.) at paras. 20-21; and *Thibodeau v. Thibodeau* (2011), 5 R.F.L. (7th) 16 (Ont. C.A.) at para. 11.

In *Rusinek*, the Ontario Court of Appeal was called upon to answer a slightly different question: can a trustee ***commence*** a claim for an equalization payment on behalf of a bankrupt spouse?

When we discussed the application judge's initial decision in this case in the April 27, 2020 edition of *TWFL* 2020-16, we had some questions about whether her decision that a trustee ***cannot*** commence a claim for an equalization payment was correct, and whether it would withstand appellate review. But as we discuss below, while the Ontario Court of Appeal did not agree with most of the application judge's reasoning, it nevertheless determined that, ultimately, she had reached the right conclusion. That is, a trustee cannot ***commence*** a claim for an equalization payment - yet another land mine for family lawyers to navigate.

The husband and wife in *Rusinek* were married for 12 years. When they separated, their most significant asset was their matrimonial home, which was owned solely by the wife.

Less than a year after the parties separated, and before a claim for an equalization payment had been started, the husband made an assignment in bankruptcy, and disclosed more than $280,000 in unsecured debts to his trustee. As a result of the husband's bankruptcy, all of his assets, including his potential claim for an equalization payment against the wife, vested in his trustee. [See s. 71 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*")]

In an attempt to recover as much money as possible for the husband's creditors, his trustee tried to start a claim for an equalization payment against the wife. The application judge, however, concluded that the trustee could ***not*** commence the claim for an equalization payment. She reasoned that a claim for an equalization payment is "inchoate until exercised", and that until then, "the right is not assignable and remains only an amorphous possibility." As noted above, we did not agree with that reasoning because if the right is not assignable, then it would remain with the bankrupt and would not be released upon discharge - as it is. We also saw the opportunity for colluding spouses to work mischief against innocent third-party creditors. But what do we know?

The husband's trustee appealed the application judge's decision to the Ontario Court of Appeal.

In thorough reasons, the Court of Appeal agreed with the husband's trustee that the application judge had erred in finding that an equalization payment is an inchoate right until a claim has been commenced, and confirmed that a claim for an equalization payment not started prior to bankruptcy is, in fact, property that vests in a trustee for the purposes of the *BIA*. (This answered our first issue above.)

But that was not the end of the matter. Pursuant to s. 7(2) of the *Family Law Act*, R.S.O. 1990, c. C.43 (the "*FLA*"), a claim for an equalization payment is "personal as between the spouses." Thus, argued the wife, even if the husband's claim for an equalization payment had ***vested*** in his trustee, the trustee still had no authority to actually ***commence*** the claim on his behalf - only the husband could do that.

In accepting the wife's argument, the Court of Appeal stated as follows:

> [48] The issue for this court to determine is, therefore, whether the qualification the Ontario legislature has imposed on the right granted in s. 7 of the *FLA* limits the trustee in bankruptcy's ability to initiate the equalization claim during the estate-administration stage of bankruptcy. **In my view, this is precisely the effect of the words "personal as between the spouses" in s. 7(2) of the *FLA*. A spouse makes the decision to initiate a claim for equalization, as it is something that is personal to the spouses, and that decision cannot be made by a trustee in bankruptcy or any other assignee**. [emphasis added]

The Court of Appeal also noted that its interpretation of s. 7(2) of the *FLA* was supported by prior cases that have confirmed that while an estate trustee can ***continue*** a claim for an equalization payment that had already been started before one of the spouses died because that is expressly permitted by s. 7(2)(a), it cannot ***commence*** such a claim on its own: *Rondberg Estate v. Rondberg Estate* (1989), 22 R.F.L. (3d) 27 (Ont. C.A.).

The Court of Appeal also discussed some of the underlying policy considerations for s. 7(2) of the *FLA*, including reducing conflict between separated spouses and encouraging them to settle their own affairs without litigation:

> [50] . . . **There can be no doubt that the decision to advance an equalization claim is deeply personal**. The [wife] argues that, in the present case, if an equalization claim is made by the trustee in bankruptcy, it may result in the [wife] and her children having to leave the matrimonial home, as it would likely have to be sold to fund the equalization claim.
>
> [51] **Such a decision may create further conflict between the spouses by involving them in litigation and causing them to incur legal fees they may well not be able to afford. Conflict between spouses often has an impact on the children of the marriage**. There is, of course, no obligation under the *FLA* for a spouse to make an equalization claim, and parties are encouraged to settle their affairs without resorting to the courts. As stated in the Preamble of the *FLA*, "it is desirable to encourage and strengthen the role of the family" and "it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses". This interpretation of "personal as between the spouses" is consistent with these overall purposes of the *FLA*.
>
> [52] **If a spouse has already taken the step of commencing an application for the equalization of net family properties, the concerns outlined in the paragraph above are substantially reduced, as the parties are already in a situation of conflict**. In such a case, the trustee in bankruptcy steps into the shoes of the bankrupt spouse and continues the claim that has already commenced. [emphasis added]

We accept that interpretation of s. 7(2) of the *FLA* is correct based on the wording of the section, and the Court's prior decisions that have concluded that s. 7(2) does not allow an estate trustee to

commence a claim for an equalization payment. Very respectfully, however, we are surprised that the Court of Appeal did not at least discuss some of the potential problems with this interpretation. For example, as we discussed when we wrote about the initial decision in this case, not allowing a trustee to commence a claim for an equalization payment could be used by spouses to, "game the system to the prejudice of all other creditors by putting all assets in the name of one spouse (say the wife) and all debt in the name of the husband. Upon 'separation', the husband would simply not advance an equalization claim against the wife, make an assignment in bankruptcy, avoid all his other creditors - and then reconcile with the wife." After all, reconciliation is a policy objective of family law statues.

The soon-to-be-bankrupt spouse could also try to use the threat of starting a claim for an equalization payment (so that the trustee could then pursue it) to try to pressure the other spouse into making other concessions (e.g. "if you claim spousal support, I'll cooperate with my trustee to claim an equalization payment . . . but if you agree to waive support now, I will not start a claim before I make an assignment").

The time has come to seriously consider whether s. 7(2) of the *FLA* needs to be amended. Despite the Court of Appeal's comments that the decision to commence an equalization claim is "deeply personal", in our view there is really no good reason to allow an estate trustee or bankruptcy trustee to ***continue*** a claim that was started a day before the spouse died or made an assignment, but to impose an absolute bar against commencing a claim as soon as that same exact same spouse dies or makes an assignment. The bar against allowing an estate trustee to commence a claim for an equalization payment is also particularly problematic, as it actually encourages spouses to commence litigation in order to ensure that their estate will be able to continue the claim if the claimant dies before the spouses have been able to reach an agreement.

Henderson v. Micetich, 2021 ABCA 103 – Retroactive Support after *Michel*

A General Unifying Theory of Child Support. Einstein would be thrilled.

This is the first provincial appellate court to consider the Supreme Court's decision of *Michel v. Graydon* and the impact it has had on retroactive support claims. In this case the Alberta Court of Appeal provides extensive reasons that examine the context in which *DBS v. SRG*, 2006 SCC 37 was decided, the changes driven by *Michel v. Graydon*, 2020 SCC 4 and provides important guidance as to how to consider claims for retroactive child support claims in this new world. Notably, *D.B.S.* also came from the Alberta Court of Appeal, so it has now come full circle.

The Court of Appeal notes that when *DBS* was decided by the Supreme Court of Canada in 2006, the *Guidelines* were still relatively young, having come into force in 1997. The Supreme Court, at the time, was concerned about the impact retroactive support claims could have on agreements and orders made under the old, pre-*Guidelines* regime. Now, however, such concerns no longer exist. *Michel* grounds the retroactive support analysis firmly alongside the *Guidelines* regime and the principles that underpin those *Guidelines*. *Michel* focuses on the fact that child support is the right of the child and that payor's have a natural informational advantage in child support litigation; absent disclosure, only they know whether their income has increased or not.

Michel mandates a holistic approach in considering retroactive support. And Justice Paperny, likely the main author, of *Henderson*, was particularly well-positioned to write on this topic -- she was the author of the Alberta Court of Appeal decision in *D.B.S.* back in 2005.

In *Henderson*, the parties had cohabited from 2002 to 2007 and had two children. There was no written agreement or court order between the parties. There was, however, an oral agreement between them that the father would pay $800.00 each month in child support based on an income of $54,000.00 and that he would see the children every other weekend. The mother repartnered and married in April of 2009, and her new spouse earned considerable income that afforded she and the children a comfortable lifestyle.

The father started a claim in January 2018 looking to increase his parenting time. The mother counter-claimed in May 2018 claiming child support retroactive to January 1, 2017 and prospectively. In the course of the litigation, the mother amended her application to claim child support from January 1, 2018.

Since 2007 the father's income had *decreased* steadily, it was $147,624.00 in 2018, $121,207.00 in 2019 and $114,720.00 in 2020.

The father's spending had far outpaced his income over the years. He entered into a consumer proposal in 2018 as a result of more than $400,000.00 in personal debt. As a result of the proposal, his debt was reduced to $42,000.00, which he was servicing through payment of $700 per month.

Based on affidavit evidence from the parties in September of 2020, the motion judge declined to order retroactive support. In doing so she considered *D.B.S.*, as *Michel* had not yet been released by the Supreme Court. The motion judge considered:

1. Whether there was a reasonable excuse for why support was not sought earlier;

2. Blameworthy conduct by the payor parent;

3. The circumstances of the child; and

4. The existence of any hardship for the payor parent.

The first issue with the motion judge's decision was that it appeared to misunderstand the mother's claim. Any support payable after January 1, 2018 – when the mother started her counter-claim -- was *not* retroactive support. The mother had also not claimed retroactive support back to 2007, but the motion judge seemed to think that she had. The mother's claim was not for retroactive support, but a retroactive support analysis was applied.

The motion judge found that:

1. The mother had not brought a claim for support before 2018 because she was satisfied with the oral agreement that the father would pay $800 per month and she would be the primary parent. The motion judge found that the mother's application for retroactive support was in response to the father's claim for parenting.

2. The motion judge determined that the father had not engaged in blameworthy conduct because he, subjectively, did not think what he was doing was wrong. The motion judge cited *Smith v. Gulka*, 2020 ABCA 32 for that proposition. In that case the court had determined that blameworthy conduct required a *subjective intention* on the part of the payor. In this case, the father believed that he was following the oral agreement and, as a result, his underpayment was not "blameworthy."

3. The motion judge determined the mother's husband was able to provide a very high standard of living for the children, well above the vast majority of households in Alberta. As a result, while a retroactive award would not provide a benefit to the children, it would cause the father a great deal of hardship.

4. Finally, the motion judge found that, after considering the consumer proposal entered into by the father, requiring the father to pay $18,603.00 in retroactive child support, in addition to ongoing support, would pose a significant financial burden on him.

According to the Court of Appeal, the motion judge had made a fundamental error in considering the mother's claim to have been for retroactive support. In fact, the mother was claiming ongoing/prospective child support commencing January 1, 2018 – which is when she claimed in her application. The motion judge treated it as a claim for retroactive support because the motion

was not heard until September 2020 -- but that was an error. When a court is determining support for the year in which the application is made, it is entitled to make a finding for that entire year. This is no different than where, in the case of spousal support, support claimed back to the date of an application being issues is not considered a claim for “retroactive" support: *Mackinnon* v. *Mackinnon*, [2005] O.J. No. 1552 (C.A.); *Wharry* v. *Wharry*, 2016 ONCA 930; *Cassidy* v. *McNeil*, 2010 ONCA 218; *Dickson* v. *Dickson*, 2011 MBCA 26; *Cameron* v. *Cameron*, 2018 ONSC 2456 at 9.

The Court of Appeal then considered the retroactive support analysis, particularly in the post-*Michel* context.

Reasons for Delay

The Court of Appeal set out that, in *Michel*, the Supreme Court recognized that there can be many reasons for delay on the part of a payee parent for bringing an application for increased child support. These reasons might include informational asymmetry, a lack of access to justice because of financial difficulties, potential intimidation, or misleading behaviour on the part of the payor, and issues of intimate partner violence. Delay on the part of a payee parent must be considered in part of the broader social context, with consideration towards issues of intimate partner violence and access to justice. Delay is not in and of itself inherently unreasonable.

The Court of Appeal set out that, absent a clear agreement or court order that waives disclosure requirements or provides for another mechanism to calculate child support, delay will rarely prejudice a payor parent. The payor knows about the child support obligation and that it should be calculated based on their line 150 income, adjusted annually. The payor parent is often the only party to know that their income has increased. This informational asymmetry puts the payor at an implicit advantage over the payee parent.

The Court of Appeal summarized the issue by stating “delay has a very limited role to play in determining the availability and extent of a retroactive child support obligation.” Any delay on the part of a payee parent must be viewed “in light of available information, resources and social context, including gender, social and economic inequities” And “there will be very few cases where delay can be truly seen as unreasonable or a factor that should preclude the award of previously-owed support to children.”

In this case, there had been no delay on the mother’s part. She had commenced her claim in 2018 and sought child support commencing in 2018. However, of note, the Court of Appeal found that even if that had not been the case, the mother’s “delay” would not preclude an award of retroactive child support. The Court of Appeal was very troubled by the motion judge finding that the mother had commenced her claim for support as a tactic or litigation strategy in response to the father’s parenting application. Child support is the right of the child. The children’s entitlement to support from their father was independent of the mother’s litigation strategy and any resources she currently had from her new spouse. The father “was well aware or should have been aware” that he was not paying proper Guideline child support. That the mother acquiesced or was prepared to accept less did not mean that she waived the children’s entitlement to child support from their father.

Conduct of the Payor Parent

The Court of Appeal rejected the concept of "subjectivity" in assessing blameworthy conduct. Instead, they cited the definition in *DBS*, that blameworthy conduct is anything that privileges the parent's own interests over his/her children's right to an appropriate amount of support. Such conduct includes a failure to provide full and accurate financial disclosure or to disclose an increase in income. Payor parents now *clearly* have an *affirmative duty* of full disclosure. "No one asked me" will no longer be an excuse.

In this case, the father had not ever disclosed his income prior to June of 2018. That was, on its own, blameworthy conduct. It could not be said that the father was unaware of his child support obligations. There was no doubt, according to the Court of Appeal, that he was aware that the children were entitled to more support than he had paid.

Blameworthy conduct is a concept that will now, into the future, have "limited utility." Blameworthy conduct allows for a retroactive award beyond the three-year rule put forward by *DBS*. A retroactive award ought to be restorative, rather than punitive. While blameworthy conduct can militate in favour of an award beyond three years, its absence should not be found to militate against the making of any retroactive order at all.

Circumstances of the Child

The Court of Appeal set out that, under the *Guidelines*, child support is the right of the child. The right to support cannot be bargained away by either parent. Retroactive support ought to be analyzed from a child-centered approach, recognizing that support is the child's right. The fact, in this case, that the children enjoyed a comfortable lifestyle and did not "need" the support was irrelevant. A payor parent cannot avoid a retroactive award by arguing that the recipient parent was able to sufficiently care for the child on his or her own.

The Court of Appeal focused on the fact that children are entitled to support from *both* parents and that child support is *presumed* to benefit the children. A wealthy stepparent does not detract from that benefit. In addition, that wealthy stepparent may not be around forever and the child's financial circumstances could change.

Of particular importance, and in a melding of *Michel* and *Henderson*, was a determination by the Court of Appeal that children remain entitled to payment of retroactive child support, even after they become adults. Child support obligations arise upon separation and retroactive support awards provide a means to "enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid." The Court of Appeal found that a loss of benefit to the child is presumed where a payor parent fails to pay the amount of support required under the *Guidelines*. Children are entitled to expect and receive child support from both of their parents. It would odd for a child to *not* benefit from the provision of monies to which they are entitled, but which where previously withheld.

Hardship the Award Might Entail

The Court of Appeal set out that while the hardship to the payor is *a* consideration, it is not the *sole* consideration under this branch of the analysis. Hardship to the recipient and the children must also be considered. Very importantly, the Court of Appeal noted that, under *Michel,* hardship experienced by the payor must be *undue* hardship. This brings the analysis inline with the *Guidelines*, which incorporates the concept of undue hardship to payors in certain situations. But hardship can only be assessed after taking into account the hardship which would be caused to the child and the recipient if the retroactive support is not ordered. The assessment of hardship must take into account the payor, the recipient, the child, and any other dependents who might be affected.

From the payor's perspective, a claim of hardship must be tangible and supported by evidence, and the hardship must be undue. There is often financial difficulty when an immediate lump sum cash payment is awarded. This, without more, is neither undue nor unfair according to the Court of Appeal. Moreover, the analysis must take into account who has benefited from failing to fulfill the obligation in the meantime -- usually the payor. Hardship is a "broad concept and a legitimate concern, but the focus cannot be exclusively on the payor."

In *Henderson*, the Court of Appeal found that the father's financial circumstances did not reveal the kind of undue hardship that would lead a court to decline to make any retroactive award. His consumer proposal was entered into *after* the mother had commenced her counter-claim. The father could not rely on his own personal debt to reduce his child support obligations, as his first obligation was to his children. The Court of Appeal stated that any concerns of unfairness raised in a case like this could be managed through an "adjustment to the quantum of the retroactive award or through a payment schedule."

In this case, the Court of Appeal ordered that the child support owing back to January 1, 2018 in the amount of $24,408.90 would be paid off in $500.00 per month payments.

Brown v. *Brown*, 2020 ONSC 7085 – *Interim Variations*

Interim Variations can be a Challenge

This was a motion by the husband to stay the enforcement of a Separation Agreement (dated August 22, 2018), and to temporarily reduce his spousal support obligation.

This case reinforces just how difficult it is in Ontario to vary a support obligation on an interim basis – a view shared by the Courts of most provinces and territories. In *Brown*, the Court refers to an interim variation as a "drastic intervention" and an "exceptional remedy."

The parties were married in 1981 and separated in 2014 after 32 years.

The Separation Agreement expressly acknowledged that there was no agreement on the amount of income available to the husband to pay support. No *SSAG* was referred to. Rather, in setting the amount of spousal support at $10,000 per month, the Agreement set out the parties' positions as to the husband's income.

For the year prior to the Agreement being signed (2017), the husband's salary from his company ("Limestone") was $139,681, and the company's pre-tax income was $231,859, for a total of $371,540.

For 2018, the husband's salary from Limestone was $133,028 and the company's pre-tax income was $477,347, for a total of $610,385.

In 2019 the husband "hived off" two of Limestone's operations into two new corporations, thereby creating three operating companies.

The husband alleged that the earnings of Limestone and its related companies after the creation of the new companies and after the year end April 30, 2018, had been a disaster. He said that things started to slow down prior to COVID-19 and that the pandemic then further restricted corporate sales.

In 2019, the husband's salary from Limestone was $133,028 again. In 2019, Limestone had a net loss of $113,745; another operating company had a net loss of $50,392; and the third operating company had a net loss of $77,701.

At some point, and no later than January of 2020, the husband's salary from Limestone increased to $13,290 per month or $160,000 per year.

After a brief increase in salary, the husband alleged that, as of August 1, 2020, his husband's salary was going to be halved to about $80,000. The husband explained that he had hired a new General Manager such that his own value to the company was reduced. He called this a "partial retirement".

In 2020, Limestone had a net profit of $77,003; another operating company had a net loss of $57,947; and the third operating company had a net loss of $266,542.

On the basis of reduced operating income, the husband sought a stay of enforcement of the Agreement and the partial suspension or reduction of his obligation to pay spousal support before his Variation Application was heard. He asked to reduce his support obligation to $3,000 per month based on his new employment income of $80,000, given that the three companies together showed net operating losses.

The wife argued that the husband had not met the test for either a stay of enforcement or a suspension of the existing obligation. She also argued that the husband could not rely on his poor (or perhaps purposeful) business decisions to defeat an appropriate level of spousal support.

The wife was 62 years old and relied almost entirely on spousal support to meet her expenses.

In Ontario, if a separation agreement has been filed with the Court pursuant to section 35 of the *Family Law Act*, R.S.O 1990, c. F.3, it may then be varied or enforced "as if" it were an order of the Court.

Justice Minnema suggests that suspending or staying a final order is indistinguishable in practical effect from an interim variation of that order. That is correct – while there are technical differences, the practical effect is the same. However, for some time, this meant the Court had to deal with two different legal tests: one for the stay of enforcement (see, for example, *Yip* v. *Yip*, 1988 CanLII 4472 (Ont. H.C.) and one for an interim variation of a final support order (see, for example, *Dancsecs* v. *Dancsecs* (1994), 5 R.F.L. (4th) 64 and *Carter* v. *Carter* (1998), 42 R.F.L. (4th) 314.)

Justice Minnema provides a good summary of how the two tests were melded and amalgamated over time to become the applicant showing "a prima facie case on the merits of the variation application" and that s/he was coming to court with "clean hands" (see also *Hayes* v. *Hayes*, 2010 ONSC 3650). Some other cases also required that the applicant show "hardship."

Some cases interpreted the "hardship" requirement to require a finding that continuation of the order would be "incongruous and absurd" or "inappropriate, unreasonable or ridiculous." See, for example: *Clark* v. *Vanderhoeven*, 2011 ONSC 2286; *Crawford* v. *Dixon* (2001), 14 R.F.L. (5th) 267; and *Innocente* v. *Innocente*, 2014 ONSC 7082

Very recently, Justice Kurz took the opportunity to synthesize, summarize and restate the test for an interim variation in *Berta* v. *Berta*, 2019 ONSC 505. In *Berta*, Justice Kurz also helpfully noted that the same principles would apply under both Federal and provincial legislation. Justice Kurz was of the view that the need for a "clear case" meant a "strong prima facie case."

Therefore, the test for an interim variation of a final support order – and by extension, the interim stay of a previous one, requires the moving party to prove:

1. A strong *prima facie* case on the merits of the variation application *as a whole* (not just a strong case to show a material change);

2. A clear case of hardship;

3. Urgency; and

4. That they have come to court with "clean hands".

So, had Mr. Brown shown a strong *prima facie* case on the merits of the variation application?

Here, there was no suggestion that the wife's circumstances had changed at all. The husband's argument was based exclusively on the alleged change in his income for support purposes.

Justice Minnema was not persuaded that the husband had a strong case to show that his employment income had decreased. The husband voluntarily reduced his income to $80,000 because he had "partially retired" (at age 63) and hired a General Manager. These were voluntary decisions made only two years after the Separation Agreement. That was not a *strong prima facie* case for variation.

With regard to the earnings of the corporations, his Honour noted that the gross sales for Limestone were $2,197,071 in 2018, and $1,624,417 in 2019 -- a significant reduction. They were lower yet again at $1,423,444 in 2020. While the husband argued that the Court should consider the *combined* performance of all the companies, Justice Minnema was not convinced. Limestone showed pre-tax income of $77,003 for the April 30, 2020 year end. If the husband's employment income was imputed at $160,000, then the husband's total income available to pay spousal support would be $237,003, considering only his imputed employment income and the pre-tax income of Limestone. And this was within the ranges of income that the husband had himself estimated for himself in the Separation Agreement.

The husband argued that the loss from the third "new" operating company should be considered and should reduce the earnings of Limestone in the calculation of the income available to the husband for spousal support purposes. However, Justice Minnema found that this new business was a very different, start-up entrepreneurial venture, wholly unrelated to the core business of Limestone. It had significant losses, and a legitimate question on the Variation Application would be whether the husband could force the wife to suffer a material drop in spousal support because he had decided to undertake a speculative new venture.

As noted by Justice Minnema – that will be a live issue on the hearing of the actual Variation Application. But this was not that. *This* was a motion for an interim variation. While the husband may be able to show a material change in circumstances on the Variation Application later, he did not, at this time, have a "strong *prima facie* case." It will be interesting to see how this plays out at the actual variation application. On the one hand, if the new venture is shown to be nothing more than a "hobby business", the losses should not be subsidized by the wife (see: *Smith* v. *Smith*, 2007 CarswellMan 312; *Proulx v. Proulx*, 2009 CarswellOnt 2189; *Hargrove* v. *Holliday*, 2010 CarswellAlta 174 (Q.B.); *Putnam v. Putnam*, 2010 CarswellNS 250; Thomas v. *Thomas*, 2019 NLCA 32; *Lamb* v. *Lamb*, 166 Sask. R. 170 (Sask. Q.B.); *Van Boekel* v. *Van Boekel*, 2020 ONSC 5265). But if the husband can show the new business to be a *bona fide* attempt to earn more income, it is hard to understand why he would not get the benefit of some reduction. After all, if his income increases, the wife will be free to claim increased spousal support.

While this ended the inquiry, Justice Minnema did helpfully take the opportunity to comment on the "clean hands" part of the test. Here, there was no question that the husband had come before the court with clean hands. His support payments were up to date; he gave the wife notice of his intent to seek variation, and he had been forthcoming with his disclosure.

However, as he was not able to show a strong *prima facie* case, the husband's motion was dismissed. This matter should now move quickly to the actual variation application because, if the husband's income for support purposes has, in fact, decreased the matter must proceed expeditiously – easier said than done these days.

Florovski v. *Florovski*, 2020, ONSC 7486 – *Non-Disclosure in Family Law*

Disclosure, Cancer Metaphors…and $500 per Day

In 2019, the wife brought a motion to strike the husband's pleadings for failure to produce disclosure, or in the alternative, an order for production of disclosure with a penalty for each day that the husband failed to comply with the order.

By the time of the motion before Justice Vallee, four years had passed since the wife had issued her Application, and five court Orders had been made regarding disclosure -- yet the wife was still seeking compliance with those orders.

Although Justice Vallee was convinced that a considerable number of disclosure request remained outstanding, as the husband had made *some* disclosure in recent months, her Honour gave the husband one last chance to provide the outstanding disclosure – but on strict terms.

Justice Vallee set out the seven categories of disclosure the husband was to provide within seven days – the usual stuff of disclosure: bank statements, pension information, an accounting of some "missing funds", etc.

Relying on cases such as *Granofsky* v. *Lambersky*, 2019 ONSC 3251 and *Mantella* v. Mantella [2008] CarswellOnt 5623, the wife asked that the Court order that the husband pay a fine for each day until disclosure was complete. In paragraphs 28, 30 and 31 of *Granofsky*, Justice Diamond stated:

> [28] In my view, the Court has jurisdiction under the Family Law Rules "to order a fine or monetary payment as part of its role to control and enforce its own process…. [While it] should be reserved to exceptional and/or egregious circumstances, the respondent has been given opportunity after opportunity to comply with his duty to disclose financial information and documentation and I find the case before me to be a fitting example.
>
> . . .
>
> …costs orders have been made against the respondent, and while he has complied with those costs orders, their impact has not resulted in compliance with his duty to disclose financial information/documentation.

A daily, monetary penalty payable to the applicant will hopefully have a different impact.

And he then ordered that the respondent pay $500 for each day that there was non-compliance with the order.

The wife asserted that, just as with *Granofsky*, there was no point in "another court Order." Five previous orders had been made and, for the most part, ignored; and the husband simply paid the associated costs Orders.

Justice Vallee noted that the husband has the means to litigate. His investment had increased by almost $1.2 million from March 2017 to March 2018. He was investment-savy. He earned $722,154 in 2018.

If the only penalty for not complying with an Order is a successive string of Orders for costs – the costs awards eventually just become a cost of doing business and of frustrating the opposing party. That seems odd for a system where "[t]he most basic obligation in family law is the duty to disclose financial information. This obligation requirement is immediate and ongoing." (See: *Roberts* v. *Roberts*, 2015 ONCA 450)

At a previous case conference, the Court said, "Here we are, three years after separation, and we do not have sufficient information upon which to hold a discussion on equalization or finalize spousal and child support. It is a waste of time. It is expensive. It demonstrates bad faith. The respondent states that the litigation is quite complex and quite involved. It is not."

As a result, Justice Vallee found that the husband would not comply with a further disclosure order absent a penalty.

In his defence, the husband stated that he did not have the records in issue and that the Wife had kept some of the records when the parties separated. He also suggested – without any supporting evidence – that he suffered from psychiatric problems.

Justice Vallee was not interested in further excuses. There was no medical evidence of the husband's alleged psychiatric problems. Most of the outstanding disclosure was easy to obtain or show that it could not be obtained.

Finding the circumstances to be "exceptional and egregious" her Honour ordered that the husband provide the disclosure by September 2, 2019 (one week), "failing which [the husband] shall pay a daily fine to the wife of $500 per day for each day of non-compliance commencing on September 3, 2019."

She further ordered that if the husband had not provided the disclosure by September 16, 2019, the wife could proceed with a motion to have the husband's pleadings struck on five days' notice.

Fast forward to December 2, 2020. The parties are in Court again. According to the wife, the husband had still not produced all of the court-ordered disclosure – and the husband owed her $224,000 ($500 a day can really add up). The wife brought a motion to strike the husband's pleadings and that he pay the $224,000 owing pursuant to Justice Vallee's Order.

The Court hearing this motion was of the view that almost all of the disclosure had been produced save and except bank account statements for some months of 2020 for one particular Canadian/US account and an accounting of $25,000 allegedly withdrawn by the husband prior to separation. And, in fact, counsel for the wife confirmed that only two of the 17 items Justice Vallee ordered be produced were still outstanding.

The judge also had some distant memory of the matter:

> [4] Even though this court is now operating remotely and does not have access to the court file, the court recalls that it first became involved in this matter at the time of separation [2015] when the respondent was confined to a psychiatric ward and the applicant had brought an urgent motion.
>
> [5] This court was subsequently involved with respect to other motions brought by the applicant for disclosure.
>
> [6] In one of those previous motions, this court commented on the aggressiveness of the applicant with respect to that disclosure.

The husband argued that the *bulk* of the disclosure was provided in *June 2020*, *prior to the wife indicating to the husband that she was in fact bringing this motion*. However, some was only provided a few days before the motion, on November 25, 2000, after the husband had been served.

The Court first noted, as is the case, that striking pleadings is reserved for the most egregious situations. However, Justice Vallee had previously specifically determined the situation to be egregious. That said, at least with respect to the punishment of having his pleadings struck, the husband had gone at least *some* way to rehabilitate himself.

Things then take a bit of an odd turn. The Court noted that both the disclosure and the manner in which production is sought must be proportional and reasonable. But the required disclosure and penalty upon failure to produce had been ordered the Justice Vallee – and her Order had neither been appealed, nor set aside, nor varied in any way.

The Court also suggested that the husband had a reasonable excuse for not providing an accounting of monies taken from the joint account – because he thought the withdrawals has been in 2015 when they were in 2014. We suspect that had the husband been diligent, this would not have been an issue. And, second, at the time of separation (five years ago) the husband had been hospitalized for a number of months in the psychiatric ward. (However, as noted above, the husband was very successful financially.)

Then Court then noted that the total amount in question was $25,000; that the withdrawals predated the date of separation; and that the lack of disclosure could be addressed at trial if the trial judge determined the withdrawals to be relevant. But Justice Vallee had already ordered the disclosure to be produced.

The Court then offers this, with which we take issue, given Justice Vallee's previous Order:

> [22] Based on the materials filed and the submissions made, this court does not find that the actions or inactions of the respondent justify either an Order striking his pleadings or an Order requiring him to pay $224,000 in penalties. In fact, this court finds that the request for such relief is consistent with this court's finding at a previous motion that the relief being sought by the applicant was overly aggressive.
>
> [23] Therefore motion dismissed. This is without prejudice to the applicant arguing at trial that there should be some cost sanctions for the respondent allegedly not having produced disclosure in a timely fashion subsequent to the Order of Justice Vallee.

> [24] However, based on today's motion, any cost sanctions would be a minuscule percentage of the $224,000 sought.

Justice Vallee made an Order. Again, that Order was not appealed, and the husband had not moved to set is aside, nor had he – at any time -- moved to change it in any way. He simply let the penalty mount. The Order itself did not suggest that the husband could move to reduce the penalty. The Order was clear on its face: her Honour found the circumstances to be "exceptional and egregious" and she ordered that the husband provide the disclosure by September 2, 2019, "failing which [the husband] *shall pay a daily fine to the wife of $500 per day for each day of non-compliance* commencing on September 3, 2019." It seems pretty clear to us. However, there is now confusion as to the status of Justice Vallee's Order. Has it been varied? Changed? Is it to be ignored? And, more important, does this Order now make enforcement of Justice Vallee's Order *res judicata*? It may just.

Respectfully, it was not open to the Court to suggest that Justice Vallee's Order was not "justified." And it sets a dangerous precedent. Recall that in *Granofsky*, Justice Diamond awarded a similar penalty because the costs orders that had been made against the respondent in that case did not result in compliance, hoping that "a daily monetary penalty…will hopefully have a different impact." That is exactly what was done by Justice Vallee in similar circumstances. A fine is a serious penalty that should be awarded only in the most egregious circumstances, after much consideration, and as a last resort. But once it is ordered, that must be the end of it, absent specific wording in the Order so as to allow the non-discloser to claim relief on reasonable grounds.

Ironically, this current Order actually provides adverse incentives. It may very well encourage future "non-disclosers" to continue "non-disclosing", because while small fines might be enforced – really large fines are more likely to be questioned.

If non-disclosure is truly the "cancer" of family law (*Leskun* v. *Leskun*, 2006 SCC 25, citing Fraser J. in *Cunha* v. *Cunha* (1994), 1994 CanLII 3195 (BCSC), 99 B.C.L.R. (2d) 93 (S.C.)), once the cancer is excised, it cannot be allowed to grow back.

Sparr v. Downing, 2020 ONCA 793 – *Striking Pleadings for Non-Disclosure*

Non-Disclosure, Game Misconduct, and other Hockey Metaphors

This decision is not long, and it doesn't make new law. It does, however, show that in these days of scarce judicial resources, courts are becoming less-and-less tolerant of litigants who do not follow Orders, and more-and-more prepared to see those litigants lose the right to participate.

The Appellant's pleadings were struck for failure to comply with financial disclosure orders. He appealed on the basis that the remedy was excessive and because, in his view, he had provided "sufficient" disclosure. The only issue in the case was the appropriate amount of child support.

Since 2014, four different judges had made six different orders that required the Appellant to produce specific financial documentation. He did not do so. He had breached the orders; he had been warned; he had been given "one last chance" - and that was that. Bye-bye pleadings.

If financial disclosure is one of the most important obligations - an obligation that should be automatic - then this remedy is not at all excessive. In fact, *six* previous chances is probably *three* previous chances too many. And the Court of Appeal has been upholding the use of Rule 1(8)c of the *Family Law Rules*, O. Reg. 114/99, in similar circumstances: *Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.); *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.), aff'd (2016), 84 R.F.L. (7th) 374 (Ont. C.A.), leave to appeal refused, 2017 CarswellOnt 1934 (S.C.C.); *Peerenboom v. Peerenboom* (2020), 39 R.F.L. (8th) 11 (Ont. C.A.); *Mackey v. Rerrie*, 2016 CarswellOnt 10853 (C.A.); *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.); and *Martin v. Watts*, 2020 CarswellOnt 8657 (Ont. C.A.).

The Court also made it clear that it is not up to litigants to decide whether disclosure is "sufficient." That is up to the Court.

While striking pleadings should most definitely not be the consequence of first resort, it should not take breaching six previous Orders to get there, either.

As suggested by Justice Myers in *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.):

> [22] A party should not have to endure order after order after order being ignored and breached by the other side. A refusal to disclose one's financial affairs is not just a mis-step in the pre-trial tactical game that deserves a two minute delay of game penalty. Failure to disclose is a breach of the primary objective. Especially if it involves breach of a court order, a party who fails to disclose evinces a determination that he or she does not want to play by the rules. It is time to oblige such parties by assessing a game misconduct to eject them from the proceeding.
>
> [77] Implementing a culture shift to enhance access to justice by promoting efficiency, affordability, and proportionality requires the court to re-draw the line between limiting drastic measures and applying the law robustly. In my respectful view, a little less judicial diffidence, a little less reluctance to hold accountable those who would deny justice to their former spouses, and a little more protection of abused parties from abusers, might be a better fulfillment of our critical responsibility . . . it is time for the court's words were taken to mean what they say.

C.M. Callow Inc. v. *Zollinger*, 2020 SCC 45 – *The Duty of Good Faith in Contractual Performance*

No more Lyin', Cheatin', or Deceivin'? Now where's the fun in that?

Less than 2% of family law proceedings that are started actually end with a trial. Most end with Minutes of Settlement or a full-blown Separation Agreement. As a result, the law of contractual development and interpretation is often crucial to the practice of Family Law. In *C.M. Callow Inc*. v. *Zollinger*, the Supreme Court of Canada further incrementally expanded the duty of honesty in contractual performance, affirming that the notion of "dishonesty" giving rise to a breach of contract goes beyond outright lies and includes half-truths, omissions -- and sometimes even silence where there is otherwise a duty to speak.

Although Callow, specifically dealt with dishonesty in the termination provisions of a contract, the principles are unquestionably transferable to Domestic Contracts.

In 2012, Baycrest (a group of condominiums) entered into a two-year winter maintenance contract and a separate summer maintenance contract with Callow. These contracts were to expire in April 2014 and October 2013, respectively. Pursuant to a clause in the winter maintenance contract, Baycrest was entitled to terminate that contract if Callow failed to give satisfactory service. The termination provision also provided that if Callow's services were no longer required for any *other* reason, Baycrest could terminate the contract upon 10 days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance agreement, but did not inform Callow at that time. (Baycrest was concerned that Callow would abandon the less profitable summer contract if the winter contract was cancelled.) Instead, throughout the spring and summer of 2013, Baycrest participated with Callow in discussions regarding a renewal of the winter maintenance contract. On account of those discussions, Callow believed that a two-year renewal of the winter maintenance contract was likely, and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would further incentivize Baycrest to renew the winter maintenance agreement.

In September 2013 (after Callow had completed its obligations under the summer contract, Baycrest gave notice to Callow of its decision to terminate the winter maintenance agreement. Callow claimed breach of contract and alleged that Baycrest had acted in bad faith.

The trial judge applied the Supreme Court's landmark 2014 decision in *Bhasin v. Hrynew*, 2014 SCC 71, which recognized an "organizing principle of good faith" in contract law and created a new duty of honest contractual performance requiring that parties "not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract."

The trial judge held that the general organizing principle of good faith in contract (*Bhasin* v. *Hrynew*, 2014 SCC 71) had created a new duty of honest contract performance requiring that parties "not like or otherwise mislead each other about matters directly linked to the performance

of the contract." She was satisfied that Baycrest had "actively deceived" Callow from the time the termination decision was made in early 2013 to September 2013, and found that Baycrest had acted in bad faith by (1) withholding that information so as to ensure Callow performed the summer maintenance contract; and (2) falsely representing that the winter contract was not in danger, despite (3) knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed.

The trial judge found that the "minimum standard of honesty" required Baycrest to address the alleged issues with Callow's performance, provide prompt notice of termination, or refrain from making any representations regarding contractual renewal.

The trial judge then awarded expectation damages to Callow, meant to place it in the same position as if the breach had not occurred.

The Ontario Court of Appeal set aside the judgment, holding that the trial judge had improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. It also held that any "deception" during the summer of 2013 related to a new contract not yet in existence, the renewal that Callow hoped to negotiate, and was therefore not directly linked to the performance of the winter contract.

The Supreme Court of Canada reversed the Ontario Court of Appeal. The majority decision was written by Justice Kasirer with a concurring three-judge opinion from Justice Brown. Justice Côté was alone in dissent.

The majority ruled that the duty of honest performance precludes active deception (that is, outright lying) and that Baycrest breached this duty by knowingly misleading Callow to believing that the winter contract would not be terminated. Furthermore, this was a matter directly linked to the performance of the contract because Baycrest had exercised a contractual obligation -- the termination clause -- dishonestly, even if the actual 10-day notice obligation was satisfied.

For the majority, Justice Kasirer wrote as follows (at paras. 5, 53, 104):

> [5] "I respectfully disagree with the Court of Appeal on whether the manner in which the termination clause was exercised ran afoul of the minimum standard of honesty. The duty to act honestly in the performance of the contract **precludes active deception**. Baycrest breached its duty by knowingly misleading Callow into believing the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of their motive for termination. For the reasons that follow, I would allow the appeal and restore the judgment of the Ontario Superior Court of Justice.
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> ...
>
> [53] Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, **the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right** because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and,

> by extension, to all contractual obligations and rights. This means, simply, that **instead of constraining the decision to terminate in and or itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest**.
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> […]
>
> [104] I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (trial reasons, at para. 67). In my respectful view, **to impute these first two requirements would amount to altering the bargain struck between the parties substantively**, a conclusion not sought by Callow before this Court. That said, I agree with the trial judge that, **at a minimum, Baycrest had to refrain from false representations in anticipation of the notice period**. Having failed to correct Mr. Callow's misapprehension that arose due to these false representations, I too would recognize a contractual breach on the part of Baycrest in the exercise of its right of termination in clause 9. Damages thus flow for the consequential loss of opportunity, a matter to which I now turn." [emphasis added]

The majority (and the concurring opinions) then went further, finding that the standard of honesty required under the organizing principle of good faith extended beyond outright lies, to also include "half-truths, omissions, and even silence, depending on the circumstances". Failing to correct a misapprehension caused by one's *own* misleading conduct can result in a breach of the duty of honest performance where this has the effect of misleading the counterparty about matters directly linked to the performance of the contract.

In this case, the majority agreed with the trial judge that Baycrest deceived Callow through a series of "active communications": (1) communicating to Callow that renewal of the winter contract was likely and that all was fine with its performance, and (2) accepting the "freebie" services offered by Callow, which suggested, at the very least, that there was hope for renewal and that the current contract would not be terminated.

However, the majority also agreed with the Ontario Court of Appeal that the trial judge went too far in concluding that the minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period. These requirements would have substantively altered the bargain struck between the parties.

The Court also affirmed that *there is no **free-standing** positive duty to disclose information to a contractual counterparty*. Therefore, the Court has re-stated its position from *Bhasin* that there is no positive duty to disclose. As long as a party does not act dishonestly, parties are still allowed to negotiate and act in their own self-interests.

That very fine line-in-the-sand -- between a party acting in their own self-interest but only to the point they cannot misleading even by way of silence -- is going to be very hard to define in most cases. Furthermore, this new duty arguably allows one contracting party to force information and disclosure from the other so as to avoid a breach. We will have to see how this duty plays out over time.

In dissent, Justice stated: "[Baycrest's conduct] may not be laudable, but it does not fall within the category of active dishonesty prohibited by the contractual duty of honest performance." Further, "there were no outright lies. Regardless of how its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken belief." We have to say, the dissent is compelling and avoids the "line-in-the-sand" issue noted above.

The main divergence between the majority and concurring opinions was the measure of damages for a breach of the duty of honest performance. The majority held that the plaintiff was entitled to expectation damages – to be put in the position it would have been in had the contract been performed. This is the ordinary measure of damages for breach of contract. The majority was satisfied that had Baycrest's dishonesty had effectively deprived Callow of the chance to bid on other contracts and Callow would have made an amount that was at least equal to the profit that it lost under the winter maintenance agreement with Baycrest. Therefore, the measure of damages was the value of the contract that Callow had with Baycrest.

The concurring judges disagreed. They held that where a party breaches the duty of honest performance, the issue is not that the defendant failed to perform the contract thereby defeating the plaintiff's expectations. Rather, the defendant performed but caused damages to the plaintiff by making misrepresentations on which the plaintiff relied (contractual reliance damages).

How does this new obligation of honesty in contract performance impact family law? As but one example, consider how many separation agreements include a provision that a recipient spouse will make "best efforts" to become self-sufficient. While it has been held by the Supreme Court of Canada that s.15.2(6)(d) the *Divorce Act* does not impose a "duty" on a spouse to become self-sufficient, it has been accepted by at least one provincial appellate court that including such an obligation in a separation agreement can transform that statutory "non duty" into a contractual obligation: *Strecko* v. *Strecko*, 2014 NSCA 66. And were a recipient to not actually make "best efforts" to become self-sufficient or to be employed as contractually required? What are the damages? The measure of damages would be to put the payor in the place s/he would have been had the recipient met his/her obligation to use best efforts to become self-sufficient – lower spousal support (or a termination of spousal support). At the very least *Callow* suggests this should feed directly into an imputation argument and possibly a more direct route to a spousal support variation.

Interesting, no?

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 CarswellBC 265 (S.C.C.) – *The Duty of Good Faith in Contractual Performance

A very important case about very smelly garbage.

Since 2014, the Supreme Court of Canada has been exploring, clarifying, and expanding the duty of honest contractual performance: *Bhasin v. Hrynew*, 2014 CarswellAlta 2046 (S.C.C.); *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 CarswellQue 9514 (S.C.C.); *C.M. Callow Inc. v. Zollinger*, 2020 CarswellOnt 18468 (S.C.C.).

Wastech is the latest brick in that wall. It deals with the exercise of contractual discretion, and ultimately decides that if a party to a contract exercises its discretion "unreasonably", it breaches a duty of good faith. And, most importantly as this requirement to exercise contractual discretion in good faith is now part of the general "organizing principle" of good faith in contract performance, the duty cannot be negated in the contract itself - one cannot contract out of it.

Wastech Services Ltd. ("Wastech") was a waste disposal company operating in British Columbia. The Greater Vancouver Sewerage and Drainage District ("Vancouver") was responsible for the administration of waste disposal in the district.

Over a period of 18 months, Wastech and Vancouver negotiated a long-term contract for the removal and transportation of waste by Wastech. The contract provided that Vancouver could elect to send waste to three possible disposal sites. Wastech would be paid a different rate depending on which site was chosen for any given load, and it would receive more when delivering to sites that were further away. The contract provided that it aimed to pay Wastech a "target operating ratio" of .89 - or operating profit of 11 percent - but it did not guarantee any specific ratio in any given year. The contract also clearly gave Vancouver discretion to send the waste to the site of its choice.

In 2011, Vancouver decided to send more waste to one of the closer locations, such that Wastech did not reach the target operating ratio. As a result, Wastech claimed that Vancouver breached the contract.

At first instance, an arbitrator decided that the parties had purposely decided not to include a clause in the contract to deal with a situation where Wastech did not/could not reach the target operating ratio. The contract provided that Vancouver was allowed to use its discretion in a way that could have a negative financial impact on Wastech. However, Vancouver had a duty to act in good faith when using this discretion, and it breached that duty by exercising its discretion in a way that prevented Wastech from having any chance of meeting the target operating ratio. Therefore, Wastech was entitled to compensation.

The British Columbia Supreme Court allowed Vancouver's appeal because the duty foisted on Vancouver by the arbitrator contradicted the provisions of the contract. That decision was upheld by the British Columbia Court of Appeal.

Leave to appeal was granted, and the matter was argued before the Supreme Court of Canada at the same time as *C.M. Callow Inc. v. Zollinger*, 2020 CarswellOnt 18468 (S.C.C.), summarized above.

The Supreme Court was clear that there is unquestionably a duty to exercise contractual discretion in good faith. The question was the extent of that duty, and the standard on which an alleged breach of that duty might be based or measured.

While a contracting party should have appropriate regard to the legitimate contractual interests of their contracting partners, the arbitrator viewed this duty too expansively. In exercising the discretion afforded to it under the contract, Wastech was not required to place Vancouver's economic or contractual interests ahead of its own. Rather, "the duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion" - for example, where the discretion is exercised in an arbitrary or capricious manner (something that certainly never happens in matrimonial files).

Importantly, as part of the general organizing principle of good faith in contract law, this duty exists regardless of the wording of the contract. Parties cannot contract out of it by, for example, including an "unfettered discretion" clause. However, the words of the contract may help the court interpret the extent of the duty in any particular case, by making the purpose of the discretion clear. Here, the duty of good faith constrained the exercise of discretion. However, it did not displace the bargain between the parties, which allowed Vancouver to do that which it did, and for a purpose that was clear in the contract itself. Wastech was not alleging that it had been lied to or deceived or that Vancouver had exercised its discretion capriciously or arbitrarily.

The Supreme Court was clear that this good faith duty does *not* require a party to subordinate its interests to their contracting counterparty, and it does *not* require that a party receive a benefit that was not contemplated under the contract. The duty to exercise contractual discretion in good faith is not a fiduciary duty. A party may sometimes cause loss to another, even intentionally, in the legitimate pursuit of its self-interest. And here, Wastech was allowed to exercise its discretion in its self-interest because that was the very purpose of the discretion allowed to it in the agreement.

Nor did the fact that this long-term contract was "relational" impact the inquiry because the specific risk at issue was specifically considered in drafting the contract. (In *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 CarswellQue 9514 (S.C.C.), the Supreme Court suggested that in a "relational contract" that creates a longer term relationship and sets out rules for cooperation, the parties owe each other the highest duties of cooperation and good faith.)

Therefore, the Supreme Court dismissed the appeal.

Where might this come into play in family law? It is not unusual to find domestic contracts in which a discretion is granted to one or both parties. An example that immediately comes to mind is *Miglin*, where part of the separation documentation included a consulting contract to benefit Ms. Miglin that was renewable after five years "on the consent of the parties" - a discretion that Mr. Miglin ultimately did not exercise in favour of renewing the consulting contract. There are also separation agreements that contemplate the continued employ of one spouse at the discretion of the other.

Some separation agreements also offer discretion to one or both parents to move within a certain geographical radius, exercise a "right of first refusal", or make temporary changes to the schedule, especially for holiday travel. And some allow one party to decide when the matrimonial home will

be sold, or to provide substitute security “at their sole and unfettered discretion.”

So, to summarize:

1. There is a general duty to exercise contractual discretion in good faith.

2. The exercise of contractual discretion cannot be “unreasonable”, which is considered with respect to whether the exercise of the discretion was “unconnected to the purposes for which it was granted.”

3. The duty to exercise contractual discretion in good faith cannot be waived. It is part of the general organizing principle of good faith in contractual performance, and it applies to all contracts - including domestic contracts.

713949 Ontario Limited v. Hudson's Bay Company ULC*, 2021 CarswellOnt 881 (S.C.J.) – *Do Lawyers have Weekends?

Hey. It's Friday. Take tomorrow off.

Many family law litigants believe their impending motion to be urgent such that the issue cannot possibly be delayed. However, absent *objective* urgency, a litigant's subjective belief cannot trump other important considerations, such as the availability of counsel, the need to ensure that both parties have adequate time to prepare, and the importance of allowing everyone (even family law lawyers) to have a break from work from time to time. This last point, which Justice Myers emphasised in his recent decision in *713949*, is particularly important right now while so many of us are working from home, and the work week tends to bleed into the work weekend.

There are undoubted benefits from being able to work from home. However, one of the major problems with it is that it can blur the lines between work and home, and leave one feeling like you are literally *always* working.

713949 involved a commercial dispute between a tenant, HBC, and the landlord of a shopping mall. The tenant objected to the landlord's attempt to lease part of the mall to a call centre, and claimed it had a consent right over the proposed lease. The landlord asked the Court to decide the issue on an urgent basis as it had signed a conditional lease with the call centre on or about January 19, 2021, and the landlord needed to know if HBC had a consent right over the lease before its ability to exercise the condition in the lease expired on Monday, February 1, 2021.

The landlord's Application was initially scheduled to be heard on Friday, January 29, 2021 (i.e. the Friday before the condition was going to expire). However, HBC requested an adjournment as its lawyer was already scheduled to be in court on another matter that day.

Granting HBC's request for an adjournment would have made it impossible to hear the landlord's Application until after the condition had expired. Accordingly, the question arose about whether there might be any way to argue the matter on Saturday, January 30, 2021. While counsel for the landlord indicated that he was willing to proceed on the weekend, counsel for HBC advised the Court that this was "not his preferred outcome", and expressed concerns about "the effects of [working on weekends and evenings] on younger members of the team who have childcare commitments etc." He also expressed concern that he would not have sufficient time to prepare if it proceeded on January 30, 2021, because of the complexity of his other matter on January 29, 2021.

In finding that it would be neither fair nor appropriate to force counsel for HBC to argue the matter on the weekend, Justice Myers reminds us that subjective urgency to a client does not necessarily equate with objective urgency sufficient to overcome other important considerations, including ensuring that lawyers are able to meet their responsibilities to their own families, and enjoy at least some "down time":

> [15] However, recognizing that there is no objective urgency but, a landlord seeking to narrow its risk profile on an upcoming decision, leaves me less concerned about prejudice to the landlord in considering granting the adjournment sought by [HBC's lawyer]. There is nothing untoward about a commercial party seeking to lessen its risk by obtaining a ruling on its legal rights. However, **absent**

> **objective urgency, it is incumbent upon it to bring a proceeding that is fair to the responding party and to the court**.
>
> [16] The court takes very seriously issues of health and wellness of practitioners, members of the judiciary, and court staff during the pandemic in particular. **While lawyers and the courts are in a service business, there has to be a brake applied to service providers' willingness to compete themselves (or their juniors) into unhealthy states in the ordinary course of business**. Recognizing that young counsel and staff may have other responsibilities or just need down time does not impair access to justice **provided that everyone understands the need to make personal sacrifices when truly urgent circumstances arise**. [emphasis added]

While these words were written in the context of a commercial dispute, they apply with even greater force in the family law context. There are unquestionably many family law motions that need to be heard on an urgent basis - those matters usually involve children being put on airplanes or the transfer of assets across jurisdictional boundaries. But most are not. And there are many where a party's subjectively held but objectively unreasonable belief in the urgency of their matter will impose undue burdens on the opposing party, his or her lawyer, and/or the court.

So, the next time a client asks that you short-serve, refuse reasonable adjournment requests, or otherwise conduct a proceeding in a manner that would not be "fair to the responding party and to the court", just say "no." And the next time opposing counsel proposes to do this type of thing to you, send him or her a copy of Justice Myers' decision.

Plese v. Herjavec, 2020 CarswellOnt 18494 (C.A.) – *Spousal Support in High Income Families*

***Halliwell* had its 15 minutes of fame.**

The appellant/payor, Robert Herjavec ("Robert"), appealed from a spousal support order made after a 24-year marriage to the respondent/recipient, Diane Plese ("Diane").

After a month-long trial, Robert was ordered to pay $2,689,558 in equalization, $125,000 a month in spousal support, and $14,233 a month in child support from May to August inclusive, for each year that the parties' youngest daughter was still in university. At the time, the decision garnered a fair bit of interest across Canada for the very significant spousal support award in favour of a claimant that had also amassed very significant capital. *After* buying a house and a cottage for $10.5 million, Diane would be left with $13.5 million which, although a healthy sum, was less than half of Robert's capital base.

Robert argued that the spousal support award should be set aside or substantially reduced.

The parties were married in 1990 and separated in 2014. They had three adult children, and the parties were each 56 years old at the time of trial.

In the early years, Robert was an entrepreneur, and Diane was a full-time optometrist who ran her own office. Diane began to work part time in 1993, upon the birth of their first child. She continued to work on a part-time basis between her subsequent maternity leaves.

Robert's business prospered, and he encouraged Diane to stop working, which she did, taking over household management and child-related duties.

By the time of their separation, they had accumulated substantial assets and enjoyed an exceptional income. They lived in a large home in an exclusive area of Toronto that was sold in 2018 for $17.395 million. The parties also owned a $2.6 million property in Florida, a $5 million cottage in Muskoka, and a ski chalet in Caledon. The children went to exclusive private schools. Through Robert's company, the family had access to a private jet which they used for European vacations with their children - all in all, a very similar lifestyle to most of us.

Diane started proceedings on March 3, 2015. The trial spanned 18 days of evidence over four weeks. There were 13 witnesses, including a number of experts on real estate and business valuation issues, and a forensic accounting expert concerning Robert's income.

There were five main issues at trial: breach of trust allegations against Robert; equalization of net family property; spousal support; child support; and retroactive adjustments to spousal support and child support.

At trial, Justice Mesbur found that:

- Robert had breached his fiduciary duties as the sole trustee of the family trust. However, he had accounted for the amounts that he had taken from the trust, and the beneficiaries had received the amounts to which they were entitled.

• Robert's net family property at the valuation date was $24,155,510, consisting primarily of his interest in his company, The Herjavec Group Inc. ("THG"). Diane's net family property was $18,835,699, consisting primarily of her ownership of the matrimonial home. As a result, Robert was ordered to make an equalization payment to Diane of $2,689,558, significantly less than the $12 million she had sought.

• Robert was required to pay spousal support of $125,000 per month, for an indefinite period.

• Robert was required to pay child support for the youngest daughter, in the amount of $14,233 per month, from May to August inclusive, for each year that she was in university.

• The parties' claims for retroactive adjustments were dismissed.

Robert was awarded $450,000 in costs, as the majority of the time taken up at trial related to equalization issues, specifically the valuation of Robert's interest in THG.

With regard to entitlement to spousal support, the trial judge noted that the "overarching criterion" was a determination of what was "reasonable", having regard to the "conditions, means and other circumstances of the parties." She reminded herself that she was required to consider the factors and objectives of a spousal support order, as set out in s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

The trial judge made the following findings of fact in relation to the s. 15.2(4) factors:

• The marriage was a lengthy one of nearly 30 years.

• The parties worked as a "team." Diane's financial contributions from her own work were "critical" to Robert's financial success, particularly in the early years of their marriage. Over the course of the marriage, Robert became the prime income earner and Diane became responsible for raising the children and managing the household.

• When Diane stopped working outside the home, she lost very steady employment and a financial safety net created from her own separate earnings. This was found to be a compensable loss.

• Diane had been unable to contribute to her own support since 2003 and, at age 56, she was unlikely to be able to return to her previous profession. Absent anything else, she was in need of support.

• In December 2015, Robert was ordered to pay interim spousal support of $124,115 per month. At the time of the interim order, Robert represented that his 2015 income would be $1.7 million. In fact, his line 150 income for 2015 was $4.553 million before the mandated adjustments under the *Child Support Guidelines*. With those adjustments, his income was $6.242 million. In contrast, Diane had virtually no income.

In addressing the objectives of spousal support in s.15.2(6) of the *Divorce Act*, the trial judge made the following additional findings:

• She rejected Robert's submission that Diane's capital position, at the end of the marriage, sufficiently compensated her for any economic disadvantages that arose from the marriage.

Robert had a capital base of at least $32 million. He also had the capacity to earn an income of more than $5.5 million per year.

• After buying a house and a cottage (for a total of $10.5 million), which Diane testified she intended to do, she would have $13.5 million, less than half of Robert's capital base.

• Robert's and Diane's capital bases did not generate the same level of income. The nature of Robert's assets allowed him to earn 8.5 times that which Diane could earn from her assets. The trial judge determined that such a disparity could "only be corrected through a generous spousal support order."

• The assessment of "economic hardship" in the context of this family required an examination of the luxurious lifestyle they enjoyed prior to their separation. Diane's lifestyle had suffered since the marriage breakdown, and there was no evidence to suggest that Robert had experienced a similar reduction in his lifestyle. Without spousal support, Diane would have suffered economic hardship as a result of the end of the marriage.

This is all to say that at trial, entitlement was not really a significant question. But how much? And for how long?

The case law sets out different approaches to the calculation of spousal support for high-income earners. Here, Robert had an annual income of about $5.9 million and Diane had an annual income of about $679,725.

The trial judge first looked to the *Spousal Support Advisory Guidelines* (the "SSAG"), which suggested a range of monthly spousal support from $153,144 (low), to $178,664 (mid-range), to $187,050 (high). The high-range figure would have provided each of the parties with approximately half of the total Net Disposable Income. She noted that in lengthy marriages, courts will often fashion a spousal support order that results in each party having roughly the same NDI.

The trial judge recognized that the SSAG do not necessarily apply where the payor spouse earns more than $350,000 per year and that, in some cases, the courts conduct a "means and needs" analysis to calculate spousal support, taking the standard of living the parties enjoyed during the marriage into account.

The trial judge considered Diane's needs in relation to the standard of living during the marriage and her evidence that she intended to use some of her capital to buy a house and cottage. The trial judge calculated that Diane's net monthly expenses would be about $58,000 if she were to maintain anything close to the marital standard of living. Therefore, on a non-compensatory basis alone, Diane had entitlement to support.

Robert urged the trial judge to award support based on the "*Halliwell* principle" [*Halliwell v. Halliwell* (2017), 90 R.F.L. (7th) 253 (Ont. C.A.)] - universally known (at least previously) as the Ontario Court of Appeal's gift to high income payors, and proving that gifts are sometimes revocable.[1]

The trial judge was not persuaded by *Halliwell*, and suggested that *Halliwell* required "an individualized fact-specific analysis" which, in turn, called for a consideration of the effect of the equalization payment on spousal support. And she had already dealt with the effect of the

equalization payment in evaluating Diane's means and needs. The trial judge also noted that, while the SSAG do not apply automatically to income above $350,000 per year, $350,000 is not a hard "cap"; that is, spousal support can, and often will, increase for income above $350,000.

The trial judge ultimately found that a spousal support award of $125,000 per month would be appropriate in all the circumstances. This figure was lower than any of the SSAG scenarios. It provided Diane with about 39% of NDI (including child support). When child support ended in the near future, Diane would have a net monthly income of about $87,000 and Robert would have a net monthly income of $173,000. This was thought to be a "reasonable balancing of the economic consequences of the end of the marriage, coupled with reasonable compensation for [Diane], over and above simply meeting her monthly needs."

The trial judge rejected Robert's position that spousal support should end after two years. There was nothing on the horizon to suggest that Diane's need for support or compensation would end after two years. The trial judge declined to order a termination date, noting that the SSAG called for "duration unknown" support in these circumstances.

So that's $125,000 a month in spousal support. No termination date. One unhappy Robert. And an appeal.

On appeal, Robert suggested that the trial judge erred:

1. In her assessment of Diane's means and needs.

2. In her determination of spousal support by failing to apply "the *Halliwell* Principle" and the SSAG.

3. In ordering indefinite spousal support by not ordering a termination date or review.

The highly-deferential standard of review in support cases is very clear. An appellate court cannot overturn a support order simply because it would have made a different decision or balanced the factors differently: *Ballanger v. Ballanger*, 2020 CarswellOnt 14284 (C.A.) at para. 23. And an appellate court should not interfere with a support order unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or the award is clearly wrong: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) at para. 11. A deferential standard of review is meant to discourage appeals that are meant to only try to persuade the appellate court the result should have been different. It promotes finality.

On appeal, Robert maintained the position with respect to spousal support that he maintained at trial. He argued that the spousal support order should be set aside and that Diane should reimburse the interim amounts that were paid. As we will see, this did not go over well with the Court of Appeal.

With respect to the non-compensatory ("means and needs") analysis, Robert argued that the trial judge erred:

> (a) in assessing Diane's means and needs, and specifically in the calculation of her income-earning capital base, in excluding the full value of the house and the cottage she intended to purchase;

(b) in estimating the professional fees that would be incurred in the acquisition of those properties;

(c) in estimating Diane's future maintenance expenses without an up-to-date budget; and

(d) in double counting the child care expenses claimed by Diane, when she was receiving child support.

These arguments make it clear that Robert was focussing exclusively on errors with respect to the non-compensatory support analysis, and specifically on alleged errors in assessing Diane's means and needs. However, spousal support is driven by both compensatory and non-compensatory factors [*Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.) at para. 201], and the Court of Appeal picked up on this, noting that Robert's argument focused only on non-compensatory factors when Diane's strongest entitlement to support was compensatory.

The trial judge was entitled to approach the question of Diane's entitlement with reference to the standard of living the parties enjoyed during their marriage. Indeed, it would have been an error to not do so. "[G]reat disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution[.]" [*Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) at para. 85]

The trial judge was entitled to determine that, without spousal support, Diane would have suffered economic hardship as a result *of the end* of the marriage. This is a point that is often forgotten in a compensatory support analysis. We are concerned not only with economic advantages and disadvantages as a result of the marriage and the roles assumed *during* the marriage; we are also concerned with disadvantages a spouse may suffer as a result of the *end* of the economic union.

Robert submitted the trial judge erred by deducting from Diane's assumed capital base the entire value of the house and the cottage ($10.5 million) she claimed she *intended* to purchase. Robert suggested that Diane made no mention of such purchases when examined prior to trial.

This argument went nowhere. It was not a palpable and overriding error. The trial judge was entitled to accept Diane's evidence. According to the Court of Appeal, the trial judge was also entitled to conclude that Diane could buy a house and a cottage reasonably commensurate with the standard of living enjoyed during marriage, without having to allocate some of that capital for investment purposes.

While the Court of Appeal was quite correct that the "true driver" of support in this case was compensation, the Court did make a confusing statement when it noted that Robert had not established that the trial judge erred in her determination of Diane's means and needs, "having regard to the compensatory nature of entitlement." It seems to us that a "means and needs" analysis specifically does not, in fact, require regard to the compensatory nature of entitlement. One can have non-compensatory entitlement to spousal support even absent compensatory factors.

Robert also suggested that the trial judge erred in estimating Diane's future maintenance expenses for her anticipated home and cottage without a written, up-to-date budget (or any evidence of a

planned specific purchase). In fact, the trial judge acknowledged that she "somewhat arbitrarily" took half of the maintenance costs for the parties' Toronto house and Florida property to *estimate* what Diane was likely to spend on maintenance in the future.

While the Court of Appeal determined this to be "entirely within the fact-finding responsibility of the trial judge," we do have some sympathy for Robert here. Surely Diane had some obligation to put forward evidence of the expenses she was likely to incur in maintaining her future properties. The trial judge had to act "somewhat arbitrarily" because Diane had not put forward the necessary evidence. This seems unfair and, to some extent, let Diane off the hook. Even if the Court of Appeal was suggesting that, generally speaking, budgets are not terribly useful in assessing future needs, surely Diane had some obligation to put forward evidence of the capital and maintenance costs of the kinds of properties she was proposing to buy.

With respect to the alleged error regarding child support, the parties' youngest daughter continued to be a child of the marriage and was, therefore, entitled to support. She lived away from home while she attended university and lived with her mother from May through August. The trial judge ordered Table "summer" child support of $14,233 per month for the four months that the daughter was living with her mother.

The trial judge also determined that it would be inappropriate to make an order for the payment of the daughter's post-secondary education expenses because of the child and spousal support she was receiving. However, as Diane's Financial Statement (on which non-compensatory spousal support was based) included the cost of the daughter's post-secondary education and other childcare expenses, Robert argued that there was an element of double-counting: those amounts were part of both the spousal support order and the child support order.

The Court of Appeal did away with this argument in one sentence, suggesting that "any error made by the trial judge here was immaterial." In our view, the issue was not that the daughter's post-secondary education expenses were double counted, but rather whether the trial judge should have taken into account the amount of spousal support Diane was receiving in deciding whether these expenses were section 7 expenses. We do not think it was necessary for her to do so, as presumably the child support on its own was sufficient to cover the daughter's post-secondary education. However, if the trial judge had found that the child support on its own was sufficient to cover these expenses, then it would have been appropriate for these expenses to be excluded from Diane's Financial Statement, to avoid the double counting issue raised by Robert.

The comments of the Court of Appeal with respect to *Halliwell* are likely the most interesting part of this case.

Robert argued that the trial judge erred in failing to consider *Halliwell* in calculating his income for support purposes. He argued that, where a payor's income exceeds $350,000, *Halliwell* ***requires*** the court to calculate the payor's income based on the average between the $350,000 SSAG "cap" and the payor's actual income.

The Court of Appeal took the opportunity to "reframe" what it had said in *Halliwell*. The decision had been the subject of significant criticism for having espoused a method of income calculation that was not based in law or in the text of the SSAG.

First, found the Court of Appeal, the trial judge was alive to the decision in *Halliwell*. At para. 341

of her reasons, the trial judge noted that the calculation of spousal support for high-income parties must be "an individualized fact-specific analysis" that considers the effect of the equalization payment: *Halliwell*, at para. 107. The trial judge then further explained that she dealt with the effect of the equalization payment when she assessed Diane's means and needs.

The Court then offered these comments on *Halliwell* itself (at para. 57):

> [57] *Halliwell* does not require the court to impute the payor's income at the mid-way point between the *SSAG*s "cap" and the payor's actual income. Rather, *Halliwell*, at para. 116, emphasizes what the *SSAG*s have always stated: "Above the $350,000 ceiling, an additional formula range is created: **appropriate income inputs range anywhere from $350,000 to *the full income amount.* Entitlement is important to determine a location within that range**" . . .
>
> [58] [Robert's] submission that the support award "far exceeds the *Halliwell* range" is simply inaccurate. The *Halliwell* range includes, at the upper end, the use of the full amount of the payor's income. The award here is within the appropriate range. [emphasis added]

Notably, these comments echo the comments of the Court of Appeal in *Dancy v. Mason* (2019), 25 R.F.L. (8th) 93 (Ont. C.A.). In *Dancy*, the Court of Appeal suggested that it is not very meaningful to speak of set "ranges" for spousal support in over-$350,000 cases because the ranges are fluid, depending on the income inputs.

Ultimately, found the Court of Appeal, the lesson in *Halliwell* is that the court must fully consider the effects of a property settlement when determining spousal support, beginning with the question of entitlement. Nothing more. And that was clearly done in this case. In her analysis of entitlement, the trial judge considered Diane's capital base resulting from the equalization payment and the potential investment income, but accepted that she could not consider the ability of Diane's capital base to meet her future needs in isolation. Some of Diane's capital was to be used to purchase real property and would not produce income.

Robert also argued that the trial judge erred by failing to account for his debts in comparing their capital positions. However, the Court of Appeal found that this submission "rang hollow" because Robert had not provided an updated valuation of THG. The trial judge explicitly inferred that had it been to Robert's benefit, he would have produced an updated valuation. This is hard to align with the Court of Appeal approving of the trial judge "somewhat arbitrarily" taking half of the maintenance costs for the parties' Toronto house and Florida property to *estimate* what Diane was likely to spend on maintenance in the future - because Diane had not put the necessary evidence before the Court.

The Court of Appeal then continues, "[if], at some future date, there are material changes in [Robert's] financial circumstances, including the valuation of THG, he has his remedies." What remedies are those? An equalization payment cannot be varied. A decrease in the value of Robert's company (or an increase in his debts) cannot (alone) be a material change for the purpose of varying support. And debts that existed on the date of trial cannot later found a material change.

Finally, the Court of Appeal saw nothing wrong with a support order "without durational limit" in the circumstances. They opined, "[t]here is nothing in the trial judge's order or in the underlying reasons to deprive [Robert] of his right to seek a review should a material change occur in either

his or [Diane's] circumstances." And here, they were correct.

Appeal dismissed. *Halliwell* dead. Summary long, but done.

Wiseau Studio, LLC v. Harper, 2021 CarswellOnt 377 (C.A.) – *Security for Judgment*

This is obviously not a family law decision; but it certainly may be of use to family law lawyers.

Everyone has "those cases." The ones where the responding party is difficult, recalcitrant, and impossible to deal with. They do all they can to obfuscate and delay. They set up roadblocks. They do not pay interlocutory costs orders against them. They just do not play by the rules.

And the conduct does not stop after trial. Then come the appeals, the motions to reconsider, the motions to change, and the variation applications. Again - one of "those" cases.

Sure, one can bring a motion for security for costs for any appeal(s). But what about the actual money judgment that has been stayed on account of the appeal(s)? Wouldn't it be nice for the difficult, recalcitrant and rule-bending party to have to actually secure the actual judgment owing before proceeding with these other steps?

This is an extraordinary remedy that has been used sparingly in British Columbia and Alberta, but only very rarely in family cases [see *Hamza v. Hamza* (1997), 29 R.F.L. (4th) 460 (Alta. C.A.)].

On this motion before Justice Thorburn of the Ontario Court of Appeal, the moving parties ("Harper") brought a motion for security for the trial judgment ($775,000) and for the costs of the trial judgment ($480,000). (The motion was also for security for costs of the appeal, but we are focussing on the motion for security for the trial judgement.)

The facts and recounts of inappropriate litigation behaviour are lengthy but entertaining (see footnote 2 below). Briefly summarized, in 2003, the responding party ("Wiseau") released a feature motion picture called "The Room." The movie is widely considered to have been the worst movie ever made in the history of film. It was so bad, in fact, that it acquired a cult following. Think "Rocky Horror Picture Show." The making of The Room was also made into a very funny movie called "The Disaster Artist".

Harper et al. were documentary filmmakers. In 2016, they finished a documentary called "Room Full of Spoons"[1] about the cult-phenomenon of The Room.
Wiseau brought a claim against Harper in 2017 in an effort to prevent the release of the documentary, and was successful in getting an *ex parte* injunction restraining the release of the documentary.[2]

When the injunction was dissolved, Harper was awarded substantial indemnity costs of $97,000.

Wiseau only paid the costs order (almost a year after it was made) after the Court warned that his

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[1] Named for a scene in the movie in which a room is decorated with store-bought framed pictures of spoons - thought to be the stock photos included with the frames that were simply never replaced before shooting.
[2] Justice Koehnen's judgment setting aside the ex parte order for failing to make full disclosure recants much of the entertaining back story and offers a good lesson in how to not move for an ex parte injunction: Wiseau Studio, LLC v. Harper, 2021 CarswellOnt 377 (C.A.).

claim would be dismissed if the costs were not paid.

Wiseau then delayed and set up roadblock-after-roadblock to actually getting the case to trial. The Case Management Judge specifically found that Wiseau had set up "roadblocks to scheduling at almost every attendance" and other improper acts. It was also determined that Wiseau had engaged in other outrageous conduct in getting the matter to trial. Wiseau's claims were dismissed at trial. Harper was awarded $200,000 in punitive damages (largely for litigation misconduct); $550,000 USD in damages (on account of the improper *ex parte* injunction); about $25,000 USD in pre-judgment interest, and $480,000 in costs.

Wiseau then tried to vary the judgment, suggesting that the reasons were based on "misleading evidence." This was found to be further evidence of the fact that Wiseau would do anything to delay. Wiseau also raised public complaints about the Ontario justice system, suggesting that he did not get "justice" as a foreign litigant in Ontario (the jurisdiction where he chose to commence his claim).

Wiseau then refused to attend an examination in aid of execution and he ignored court orders compelling his attendance to provide information about his assets.

Wiseau, through counsel, also suggested that as the bulk of his assets were located in the United States, Harper would have to convince a U.S. court to patriate the Ontario judgment. This "taunt" was probably not such a good idea.

Wiseau appealed the trial judgement, using a Notice of Appeal that was wholly bereft of meaningful grounds of appeal.

On the motion for security, Harper argued that Wiseau had made it abundantly clear, by his own conduct, that he would not voluntarily pay any order of the Ontario courts.

Wiseau claimed that he was entitled to appeal the judgment below, to "due process", and to all the usual protections afforded to a judgment debtor. Wiseau argued that, to allow Harper to obtain information about his assets would constitute execution before final judgment, and that there was a reason that an order for security for judgment had never been granted in Ontario.

Considering the issue of security for costs of the trial judgment, Justice Thorburn looked to s. 134(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43: "On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal." Rule 1.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, then provides that, "[w]hen making an order under these rules the court may impose such terms and give such directions as are just." Those provisions are clearly very broad.

Based on the broad jurisdiction provided in the *Courts of Justice Act* and the *Rules of Civil Procedure*, Justice Thorburn concluded that the requested relief was, indeed, permissible. However, following the lead of other jurisdictions that have a history of granting such relief, she found that security for judgment is an extraordinary remedy that should only be granted in exceptional circumstances: *Vaillancourt v. Carter*, 2017 CarswellAlta 2570 (C.A.) at para. 20; and *Hamza*, at para. 24.

As such an order would require an appellant to post security for judgment before continuing with the appeal, it functions somewhat like a *Mareva* injunction, restraining the appellant from disposing of assets so as to ensure they are available to satisfy the judgment should the appeal be dismissed. If the security is ordered and not posted, the appeal is dismissed: *Vaillancourt* at para. 20.

Notably, security for judgment has been granted in other jurisdictions for varying reasons, all of which appear to be relevant to family cases in some situations:

> 1. Where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit (*Vaccaro v. Twin Cities Power-Canada, U.L.C.*, 2013 CarswellAlta 1177 (C.A.) at para. 11; *Creative Salmon Co. v. Staniford*, 2007 CarswellBC 1062 (C.A. [In Chambers]) at paras. 12 and 14; *Richland Construction Inc. v. Manningwa Developments Inc.*, 1996 CarswellBC 1767 (C.A. [In Chambers]) at paras. 13-14);
>
> 2. To preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute: *Aetna Financial Services Ltd. v. Feigelman*, 1985 CarswellMan 19 (S.C.C.) at p. 12); and
>
> 3. To encourage respect for the judicial process and avoid abuse of process (*Hamza* at para. 23, citing *Mooney v. Orr*, 1994 CarswellBC 26 (S.C.) at para. 50; *Vaccaro* at paras. 12-14; and in respect of *Mareva* injunctions, *Aetna Financial* at pp. 13-14).

Sound familiar?

In *First Majestic Silver Corp. v. Santos*, 2013 CarswellBC 1947 (C.A.), the Court invoked s. 10(2)(b) of the British Columbia *Court of Appeal Act*, R.S.B.C. 1996, c. 77, a provision with similar wording to that of s. 134 of the Ontario *Courts of Justice Act*, and set out the following principles governing the exercise of discretion in ordering security for a trial judgment:

> 1. The onus is on the applicant to show that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.
>
> 2. The applicant must show prejudice if the order is not made.
>
> 3. In determining the interests of justice, the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.

The interests of justice may include a consideration of the *ex juris* residence of an appellant and therefore the effective immunity of an appellant from enforcement of the judgment. They may also include a consideration of the ability to enforce the judgment in the appellant's *ex juris* jurisdiction and/or the absence of assets in the jurisdiction in which the judgment was rendered.

The interests of justice may *not* be relied upon by a successful plaintiff where the effect of requiring the posting of security for a trial judgment would be to preclude a party from pursuing the appeal: *Shandro Dixon Edgson v. Kedia*, 2007 CarswellBC 1253 (C.A. [In Chambers]). However, adverse financial circumstances will generally not defeat an application for security where an appeal is virtually without merit. A finding that an appeal has no reasonable prospect of success may be a factor, and a successful plaintiff should not be required to respond to an unmeritorious appeal when

there is no real prospect of recovery.

Her Honour determined this to be one of those rare and exceptional circumstances where an order for security for judgment is warranted.

Wiseau was resident in the United States, and there had been some suggestion that the claim had been started in Ontario for the specific purpose of making execution difficult. He had repeatedly failed to provide any information on his assets, and the reasonable inference was that Wiseau had no assets in Canada. Furthermore, he had sufficient assets to post security without jeopardizing his ability to pursue the appeal. Therefore, the interest of justice requirement was met.

There was also sufficient evidence of prejudice to Harper if the award was not granted. Justice Thorburn was satisfied that absent this order, Harper may never actually recover on the judgment. The fact that Wiseau had a history of ignoring the *Rules of Civil Procedure* and previous orders (like the previous costs order) supported this.

Finally, her Honour found the Notice of Appeal, as drafted, to be frivolous, and articulated no significant errors of fact or law.

As a result, the Court of Appeal ordered that Wiseau post security for the trial judgment of $200,000 and sufficient Canadian currency to purchase $575,488.36 USD.

It is easy to see how this sort of rare security award may be of use in certain family cases across Canada, especially those with a multi-jurisdictional element. Again, it is not for every case or for every appeal; in fact it is not for every “hard” case or hard appeal. But it is certainly nice to know that another Canadian appellate court has now adopted the idea of security for judgment for when it is actually needed.

Simons v. Crow (2020), 48 R.F.L. (8th) 135 (Ont. S.C.J.) – *How to Determine Jurisdiction*

The little known 11th Commandment: "Thou Shalt Not Forum Shop"

Justice Bale's thorough reasons in *Simons v. Crow* provide a roadmap for determining whether a court in Ontario has jurisdiction in a family law case. It also serves as a reminder that when dealing with a jurisdictional dispute, one must consider all three of the following questions:

1. Does the court have statutory jurisdiction?
2. Does the court have jurisdiction *simpliciter*?
3. Is another forum clearly more appropriate?

The parties in *Simons* were married in 1993 and had three children together. The family moved to Bermuda in 1998, and lived there together until the husband and wife separated in 2005.

The parties litigated, and ultimately resolved, the issues arising from their separation in Bermuda.

In 2008, the parties agreed that the wife and children would return to Ontario. They also agreed that the husband would be able to be able to spend approximately three months a year with the children in Ontario.

In 2018, the husband commenced a proceeding in Bermuda to reduce his child support payments because his income had decreased, and because the children were all over the age of majority and enrolled in various post-secondary programs. The mother defended the husband's claims in Bermuda, and she participated in the final hearing in March 2019.

In August 2019, the Supreme Court of Bermuda released its decision terminating the husband's child support obligation for one of the children, and reducing his support payments for the other two.

The husband also made claims in Bermuda to deal with various parenting issues. On September 25, 2019, the Bermuda court determined that although the children were already all over the age of majority (and although they had been living in Ontario since 2008), it had inherent jurisdiction because they had various disabilities and did not have capacity to make their own decisions about their custody, care, and control.

After the September 25th hearing, the mother decided she no longer wanted to participate in the proceeding in Bermuda. On November 14, 2019, she commenced an Application in Ontario for, among other things, custody of the parties' adult children, an order limiting the husband's access with the children, child support, and an order requiring the husband to maintain life insurance for the children.

Upon receiving the mother's Application, the husband retained counsel in Ontario, and brought a motion to dismiss the wife's claims on the basis that the court in Ontario lacked jurisdiction *simpliciter* or, alternatively, that it should decline to exercise its jurisdiction on the basis of *forum*

non conveniens.

Statutory Jurisdiction

The wife acknowledged that she could not claim relief under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), because the parties had been divorced in Bermuda (for further discussion of the problems associated with not being able to seek relief under the *Divorce Act* once a foreign divorce has been granted, see "How Do You Solve a Problem Like *Rothgiesser*?" in the 2020-18 and 2020-19 editions of *TWFL*). However, she argued that the court had jurisdiction under the applicable provincial legislation - the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") and the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12 (the "*CLRA*").

Justice Bale quickly disposed of the wife's claim for custody of the adult children because the children were already in their early 20's and, unlike the *Divorce Act*, under the *CLRA* a court can only make custody and access orders for someone who is a minor (pursuant to s. 1 of the *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7, the age of majority in Ontario is 18). Accordingly, the Court did not have jurisdiction to deal with the wife's claim for custody under the *CLRA*. And, if the wife wanted to pursue the matter, she would have to commence a new Application under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, which deals with decision making for adults who are incapable of making decisions relating to personal care.

Jurisdiction *Simpliciter*

The more difficult question that Justice Bale had to determine was whether to permit the wife to proceed with her child support claims. Since the support payor (i.e. the husband) was not in Ontario, the wife was required to satisfy the Court that the husband or the claim had a "real and substantial connection" to Ontario (see *Jasen v. Karassik* (2009), 62 R.F.L. (6th) 63 (Ont. C.A.) at para. 16). Justice Bale explained how to determine whether an out of province support payor has a "real and substantial connection" to Ontario:

> [45] **A 'real and substantial connection' must be established on the basis of objective facts that connect the legal situation or the subject matter of the litigation with the forum. The language is deliberately general to allow for flexibility and evolution in application of the test**: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), *Van Breda v. Village Resorts Ltd.*, *supra* at para. 82.
>
> [46] The following factors have emerged as relevant in assessing 'real and substantial connection':
>
> a. The connection between the forum and the plaintiff's claim;
>
> b. The connection between the forum and the defendant;
>
> c. Unfairness to the defendant in assuming jurisdiction;
>
> d. Unfairness to the plaintiff in not assuming jurisdiction
>
> e. The involvement of other parties to the suit;
>
> f. The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;

g. Whether the case is interprovincial or international in nature;

h. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere: *Muscutt v. Courcelles*, *supra* at paras. 77-110. [emphasis added]

Although some of these factors favoured the wife (e.g. the wife and the children were in Ontario and had no physical or financial connection to Bermuda), she was clearly trying to re-litigate issues that had already been decided in Bermuda only a few months earlier. After not objecting to Bermuda's jurisdiction, fully participating in the Bermuda proceeding, and not appealing the trial judge's thorough 25-page decision, Justice Bale did not think that it would be fair to essentially give the wife a "do-over" in Ontario:

[57] At the outset, it is important to note that the Judgment of Wheatley J. of the Supreme Court of Bermuda dated August 12, 2019 is Final. **The matter was commenced, litigated, and judgment was rendered before the [wife] made any objection as to forum, and before she commenced any proceedings in Ontario. This is a critical feature to the analysis**: all of the jurisprudence brought to the attention of this court pertained to competing actions in two jurisdictions wherein either: (a) the action in the foreign jurisdiction was not complete; or (b) the concluded action in the foreign jurisdiction did not consider the issues brought before the Ontario court. **This causes the court obvious concern as to a potential abuse of process**. . . . The same questions that would require judicial determination in relation to [the wife's] Ontario action were considered and have already been decided (quite recently) by the Supreme Court of Bermuda. **With some minor changes in phraseology, the decision of Stoneham J. could easily be mistaken for the decision of an experienced Ontario Superior Court of Justice judge considering a child support variation motion under the *Divorce Act* or the *FLA***. The [wife] did not object to the forum, participated fully in that hearing, and did not appeal the decision.

[58] **The [husband] appears to have participated in good faith throughout the Bermuda action**, making appropriate financial disclosure, tendering relevant evidence, and advancing his legal argument in accordance with the procedure of that court. The [husband] was represented by counsel and incurred legal expense. **He obtained judgment through proper legal channels, without objection from the [wife], and should not be required to relitigate this issue in another court without compelling reason**. Although the [husband] did not specifically argue issue estoppel, the court is alert to the need to promote finality in litigation, to avoid duplicative action which increases costs to families, and to enforce its positive obligation to promote the primary object of the *Family Law Rules*: to deal with cases justly: O. Reg. 322/13 at Rule 2.(2). [emphasis added]

It also did not help the wife that Bermuda's child support regime is similar to Ontario's, and that Bermuda is a reciprocating jurisdiction in the enforcement of child support:

[70] In light of such significant similarities in legislation regarding entitlement to child support for children over the age of majority, and the thorough application of those similar principles to the child support issues determined by the Supreme Court of Bermuda, and raised again in these proceedings, **it would be contrary to principle and inconsistent with comity if this court were to refuse to recognize the decision of Wheatley J. as relevant, binding, and enforceable**. [emphasis added]

In the end, Justice Bale concluded that even though the wife and children lived in Ontario, the wife had not established that the case had a "real and substantial connection" to Ontario:

[71] As explained by the Supreme Court of Canada, the real and substantial connection test permits a general and flexible application. No factor need be given more weight than any other, but there is no

> prohibition against finding some factors to be more influential than others. **While in normal circumstances the primary residence of the "children" and the recipient parent would weigh heavily in favour of establishing jurisdiction *simpliciter*, on the specific facts of this case, I am not satisfied that the [wife] has discharged the burden** of establishing the court's territorial competence in this matter. The strength of the factors which establish **significant prejudice to the [husband] if this matter is permitted to be (re)litigated in Ontario, and the lack of prejudice to the mother in awaiting a material change (if any) before returning this matter through the available procedure under the *Interjurisdictional Support Orders Act*, and the strong need for comity in this matter demand respect for and recognition of the existing Order of the Supreme Court of Bermuda**. In reaching this conclusion I am guided by the factual similarities and reasoning of Goodman J. in *Sun v. Guilfoile*. I adopt his comments: "Where a valid and subsisting foreign court order provides for support, there is no jurisdiction in Ontario to proceed with an originating application for support under s. 33. Such an application is nothing more than a disguised variation application": *supra*, at para. 55. There are no legitimate custody and access claim before this court which warrant a deviation from this general practice. [emphasis added]

In *Sun v. Guilfoile* (2011), 96 R.F.L. (6th) 397 (Ont. S.C.J.), Justice Goodman held that a party cannot simply get a new original order for support in successive jurisdictions. Where a valid and subsisting foreign order provides for support, there is no jurisdiction in Ontario to proceed with an originating application for support under s. 33 of the *FLA*. A foreign order is not a "nullity" and cannot just be ignored. The same theory was also upheld in *Mittoo v. Nanda* (2015), 64 R.F.L. (7th) 481 (Ont. C.J.), where the Court determined that the party had to avail itself of the *Interjurisdictional Support Orders Act, 2002*, S.O. 2002, c. 13, to vary a foreign child support order. But one cannot use an Ontario proceeding under the *FLA* to, in essence, try to vary a foreign order, and courts generally should not accept jurisdiction over support applications where there is a valid foreign order.

There is some contrary authority - *Kaur v. Guraya* (2011), 4 R.F.L. (7th) 346 (Ont. S.C.J.), for example - where the Court held that where there is a foreign order for custody and child support and an Ontario applicant tries to supersede both, the application can proceed in Ontario on the applicant's undertaking to withdraw enforcement of the foreign order. That said, we believe the authority of *Sun v. Guilfoile* is preferable, and certainly so where the Ontario application is brought literally on the heels of the foreign order.

Where claims for custody/access can proceed under s. 42 of the *CLRA* (superseding a foreign order where there has been a material change in circumstances), then it may be appropriate to accept jurisdiction over support as well: *Gavriluke v. Mainard* (2012), 32 R.F.L. (7th) 99 (Ont. S.C.J.), aff'd (2013), 32 R.F.L. (7th) 111 (Ont. Div. Ct.); *Von Pfetten v. Kocher*, 2013 CarswellOnt 18956 (S.C.J.); *Lowry v. Steinforth* (2018), 17 R.F.L. (8th) 487 (Ont. C.J.).

In case she was wrong about Ontario not having jurisdiction *simpliciter* (and we do not think she was), Justice Bale also considered whether to stay the Ontario proceeding pursuant to the doctrine of *forum non conveniens*, which permits a court to stay a proceeding on the basis that a court in another jurisdiction is clearly the more appropriate forum for dealing with the matter:

> [75] Very often there is more than one forum capable of assuming jurisdiction and it is necessary to determine where the action should be litigated. **At times, there are several equally suitable alternatives and the most appropriate forum is determined through the *forum non conveniens* doctrine, which allows a court to decline to exercise its jurisdiction**

on the ground that there is another forum more appropriate to entertain the action: *Muscutt v. Courcelles*, *supra* at para. 40.

[76] Several considerations have evolved in the determination of the most appropriate forum, including but not limited to:

a. The location of the parties;

b. The location of key witnesses and evidence;

c. Contractual provisions that specify applicable law or accord jurisdiction

d. The avoidance of multiplicity of proceedings

e. The applicable law and its weight in comparison to the factual questions to be decided;

f. Geographic factors suggesting the natural forum;

g. Whether declining jurisdiction would deprive the plaintiff of a legitimate judicial advantage available in the domestic court: *Muscutt v. Courcelles*, *supra* at para. 41, and *Jasen v. Karassik*, *supra*. [emphasis added]

Although the Bermuda proceeding was already finished, Justice Bale determined that based on these factors, if she was "wrong in finding that Ontario does not have territorial competence to hear a fresh Application for child support in this matter, the circumstances of this case weigh strongly in favour of upholding the Supreme Court of Bermuda's judgment as having already been decided in the more appropriate forum."

As a result, Justice Bale dismissed the wife's Application.

Schieder v. Gajewczyk, 2021 CarswellOnt 883 (S.C.J.).; and 2021 ONSC 640 – *Notices to the Profession and the Format of Materials*

Can't we just all be friends?

The days of tolerating blatant non-compliance with procedural rules, Notices to the Profession, and Practice Directions appear to be over - at least in Ontario.

In *Schieder*, the parties' Case Conference judge, Justice Himel, issued very specific directions about the materials the parties would each be permitted to file in support of the motions they both wanted to bring. The applicable Notice to the Profession also provided that unless leave was granted in advance, and that did not happen in this case, each party's Affidavits could not exceed ten pages of narrative and ten pages of exhibits.

Instead of complying with Justice Himel's Order and the Notice to the Profession, and without even trying to seek leave, the parties simply filed Affidavits that were *exponentially* longer than they were supposed to be. The wife, for example, filed an Affidavit that had more than 300 pages of exhibits. That is a far cry from "10".

The day before the motions were supposed to have been heard, Justice Jarvis advised the parties and their lawyers that he was not going to hear the matter given their failure to comply with Justice Himel's Order and the Notice to the Profession. He also advised the parties' lawyers to familiarize themselves with Rule 24(9)(a) of the Ontario *Family Law Rules*, which allows a court to order a lawyer not to charge a client for work that was done and/or to reimburse the client for fees that have already been paid. This is something that no lawyer ever wants to see in a decision.

Despite Justice Jarvis' rather stern and direct warning, the parties did not get the message. Although Justice Himel had specifically directed counsel to speak before their next attendance to at least try to resolve some of the issues, they did not do so - and they could offer no explanation. And, as Justice Himel noted in her Endorsement, during their next court attendance, "neither counsel provided any explanation for the gross repudiation of the page limitations that they filed for the motion [that was supposed to have been heard by Justice Jarvis], nor any apology."

All of this led Justice Himel to issue a stern warning to lawyers and litigants in both Ontario and across Canada that this type of unreasonable behaviour simply needs to stop - especially in these times of judicially-limited resources:

> [11] **The case is indicative of the culture of unreasonableness that plagues the Court. This culture is particularly problematic given the current challenges and delays faced by litigants in gaining access to justice**. Other flagrant examples include:
>
> (a) failing to file any conference materials and/or Confirmation notices;
>
> (b) ignoring the line spacing and font size so as to "comply" with the page limits;
>
> (c) circumventing page limitations by directing the judge to earlier affidavits;
>
> (d) bringing "urgent" motions that are *not* urgent, and attempting to squeeze long motions into one hour slots;

(e) seeking last minute adjournments based on information known weeks in advance;

(f) failing to advise the Court until the morning of a matter that the case has settled when the Minutes of Settlement were executed days before;

(g) using the Court's limited resources to further the delay, delay, delay game;

(h) seeking costs in amounts that are unreasonable and not proportionate;

(i) requesting relief that is extreme, not child-focused and unrealistic; and

(j) playing "good cop, bad cop" with the judge delivering the unfavourable opinion rather than the client's legal advisor.

[12] It seems that, **for some counsel, the days of valuing one's reputation over success in any particular file may be gone**. Given the current state of rapid transformation of the Court, coupled with additional unspecified future changes, that is unfortunate.

[13] **Civility inside and outside of the courtroom, and respect for colleagues and the Court, are vitally important to the successful functioning of the Family Justice system.**

[14] **Enough is enough.** [emphasis added]

With one caveat, we echo Justice Himel's concerns, and hope that her decision, and others like it (several of which we have commented on in earlier editions of *TWFL*), should help prevent this from continuing to happen in the future.

The caveat? Some cases are complicated. They just are. And *sometimes* (not all the time, but ***sometimes***) the objectively necessary detail for a Case Conference just cannot be reduced to six-double-spaced-pages of Case Conference Brief or a 10-double-spaced-page Affidavit and 10 pages of Exhibits (of which a Financial Statement would consume almost all the allotted exhibit pages).

A deep breath is required from both sides here.

Counsel get upset when their pages numbers are limited. But the system cannot function if each side to a Case Conference or motion files a 4-inch binder of material. It is an impossible task for any judge of any court. Counsel must also carefully consider how much time will be needed for oral argument *before* scheduling a hearing. As lawyers, we are notorious under-estimators (in fairness, time does seem to fly when arguing a motion). If a motion involves complicated legal and/or factual issues, it is not realistic or fair to expect that the court will be able to deal with the matter if only 45 minutes has been set aside for oral arguments, particularly if factums are not filed, and/or the matter is being dealt with in a jurisdiction that was already under resourced before COVID-19. But if your motion requires multiple affidavits and expert reports - it's likely not a short motion.

Counsel need not include full expert reports in their materials. The summary or conclusion page can often suffice; and the full report can be "available" electronically at the hearing if necessary. Several years' worth of account statements need not be included in exhibits - attach the statements that are necessary. Full income tax returns are rarely necessary to make any point; but again, they can be available electronically should they be required. If you are concerned that the court might need to see an entire document, consider uploading it to a file sharing site and providing a link that

can be used to access the full document during the hearing should the need arise (although until this practice is expressly authorized either by the rules or a Practice Direction, it should probably only be done with either the other party's consent or prior judicial approval).

Paragraphs spent on "rhetorical excess" (to borrow from Justice Kurz in *Alsawwah v. Afifi* (2020), 41 R.F.L. (8th) 362 (Ont. S.C.J.)) can (and should) be omitted (they are only going to annoy the court anyway). And counsel must condense their materials with ruthless editing: what is really necessary, and what is not? Know your limit and (try to) draft within it.

In those situations where the file is, in fact, sufficiently complicated such that more pages are required, counsel must plan ahead and seek leave to file more lengthy materials (not the day before the material is due), offering a reasonable explanation. These types of requests must be made enough in advance to give the court a reasonable opportunity to process them. And courts should address those requests on a timely basis because, anecdotally, those requests are often not answered until after the material is already due to be filed.

And finally, there is excessive material and then there is ***excessive*** material. *Schieder* involved ***excessive*** material. There are stories of materials being rejected (not just in Ontario) for being very marginally over the page limit (i.e. as little as one-half page). If the pages have been limited by an Order, that is the end of it; an order is an order and counsel simply *must* get leave prior to filing anything in excess of the ordered page limits. But if the page limit comes by way of Practice Direction or Notice to the Profession, provide a reasonable explanation and respectfully request the indulgence, as Courts will surely continue to accept that, sometimes, a complicated case may call for an extra page or two (or three? Or are we pressing our luck . . . ?).

Caplan v. *Atas*, 2021 ONSC 670 – *The (New) Tort of Internet Harassment*

Weaponizing the Internet.

Caplan is not a family law case per se, but anyone that practises in the area should know about it…just in case.

The internet is largely ungovernable. The defendant, Atas, had engaged in over a decade of unrelenting online harassment through websites, weblings, emails, tweets, etc. The plaintiffs, including former employers, counsel that acted both for and against Atas over many years, reporters – and their families, etc., who were all the objects of Atas' harassment. In many of these cases, the harassment also extended to the plaintiffs' family members and associates. The published allegations on the internet were particularly heinous. Atas targeted her victims through thousands of anonymous posts making claims of fraud and unethical conduct, prostitution, sexually deviant behaviour, and pedophilia. She posted on websites that do not control content (something really must be done about those) and she often included photos of the targeted individuals. As noted by Justice Corbett, "serious mental illness must underlie [the defendant's] conduct."

Justice Corbett found that Atas had "engaged in a vile campaign of cyber-stalking against the plaintiffs…the goal of which has been retribution for long standing grievances". Unfortunately, the law of defamation was ill-equipped to address the transgressions as the defendant was impecunious. Furthermore, the conduct at issue was not meant to defame; it was intended to cause fear, anxiety and misery *through* repeated publications of defamatory material online. The defendant also proved to be resistant to change through orders for contempt. The tort of intentional inflection of mental suffering was also an insufficient answer given the requirement that the victims suffer with a visible and provable illness – and, again, because the defendant was judgment proof. The tort of intrusion upon seclusion also did not fit the situation as Atas did not actually invade anyone's privacy.

Therefore, relying on American case law, Justice Corbett created a new civil tort: the tort of internet harassment. In doing so, his Honour made it clear that this new tort was not meant to address "run-of-the-mill" harassment or conduct just meant to annoy; it would only apply to the most serious and persistent of harassing conduct that "rises to a level where the law should respond to it." It is meant to address conduct far beyond "mere character assassination." It is to address repeated conduct that is specifically meant to "cause fear, anxiety and misery."

In this case, the defendant's conduct was so over-the-top, continuing, long-lasting and outrageous, that the New York Times published an article about it (it's a great read and details the sleuthing efforts undertaken by counsel to identify the plaintiff):

https://www.nytimes.com/2021/01/30/technology/change-my-google-results.html

A review of that article (or the decision) shows the basis for the test for this new tort:

- the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance;

- with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and

- the plaintiff suffers such harm.

Because ordinary remedies would not suffice against an impecunious plaintiff, Justice Corbett also designed some tort-specific remedies, essentially designed to remove Atas' ability to weaponize the internet:

- He permanently enjoined Atas from communicating with any of the plaintiffs.

- He permanently enjoined Atas from disseminating, publishing, communicating or posting on the internet by any means with respect to the plaintiffs together with their families, related persons, and business associates.

- He then vested title of the offensive postings to a court-appointed independent third party in order to take the necessary steps to have them removed.

As noted above, this is not a family case. But anyone that has been practising in the area for any length of time will surely want to know about this case while, at the same time, hoping they need never use it.

Champoux v. *Jefremova*, 2021 ONCA 92 – *Admissions*

We Admit We Don't Often Think About Admissions

Formal admissions are important.

A formal admission is not like other evidence at trial that is generally weighed. Rather, a formal admission is *conclusive* of the matter admitted, and a court must act on a formal admission, even if other evidence contradicts the admission: *Serra* v. *Serra*, 2009 ONCA 105 at para. 106. While a trial judge my interpret what an admission means, that interpretive exercise cannot ultimately question the truth of the admission.

Therefore, what is or is not an admission can be crucial, and in *Champoux* v. *Jefremova*, the Ontario Court of Appeal opined that when a party refuses to admit a fact in a Request to Admit, *the reason for the refusal can become an admission in and of itself*, that cannot just be withdrawn.[3] An "admission" can be the reason for a refusal to admit a fact.

The purpose of the Request to Admit procedure is to save time and cost by narrowing the facts in issue. If a litigant could deny a fact in a Request to Admit on the basis alternate facts are accurate, but then treat those alternative facts as non-binding, this purpose would be undercut. To allow that would obfuscate rather than clarify the facts in issue.

By way of example, suppose Wife asked Husband to admit that Husband quit his job after separation because Husband was expecting a large inheritance. And, in response, Husband refused to admit that fact, responding that he did not quit but that he was fired because of insubordination. The fact of termination because of insubordination would be an admission, and the Wife could use that admission in her support claim. Or suppose Husband refused to admit that fact, responding that he quit because he was suffering from severe mental health issues. Those mental health issues would then be admitted and could possibly come into play with respect to custody matters.

The practice point to take from this? Be careful what you admit. Be careful what you don't admit. And remember that the reason for any refusal can be held against you.

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[3] And it's not so easy to withdraw an admission. See *Antipas v. Coroneos* (1988), 26 C.P.C. (2d) 63 (Ont. H.C.); *Liu* v. *The Personal Insurance Company*, 2019 ONCA 104, 89 C.C.L.I. (5th) 195, at para. 13; *Serra* v. *Serra*, 2009 CarswellOnt 513 (C.A.)

C.H. v. S.F., 2021 CarswellSask 87 (C.A.) – The *Audi Alteram Paretem* Rule

I would have gotten away with it too – If it weren't for you meddling kids!

Audi alteram partem is a rule of natural justice that "requires that courts provide an opportunity to be heard to those who will be affected by the decisions" [*A. (L.L.) v. B. (A.)*, 1995 CarswellOnt 955 (S.C.C.)]. It seems simple enough. Where, as in this case, a party is denied the right to be heard, the result will almost invariably be a new hearing.

C.H. v. S.F. involved a dispute over the parenting arrangements for the parties' two teenage children. The children initially lived primarily with the mother, but moved in with the father when the mother was hospitalized because of a mental health event in March 2020.

After the mother was released from the hospital, she brought a motion to require the father to return the children to her care. The father responded by bringing his own motion for, among other things, an order suspending the children's contact with the mother.

The motions were adjourned several times, but were ultimately scheduled to be heard by teleconference on July 7, 2020.

Two business days before the return date, the father served a further affidavit. As a result, on the morning of July 7, 2020, the mother's lawyer advised the father's lawyer that she needed an adjournment. The father's lawyer consented to the request for an adjournment, and agreed *in writing* to adjourn the motions to July 28, 2020.

In accordance with her understanding of procedures that were in place at the time, the mother's lawyer had provided the registrar with phone numbers where both she and her client could be reached for the telephone attendance on July 7, 2020.

Unbeknownst to the mother's lawyer, however, the court had recently changed its procedures such that parties and their lawyers were actually required to call into the court using a phone number that would be emailed to them prior to the hearing. Unfortunately, the email the court sent to the mother's lawyer on July 3, 2020, advising her of the change in practice and providing her with the phone number ended up in her junk mail folder (along with e-mails offering duct cleaning service and offers to repatriate foreign lottery winnings). As a result, neither the mother nor her lawyer called into the court for the motion at the scheduled time.

For reasons that are not entirely clear, it does not appear that anyone tried to contact the mother's lawyer to find out why she had not called into the court. But that wouldn't have mattered if the father's lawyer had simply advised the court that the parties had agreed to adjourn the motions to July 28, 2020. Shockingly, that is not what happened.

Instead of telling the judge that the parties had agreed to a brief adjournment, the father's lawyer advised the judge that the father was opposed to any further adjournments, and wanted to proceed.

Based on only what the father's lawyer had told him, the Chambers judge declined to adjourn the

matter, and proceeded to hear submissions on the merits - from only the father's lawyer. Not surprisingly, given that he only heard one side of the story, the Chambers judge granted the husband interim custody of the children pending trial. What is surprising, however, is that the Chambers judge apparently did not provide any reasons for his decision. So we have one lawyer that was not aware of a change in procedure; another lawyer that did not tell the court of an agreed-upon adjournment; and a decision made without reasons. This would seem to be a problem.

As soon as the mother's lawyer found out what had happened, she wrote to the court to ask that the matter be reopened. The registrar responded that the Chambers judge had declined to reopen the matter because "the Order had already been made", but provided no further explanation. Another problem.

The mother appealed the Chambers judge's Order to the Saskatchewan Court of Appeal on a number of grounds, including the absence of reasons. However, the primary thrust of her appeal was that she had been denied the most basic rules of natural justice and procedural fairness: the right to be heard.

The mother filed fresh evidence to show what had actually happened leading up to the motion (including the father's lawyer's agreement to adjourn the matter), and to explain why she and her lawyer did not attend the hearing. The Court of Appeal admitted the fresh evidence, and it persuaded the Court that it needed to intervene.

A court is not *functus officio* and has jurisdiction to reconsider a matter until the formal order has been issued and entered. As the Court of Appeal noted in this case:

> [25] . . . Until the order was issued, the Chambers judge had jurisdiction to reconsider or withdraw it. This point was made by Martin J.A. (as he then was) in *Friesen v. Saskatchewan Mortgage & Trust Corp.*, [1926] 4 D.L.R. 496 (Sask. C.A.) at 497 [*Friesen*]:
>
> > . . . Until a judgment or order has been entered or drawn up, there is an inherent power in every Court to vary its own order so as to carry out what was intended, and to render the language used free from doubt. The Court has power, so long as the order has not been perfected, to reconsider and even to withdraw the order made, so that the decision may be reconsidered[.]
>
> [26] Justice Martin reiterated this point in *Rygus v. Zawitkowski*, [1928] 2 D.L.R. 539 (Sask. C.A.) at 539, wherein he held that "[f]ormal judgment has not been entered, and so long as an order has not been perfected the Judge has power to reconsider; but when once the order has been completed, the jurisdiction over it is at an end". See also: *Peltier v. Peltier*, 2008 SKCA 151 (Sask. C.A.) at para 8, (2008), 314 Sask. R. 211 (Sask. C.A.). That said, while the Chambers judge had the jurisdiction to amend or vary his order, courts generally only do so in exceptional circumstances: *Metx v. Marshall* (1922), [1923] 1 D.L.R. 367 (Sask. C.A.) at 368; *Storey v. Zazelenchuk* (1985), 40 Sask. R. 241 (Sask. C.A.) at paras 2-7; and *Saskatchewan v. Mountain Pacific Transport Ltd.* (1995), 129 Sask. R. 9 (Sask. Q.B.) at paras 13-14.

Alternatively, if the Chambers judge had been *functus* because the formal order had already been issued and entered before he received the mother's lawyer's letter, appellate intervention was still required as the process had been patently unfair to the mother:

> [27] In our view, the circumstances here were exceptional and required that the Chambers judge reconsider the order he had made in the absence of [the mother] or her counsel. The record does not allow us to be certain that [the mother's lawyer's] July 7, 2020 letter to the local registrar, advising that

> her client wished to have the matter reopened, was brought the Chambers judge's attention before the order issued the next day. If it was, then the Chambers judge committed an error in principle by failing to recognize that he had jurisdiction to reopen the matter. If there was a delay within the registry office in providing the letter to the Chambers judge, the error may be seen to be more institutional in nature, but the procedure was nonetheless unfair. Under both scenarios, on the face of what was before the court prior to the issuance of the order, it was patent that [the mother] had intended to provide submissions, but she had not been heard. Under either scenario, this Court must intervene.

[As an aside, in some jurisdictions, the rules of court give a court authority to vary or set aside an order if a party did not attend the hearing for a reason that is satisfactory to the court - see e.g. Rule 25(19) of Ontario's *Family Law Rules*. However, that does not appear to be the case in Saskatchewan.]

The other significant problem with the Chambers judge's decision was that he did not provide any reasons for his decision, which the Court of Appeal found was "a second, and independent, breach of the duty of fairness[.]" While a failure to give adequate reasons is not "a free standing basis for appeal" (*F.H. v. McDougall*, 2008 CarswellBC 2041 (S.C.C.) at para. 99), the complete absence of reasons is generally a problem and was a significant problem in this case. That being said, even if the Chambers judge had provided comprehensive reasons, that would still not have cured the *audi alteram partem* problem.

Surprisingly, the Court of Appeal did not admonish the father's lawyer for engaging in what was, at best, sharp practice. It is simply unacceptable for lawyers to mislead the court and breach clear agreements with opposing counsel, and this type of behaviour ought not to be tolerated. If lawyers cannot trust each other, and if the court cannot trust lawyers, the system falls apart.

In addition to being highly unethical - this was not a "grey area" - the type of conduct that occurred in this case will quickly ruin your reputation, which is really all you have as a lawyer.

So remember the words of Warren Buffet: "[i]t takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently."

Chrisjohn v. Hillier, 2021 CarswellOnt 3681 (S.C.J.) – Hearsay and Affidavits

Lisanti lives on

The father brought an urgent motion for the return of the parties' child, age three, to his care. The mother was withholding the child, alleging that the father had been intoxicated (or at least had been drinking) at an access exchange on February 19, 2021. The mother admitted that she should not have allowed the father to leave with the child, but that she was fearful of a confrontation.

The mother swore that the police later confirmed that the father had been drinking. The father swore that he had not been drinking, and his mother (with whom he lived) also swore that the father had not been drinking that day.

The mother refused to return the child to the father, who was in fact the primary residential parent - thus prompting the father's emergency motion. The mother actually had somewhat restrictive access.

The mother responded with a motion to increase her access (although the basis for that motion was not entirely clear).

The important part of this case is not the substantive issue. Rather, Justice Mitrow took the opportunity to address the unfortunate trend of inadmissible hearsay evidence being included in affidavits.

This "trend" was the subject of comment by Justice Vogelsang over 30 years ago in *LiSanti v. LiSanti* (1990), 24 R.F.L. (3d) 174 (Ont. Fam. Ct.). In that case, during a motion, Justice Vogelsang struck an exhibit to the wife's affidavit that consisted of a lengthy prose statement tendered as part of the wife's evidence on the motion. The exhibit was not in affidavit form.

In *LiSanti*, Justice Vogelsang stated:

> [4] An interesting issue arose, before argument of the motion, concerning the propriety of Ex. D annexed to the wife's affidavit. Mr. Mamo brought an oral motion to strike that portion of the affidavit which, after submissions, I granted. The exhibit is a lengthy prose statement consisting of material headed "History of Abuse", "Interaction with Children", "Interactions During Visits with Mr. LiSanti" and "Interactions with Staff of Women's Community House". The allegations made in the exhibit are clearly stated to be hearsay. The tone is highly pejorative and prejudicial to the husband. The exhibit is not in affidavit form. No one swears as to the source of information outside his or her personal knowledge and deposes to a belief that the statements are true. Not the subject of an affidavit, no one can cross-examine on the statements, or the source of the information.
>
> [5] **There has been a disturbing tendency in recent months to attempt to incorporate, in motion material, renditions of statements allegedly made by parties or other sources without their inclusion in an affidavit**. The rules, however, require evidence on a motion to be by way of affidavit. The basis of that requirement is obvious. **Without the possibility of testing an allegation through cross-examination, there is an incentive to swell the evidence freely with unsupported statements by persons not clearly identified and, therefore, safe from inquisition**. That is the situation with this exhibit. [emphasis added]

Here, the mother had appended as an exhibit to her affidavit some text messages from the father's

girlfriend that the mother argued showed that the father had been drinking on the occasion in question. The mother also made allegations about the father's alleged history of substance abuse, and attached a copy of an email from the mother of one of the father's other children, alleging drinking and substance use by the father, as an exhibit to her affidavit.

In the 30 years since *LiSanti* was decided, the use of electronic evidence and emails has increased geometrically, and it is regularly used in an attempt to adduce inadmissible hearsay into the record: "Attached as Exhibit 'X' is an email from Sarah Smith where in she says . . . ". That is not evidence. It is - or ought to be - inadmissible; and it is unfair and often prejudicial.

As noted by Justice Mitrow,

> [18] The lesson from *Lisanti* has withstood the test of time and remains the law today. Litigants should remain vigilant in ensuring that motion material is restricted to admissible evidence. The temptation to append as exhibits to affidavits text messages, or email strings from third parties, who do not swear to their truth, must be avoided.

In Ontario, the Court of Appeal has taken a step further. In the case of what purports to be probative evidence, the party must not only clearly identify the source of the information, but must also explain why the original source of the information did not swear an affidavit: *Berger v. Berger* (2016), 85 R.F.L. (7th) 259 (Ont. C.A.).

The offending emails were ruled inadmissible.

Equally inadmissible (at least for the truth of their contents) were statements in the mother's affidavit swearing to what the "police" told her and what the "officers" said. That evidence contravened Rule 14(19) of the *Family Law Rules*: an affidavit may contain information learned from someone else, but only if the source of the information is identified by name and the affidavit states that the person signing it believes the information is true. This is another provision more honoured in the breach.

Coates v. Dickson, 2021 CarswellOnt 1430 (S.C.J.) – Ownership of the Dogs

We miss you Phil

Phil loved dog cases. He wrote numerous comments about them in the *This Week in Family Law* newsletter (at least 10 by our count). Some people (including Phil himself in the September 2, 2019 edition of *TWFL*) might even say he was obsessed. He also pioneered the idea of a "Voice of the Dog Report" to ensure that the court would be able to have the best possible evidence about each particular dog's views and preferences. So in honour of Phil, we had to include a dog case - the "tail" of two Labrador Retrievers - Jazz and Jetta.

For four years, Jazz and Jetta lived with their humans, Mr. Coates and Ms. Dickson. When the humans parted ways, they could not decide who would keep the dogs.

The only thing rivaling the animosity between Mr. Coates and Ms. Dickson was their love of 4-year-old Jazz and 3-year-old Jetta. The parties resolved the issue of spousal support, but they could not resolve the issue of possession of the dogs. Each claimed possession/ownership of both dogs, and in the alternative, each sought possession of Jazz. Jetta surely now has a canine inferiority complex.

Justice Baltman started with the usual refrain: no matter how much we humans love our dogs, in the eyes of the law, a dog is a kitchen table, ownership of which must be determined.

As regular readers will recall, the case law reveals two different approaches to determining the ownership of pets. The more traditional and narrow approach turns on who paid for the dog: *King v. Mann*, 2020 CarswellOnt 178 (S.C.J.) at para. 71; *Warnica v. Gering*, 2004 CarswellOnt 5605 (S.C.J.) at paras. 25-28, aff'd 2005 CarswellOnt 3989 (C.A.). This traditional approach views the care and maintenance of the dogs (such as paying vet bills, purchasing food, walking them, etc.) to be wholly irrelevant to ownership.

The broader, more contemporary, more SPCA-friendly approach, considers the relationship between the parties and the pooch - or pooches in this case. This approach has been adopted in several Small Claims Court decisions and has been followed in *Eggberry v. Horn et al*, 2018 CarswellBC 1920 (C.R.T. (S.C.)); *Oh v. City of Coquitlam*, 2018 CarswellBC 1558 (S.C.); *Delloch v. Piche*, 2019 CarswellBC 4117 (Prov. Ct.); and *Almaas v. Wheeler*, 2020 CarswellBC 784 (Prov. Ct.), to name a few. Those principles were summarized in *MacDonald v. Pearl*, 2017 CarswellNS 188 (Small Cl. Ct.) at para. 25:

> 1. Animals (dogs included) are considered in law to be personal property;
>
> 2. Disputes between people claiming the right to possess an animal are determined on the basis of ownership (or agreements as to ownership), not on the basis of the best interests of the animal;
>
> 3. Ownership of - and hence the right to possess - an animal is a question of law determined on the facts;

4. Where two persons contest the ownership of an animal, the court will consider such factors as the following:

i. Whether the animal was owned or possessed by one of the people prior to the beginning of their relationship;

ii. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;

iii. The nature of the relationship between the people contesting ownership at the time the animal was first acquired;

iv. Who purchased or raised the animal;

v. Who exercised care and control of the animal;

vi. Who bore the burden of the care and comfort of the animal;

vii. Who paid for the expenses of the animal's upkeep;

viii. Whether a gift of the animal was made at any time by the original owner to the other person;

ix. What happened to the animal after the relationship between the contestants changed; and

x. Any other indicia of ownership, or evidence of agreements, relevant to the issue of who has or should have ownership or both of the animal.

These two competing approaches collided in a case that was heard by three successive levels of courts in Newfoundland (home to one of the top 10 best breeds - the Newfoundland - if you don't mind a little drool): *Baker v. Harmina* (2018), 7 R.F.L. (8th) 283 (N.L. C.A.).

Using the more traditional approach, the Small Claims Court granted ownership of the dogs in that case to Mr. Baker, because he paid for them.

Ms. Harmina was dogged. She believed the Small Claims Court judge to have been barking up the wrong tree. She appealed, and the appeal judge found that the Small Claims Court judge had erred in deciding ownership without considering the full factual matrix of the parties' relationship. She concluded that the parties owned the dog jointly. She ordered that Mr. Baker, who often worked out of town, have the dog while in town and that Ms. Harmina have the dog the rest of the time.

But Mr. Baker would not let sleeping dogs lie, and the dog fight continued in the Newfoundland Court of Appeal which resulted in a split decision. The majority opted for the more traditional approach and expressed the view that joint ownership would be an undesirable result.

Justice Hoegg, in dissent, accepted that, in law, dogs are considered property, but agreed with the first appeal judge that the dog was jointly owned. She noted that people acquire personal property all the time, sometimes jointly, and in so doing often "pay little attention to legal rules respecting exactly who is acquiring title to the property."

Justice Hoegg also took an expansive, holistic view of human behaviour with respect to their furry friends:

> [52] Like the SCTD Judge, I am of the view that the ownership of Mya involved much more than a determination of who paid for her at the time of purchase. The ownership of a dog is a more complex and nuanced question than the ownership of, say, a bicycle. In this regard, I see the non-exhaustive list of principles to which the SCTD Judge referred, set out by Adjudicator Richardson . . . as helpful and relevant to determining the ownership of a dog.

As noted by Justice Baltman, that approach was followed by Justice Miller in *Hutchinson v. Hutchinson*, 2019 ONSC 6574, who rejected the idea that "the difficulties which naturally flow from a finding of joint ownership of a pet should themselves preclude such a finding."

Justice Baltman strayed from the classic approach. She found that ownership of a dog is an investment that goes beyond the mere purchase price, and it includes the care and maintenance that are an integral part of "owning" the dog. Separating the purchase price from the upkeep is artificial and unfair - particularly where there were two dogs in issue and, assuming the facts support joint ownership, they could be divided.

The parties each swore affidavits that conflicted. However, as determined by her Honour, on any objective view of the evidence, both parties were significantly vested in both dogs. The following factors were particularly relevant to Justice Baltman:

1. Both dogs were purchased by the parties during their marriage as their family dogs;

2. Although they disagreed on the amounts of their respective contributions, both parties had invested financially in the purchase and upkeep of the dogs;

3. Both parties had made significant contributions of time and energy toward the dogs' welfare and upkeep;

4. Both parties were listed on different official documents connected to the dogs, including veterinary, the municipality, and The Canadian Kennel Club; and

5. Both parties had suffered mental and emotional stress as a result of the separation and believed that the dogs would be therapeutic to their recovery. (Respectfully, we don't see this factor as terribly relevant. It is an after-the-fact justification for the result - or, as one might say, letting the tail wag the dog.)

Based on this evidence, it was a walk-in-the-park for Justice Baltman to conclude that both of the dogs were jointly owned. Both parties were involved in looking after them as family pets. Unfortunately, continued joint ownership was just not possible. Ultimately, as Jazz was the better watchdog, and had protective qualities that were particularly important to Ms. Dickson, she was awarded Jazz, while Jetta went to Mr. Coates.

A thoughtful decision from a thoughtful judge. But please don't make the mistake of thinking that *all* judges will so sensitively devote resources to the determination of pet ownership. To do so with some may very well land you in the judicial doghouse. (Sorry. Last one.)

No costs. It's a dog-eat-dog world. (Sorry. Lied a bit there)