Law Society of Ontario | Barreau de l'Ontario

Family Law Refresher 2024

CO-CHAIRS

Farrah Hudani
Burrison Hudani Doris LLP

Michael Stangarone
MacDonald & Partners LLP

April 5, 2024

CLE24-004020 1-D-WEB

Law Society of Ontario | Barreau de l'Ontario

CPD Materials Disclaimer & Copyright

These materials are part of the Law Society of Ontario's initiatives in Continuing Professional Development. Their content, including information and opinions, provided by the authors, is that of the authors. The content does not represent or embody any official position of, or statement by, the Law Society of Ontario, except where specifically indicated, nor should any content be understood as providing definitive practice standards or legal advice. The Law Society of Ontario does not warrant the current or future accuracy of the content and expressly disclaims responsibility for any errors and omissions in the content, including inaccuracies that may result due to developments in law.

Law Society of Ontario
130 Queen Street West, Toronto, ON M5H 2N6
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315
Fax: 416-947-3370
E-mail: cpd@lso.ca
www.lso.ca

Library and Archives Canada
Cataloguing in Publication

Family Law Refresher 2024

ISBN 978-1-77345-983-7 (PDF)
ISBN 978-1-77345-984-4 (Hardcopy)

cpd

March 15, 2024

Family Law Refresher 2024

CO-CHAIRS: **Farrah Hudani,** *Burrison Hudani Doris LLP*

Michael Stangarone, *MacDonald & Partners LLP*

April 5, 2024
9:00 a.m. to 1:00 p.m.
CPD Hours = 3 h Substantive + 1 h Professionalism P

Webcast
Law Society of Ontario

SKU CLE24-00402

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Farrah Hudani, *Burrison Hudani Doris LLP*

Michael Stangarone, *MacDonald & Partners LLP*

9:05 a.m. – 9:30 a.m. **Statutory Framework and Key Concepts: Update on Decision Making, Parenting Time, and Relocation** (5 m P)

Steven Benmor, C.S., *Benmor Family Law Group LLP*

9:30 a.m. – 9:55 a.m.	**Update on Family Law Cases and Legislation: Cases You Need to Know and Recent Developments** Adam Prewer, *Epstein Cole LLP*
9:55 a.m. – 10:25 a.m.	**Best Practices for Completing Financial Statements and Handling Complicated Financial Issues** (5 m P) Christopher Burrison, *Burrison Hudani Doris LLP* Brandon Lewis, CPA, CA, CBV, ABV, CFF, CTCE, *White & Lewis*
10:25 a.m. – 10:35 a.m.	**Question and Answer Session**
10:35 a.m. – 10:55 a.m.	**Break**
10:55 a.m. – 11:15 a.m.	**Mediation, Alternative Dispute Resolution, and Negotiation Best Practices** (10 m P) Seema Jain, *Jain Family Law and Mediation*
11:15 a.m. – 11:50 a.m.	**How to Best Craft the Pleading and Case Development: Torts, Trusts, Third Parties and Beyond** (5 m P) Andrea Gonsalves, *Stockwoods LLP* Frances Wood, *Wood Gold LLP*
11:50 a.m. – 12:10 p.m.	**Case Conferences, and Motions** (10 m P) Kristy Maurina, *MacDonald & Partners LLP*

12:10 p.m. – 12:40 p.m. **Trial Preparation** (10 m P)

Fareen Jamal, *Jamal Family Law Professional Corporation*

12:40 p.m. – 1:00 p.m. **Tips From the Bench: Oral and Written Advocacy at Motions and Conferences** (15 m P)

Moderators: Farrah Hudani, *Burrison Hudani Doris LLP*

Michael Stangarone, *MacDonald & Partners LLP*

Panelist: The Honourable Justice Mohan Sharma, *Superior Court of Justice*

1:00 p.m. **Program Ends**

This program qualifies for the 2025 LAWPRO Risk Management Credit

What is the LAWPRO Risk Management credit program?

The LAWPRO Risk Management Credit program pays you to participate in certain CPD programs. For every LAWPRO-approved program you take between September 16, 2023 and September 15, 2024, you will be entitled to a $50 premium reduction on your **2025 insurance premium** (to a maximum of $100 per lawyer). Completing any Homewood Health Member Assistance Plan e-learning course available at homeweb.ca/map also qualifies you for a $50 credit.

Why has LAWPRO created the Risk Management Credit?

LAWPRO believes it is critical for lawyers to incorporate risk management strategies into their practices, and that the use of risk management tools and strategies will help reduce claims. Programs that include a risk management component and have been approved by LAWPRO are eligible for the credit.

How do I qualify for the LAWPRO Risk Management Credit?

Attendance at a qualifying CPD program will NOT automatically generate the LAWPRO Risk Management Credit. To receive the credit on your 2025 invoice, you must log in to My LAWPRO and completing the online Declaration Form in the Risk Management Credit section.

STEP 1:	STEP 2:
• Attend an approved program in person or online; and/or • View a past approved program • Completing a Homewood Health e-course*	Complete the online declaration form in the Risk Management Credit section of my.lawpro.ca by September 15, 2024. The credit will automatically appear on your 2025 invoice.

You are eligible for the Risk Management Credit if you chair or speak at a qualifying program provided you attend the entire program.

Where can I access a list of qualifying programs?

See a list of current approved programs at lawpro.ca/RMcreditlist. Past approved programs are usually indicated as such in the program materials or download page. Free CPD programs offered by LAWPRO can be found at www.practicepro.ca/cpd

Whom do I contact for more information?

Contact practicePRO by e-mail: practicepro@lawpro.ca or call 416-598-5899 or 1-800-410-1013.

*One Homewood Health e-learning course is eligible for the credit on a yearly basis.

LawPRO®
Lawyers' Professional Indemnity Company

Family Law Refresher 2024

April 5, 2024

SKU CLE24-00402

Table of Contents

Law Society of Ontario | Barreau de l'Ontario

TAB 1

Family Law Refresher 2024

Tips on Representing Parents in Parenting, Relocation & High-Conflict Cases

Steven Benmor, C.S.
Benmor Family Law Group LLP

April 5, 2024

cpd

Law Society of Ontario
Family Law Refresher 2024

April 5, 2024

TIPS ON REPRESENTING PARENTS IN PARENTING, RELOCATION & HIGH CONFLICT CASES

By Steve Benmor, B.Sc., LL.B., LL.M. (Family), C.S.*
Family Mediator, Arbitrator & Parenting Coordinator
Benmor Family Law Group

Introduction

This paper serves as a reference guide to the most recent case-law on parenting, family violence, decision-making, parenting coordination, relocation, high-conflict parenting cases and the role of counsel in high-conflict cases.

Executive Summary

- The 2021 amendments to the Divorce Act and Children's Law Reform Act were well-received and consistently applied by the judiciary

- Given the development in the law, counsel must be excellent at intake/interviewing/listening, objective fact-finding, inculpatory and exculpatory evidence gathering, providing a neutral evaluation of client's case and identifying all out-of-court avenues for resolution

- Family law is a great opportunity for counsel to play a strong advisory role to avoid court, build healthy families, collaborate with counsel to improve children's lived experiences and divert difficult parenting cases to therapeutic supports

- If legal advice, therapeutic support and negotiation is insufficient, use closed mediation, neutral evaluation, mediation/arbitration or parenting coordination

- If court is absolutely necessary, have regard for the legal tests set out in this paper, build a strong case on the evidence, uncover/remediate all weaknesses and practice stellar legal writing and oral advocacy

- Above all, be an objective advisor to the client, a reliable officer of the court, with an emphasis on professional ethics and civility towards fellow counsel

LAW ON PARENTING

Case #1: Knapp v. Knapp, [2021] ONCA 305
Ontario Court of Appeal
Appeal on parenting schedule
Appeal granted
Decided after amendments to Divorce Act
Trial judge granted joint custody and apportioned decision-making authority
Mother appeals
Appeal dismissed

- There is no presumption that maximum parenting time equates with equal parenting time.
- "It may end up being equal time. It may not. Each family is different."
- The court must focus on the child's best interests in determining the appropriate parenting time order.
- Counsel must build a 'best interests' case based on the enumerated factors in the Divorce Act (section 16(3+4)) and Children's Law Reform Act (section 24).

Case #2: Barendregt v. Grebliunas, 2022 SCC 22 (CanLII)
Supreme Court of Canada
Relocation case with dicta on family violence and parenting

- Court declares need for finality in parenting litigation.
- The inquiry into the child's best interests is a heavy responsibility, with profound impacts on children, families and society.
- In many cases, the answer is difficult – the court must choose between competing and often compelling visions on how to best advance the needs and interests of the child.
- The best interests inquiry is highly contextual because of the numerous factors that may impact a child's well-being.
- Any family violence or abuse may affect a child's welfare and should be considered when determining a parenting order.
- In relocation cases, courts have been significantly more likely to allow relocation applications where there has been a finding of abuse.
- The recent amendments to the Divorce Act recognize that findings of family violence are a critical consideration in the best interests analysis.

Case #3: R.A.K. v. M.Z. 2023 ONCJ 476
Justice Sherr
4 day trial
Parenting and child support

Excellent factum on law of parenting under CLRA

Case #4: A.C. v. K.C. [2023] O.J. No. 4811
Justice Mandhane
7 day trial
Interplay of parenting and family violence

On Family Violence:

"*The first issue before me is how the history of family violence should factor into my determination of the child's best interests for the purposes of determining parental decision-making responsibility and parenting time."*

"In Ahluwalia v. Ahluwalia, 2023 ONCA 476, paras. 1, 99, 101, the Court of Appeal for Ontario recognized that: "the relatively recent addition of family violence considerations reflects Parliament's awareness of and concern about the devastating effects of family violence on children" and that it is an important consideration when developing a parenting plan."

"The Father makes a profitable living in finance, was represented by counsel in multiple pre-trial parenting motions, and was represented by two lawyers at trial. In contrast, the Mother is in receipt of public assistance, is not currently employed, and represented herself at trial."

"Judicial determination of the "best interests of the child" is broader and more wholistic than a child welfare agency's determination of whether a child needs protection."

TIP: Take ownership and remediate the situation

"*Most troublingly, the father consistently minimizes the nature and extent of his violent behaviour and shows no real insight into how it has impacted the family dynamics and, ultimately, the child. Throughout the trial, the father never acknowledged the seriousness of his pattern of violence nor the impact that it had on the mother and child, instead focusing his concerns on*

how the mother was projecting her own anxiety onto the child. The father showed no insight into how his violence during the relationship might have caused or contributed to the mother's anxieties post-separation, including some of her hyper-vigilant behaviour in relation to the child (i.e., demanding regular check-ins during vacations, initiating a wellness check when the child was vacationing with the father, etc.). The father's significant lack of insight is illustrated by his testimony wherein he repeatedly cast himself as the victim, blamed the mother for past and ongoing difficulties in his relationship with the child, and called her his "abuser." I am concerned that the father does not seem to have internalized any of the lessons from the PAR program."

On Shared Parenting Time:

"Clearly the idea of a presumption in favour of one type of parenting order is anathema to the court's unrelenting focus on the child's "best interests." The most one can say is, all things being equal, the child deserves to have a meaningful and consistent relationship with both of their parents so long as it is in their best interests."

On Social Science:

"The parties did not oppose the court taking judicial notice of information contained in the Association of Family and Conciliation Courts (Ontario) 2021 Parenting Plan Guide ("Parenting Plan Guide"), which succinctly outlines the developmental needs of children of separated parents who are around the same age of the Child, and also provides guidance on developing appropriate parenting plans in the face of family violence."

Case #5: Johnston v. Bigras 2023 ONSC 3680

Justice Roger
Benefits of 2-2-5-5 parenting schedule

Trial judge favours the 2-2-5-5 schedule during the school year and gives these reasons:

- children are close to both parents.
- 2-2-5-5 schedule gives children more frequent contact with each parent.
- each parent can help with children's homework.
- each parent can help with children's stress and anxiety.
- parents live near one another and near the children's school.
- easy for the children to transition from home to home and to go to school from either of the parent's home.
- no evidence that 2-2-5-5 parenting schedule does not work for the children.
- children have expressed concern about changing schedule.
- week-about schedule could reduce communications between the parents, but it is not certain that it will reduce children's anxiety.

LAW ON DECISION-MAKING

Case #6: Proulx v. Proulx 2022 ONCA 428
Ontario Court of Appeal
Appeal on joint decision-making
Appeal dismissed

> *"Indeed, the trial judge expressly considered the parties' ability to communicate and co-operate with the conditions of her order under section 24(3)(i) of the Children's Law Reform Act, R.S.O. 1990, c. C.12 ("CLRA"). She noted that the parties have managed to communicate with respect to the child, largely with the assistance of the respondent's spouse, who gets along well with the appellant. The trial judge correctly stated that a standard of perfection is not required and concluded that the parties are able to make decisions jointly concerning the child in the future. We do not agree with the appellant that the fact that the parties have not spoken directly for some time precludes a joint decision-making order in such circumstances."*
>
> *"The appellant also argues that the trial judge erred in law by failing to categorize the father's conduct as "family violence" under the recently amended s. 2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), as amended by S.C. 2019, c. 16, s. 1(7). The appellant made a number of allegations of conduct on the respondent's part that she claims constituted family violence that warranted a parenting order in her favour. The trial judge painstakingly considered all the appellant's allegations within the meaning of s. 24(3)(j) of the CLRA. Indeed, she devoted over 70 paragraphs of her decision to the issue of family violence. She cited the definition from the Divorce Act, weighed the relevant evidence, and ultimately found against the appellant. Her findings were amply grounded in the record before her. Accordingly, we reject this ground of appeal."*

Case #7: Moreton v. Inthavixay 2021 ONSC 2976
Justice Diamond
5 day trial on decision-making
Decided under amendments to CLRA

> *"While the respondent is an advocate for the children, her approach and overall attitude towards her children are replete with hypervigilance and illness anxiety carried out from the proverbial parental helicopter. The respondent often refuses to work cooperatively with those who do not agree with or question her observations and/or conclusions. As put by the OCL in its closing*

submissions, her attitude towards the children's health and education results in her consistently pathologizing the children."

"Section 24(2) of the CLRA requires the court to give primary consideration to the children's physical, emotional and psychological safety, security and well being. Section 24(3) of the CLRA sets out the factors which the court may consider in its assessment of the said primary considerations:

Factors related to the circumstances of a child include,

a. the child's needs, given the child's age and stage of development, such as the child's need for stability;
b. the nature and strength of the child's relationship with each parent, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
c. each parent's willingness to support the development and maintenance of the child's relationship with the other parent;
d. the history of care of the child;
e. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
f. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
g. any plans for the child's care;
h. the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
i. the ability and willingness of each person in respect of whom the order would apply to communicate and co-operate, in particular with one another, on matters affecting the child;
j. any family violence and its impact on, among other things,
k. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child,
l. the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
m. any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child."

Outcome (& Excellent Precedent on Decision-Making)

1. *Subject to the consultation process set out below, the Applicant shall have final decision-making authority with respect to major decisions concerning XXXX and XXXX, including but unlimited to education, non-emergency medical care, religion/ spirituality and extra-curricular activities.*

2. *Prior to making any final significant decisions, the parties shall consult with one another in the following manner:*

    a. *In the event the parties do not agree upon any major decisions, the Applicant shall provide the Respondent with his proposed decision in writing, together with all other options (if they exist) and brief reasons for his preferred option;*
    b. *The Applicant shall provide this information in writing at least 21 days before the decision must be made, except in the case of an emergency;*
    c. *The Respondent shall review the Applicant's information, and shall provide her responding input and proposed course of action in writing to the Applicant within seven days of the receipt of the Applicant's information, failing which she shall be deemed to be in agreement with the Applicant's proposed decision;*
    d. *If the Respondent responds in writing, and suggests a different option than suggested by the Applicant, the Applicant shall consider it and may consult with any professional (doctor, educator, etc.) suggested by the Respondent for a second opinion in order to fully consider the option(s) proposed by the Respondent; and*
    e. *After taking the steps set out in above, the Applicant shall provide his own response, in writing, to the Respondent within ten days of the receipt of the Respondent's response, and advise her of the final decision that he wishes to make, in writing.*

3. *The Applicant is precluded from making final decisions regarding any extra-curricular activities or after school child care that occurs during the Respondent's parenting time with the children without her written consent. In addition, the Respondent shall not make such decisions without the Applicant's written consent.*

4. *The Respondent shall not make any appointments for the children without the prior written consent of the Applicant except in the case of an emergency that arises during her parenting time in which case the*

Respondent shall advise the Applicant forthwith after making the appointment with the reasons the appointment was required. If any treatment is prescribed as a result of any emergency, the Respondent shall provide the instructions, medication or treatment information to the Applicant when the child/children are returned to him.

5. *With respect to booking to any specialist appointments/assessments or non-routine school meetings, the Applicant shall advise the Respondent of same and invite her to attend or request that the specialist/school extend that invitation. In the event the specialist/school agrees to notify the Respondent, the Applicant shall provide the specialist/school with the Respondent's contact information and/or provide the Respondent with notice of those appointments or meetings forthwith.*

6. *The Applicant shall be responsible for routine medical/health care decision regarding both children, but shall provide any information about such decisions to the Respondent through the use of Our Family Wizard unless the Respondent has been provided with the said information by the health care professional.*

7. *Both parties shall otherwise be responsible for day-to-day decisions regarding the children while in their respective care.*

8. *Both parties shall have the full authority to obtain information directly from the children's doctor, dentist, teacher(s) and other school personnel in accordance with the policy and resources of those third party care providers.*

9. *Both parties shall provide their respective contact information and email addresses to their children's school and shall be responsible for obtaining their own copies of progress reports, report cards, parental notices and similar items.*

10. *Except in the case of an emergency, the parties shall communicate about the children through Our Family Wizard.*

11. *In the event of an emergency, the parties are permitted to communicate by telephone and/or text message.*

Case #8: S.V.G. v. V.G. 2023 ONSC 3206
Justice Chappel
2 children (12 and 9 years-old)
15 day trial on decision-making

Excellent factum of law on:

1. **parenting under amendments to Divorce Act;**
2. **family violence (including how to assess credibility where there are allegations of family violence);**
3. **decision-making (including a summary of the law on various models and where they apply);**
4. **the form of an order for Parenting Coordination.**

"For the reasons that follow, I have concluded that neither of the decision-making frameworks proposed by the parties is in the best interests of XXXX and XXXX."

"I have decided that the children's best interests require that the parties make all reasonable efforts and take all reasonable steps to attempt to reach decisions respecting the children's health and education jointly. I have structured a detailed framework for the parties' decision-making regarding these issues. I am ordering that if the parties remain unable to reach a consensus after following this framework, they are to engage in either mediation or Parenting Coordination to try to resolve the issue."

"I have also concluded that Parenting Coordination has been an effective tool for the parties in their attempts to co-parent XXXX and XXXX and that it has assisted them in achieving the best possible results for the children in terms of their decision-making. However, I have concluded that on the rare occasions when the parties are unable to reach agreement through the decision-making process that I am ordering, including mediation or Parenting Coordination, then one party should be given the right to make the final decision so that further court intervention is not required.

After much deliberation, I have concluded that it is in XXXX and XXXX's best interests that the mother ultimately have final say on health and education matters.

In addition, I am ordering that the detailed decision-making framework and the requirement of mediation or Parenting Coordination services do not apply in the case of urgent health-related situations involving the children. In those circumstances, the mother will have straight sole decision-making responsibility, unless she cannot be reached in sufficient time to make an urgent decision of the time required to reach her would place the child at risk of harm, in which case the father will have the right to decide the appropriate course of action."

On Various Models Of Decision-Making:

"Section 16.3 of the Divorce Act provides that the court may allocate decision-making responsibility in respect of a child, or any aspect of that responsibility, to either spouse, to both spouses, to another person authorized to seek a parenting order or to any combination of those persons. This provision gives the court a wide discretion to craft a tailor-made decision-making responsibility framework that supports and promotes the best interests of the child before the court, taking into consideration the unique facts of each case. The options available to the court include the following:

1. *It may grant sole decision-making responsibility in all areas to one spouse.*

2. *It may grant joint decision-making responsibility in all areas to both spouses.*

3. *It may grant joint decision-making responsibility to both spouses in one or more areas of responsibility, but give sole decision-making authority in the other areas to one spouse or allocate those other areas of decision-making between the spouses.*

4. *Alternatively, it may allocate each party sole decision-making responsibility in separate specified areas, with no provision for joint decision-making in any areas.*

5. *Another option open to the court is to require the parties to engage in all reasonable efforts and take all reasonable steps to make some or all significant decisions jointly, but to designate which party has final say in each area of decision-making in the event of disagreement. This option typically includes a detailed decision-making framework that establishes timelines for parties to exchange their positions and information on issues and requires them to take particular steps in an attempt to decide matters jointly.*

On Parenting Coordination:

Legislation:

"Subject to provincial law, the order may direct the parties to attend a family dispute resolution process (s. 16.1(4))

The court may direct parties to attend a family dispute resolution process (section 16.1(6)) which is defined in section 2(1) of the Divorce Act as follows:

"family dispute resolution process means a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law."

Discussion:

Parenting Coordination is a hybrid legal-mental health service that is intended to assist co-parents who have difficulty making parenting decisions jointly to communicate effectively, comply with parenting agreements or orders and shield their children from the impact of parental conflict.

The role of a Parenting Coordinator is not to develop a parenting plan, but rather to assist the parties in implementing, interpreting, and applying the terms of an established plan, and in nuancing the issues in relation to that plan if agreed to and if necessary.

Parenting Coordination is a term that combines a wide variety of functions that include the following:

1. *Assessment services, which can include:*

a. *Assessment of the appropriateness of ongoing Parenting Coordination;*

b. *Assessing and advising on the need for referrals for family members to other professional services, including evaluation, treatment, and second opinions;*

c. *Assessing the safety of family members and the Parenting Coordinator;*

d. *Evaluating the efficacy of techniques and interventions that are being used for the family members; and*

e. *Assessing if there has been compliance or breaches of a parenting plan, agreement or court order addressing parenting issues.*

2. *Educational assistance regarding parenting-related issues, including:*

a. *Child development;*

b. *Separation and divorce and their impact on family members;*

c. *The effects of conflict and the impact of parents' behaviour on children; and*

d. *Parenting, communication and conflict management and resolution skills. The Parenting Coordinator may model or teach parents these skills and support them in acquiring and applying them in their daily lives.*

3. *Coordination and case management assistance services. This assistance involves working with professionals and systems involved with the family, including mental health,*

health care, social services, education and legal professionals, to assist the parties in addressing the needs of the family members. The services can also include liaising with extended family members and other significant people involved with the family. This aspect of the role can extend to monitoring and facilitating compliance with court ordered intervention services if authorized to do so.

4. *Conflict management assistance and guidance. These services focus on helping parents to resolve or manage child-related conflict.*

5. *Communication services. This assistance involves acting as a conduit for communication between parents and facilitating respectful and child-focused interactions between the parents.*

6. *Parenting plan assistance. This involvement includes helping parents to interpret and apply decision-making responsibility and parenting time provisions of an existing agreement, parenting plan or order.*

7. *Mediation services to assist the parties in resolving parenting issues arising in connection with an existing parenting plan, agreement or court order.*

8. *Parent-child support services, to facilitate the child's relationship with each parent.*

9. *Decision-making services. Parenting Coordinators can by agreement make reports to the court and assume a decision-making role in the event that the parents cannot agree on issues, including arbitral powers.*

The nature, scope, cost and powers associated with Parenting Coordination are issues for negotiation between the parties and the proposed Parenting Coordinator. The services can include all or some of the roles set out above. The parties and the Parenting Coordinator should enter into a written agreement at the outset of the process in order to clarify expectations and responsibilities.

It is apparent from the list of functions set out above that Parenting Coordination encompasses a vast range of roles, including therapeutic assistance, conflict management support, mediation services respecting disputes that arise under an existing parenting plan, agreement or order, and final decision-making powers if the parties cannot agree on issues.

The services of Parenting Coordinators have been widely accepted by Family Law professionals and the courts as being an integral part of the Family Law system and highly beneficial for parents and children.

The use of these Parenting Coordination services should be encouraged where appropriate in furtherance of the direction that has been given by both the Supreme Court of Canada and the Ontario Court Appeal regarding the overall benefits of Family Law litigants resolving issues outside of the court process.

The determination of whether the court may order parties to participate in Parenting Coordination services, including an arbitration component, absent consent from both parties must be undertaken keeping these overall considerations in mind.

As I have stated, one of the questions that must be addressed in determining the court's authority to order parties to participate in Parenting Coordination is whether the wide-sweeping services that fall within the umbrella of this process constitute a "family dispute resolution process" within the meaning of section 2(1) of the Divorce Act, which the court can order the parties to attend pursuant to section 16.1(6) of the Act.

I conclude that this concept does not encompass the functions of the Parenting Coordination roles that involve the Parenting Coordinator making final binding decisions regarding parenting disputes between the parties, including the arbitration component of the role. By contrast, the other functions listed above are either clearly geared towards assisting the parties to reach agreement between themselves regarding parenting disputes, or they are functions that support the parties in attempting to resolve such disputes.

Accordingly, I conclude that Parenting Coordination services that include the functions set out above fall within the definition of a family dispute resolution process in section 2(1) of the Divorce Act.

The CLRA does not include a provision similar to section 16.1(6) of the Divorce Act specifically authorizing the court to order parties to attend an alternative dispute resolution process. However, it does not preclude the court from making such an order either, and authority to make such an order can be found in section 28(1)(c) of the Act, which grants the court the broad power in the context of an application for a parenting order to make "any additional order the court considers necessary and proper in the circumstances."

Section 31 of the CLRA addresses the court's powers to appoint a mediator during the course of an ongoing proceeding in which a parenting or contact order has been requested. This provision must be considered as part of the analysis, since Parenting Coordination may include mediation services when necessary to assist the parties.

Section 31(1) clearly establishes that the court can only order the appointment of a mediator at the specific request of all parties in the case. The question is whether this requirement of consensus for mediation from all parties applies where the court makes a final parenting order under the Divorce Act and is considering including a term requiring the parties to participate in mediation relating to parenting issues that may arise in the future. I conclude that it does not.

I have also considered the Family Law Act, R.S.O. 1990, c. F.1, as amended and the Arbitration Act, 1991 to determine if there are any provisions in either Act which preclude or limit the court's authority to make a final order requiring parties to participate in Parenting Coordination services. The Family Law Act includes provisions that are relevant to the analysis of this issue in relation to the arbitration aspect of Parenting Coordination services. Section 59.1(1) of the Act stipulates that family arbitrations, family arbitration agreements and family arbitration awards are governed by the Family Law Act and by the Arbitration Act, 1991.

Section 59.4 provides that a family arbitration agreement and an award made under it are unenforceable unless the family arbitration agreement is entered into after the dispute to be arbitrated has arisen.

The order that I am making in this proceeding will resolve all outstanding issues between the parties, and therefore section 59.4 precludes me from making an order requiring the parties to enter into a Parenting Coordination Agreement at this time that includes an arbitration component. The arbitration provisions of any such agreement would be unenforceable in the absence of a current dispute requiring immediate arbitration.

Based on this caselaw, I conclude that sections 16.1(4)(d) and (5) of the Divorce Act provide further authority for the court in making a final parenting order to require parties to participate in the non-decision-making components of Parenting Coordination to attempt to resolve any future parenting disputes before seeking relief from the court.

To summarize then, my conclusion is that the court has jurisdiction to include in a final parenting order made under the Divorce Act a term requiring the parties to participate in Parenting Coordination services that include the functions set out above, regardless of consent from all parties.

However, the court cannot require parties to participate in the aspects of Parenting Coordination that grant the Parenting Coordinator authority to make final binding decisions about parenting issues. These conclusions strike a fair and reasonable balance between the desirability and importance of encouraging parties to resolve Family Law issues between them through processes and appropriate therapeutic interventions outside of court on the one hand, and the fundamental right of individuals to have access to the court system to resolve their Family Law disputes.

While the court can include a term in a final parenting order requiring parties to participate in Parenting Coordination services to attempt to resolve future parenting disputes, the term should always be subject to the right of either party to bring a motion at

the relevant time for an order that the requirement should not apply based on the prevailing circumstances at that time.

The decision as to whether it is appropriate to order parties to participate in Parenting Coordination services before returning to court will turn on the unique facts and dynamics of every case at the time the order is made. It involves consideration of several critical factors including the level of conflict and quality of communications between the parties in the past and at the time of the order, the nature of their past interactions with professionals, whether there has been any family violence between the parties or towards other family members, whether there are any concerning power imbalances between the parties, and practical considerations such as whether the parties can afford the services. Changes in circumstances over time may render the use of Parenting Coordination services inappropriate or impractical for any number of reasons. Accordingly, the interests of justice dictate that the parties should be granted a quick and cost-efficient means of revisiting the requirement to participate in Parenting Coordination services as a precondition to accessing the court in the future, based on the circumstances at the relevant time.

Outcome (& Excellent Precedent on Decision-Making)

1. *Subject to paragraphs 6 and 7, the Applicant and Respondent shall engage in all reasonable efforts and take all reasonable steps to attempt to make significant decisions respecting the health of the children XXXX and XXXX jointly. This shall include but not be limited to significant decisions relating to the assessment, treatment and care of the children's physical health, psychiatric and psychological health, counselling needs, developmental needs and vision and dental needs.*

2. *The Applicant and the Respondent shall also engage in all reasonable efforts and take all reasonable steps to attempt to make significant decisions respecting the education of XXXX and XXXX jointly. This shall include but not be limited to decisions about where the children attend school, whether they participate in any specialized educational programming including tutoring,*

whether they receive other forms of academic assistance and support, the professionals who will provide any such assistance and support, whether they should undergo psycho-educational or other assessments to gain information respecting their cognitive functioning and academic needs, and if so, the professional(s) who will carry out any necessary assessments.

3. *In carrying out their responsibility to attempt to reach significant decisions respecting the children's health and education jointly, the parties shall at minimum take the following steps:*

    a. *The party raising an issue ("the initiating party") shall advise the other party ("the responding party") in writing of the issue to be decided, their position regarding the issue and the reasons supporting their position, and they shall produce any documentary materials that they want the responding party to review in considering the matter;*
    b. *The responding party shall within 10 days of receiving the message from the initiating party consider the issue, review the materials produced by the initiating party, conduct their own research on the matter, consult with any third parties if they consider this necessary to reach an informed decision, advise the initiating party in writing of their position and the reasons for that position and produce to the initiating party any documentary materials that they want the initiating party to review in considering the matter;*
    c. *The parties shall both take into consideration the views and preferences of the child in question, if appropriate based on the age and development of the child and the nature of the issue to be decided;*
    d. *The parties shall both take into consideration the recommendations of any professionals involved with the child in relation to the issue before formulating their position on the matter;*
    e. *The initiating party shall within 10 days of receiving a response from the responding party consider that party's position and any documentary materials that they have produced in support of it, conduct any further research or inquiries they consider to be appropriate on the issue, and confirm in writing their position on the issue after having undertaken these steps;*

f. If the parties are unable to reach agreement on the issue after taking the steps set out above, and either of them requests a second opinion from a professional qualified to provide guidance on the issue, the parties shall forthwith take all necessary steps required to obtain a second opinion;

g. The parties shall confer with each other again about the issue within 7 days after obtaining a second opinion;

h. If the parties remain unable to reach a consensus on the matter, they shall forthwith take all necessary steps to jointly retain either a mediator or a Parenting Coordinator to assist them in reaching a joint decision. They shall be equally responsible for the cost of this service. They are not required to submit the issue to arbitration;

i. If the parties remain unable to reach a joint decision despite the assistance of a mediator or Parenting Coordinator, XXXX shall have final decision-making responsibility on the issue.

If either party is of the view that participation in Parenting Coordination is not appropriate at the relevant time, they may bring a motion for directions on the issue and for an order that it shall not apply.

Both parties shall have the right to take the children for medical assessment and treatment of non-urgent health issues that may arise during their parenting time, and to administer appropriate over-the-counter or prescribed medications, care and treatment for the children's routine health-related issues while they are in their care.

If either XXXX or XXXX experiences an urgent health-related situation that requires immediate treatment, the party who has care of the child shall notify the other party as soon as is reasonably possible in the circumstances, and if time permits, the parties shall consult with each other regarding the child's treatment needs.

The XXXX shall have sole decision-making responsibility respecting the health of the child in question, unless the XXXX has care of the child and either:

a. He cannot reach the XXXX; or

b. He has been advised by the attending treatment professionals that the situation is of such urgency that the time required to contact the XXXX to obtain her decision would place the child at risk.

In either of these situations, the XXXX shall have decision-making responsibility to determine the appropriate course of action to address the child's urgent health needs and treatment, but he shall advise the XXXX forthwith of the situation and the decision that he has made.

The XXXX shall have primary responsibility for making significant educational and health-related appointments respecting the children. She shall consult with the XXXX about his availability before making appointments so that she can attempt to schedule the appointments for times when the XXXX can attend. However, if she considers the appointment to be urgent in nature, she shall have the right to make these appointments based on the earliest possible date recommended by the relevant professional that is compatible with her schedule. She shall advise the XXXX of appointment dates forthwith after they are scheduled so that he may attend if his schedule permits.

LAW ON RELOCATION

Case #9: Sobeck v. Rawlinson 2023 ONSC 7266
Justice Shore
Interim motion on relocation to Calgary
Decided under amendments to Divorce Act

Excellent factum on law of relocation for interim motions under Divorce Act

Citing the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22:

> *"Determining the best interests of the child is a heavy responsibility, with profound impacts on children, families and society. In many cases, the answer is difficult -- the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child. The challenge is even greater in mobility cases. Geographic distance reduces flexibility, disrupts established patterns, and inevitably impacts the relationship between a parent and a child. The forward-looking nature of relocation cases requires judges to craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can withstand the test of time and adversity."*

Case #10: Rygiel v. Mathes 2024 ONSC 33
Justice Brownstone
5 day trial on relocation
Move to Naperville, Illinois

Excellent factum on law of relocation at trial under Divorce Act especially as regards analysis of 'substantially equal time' versus 'vast majority of time'

Case #11: Reid-Taylor v. Vecchio 2023 ONSC 7159
Justice Lemon
Motion by mother to relocate to Nova Scotia
Decided under amendments to CLRA

Judge decides relocation on the enumerated factors under sections 24(3) and 39.4(3) of CLRA.

On the onus of proof, if a child spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

If the child spends the vast majority of time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

LAW ON HIGH-CONFLICT PARENTING CASES

Case #12: R.F. v. J.W. 2021 ONCA 528
Ontario Court of Appeal
Appeal on parenting after 16-day trial
High conflict and relevancy
Appeal dismissed

> *‘‘Although the best interests of the children are engaged in family law appeals of final parenting orders, an appeal is not the place to address ongoing conflict between the parties arising out of the order under appeal. There is a strong interest in finality, not only for the parties, but for the children. This is especially the case where the parties have been involved in years of high-conflict litigation, culminating in a lengthy trial. The order under appeal must be treated as a final order, unless there are demonstrated errors meeting the exacting standard of review on appeal.”*
>
> *“I would not give effect to any of these grounds of appeal. No reversible error has been demonstrated in the final order respecting the parenting of the children. As I will explain, it is apparent from a review of the trial judge's lengthy and detailed reasons that she considered all of the evidence at trial, she made all necessary findings of fact - including that both parties were good and loving parents to the children - and she assessed the parties' credibility in the context of determining which of the parties was more likely to encourage the other's relationship with the children. This was a very important factor in this high conflict case, where the children's relationship with their father had deteriorated over time.”*
>
> On relevancy of conduct:
> - alternative lifestyle
> - swingers club
> - adultery
> - nude photos
>
> *“It is also unfortunate that, despite her conclusion that the evidence was not ultimately relevant to the parenting orders, the details of this evidence were recounted at length in the trial judge's reasons.”*

Case #13: K.K. v. M.M. 2021 ONSC 3975
Justice Petersen
2 children (16 and 11 at trial; 8 and 3 at separation)
40 court appearances at motions/conferences
19 day trial on parenting, violence, alienation and support
10 different judges

> *"The children involved in this case are the tragic casualties of a protracted high-conflict legal battle between the parties."*
>
> *"This is a high-conflict case in which the children have suffered greatly."*
>
> *"It would not be in their best interest to interview them as part of the proceeding because it would place them at the centre of their parents' conflict."*
>
> *"The credibility of the parties, on the other hand, was a key issue in the trial, central to most of the necessary factual findings.*
>
> *"I am not required to choose between the parties' requested parenting orders. I will consider their respective parenting plans, but I must ultimately determine what orders are in the children's best interests in accordance with the following provisions of s. 16 of the Divorce Act."*
>
> *"In my Final Order, I made ancillary orders to protect the mother from the father's potentially rageful reaction to the outcome of the trial. Given his history of violence toward her and his controlling tendencies, there were reasonable grounds to fear for her safety and the safety of the children placed in her care."*

Case #14: Bors v. Bors 2021 ONCA 513
Ontario Court of Appeal
8 day trial
Trial judge found parental alienation and ordered custody reversal
Appeal dismissed

On appeals of parenting cases:

> *"As this court has reiterated many times, an appeal court must not retry parenting cases, but instead "approach the appeal with considerable respect for the task facing a trial judge in difficult family law cases, especially those involving custody and access issues."*

On advice to be given to parent:

> *"The mother had been advised repeatedly to encourage and not to undermine the children's relationship with their father, and that alienation could be highly damaging to the children. Yet the mother persisted in her conduct, and the relationship between the children and their father deteriorated."*

On judge's observation of body language:

> *"The trial judge noted in her oral reasons that '[the mother's] whole demeanour and attitude telegraphs her intense dislike for him. There is no way that her attitude is not transmitted to the children".*

On alternatives to a custody reversal:

> *"The mother asserts that the trial judge erred in making an order restricting her access to the children when other alternatives were available, such as an order for access with police enforcement, an order finding her in contempt of earlier orders or, if custody were changed, an order for supervised access. The mother further argues that a different order should have been made because the trial judge's order requires her to gain a level of insight that is beyond her reach, and prevents her from demonstrating positive behavioural changes in order to regain access to the children."*

“As this court recently observed, “[w]here a reversal of decision-making and primary residence has been ordered, courts may order that the alienating parent have no contact with the child for a minimum period.”

Tip: Do not let this client into a courtroom...bad things can happen

“The mother's alienating behaviour is informed by her beliefs and attitudes. The order requires the mother to engage in individual therapy to assist her to recognize the need to support the children's relationship with their father - which is in their best interests. The mother is not expected to change her attitude overnight; she is however expected to comply with the order by engaging in counselling with a view to helping her to develop behaviours that facilitate, and do not impede, the children's relationship with their father, irrespective of her own feelings about him.”

LAW ON ROLE OF COUNSEL IN HIGH-CONFLICT CASES

TIP: High Conflict Divorce ≠ Incivility

On Counsel's Drafting:

Case #15: Alsawwah v. Afifi 2020 ONSC 2883

Justice Kurz
Motion for exclusive possession of matrimonial home

> *"Family litigation is far too corrosive of once-loving relationships and far too soul destroying for emotionally scarred litigants to be exacerbated by an unnecessary war of invective. Yet far too often that is just what occurs. Litigants feel that they can leave no pejorative stone of personal attack untilled when it comes to their once loved one. Many lawyers, feeling dutybound to fearlessly advocate for their clients, end up abetting them in raising their discord to Chernobyl levels of conflict.*
>
> *Often those parties and their lawyers forget that once the war is over, the financially and emotionally drained family still has to pick up the pieces. And the children whose best interests are ostensibly the central concern of their parents' struggle, can leave their field of battle scarred for life.*
>
> *The role of lawyers in family law cases is a complicated one. That role involves a balancing act of duties towards the client, the administration of justice and even the child before the court.*
>
> *Beyond the balance of those duties, many capable family law lawyers realize that if the cost of victory is too great, everyone loses. Those lawyers realize that their role as advocate should often be as rational counsel not flame-throwing propagandist. Where the client wants to raise the emotional stakes with invective and personal attack, that lawyer must often counsel restraint. While many lawyers who appear before this court recognize the truth of Mr. Nizer's aphorism that began these reasons, all too many, unfortunately, fail to do so.*

In the hopes of lowering the rhetorical temperature of the future materials of these parties and perhaps those of others who will come before the court, I repeat these essential facts, often stated by my colleagues at all levels of court, but which bear constant repetition:

1. *Evidence regarding a former spouse's moral failings is rarely relevant to the issues before the court.*
2. *Nor are we swayed by rhetoric against the other party that verges on agitprop.*
3. *Our decisions are not guided by concerns of marital fidelity. A (non-abusive) partner can be a terrible spouse but a good parent. Everyone is supposed to know this, but all too often I see litigants raise these issues for "context".*
4. *Exaggeration is the enemy of credibility. As it is often said, one never gets a second chance to make a first impression. If that impression, arising from a parties' materials or argument, is one of embellishment, that impression will colour everything that emanates from that party or their counsel.*
5. *Affidavits that read as argument rather than a recitation of facts are not persuasive. They speak to careless drafting.*
6. *Similarly, hearsay allegations against the other side which fail to comply with r. 14(18) or (19) are generally ignored, whether judges feel it necessary to explicitly say so or not.*
7. *A lawyer's letter, whatever it says, unless it contains an admission, is not evidence of anything except the fact that it was sent. The fact that a lawyer makes allegations against the other side in a letter is usually of no evidentiary value.*
8. *Facts win cases. A pebble of proof is worth a mountain of innuendo or bald allegation.*
9. *Relevance matters. If the court is dealing with, say an issue regarding parenting, allegations of a party's failures regarding collateral issues, say their stinginess or the paucity of their financial disclosure, are irrelevant and counter-productive. They do not reveal the dark soul of the other side or turn the court against the allegedly offending spouse. Rather, they demonstrate that the party or their counsel is unable to focus on the issue at hand. Often*

those materials backfire leading the court to place greater trust in the other side.

10. *One key to success in family law as in other areas of law is the race to the moral high ground. Courts appreciate those parties and counsel who demonstrate their commitment to that high ground in both the framing and presentation of their case.*
11. *While dealing with that moral high ground, many capable counsel advise their clients against "me-too" ism. One side's failure to obey a court order or produce necessary disclosure does not give licence to the other side to do the same. Just because the materials of one side are incendiary or prolix, that does not mean that the other side is required to respond in kind. Judges are usually aware when a party has crossed the line. Showing that you or your client does not do the same is both the ethical and the smart thing to do.*

None of these comments should be taken as a comment on present counsel. Nor should they be seen to minimize the kind of resolute advocacy that the court has come to expect from so many of its best lawyers. That type of advocacy is often necessary and valued. But even then, rhetorical excess is the enemy of good advocacy."

On Counsel's Conduct at Oral Examinations (Questioning):

Case #16: Singh v. Braich 2023 ONSC 5053
Justice Rahman
Motion in civil case to compel answer to questions refused

> *"To achieve a proper discovery there must be a spirit of co-operation between counsel. They can protect their respective clients while still conducting a proper discovery."*
>
> *"A motion relying on Rule 34.14 should only be necessary when counsel for the party being examined has refused all requests to conduct him or herself in accordance with the rules and interference has become so extreme as to render the discovery futile and to require the court's intervention."*
>
> *"When an objection is taken, counsel should not engage in argument on the record about the objection."*
>
> *"Mr. XXXX's conduct was not acceptable. It appears to have been an attempt by a senior lawyer to bully a junior lawyer. This is unfortunately a common occurrence in the practice of law. It should not happen. When it does happen, counsel who decide to conduct themselves that way should understand that their behaviour will be called out. Senior members of the bar should serve as examples to their junior counterparts. They should not use their seniority to try and gain a tactical advantage."*

On Counsel's Conduct During Hearing:

Case #17: China Yantai Friction Co. v. Novalex 2024 ONSC 608
Justice Chang
Application for enforcement of a commercial arbitral award

> *"During the application hearing, counsel for the applicant somehow decided that it was appropriate during opposing counsel's submissions to express themselves by way of, among other things, eye rolling, head shaking, grunting, snickering, guffawing and loud muttering. This behaviour culminated in one of them leaning back in his chair, throwing both hands in the air and laughing in a gleeful moment of triumph during a particularly engaging exchange between opposing counsel and the bench. Apparently, applicant's counsel felt that he had scored some major point during my questioning of the respondent's counsel and wanted to ensure that everyone else was aware of that victory.*
>
> *Unfortunately, the behaviour engaged in by applicant's counsel is neither a new nor a rare phenomenon. Too often, counsel seem to believe that enthusiastically attempting to disrupt and/or demean opposing counsel during the latter's oral submissions is one of the hallmarks of an effective advocate. It is not. Too often, counsel seem to believe that "rolling eyes, dancing eyebrows and other mannerisms"[1] whilst opposing counsel is making submissions to the court constitute proper critique or response to those submissions. They are not.*
>
> *Counsel's submissions to the court are to be made in only two ways: written argument and oral argument. No proper submissions are made by way of emanations from counsel (be they oral, non-verbal, audible or inaudible) when another justice participant is speaking. Indeed, during a court hearing, there should be nothing from counsel but complete oral and non-verbal silence while someone else "has the floor". Anything other than such complete silence is not only distracting to the court, but is also profoundly disruptive, disrespectful and demeaning to everyone in that courtroom.*

I fully acknowledge that, in the "heat of battle", human emotions run high and can sometimes get the better of even the most seasoned advocate. However, I am unable to countenance any circumstances under which the type of sophomoric behaviour too often demonstrated by counsel could possibly be excusable, let alone acceptable. It is not only discourteous and disruptive, but is also antithetical to the peaceful and orderly resolution of disputes and undermines procedural and substantive fairness.

The type of misconduct demonstrated by the applicant's counsel in the case-at-bar significantly delays the timely and effective administration of justice, exacts an unnecessary and unacceptable additional cost on litigants and erodes the public's respect for the legal profession and, more importantly, for the rule of law. The parties, counsel, other justice participants, the public and the administration of justice deserve far better than what too many counsel seem to have to offer.

Whether the culprit is a lack of proper mentoring, an overconsumption of courtroom television shows, extended periods of time without in-person human interaction or something else entirely, a fundamental shift in mindset is required to stem this tide.

It has long been a tradition and requirement of etiquette in our courts that counsel refer to their counterpart as their "friend". While most counsel use this appellation, painfully few appear to understand that the fundamental intention underlying its use is to remind counsel of their duty to treat opposing counsel with professionalism, courtesy, respect and civility. All counsel would be well advised to always keep this top of mind, lest the already threadbare state of professionalism and civility between them deteriorate into the irremediable."

**Steve Benmor, B.Sc., LL.B., LL.M. (Family Law), C.S., is the founder and principal lawyer of Benmor Family Law Group, a boutique matrimonial law firm in downtown Toronto. He is a Certified Specialist in Family Law and was admitted as a Fellow to the prestigious International Academy of Family Lawyers. Steve is regularly retained as a Divorce Mediator, Arbitrator and Parenting Coordinator. As a Divorce Mediator, Steve uses his 30 years of in-depth knowledge of family law, court-room experience and expert problem-solving skills in Divorce Mediation to help spouses reach fair, fast and cooperative divorce settlements without the financial losses, emotional costs and lengthy delays from divorce court. He can be reached at steve@benmor.com*

Law Society of Ontario | Barreau de l'Ontario

TAB 2

Family Law Refresher 2024

That Seems Like Too Many Cases

Adam Prewer
Epstein Cole LLP

April 5, 2024

cpd

That Seems like Too many Cases.

Adam Prewer of Epstein Cole LLP

Family Law Refresher
April 5, 2024

Table of Cases

Parenting

***Roberts* v. *Symons*, 2023 ONSC 4757 – School Choice**

One Small Step for Public School Education

Here, the battlefield was kindergarten, and where the child, E, should attend.

Roberts wanted E to attend Kettle Creek, the public school serving the area where he lived with E.'s paternal grandparents, on a farm. Symons wanted E to attend King's Academy, a private faith-based school – the same school attended by his older half-brother.

Having done his research, Roberts advocated for Kettle Creek for the following reasons:

a. As a public school, it was subject to government oversight and receives public funding to operate, which would ensure that E received adequate and necessary resources, equipment and supports;

b. Kettle Creek would keep E. in close contact with neighbourhood friends who are also students there, and with whom he would share a bus ride to and from the school each day;

c. E would have greater opportunities to participate in sports and extracurricular activities at Kettle Creek than would be the case at King's Academy;

d. E would be exposed to a greater diversity of students than was likely to be the case at King's Academy;

e. There would likely be more consistency to E's daily and weekly routines if were he attends Kettle Creek, particularly in continuing to receive the free childcare from his paternal grandmother;

f. There was a before and after-school program at Kettle Creek;

g. As a public school, there was no cost for E to attend Kettle Creek, and the parties did not earn sufficient incomes to pay both the tuition and the attendant childcare costs which would be required should E attend King's Academy;

h. The physical amenities and plant at Kettle Creek far exceed those of King's Academy, which was housed in a church with limited outdoor space for children's activities;

i. The teaching staff at Kettle Creek are accredited by the province and are members of the Ontario College of Teachers, subject to oversight, whereas the teaching staff at King's Academy were not required to hold accreditation as teachers; and

j. Kettle Creek followed the Ontario provincial curriculum. King's Academy was under no obligation to do so.

And having done her research (and using more of the alphabet), Symons was equally sure it was in E's best interests to attend King's Academy:

a. E's spiritual development is essential. At King's Academy, he would receive the same education as in the public system, "if not better," while experiencing "spiritual growth and education";

b. The first year of attendance at King's Academy, E would have the benefit of his older half-brother at the school in Grade 7;

c. The teachers at King's Academy are "kind, fair and patient," setting positive examples for their students, taking seriously and doing their best to resolve any concerns expressed to them;

d. The teachers at King's Academy have at least a bachelor's degree;

e. King's Academy follows provincial guidelines for curriculum and is recognized as a private school;

f. While the subjects taught to students at King's Academy are the same as those taught in the public school, they also integrate a "Biblical worldview;"

g. It is important that E "grow up seeing that God is not just for Sundays at church, but in the "everyday";

h. King's Academy had smaller class sizes;

i. There was little likelihood of bullying at King's Academy, based on the experience of E's older brother;

j. The student body at King's Academy would grow over time grow, and until then, E would be able to participate in extracurricular activities in community-based programs;

k. There was a public park near the school for outdoor recreation;

l. King's Academy was prepared to limit monthly tuition $300.00;

m. King's Academy was equidistant from the parties residences so that both parties could participate in driving;

n. To attend Kettle Creek, E, a shy four-year-old, would be placed on the bus with children he did not know, driven to a school he did not know, and taught by teachers he did not know; whereas E was already familiar with King's Academy, having visited it on a few occasions.

While there are some general principles set out in the case law, Justice Price was clearly, and correctly, of the view that E's best interests were to govern his decision.

In *Thomas* v. *Osika*, 2018 ONSC 2712, Justice Audet helpfully set out a number of general principles taken from the case law when considering the choice of school issue:

> [37] They can be summarized as follows:
>
> a. Sub-section 28(1)(b) of the *Children's Law Reform Act* specifically empowers the court to determine any matter incidental to custody rights. The issue of a child's enrollment in a school program must be considered as being **incidental to or ancillary to the rights of custody** (*Deschenes* v. *Medwayosh*, 2016 ONCJ 567);
>
> b. It is implicit that a parent's plan for the child's education, and his or her capacity and commitment to carry out the plan are important elements affecting a child's best interests. In developing a child's educational plan, **the unique needs, circumstances, aptitudes and attributes of the child, must be taken into account** (*Bandas* v. *Demirdache*, 2013 ONCJ 679 (Ont. C.J.));
>
> c. When considering school placement, one factor to be considered is the ability of the parent to assist the child with homework and the degree to which the parent can participate in the child's educational program (*Deschenes* v. *Medwayosh*, 2016 ONCJ 567);
>
> d. The **emphasis must be placed on the interests of the child, and not on the interests or rights of the parents** (*Gordon* v. *Goertz*, 1996 CanLII 191 (SCC), [1996] S.C.J. No. 52 (S.C.C.);
>
> e. The importance of a school placement or educational program will promote and maintain a child's cultural and linguistic heritage (*Perron* v. *Perron*, 2012 ONCA 811 (Ont. C.A.);
>
> f. Factors which may be taken into account by the court in determining the best interests of the child include assessing any impact on the stability of the child. This may include examining whether there is any prospect of one of the parties moving in the near future; where the child was born and raised; whether a move will mean new child care providers or other unsettling features (*Askalan* v. *Taleb*, 2012 ONSC 4746 (Ont. S.C.J.);
>
> g. The court will also look to any decisions that were made by the parents prior to the separation or at the time of separation with respect to schooling (*Askalan* v. *Taleb*, 2012 ONSC 4746 (Ont. S.C.J.);

h. Any problems with the proposed schools will be considered (*Askalan* v. *Taleb*, 2012 ONSC 4746 (Ont. S.C.J.);

i. A decision as to the choice of school should be made on its own merits and based, in part, on the resources that each school offered in relation to a child's needs, rather than on their proximity to the residence of one parent or the other, or the convenience that his attendance at the nearest school would entail (*Wilson* v. *Wilson*, 2015 ONSC 479);

j. **Third party ranking systems, such as the Fraser Institute's, should not factor into a Court's decision.** These systems of ranking do not take into consideration the best interest of the particular child in a family law context (*Wilson* v. *Wilson*, 2015 ONSC 479);

k. If an aspect of a child's life, such as school placement, is to be disrupted by an order of the court, **there must be good reason for the court to do so**. Thus, before a court will order a child to transfer schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron* v. *Perron*, 2012 ONCA 811 (Ont. C.A.);

l. Custodial parents should be entrusted with making the decision as to which school children should attend. When a sole custodial parent has always acted in the best interest of a child, there should be no reason to doubt that this parent will act in the best interest of the child when deciding on a school (*Adams* v. *Adams*, 2016 ONCJ 431);

m. Those cases are very fact-driven. **The courts are not pronouncing on what is best for all children in a general sense but rather deciding what is in the best interests of this child before the court** (*Deschenes* v. *Medwayosh*, 2016 ONCJ 567). [**emphasis** added]

As we said, a very helpful list.

Much to the chagrin of the Court, the evidence did not reveal much about E, and the parties seemed unable to agree on anything – even whether E was an "active, outgoing, rough and tumble" child who enjoyed participating in agricultural work at his grandparents' farm, as Roberts asserted, or a shy four-year-old, as asserted by Symons.

Each parent seemed to frame the major benefit, as they saw it, to E of attending their preferred school by connecting it to the lifestyle that they would want for him. Roberts focused on the prospect to E making friends at Kettle Creek with other children coming from the agricultural community. Symons focused on E making friends with other children who were more likely to have been exposed to a faith-based lifestyle.

Justice Price accepted that, if Roberts' assertion about the agricultural roots of many of the students at Kettle Creek proved to be true, then E would be more likely there be able to develop a connection with other children who shared that background with him.

Neither parent had a further move on the horizon, so that did not impact the decision.
Justice Price recognized that the educational experience for any child of this age would primarily be driven by the friendships he is able to form at school and the teachers to whom he is exposed. Save for the significantly smaller student body at King's Academy, both schools would otherwise likely present E with positive experiences.

However, it was of concern to the Court that King's Academy was regularly forced to fundraise for basic student necessities, even though this is a reality at many private schools.

Of interest was the determination that the decision about where a child attends school should not turn on what extracurricular sporting or other activities might be available when children can participate in community extracurricular activities throughout the year. We're not sure we agree with his Honour on this specific point. Extracurricular activities, be those sports or other activities, are important social activities for children – and kids often want to be on teams with their school friends. But we do agree this should be a secondary or tertiary consideration at best.

While Kettle Creek, as a public school, certainly had more resources for students that need extra assistance or that struggle, there was no evidence that E has any such issues that might require such resources. However, it must surely be a significant consideration that those resources are available they be needed in the future.

It is noteworthy that Justice Price was not overly concerned that, while all teachers at King's Academy had at least a Bachelor degree – none actually held degrees in education. While there was no doubt that the teachers in the public system held higher qualifications, to Justice Price, teaching is a "calling." He had little doubt that teachers at both schools did so because they are dedicated, to their students.

In fact, as noted by Justice Price, the Ontario *Education Act*, R.S.O. 1990, c. E.2, allows for people who are not members of the Ontario College of Teachers to teach for a period of up to one year under a letter of permission. Accordingly, being a member of the Ontario College of Teachers seems not to confer any superior status on a person's ability to teach. It merely grants them permission to teach in the public system and makes them subject to the requirements of the College with respect to such matters as competence and discipline. Interesting point.

Ultimately, based on an analysis of these factors, his Honour determined that Kettle Creek was a potentially more stable and, for students with learning difficulties, better resourced school, where E. was more likely to encounter a greater number of students who shared his cultural heritage. King's Academy seemed better positioned to focus on E as an individual and to attend to matters beyond academics.

For those of you that are still reading – here is where your tenacity pays off. After reviewing some decisions regarding private school as a section 7 expense (as opposed to a "choice of school issue"), Justice Price came to the conclusion that absent evidence that private school is *necessary*,

or that a child has any particular needs which could only be met at private school, or any other such "compelling reason" – *public school is the default*. Bold statement. We like it. It essentially suggests a rebuttable presumption of public school. Recently, Justice Kristjanson came to an almost similar conclusion in *Cibuku* v. *Cibuku*, 2023 ONSC 4576: there must be evidence that private school satisfies some specific and identified need that cannot otherwise be addressed appropriately in public school.

Putting all of this together, his Honour was not convinced that Symons had put forward a sufficiently compelling case for him to order that E attend private school over public school. Symons desire for a faith-based education was not sufficient.

E will be attending Kettle Creek. Symons gets to pay some modest costs. And it would appear the rest of us get the benefit of a new presumption in favour of public school.

***R.D.L. v. R.C.S,* 2022 SKKB 219 — School Choice and French Immersion**

Est-Ce Possible???

In *R.D.L.*, the Court was faced with what, at first glance, seemed to be just another fight about where a child should go to school. But it is far more interesting than that — because the Court appears to have decided the case by taking judicial notice of the "fact" that French immersion programs are generally beneficial for Canadian children, and then using that general proposition as a basis to overcome other considerations that were relevant to the best interests of the ***particular child in this case***.

The parties never married. They lived together from 2016 to 2019 and had a young daughter together. After they separated, the child lived primarily with the mother, and spent every other weekend from Thursday night to Monday morning with the father.

When the mother started a court proceeding in May 2021, for various financial relief, the father responded by requesting a shared parenting arrangement, and bringing an interim Application for a week-on/week-off parenting schedule. He also asked to have the child, who would be starting kindergarten in September, enrolled in a school with a French immersion program instead of the English-only public school where the mother had already enrolled her.

The interim hearing took place in July 2021. The Chambers judge granted the father's request for interim shared decision-making authority, but dismissed his request to vary the schedule that had been in place for the last two years. The Chambers judge also ordered the parties to attend a pre-trial to try to resolve the school issue.

The father appealed, but his appeal was dismissed in May 2022 (2022 CarswellSask 218 (C.A.)). The Court of Appeal also directed the parties to proceed to a pre-trial on an expedited basis to try to resolve all of the parenting issues.

The pre-trial did not result in a settlement, and the father brought an interim Application to change the child's school so she could attend a French immersion program for grade 1. The mother opposed the father's Application.

While the mother was not against the child learning French, she did not think it would be in her best interests to attend a French immersion program for a number of reasons, including that she was already doing well at her current school, and the mother would not be able to help with her homework as she did not speak French. The child's older brother (the mother's child from a previous relationship) also attended the English public school, and the mother argued that it would be better for them to go to school together.

The father disagreed, and argued that the child was adaptable and would have no difficulty changing schools for grade 1. He also claimed that the parents of most of the students in the French immersion program did not speak French, and the school accommodated them by communicating about homework primarily in English.

As the schools were of similar quality and distance to the parties' homes (they were also only five blocks away from each other), the Application judge concluded that the central issue he needed to determine was "whether or not it is of benefit in Canada for a child to gain the ability to communicate in both French and English."

As there was no expert evidence before the court about French immersion (whether generally or

for the particular child in this case), the Application judge decided that "the application must necessarily focus on whether I can take judicial notice of the potential benefits of a French immersion education to a child and, if so, whether such potential benefits outweigh the concerns [the mother] has." To answer this question, his Honour started by reviewing the Ontario Court of Appeal's summary of some of the principles of judicial notice in *R. v. G.M.C.*, 2022 CarswellOnt 63 (C.A.):

> [34] The principles of judicial notice were recently explained by Brown J.A. in *R. v. J.M.*, 2021 ONCA 150, 154 O.R. (3d) 401, at paras. 31-38. For the purposes of this appeal, only the following principles need be stated. First, **courts may only take judicial notice of facts that are (1) "so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons", or (2) "capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy"**: *J.M.*, at para. 31. [emphasis added]

After considering these principles, the Application judge decided that he could — and should — take judicial notice that French immersion is generally beneficial for children:

> [16] **While counsel for [the mother] argued that I should not take judicial notice of the potential benefits of a French Immersion education, I am satisfied that I can and should.** I am satisfied that **it is generally accepted and not the subject of dispute among reasonable people that being multilingual has many benefits.** This general acceptance exists internationally but is especially pronounced in countries that are bilingual like Canada. Beyond this general acceptance, **the benefits are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy. The published papers of neuroscientists, psychologists, economists and other scientists and academics consistently support the cognitive, intellectual, social and economic benefits of being bilingual or multilingual.**
>
> . . . . .
>
> [19] While [the mother] expresses a variety of concerns, these concerns are but concerns and there is no good reason to conclude these concerns will become actual problems. [The child] is, on the evidence before me, an intelligent, social and adaptable young lady. **The concerns do not outweigh what in my opinion are the clear benefits to [the child] of French Immersion schooling.** The best time to start French Immersion schooling is clearly Grade 1. I am satisfied that the benefits that [the child] will obtain from French Immersion schooling outweigh any potential harms. If it turns out that for some reason [the child] does not benefit from French Immersion education, it is, as Schwann J. said, easier to transfer back to the English program than the reverse. [emphasis added]

As a result, the parties were ordered to enrol the child in the father's chosen French immersion program.

While we offer no opinion about whether this was the "right" outcome for the child in this case, we have some significant concerns about how the Court arrived at its conclusion.

First, by framing the issue as "whether or not it is of benefit in Canada for a child to gain the ability to communicate in both French and English", the Court appears to have lost sight of the fact that its real task was to determine whether it would be in the best interests of ***the particular child in***

this case (as opposed to Canadian children in general) to switch to the specific French immersion program the father was proposing.

Second, there were other important factors in this case that warranted serious consideration. In *Thomas v. Osika* (2018), 13 R.F.L. (8th) 191 (Ont. S.C.J.), Justice Audet provided an excellent summary of the principles that courts should consider when deciding where a child should attend school — and the following ones are directly relevant on the facts of *R.D.L.*:

> [37] . . .
>
> c. When considering school placement, one factor to be considered is the ability of the parent to assist the child with homework and the degree to which the parent can participate in the child's educational program (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. C.J.));
>
> d. The emphasis must be placed on the interests of the child, and not on the interests or rights of the parents (*Gordon v. Goertz*, [1996] S.C.J. No. 52 (S.C.C.);
>
> e. The importance of a school placement or educational program will promote and maintain a child's cultural and linguistic heritage (*Perron v. Perron*, 2012 ONCA 811 (Ont. C.A.);
>
> . . . . .
>
> k. If an aspect of a child's life, such as school placement, is to be disrupted by an order of the court, there must be good reason for the court to do so. Thus, before a court will order a child to transfer schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron v. Perron*, 2012 ONCA 811 (Ont. C.A.);
>
> . . . . .
>
> m. Those cases are very fact-driven. **The courts are not pronouncing on what is best for all children in a general sense but rather deciding what is in the best interests of this child before the court** (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. C.J.)). [emphasis added]

To this we would add that, as the Supreme Court of Canada recently noted in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.) at para. 123, "[t]he parent who cares for the child on a daily basis is in a unique position to assess what is in their best interests[.]"

Although the mother did not have sole decision-making authority, the child was in her care for the vast majority of the time. Accordingly, she was in a unique position to assess what was in the child's best interests, and her views ought to have been entitled to significant weight. So should the facts that:

- The mother did not speak French and would not be able to help the child with her school work (or, at the very least, it would be far more difficult).

- The mother was responsible for the majority of school pick-ups and drop-offs, and her other child attended the English school. Although it might not be impossible for her to get both kids to and from school given they were only five blocks away from each other, it would definitely be far more difficult to do two pick-ups and drop-offs at different locations instead of just one.

- As the father was the one asking to change the child's school, it was *his onus* to produce

> "convincing evidence that a change of schools is in the child's best interests[.]" And given that the Court ended up having to decide the case based on judicial notice, clearly he did not meet that onus.

While none of these factors are necessarily determinative, they certainly warranted very serious consideration.

On the other hand, while the Application judge didn't discuss the child's cultural or linguistic heritage in his reasons, the Court of Appeal's earlier decision indicates that one of the reasons the father wanted the child to attend French immersion was "to foster her connection to her French Métis heritage." It is unclear whether this argument was raised before the Application judge because it is not mentioned in his reasons. But if it was raised, it certainly warranted at least a mention, and may even have been a reasonable basis to find that it would be in the child's best interests to attend the French immersion program without having to resort to judicial notice.

Finally, although the Court considered some of the principles of judicial notice that Justice Brown set out in *R. v. J.M.*, 2021 CarswellOnt 3180 (C.A.), it does not appear to have considered several of the other principles that were discussed in that case, including:

> • "Since judicial notice dispenses with the need for proof of facts, the threshold for judicial notice is strict[.]" [paragraph 31(iv)]
>
> • "The closer the facts lie to the dispositive end of the spectrum, the more pressing it is to meet the two criteria of notoriety or immediate demonstrability[.]" [paragraph 33]
>
> • "Finally, matters of which judicial notice may be taken and those that require expert evidence are not compatible. Matters that are the proper subject of expert evidence are, by definition, neither notorious nor capable of immediate and accurate demonstration[.]" [paragraph 35]

To be clear, we do not take issue with the proposition that being bilingual can be beneficial. But we also don't think that this should be the primary basis for a court to decide that a ***particular*** child should attend a ***particular*** French immersion program. We also question whether it was really necessary or appropriate for the Court to resort to judicial notice to decide this particular case.

Reductio ad absurdum (extra points for Latin), if it is a matter of judicial notice that it is of benefit in Canada for *all children* to gain the ability to communicate in both French and English, there is no point in litigating this issue ever again. Ce n'est pas possible!

Brun v. Fernandez, 2023 ONSC 4787 – Adult Children and the End of Support

Excuse Me; There's Some Child Support Irony Stuck in My Throat

Brun v. Fernandez provides a thorough summary of the law addressing when child support should end for a child over the age of majority – commonly referred to as the oxymoronic "adult child").

The parties were married in 1996 and separated in 2006. They had two children together, who were born in 1997 and 1999 respectively.

After they separated, the parties signed a Separation Agreement that required the father to pay the mother $400 a month in child support based on an income of $27,100 a year.

Although the Separation Agreement only required the father to pay minimal support, he still failed to comply with his obligation, and by 2014 his arrears had grown to $26,000, which was equivalent to almost ***five and a half years*** of support based on the $400 a month he had agreed to pay. When the Family Responsibility Office finally started taking more aggressive steps to collect the arrears, the father responded by commencing a Motion to Change looking to rescind the arrears, and to reduce his ongoing support payments. (The FRO seem to have that effect on people.)

In 2016, the parties settled the father's Motion to Change by way of a Consent Order that reduced the arrears to $20,000, and which required the father to pay them at a rate of $150 a month. The final order also reduced the father's child support payments from $400 a month to $350 a month based on an imputed income of $23,000.

Their parties' older child finished university in January 2020. Their younger child finished high school in June 2017, and did not pursue further education.

After the older child finished university, the father commenced a further Motion to Change, and asked the court to terminate his support obligations retroactive to June 2017 for the younger child, and to January 2020 for the older child.

The mother agreed that the support payments should end, but she argued that the appropriate termination date was November 2020 because:

(a) although the older child had graduated university in January 2020, it had taken him until November 2020 to secure employment; and

(b) although though the younger child finished school in June 2017, he had still been still dependant on her until November 2020 for various reasons, including the emotional difficulties he experienced as a result of the divorce, and his unsuccessful attempts to complete various training programs.

Accordingly, Justice Jain had to determine when child support should end for each of the parties' children, which required her to consider the following provisions of the *Divorce Act*:

1. Subsection 15.1(1), which permits a court to make an initial order requiring a spouse to pay child support for a "child of the marriage";

2. Subsection 17(1), which permits a court to vary an order that was made pursuant to s. 15.1(1); and

3. Subsection 2(1), which defines a "child of the marriage" as "a child of two spouses or former spouses who, at the material time, (a) is under the age of majority and who has not withdrawn from their charge, or (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life[.]"

Based on these provisions, Justice Jain determined that to decide the case, she had to consider and answer the following two questions:

> [10] … (a) **Is the adult child able to withdraw from their parents' charge or obtain the necessities of life**, i.e., the court must make a finding of whether the adult child can or cannot obtain an income to meet their reasonable needs; and
>
> (b) **Is the "cause" of the inability to withdraw permitted under the *Divorce Act***, i.e., is the cause of that inability a social/economic factor (such as the cost of living and delayed adulthood, or a difficult transition in their life). [emphasis added]

Her Honour also determined that the onus of proof fell on the mother, as she was the parent claiming that child support should continue, and she then proceeded to review the leading authorities about whether and when a child over the age of majority will still be entitled to child support, including the following:

Question One: Is the adult child able to withdraw from their parents' charge or obtain the necessities of life

- "The first part of the analysis in determining child support entitlement for adult children requires the court to ascertain whether the child is in fact still under parental charge. The analysis of this issue focuses in part on whether the child remains financially dependent on the parent[.]" **[*Weber v. Weber*, 2020 ONSC 4098 at para. 57]**

- "In assessing whether an adult child is 'unable to obtain the necessaries of life' within the definition of 'child of the marriage,' the question is not whether their sources of income and other financial assistance support a sustenance existence, but rather whether they are sufficient to support the child's reasonable needs having regard for the condition, means, needs and other circumstances of the child, and the financial ability of each parent to contribute to the child's support[.]" **[*Weber v. Weber*, 2020 ONSC 4098 at para. 58]**

- The court must consider whether the adult child's sources of income are sufficient to meet their reasonable needs, bearing in mind that "the lifestyle of children should suffer as little as possible as a consequence of their parents separating", and that "[i]f the parents would have paid the educational expenses of the children had they not separated, then, all things being equal, the children should be entitled to expect they

would pay them even though the parents have separated." **[*Lewi v. Lewi* (2006), 80 O.R. (3d) 321 (C.A.) at para. 171]**

- "Claims for support for adult children who are able to work, but unemployed, have been granted, though generally the courts will limit the duration of support in these cases[.]" **[*Phillip v. Phillip (Kreger)*, 60 D.L.R. (4th) 319 (SKQB) at para. 16; *Weir v. Weir*, [1986] B.C.J. No. 3096 at paras. 12-13; and *Bruehler v. Bruehler*, [1985] B.C.J. No. 1958 (CA), at para. 3]**

Question Two: Is the "cause" of the inability to withdraw permitted under the Divorce Act

- If a child is under parental charge and unable to withdraw from it or obtain the necessaries of life, the court must determine whether the inability is due to illness, disability, or other cause. When considering this question, the term "other cause" should be "interpreted broadly". **[*Weber v. Weber*, 2020 ONSC 4098 at para. 59; and *KMR v. IWR*, 2020 ABQB 77 at para. 38]**

- The term "other cause" can include "a reasonable transition period" after a child completed his or her studies "to seek out and obtain employment." **[*Weber v. Weber*, 2020 ONSC 4098 at para. 62; *Jefic v. Jefic (Grujicic)*, 2022 ONSC 7240 at para. 68; and *A.E v. A.E.*, 2021 ONSC 8189 at para. 189]**

After discussing the applicable legal principles, Justice Jain turned her attention to the particular facts of this case. There was certainly an argument to be made that child support should end earlier than November 2020, particularly for the younger child who had been out of school since June 2017. However, in this case, Justice Jain was satisfied that the father's non-compliance with the parties' original agreement and his own failure to earn or pay support on more than minimum wage for many years were far more important considerations. As she explained in her decision:

> [30] … The [father] did not see the irony in the fact that he expected his [younger son] to become completely independent as soon as he turned eighteen and graduated high school, while he, at the age of forty-eight was not even working full-time or supporting himself without help from family and friends. He did not have any insight or compassion to extend support for [the older son] because it took [him] almost one year after graduation to find a full-time job. In my view, by 2017, the [father] had gotten away with being very irresponsible for his children for many years, and he had a very poor work ethic. For most of the children's childhood, the [father] failed to obtain and/or maintain full-time employment. Then, not long after both children were eighteen years old, he suddenly (and conveniently) was able to obtain and hold a full-time job that pays more than minimum wage.

Accordingly, Justice Jain rejected the father's request to terminate child support for the older child as soon as he finished school in January 2020, and the younger child as soon as he finished school in June 2017, and instead granted the mother's request to find that both children were still entitled to child support until November 2020. In choosing this date, she also took into account the difficulties created by the start of the COVID-19 pandemic in March 2020, particularly its impact on the children's ability to find employment and support themselves.

After determining that both children were entitled to child support until November 2020, Justice Jain reviewed the father's income since 2016 and the mother's claim for s. 7 expenses. In doing so, her Honour concluded that the father had underpaid child support by just over $21,000, and she ordered him to pay that amount to the mother, together with any remaining arrears he still owed pursuant to the 2016 Order, at a rate of $500 a month.

Given the father's behaviour, this result is not particularly surprising. That being said, we would suggest that the order for the younger child, which required the father to pay support for him from June 2017 to November 2020 (i.e. 3½ years) even though was not in school -- and in the absence of any objective evidence (medical or otherwise) -- is not something that should be done as a matter of course. Absent exceptional circumstances, a parent simply does not have a legal obligation to support an adult child who has been out of school for years and does not have an illness or disability that prevents him or her from becoming gainfully employed. However, the result is wholly unsurprising given the father’s conduct.

Y.H.P. v. J.N., 2023 ONSC 5766 – Parental Alienation and Interim Parenting Orders

The Interim Alienation Two-Step

The parties in *Y.H.P.* were married from 2008 to 2014. They had one child together, a daughter, who was 12 years old by the time of the motion before Justice Kraft.

After the parties separated in 2014, the mother alleged that the father had sexually abused the daughter. These serious allegations were investigated by the police, the Children's Aid Society of Toronto, the Suspected Child Abuse and Neglect Program at the Hospital for Sick Children in Toronto (otherwise known as the "SCAN" team), the Office of the Children's Lawyer ("OCL"), and various other medical professionals, but were not verified. Nevertheless, the mother refused to let the father have unsupervised parenting time until he brought a motion for access and successfully opposed the mother's request for supervision.

In 2016, the OCL prepared a report confirming that the child was happy and comfortable with the father. It also expressed concerns about the mother's behaviour.

Fortunately, in 2017, the mother apparently realized that she needed to change her behaviour, and agreed to resolve the family law case pursuant to a consent order that provided, among other things, that the parties would share joint custody (now decision-making authority), and that the child would live with the father for 5 out of every 14 nights.

Over the next several years, things went reasonably well, and the parties essentially followed the schedule set out in the 2017 order. So even though the matter initially bore many of the hallmarks of a serious alienation case, there was reason to hope for a reasonably happy ending. But sadly, that did not happen.

In March 2020, the COVID-19 pandemic began. As the father was a dentist and was still seeing patients, he agreed to **temporarily** suspend his in-person parenting time with the child to minimize the risk of exposing her to COVID-19. However, he still maintained regular contact with the child over FaceTime and by text message.

The father eventually asked to resume in-person parenting time with the child. The mother initially asked him to wait until the child was fully vaccinated in mid-2022. However, in mid-2022, she told the father she had decided not to vaccinate the child, and started claiming that the child was happy with the current arrangements, and did not want to see the father in person. And, when the mother found out that the child's therapist for the last six years supported the resumption of in-person parenting time, the mother — of course — responded by terminating the therapy.

You can see where this is going. So much for fairy tale endings . . .

Upon realizing that the mother was not going to let him see the child in person, the father commenced litigation, and arranged an urgent Case Conference. At the Case Conference, which took place in November 2022, the mother consented to a temporary order whereby the father would have in-person parenting for the next four Saturdays for three to five hours, and that his parenting time would then increase further. But despite the court Order, the father did not get to see the child. Instead, the mother claimed the child was refusing to see him, and either kept her home entirely, or drove her to the exchange but didn't take steps to get her out of the car.

The parties also agreed to retain a reintegration therapist by February 7, 2023. However, the mother managed to delay that process until March, and then sabotaged it entirely by, among other things,

"barging in [during a visit between the child and father] after agreeing to not be in the building and repeating in front of [the child] that her father is dangerous." If this is what the mother did *in front* of the therapist while litigation was ongoing, we can't imagine what she was saying to the child about the father in private; well, maybe we can.

The father brought a motion to have the mother held in contempt of the November 2022 order. The contempt motion was granted by Justice Akazaki in February 2023, but the mother appealed, and the Court of Appeal's decision is currently under reserve.

In addition to moving for contempt, the father brought a motion to have the child placed in his primary care, and to prohibit the mother from seeing the child for 120 days while they attended the Building Family Bridges Program, which "is a 4-day intensive workshop to re-establish the damaged father-daughter relationship", and has been ordered in a number of alienation cases that Justice Kraft discussed in her decision (see, for example, *M.M.B. (V.) v. C.M.V.*, 2017 CarswellOnt 10747 (S.C.J.); *B. (S.G.) v. L. (S.J.)*, 2010 CarswellOnt 4782 (S.C.J.); *Bouchard v. Sgovio*, 2021 CarswellOnt 20740 (S.C.J.); and *X v. Y*, 2016 CarswellOnt 3301 (S.C.J.)). It is that motion that is of interest for our purposes.

Justice Kraft started her analysis by reviewing the leading authorities from Ontario about varying a final parenting order on a motion for temporary relief, including Justice Pazaratz's excellent decision on the subject in *F.K. v. A.K.* (2020), 43 R.F.L. (8th) 411 (Ont. S.C.J.), and the Divisional Court's decision in *S.H. v. D.K.*, 2022 CarswellOnt 2219 (Div. Ct.), which we discussed in the March 28, 2022 (2022-11) edition of *TWFL*, and where the Divisional Court cited *F.K.* with approval. She also reviewed many of the leading cases from Ontario about parental alienation, including the detailed list of indicators of alienation set out by Justice Nicholson in *Malhotra v. Henhoeffer*, 2018 CarswellOnt 18560 (S.C.J.), aff'd (2019), 32 R.F.L. (8th) 1 (Ont. C.A.) (another "must-read").

After a careful review of the evidence, Justice Kraft was satisfied that the mother was trying to alienate the child from the father:

> [28] I find that the facts of this case demonstrate circumstances that are so compelling that I am satisfied that [the child's] best interests require an immediate change to her primary residence to her father, **without contact with the mother** to reduce the detrimental impact of the mother's unacceptable alienating behaviour. . . . [**emphasis** added]

Given the mother's egregious behaviour, which included multiple breaches of court orders, fabricating false allegations (that the father had physically and sexually abused the child), and preventing the child from being able to obtain the therapeutic help she needed, Justice Kraft's findings are bold but not particularly surprising. The far more difficult issue, however, was what to do about the situation, bearing in mind that the child was 12 years old and vehemently opposed to having any further contact with her father.

According to Justice MacPherson in *C. (W.) v. E. (C.)* (2010), 93 R.F.L. (6th) 279 (Ont. S.C.J.) (which was recently cited with approval by the Alberta Court of Appeal in *JLZ v. CMZ* (2021), 58 R.F.L. (8th) 313 (Alta. C.A.)) (see also our discussion of *JLZ* in the September 27, 2021 (2021-37) edition of *TWFL*), there are essentially four options for dealing with cases involving parental alienation:

a. Do nothing and leave the child with the alienating parent;

b. Reverse custody and place the child with the rejected parent;
c. Leave the child with the favoured parent and provide therapy; or
d. 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.

As therapy alone had already failed, and as neither party had suggested placing the child with a third party, that only left options (a) and (b).

The mother, of course, argued that the child should remain with her, and that perhaps the OCL should be appointed to investigate and/or prepare a voice of the child report. Or, to put it in slightly more cynical terms — that the court should sanction further delays while the parent-child contact problem became even more entrenched.

The father, on the other hand, asked the court to reverse custody immediately, and place the child with him. He also proposed a 120-day "blackout period", during which the mother would have no contact with the child, and enrolling in the Building Family Bridges program.

After reviewing the best interests factors set out in s. 16 of the *Divorce Act*, Justice Kraft decided to grant the extraordinary interim relief sought by the father:

> [88] Based on the above, [the child's] primary residence will be reversed. **I do not find that simply returning to the status quo, leaving [the child] with the mother, without further and timely intervention is an appropriate option.** [The child] would likely never voluntarily see her father again, continuing to justify her rejection with a narrative of alleged paternal abuse. **That leaves me with one option: a temporary parenting time reversal and a blackout period. While this kind of order is a last resort, this may well be that last resort. It cannot wait until the father's Motion to Change is heard.**
>
> [89] **The only way to guard against any ongoing negative influence from the mother and to ensure the best possible success of re-establishing the relationship with the father is to suspend contact between [the child] and the mother temporarily.** On the assumption that [the child] will desire to re-establish a connection with her mother, I will order that [the child] participate in therapy as a condition to the court considering re-establishing contact with the mother upon review of this matter. In order to ensure compliance with this order, police enforcement will be necessary.
>
> [90] **I agree with the father that the blackout period should be for 120 days, but it should be subject to regular reviews to see how it is progressing and whether it should be expanded or contracted.** Those reviews must look to the extent that each party follows the therapeutic advice of the Aftercare therapist. Each parent must play their role. The mother must be open to altering her perspective of the father to allow [the child] to fully accept him as a safe and loving father. For the sake of [the child], the mother must work closing with Family Bridges and the Aftercare therapists and follow their directions. [emphasis added]

Again; a rather bold (and appropriate) decision. Justice Kraft also made a very detailed order setting out exactly what was going to happen going forward, and how the process was going to work that is worth a careful review when dealing with these types of cases. However, there is one particular part of the order that warrants specific mention: Justice Kraft appointed a Case

Management Judge who would have regular meetings with the parties to ensure that the order was being implemented, and who would receive regular updates from the therapists. The Case Management Judge was also given authority to decide whether and when the blackout period should be extended or ended.

This type of ongoing judicial oversight is critical when granting a full custody reversal, and should ***always*** be included as a term whenever this type of order is made. We say this for two reasons:

1. First, the court needs to ensure that the order is still serving the child's best interests, as it is impossible to predict how a particular child will react to such a drastic change in their life, and adjustments may have to be made.

2. Second, one of the most common criticisms about programs like Building Family Bridges is that there is still a serious debate amongst psychologists about whether and to what extent they are an appropriate and/or effective form of treatment. Some jurisdictions, including Colorado, have even gone so far as to enact specific legislation to limit or restrict their use. [For more information, see "Colorado Becomes the First State to Limit Court Use of Family Reunification Camps" by Propublica as part of a series of articles it published about parental alienation issue that can be found on its website at https://www.propublica.org/series/parental-alienation.]

Without clear evidence about the utility and safety of programs like Our Family Bridges, it is important to include appropriate terms in the court's order — as Justice Kraft did in *Y.H.P.* — so that the court has the ability ensure that the process is not doing more harm than good for the child/children in each particular case.

We have all seen "those" final orders that start with: "This is a high conflict parenting situation. The case is seven years old and fills 52 bankers boxes, including 32 different court orders and 45 court attendances . . . " Want to avoid those situation? This is the way to do it — early, decisive court intervention with continued case management. The court simply ***must*** act early to prevent alienation: *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.); *A. (A.) v. A. (S.N.)* (2009), 66 R.F.L. (6th) 294 (B.C. S.C.); *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.) (can make finding of alienation at interim stage); *Hajji v. Al-Jammou* (2020), 48 R.F.L. (8th) 401 (Ont. S.C.J.). And for those that say "the court does not have the resources for continued management of cases" — we point to the benefit of avoiding cases that fill 52 bankers boxes, etc . . .

G.R.G. v. S.G., 2023 ONSC 6162 – Parental Alienation and Interim Parenting Orders

And again, this time with Feeling

The parties in *G.R.G.* were married in 2018 and had a child together. When they separated in 2019, the child was only eight months old.

Litigation ensued almost immediately after separation. The mother alleged that the father was abusive. The father denied the allegations.

Between 2020 and 2022, the mother breached multiple court orders, including **consent** orders for the father to have **supervised** parenting time with the child.

In 2022, Justice Lack, an experienced family law judge, heard a contested motion by the father to allow him to start having unsupervised parenting time with the child. On April 1, 2022, her Honour found that there was no reason for supervision to continue, and granted the father's motion, and ordered a graduated schedule whereby the father would start seeing the child during the day on Wednesdays and Saturdays, and that overnight parenting time would start in late June 2022.

After Justice Lack made this order, the mother started contacting the police and the Durham Children's Aid Society to allege that the father had anger issues and had locked the child in a bathroom. And, shortly before the overnights were supposed to start, she contacted the police and alleged that the father had sexually abused the child. The police investigated, and the child was seen by the SCAN team and other professionals, but the allegations were not verified.

Unfortunately, this was merely the first of many times that the mother would respond to a court order she didn't like by raising serious new allegations of abuse and/or violence against the father. For example, in response to a subsequent order requiring the mother to comply with Justice Lack's order (yes — an order that someone comply with an order), the mother contacted the police and alleged that the father had drugged the child, and had assaulted the mother's mother. And, upon learning that her request to change Justice Lack's order had been dismissed, the mother responded by contacting the police to allege that the father had assaulted the child.

Although the parties had numerous further court attendances in 2022 and 2023, they were not able to resolve matters, and the mother continued breaching court orders and raising serious allegations against the father with both the court and various third parties, including the police and Society.

Ultimately, in 2023 the father brought a motion to have the child removed from the mother's care, and placed in his sole care. By the time this motion was argued before Justice Finlayson in September 2023, some **20 orders or endorsements** had already been made by **five other judges**. (Sound familiar?)

In order to decide the father's motion, Justice Finlayson first summarized the principles that apply when dealing with a request to vary an interim parenting order prior to trial, including the following:

1. "Just because the Court can vary a temporary order on a temporary basis prior to trial, or just because the Court can make an initial order for temporary decision-making that would disturb a status quo, does not necessarily mean that it should do so."

2. "The maintenance of the status quo is a heavy factor on a motion of this kind."

3. "The preferable approach is usually to get the matter on for trial."

4. "Generally it is not in a child's best interests to be subjected to a change in her residential arrangements if the possibility of yet another change is right around the corner because of an impending trial."

5. "Nevertheless, the Court is not powerless to act, where a child is in danger, or where there is some other compelling reasons to do so in a child's best interests[.]"

6. " . . . additional considerations when deciding to intervene or not, are about the calibre of the evidence before the Court, and how quickly the case is likely to go to trial[.]"

Justice Finlayson also reviewed Justice Mackinnon's decision in *J.D. v. N.D.* (2020), 50 R.F.L. (8th) 62 (Ont. S.C.J.), which we discussed in the July 12, 2021 (2021-26) edition of *TWFL*, and where her Honour explained that there was good reason to consider lowering the threshold for varying an interim parenting order prior to trial:

> [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]

Given the enormous backlogs in our courts, the need to consider lowering the threshold for varying interim orders is even more important now than it was in 2020. But no matter what standard applied, Justice Finlayson was satisfied that the facts of this case desperately cried out for **immediate** judicial intervention since, among other things: (a) the mother was clearly not supporting the child's relationship with the father; (b) the mother had refused to comply with multiple court orders; (c) the record before the court contained objective evidence from multiple third parties; (d) the case was not ready to be tried during the November trial sittings; and (e) the next available trial date was not until May 2024 at the earliest.

Given the mother's conduct, Justice Finlayson found that it would be in the child's best interests to be placed in the father's sole care, and to limit the mother to weekly supervised access for a few hours through either the local supervised access program, or a private supervision service. (At the risk of repetition — another bold decision.)

Like Justice Kraft in *Y.H.P.*, Justice Finlayson also made a number of orders to ensure that the court would be able to monitor the situation. In particular: (a) he asked the OCL to conduct an investigation to help the court understand how the child was doing in the father's care, whether the mother was able to gain any insight into her behaviour, and what a final parenting plan might look like; and (b) he ordered the parties to re-attend before him in approximately 30 days to see if the OCL had accepted the court's referral, and to obtain an update about how the child was adjusting to the new arrangements.

Finally, and of particular interest to us, Justice Finlayson directed that a copy of his reasons be sent to the Durham Children's Aid Society as, in his view, "[a] number of aspects of this case have approached if not crossed the line into matters of child protection, yet the parents were left to

litigate these issues in private parenting litigation. A father-child relationship has been significantly disrupted in the process[.]" He also ordered the Society to have its representative attend the next court attendance to explain how the Society was going to support the family going forward. Love it.

Bose v. Bose. 2023 NSSC 229 – Contempt and Parenting Orders

Orange Jumpsuit Anyone?

In our discussion of *Hamid v. Hamid* (2023), 91 R.F.L. (8th) 447 (Ont. C.J.) in the August 28, 2023 (2023-33) edition of *This Week in Family Law*, we discussed the court's increasing reluctance to use its contempt power to deal with breaches of parenting orders, and wondered if: (a) the serious problem of non-compliance with parenting orders "has been exacerbated by some relatively recent appellate decisions that have hampered the court's ability to provide meaningful remedies for non-compliance"; and (b) we had now reached the point where parenting Orders really were, despite the multitude of cases stating otherwise, not much more than mere suggestions.

Fortunately, based on Justice Jollimore's recent decision in *Bose v. Bose*, it appears that our concerns were premature (or, at the very least, that the pendulum may have started swinging the other way).

The parties in *Bose* had a young son together who was born in or around 2019. Shortly after the child was born, the mother made it clear — abundantly so — that she was not going to support the child having a relationship with the father. She even prevented the child from having contact with the father for the 10 months leading up the trial, which obviously was not the *best* litigation strategy.

The case went to trial and, in February 2022, the trial judge made a detailed final Order that included, among other things, a graduated parenting schedule whereby the child would eventually be with the father every Monday and Wednesday and on alternate weekends.

Almost immediately after the Order was released, the mother made it clear — abundantly so — that she had no intention of complying with it. According to the father:

> 1. The mother did not provide him with a current address for their son as required by s. 1b(1) of the Order;
>
> 2. She did not keep him updated with their son's current address as required by s. 1b(2) of the Order;
>
> 3. She denied him parenting time at the location of his choice on February 28, 2022 in breach of ss. 2d and 2e of the Order;
>
> 4. She denied him parenting time on May 28, 2022; May 30, 2022; and June 1, 2022 in breach of ss. 2h and 2i of the Order;
>
> 5. She denied him 36 consecutive hours of parenting time during Onam in breach of s. 2***o*** of the Order;
>
> 6. She denied him 36 consecutive hours of parenting time during Diwali in breach of s. 2***o*** of the Order;
>
> 7. She denied him 2 non-consecutive 1-week blocks of parenting time during July 2022 and August 2022 in breach of s. 2p of the Order;
>
> 8. She denied him parenting time at a location and time of his choice beginning February

> 28, 2022 in breach of ss. 2d-2i of the Order;
>
> 9. She denied him overnight parenting time on alternate weekends from Saturday at 10 a.m. until Sunday at 5 p.m. starting on September 10, 2022 in breach of s. 2j of the Order;
>
> 10. She denied him regular parenting time on Mondays, Wednesday, and alternate weekends from Saturday at 10 a.m. until Sunday at 5 p.m. starting on October 7, 2022 in breach of s. 2j of the Order; and
>
> 11. She did not meaningfully consult with him or agree on all major developmental decisions with respect to their son's health in breach of ss. 1a and 1b(5) of the Order.

In other words, according to the father, the mother viewed the Order as a mere form of judicial "recommendation" that she was free to ignore.

As a result of the mother's intransigence, the father started a contempt proceeding against her in October 2022. But in the face of the contempt proceeding, and despite being represented by counsel and warned by at least one judge about the potential consequences for non-compliance, the mother responded by prohibiting the father from having ***any*** contact with the child for the next five months. You have to admire the mother's commitment to self-destruction.

The contempt proceeding was supposed to have been heard in March 2023. On the eve of the hearing, the mother permitted the father to resume seeing the child, but still refused to comply with all of the terms of the Order. The mother also requested, and was granted, an adjournment of the contempt proceeding to June 2023. Respectfully, this wreaks of a litigant knowing how to game the system.

In June 2023, Justice Jollimore heard the contempt proceeding on the merits. After setting out the 3-part test for contempt (the order must state clearly and unequivocally what should and should not be done; the breaching party must have had actual knowledge of the order; and the breaching party must have acted or failed to act intentionally: *Carey v. Laiken*, 2015 CarswellOnt 5237 (S.C.C.) at paras. 32-35), Justice Jollimore reviewed the evidence. While she was not satisfied that the father had proven *all* of the alleged breaches beyond a reasonable doubt, she was persuaded that the mother had, in fact, knowingly and intentionally breached the Order by denying the father parenting time on February 28, May 28, May 30, June 1, two religious holidays, during parts of the summer, and multiple weekends and weekdays in September and October. As a result, Justice Jollimore found the mother in contempt, and scheduled a hearing to address what the penalty should be.

According to *Carey* and, more recently in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), which was written by Justice Jamal (as he then was) shortly before he was appointed to the Supreme Court of Canada, even if the 3-part test for contempt has been met, the presiding judge must still consider whether contempt is an appropriate remedy, bearing in mind that it should only be used as a remedy of last resort. As Justice Jamal explained in *Moncur*:

> [10] . . . 2. **Exercising the contempt power is discretionary.** Courts discourage the routine use of this power to obtain compliance with court orders. **The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort.** A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. **As an alternative to making a contempt finding too readily, a judge should**

> **consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance:***Carey*, at paras. 36-37; *Chong v. Donnelly* 2019 ONCA 799 Ont. C.A., 33 R.F.L. (8th) 19, at paras. 9-12; *Valoris pour enfants et adultes de Prescott-Russell* c. *K.R.*, 2021 ONCA 366, at para. 41; and *Ruffolo v. David* 2019 ONCA 385 Ont. C.A., 25 R.F.L. (8th) 144, at paras. 18-19. [emphasis added]

We have previously discussed how "issuing declarations of breach" or "encouraging professional assistance" are cold comfort to a party dealing with the alienation of a child [see the August 28, 2023 (2023-33), May 2, 2022 (2022-16) and the September 6, 2021 (2021-34) editions of *TWFL*].

Although Justice Jollimore did not address *Moncur* in her decision or expressly explain why this was not an appropriate case to exercise discretion in the mother's favour, it is abundantly clear from her reasons that, given the mother's blatant disregard for the final Order, she was satisfied that no other remedy would suffice. And, on the particular facts of this case, it is abundantly clear that a lesser remedy, such as a declaration of breach or requiring the mother to seek professional help, would have been ineffective and inadequate, as they usually are.

At the penalty hearing, the father asked that the mother be incarcerated but that the sentence be suspended as long as the mother complied with the final Order. The mother, on the other hand, suggested that a $500 fine might be appropriate and that incarceration would only be appropriate if she did not pay the $500. This is what we call "misreading the room". Given the mother's egregious conduct, in our view a $500 fine would not even qualify as a "slap on the wrist", especially since the mother said nothing about what the remedy might be if she continued breaching the final Order going forward.

As part of considering what an appropriate penalty would be, Justice Jollimore provided an excellent explanation of the important role of contempt proceedings for ensuring respect for the rule of law:

> [5] **The focus of a contempt proceeding is far greater than the impact of [the mother's] denial of parenting time because obeying the law and following court orders are foundations of social order.**
>
> [6] **Respect for court orders means following them.** If a decision is thought to be wrong, it should be appealed. If the circumstances on which a decision is based have changed, it should be varied. **Until stayed, overturned, or varied, court orders must be followed.** Since the parenting decision was made in February 2022, [the mother] has not applied to stay it, sought to appeal it, or asked to vary it.
>
> [7] **[The mother's] penalty is both to secure her compliance with the Corollary Relief Order and to protect the administration of justice:***Carey v. Laiken*, 2015 SCC 17 at paras 18 and 30. I have the inherent authority to impose penalties for civil contempt. The *Civil Procedure Rules* are supplementary to my authority.
>
> [8] **Securing compliance with the order means ensuring that [the mother] does not continue to thwart [the father's] parenting time.**
>
> [9] **Denouncing [the mother's] conduct and deterring both her, specifically, and others, generally, from defying court orders is particularly important where this order relates to parenting time for a young child.** The denial of parenting time for a young child can

> negatively impact a child's relationship with a parent and the child's own well-being.
>
> [10] **[The mother's] penalty must reflect her offence. It must be in proportion to the offence's gravity and [the mother's] degree of responsibility**, recognizing any aggravating and mitigating factors. [emphasis added]

Justice Jollimore found that, here, there were no mitigating factors, and that there were actually three aggravating factors: (a) the mother had not apologized for her conduct; (b) the mother's breaches began immediately after the Order was released; and (c) the mother responded to the contempt motion by cutting off all contact between the father and the child.

Accordingly, Justice Jollimore determined that the mother should be sentenced to one month at His Majesty's pleasure. However, she gave the mother one last chance to avoid prison by suspending the mother's sentence on condition that she complied with the final Order, attended a parental education course "designed to include a component to educate parents about the damage done to children by continuing levels of conflict and animosity between parents", and facilitated the child attending therapy to help reunify him with the father.

While reasonable people can disagree about whether a month in jail was overly harsh in the circumstances, and that a shorter period of incarceration as an initial punishment might have sufficed, the sentence in this case clearly sends the message to the mother — and to the public at large — that non-compliance with parenting Orders is not acceptable, and will not be tolerated. Or, as Justice Quinn famously put it in *Gordon v. Starr* (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.):

> [23] . . . **An order is an order, not a suggestion. Non-compliance must have consequences.** One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders. [emphasis added]

We commend Justice Jollimore for having the courage to make this type of decision. The mother's conduct was blatant, purposeful, and unacceptable, and warranted serious consequences and clear denunciation. Hopefully, her decision to use contempt to deal with the type of egregious disregard for the rule of law demonstrated by the mother will be followed by other courts. And, being able to point to this type of decision should help to deter at least some other parties from engaging in similar conduct in the future, because it will help to ensure they know that this type of unacceptable behaviour can and does lead to extremely serious consequences.

***Children's Aid Society of Toronto v. M.O.*, 2024 ONCJ 26 – Incidents of Decision Making and Interim Motions**

What the Court can do at the End, the Court can do in the Middle

This is a case that is both important in terms of the jurisdiction of courts to determine "incidents of custody" and an example of intelligent pragmatic lawyers working with a judge to solve a problem for the benefit of a child.

The child in this case (C.O.) had been removed from his mother at birth by the Children's Aid Society (the "CAS"). There were concerns about the mother's mental health and the father did not present a plan to care for the child (he lived, and continues to live, outside of Canada). The CAS commenced a protection application and placed the child in the care and custody of the maternal aunt (the "Aunt") until July 21, 2020, when a final order was made placing the child in the care and control of the Aunt pursuant to s. 102(1) of the *Child Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 (the "*CYFSA*"). The final Order also provided the parents with parenting time at the discretion of the Aunt. Under the final Order the Aunt could obtain and/or renew government documentation for the child without the consent of any other party.

In February 2023, the Aunt contacted the CAS. She felt that there had been an error in the final order: the caregiver consent she had signed set out that she could travel with the child outside of Canada without the consent of the mother and father, but this term did not make its way into the final order. CAS advised the Aunt to bring a motion to change the final order in Family court, but this proved challenging for the Aunt, an unsophisticated litigant, who was struggling with the child who had been diagnosed with autism after the final order was made.

Fortunately, CAS was able to provide the Aunt with additional support and assistance in getting the child the help they needed (along with respite care for the Aunt).

CAS also brought a protection application on December 21, 2023, seeking an order placing the child in the care and supervision of the Aunt, subject to the supervision of the society for six months. The Aunt wanted to travel to Ghana with the child and CAS was supportive of this trip, stating that in their view it would be good "for the maternal aunt and for the child."

While everyone was supportive of the trip, the jurisdiction of the court to provide the relief sought by the Aunt was not clear. Under s. 102(a) of the *CYFSA*, a court can make any of the orders available to it under s. 28 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"), which reads:

> **Parenting orders and contact orders**
>
> 28 (1) The court to which an application is made under section 21,
>
> (a) may by order grant,
>
> (i) decision-making responsibility with respect to a child to one or more persons, in the case of an application under clause 21(1)(a) or subsection 21(2),
>
> (ii) parenting time with respect to a child to one or more parents of the child, in the case of an application under clause 21(1)(b), or

(iii) contact with respect to a child to one or more persons other than a parent of the child, in the case of an application under subsection 21(3);

(b) may by order determine any aspect of the incidents of the right to decision-making responsibility, parenting time or contact, as the case may be, with respect to a child; and

(c) may make any additional order the court considers necessary and proper in the circumstances, . . .

Exception

(2) If an application is made under section 21 with respect to a child who is the subject of an order made under section 102 of the *Child, Youth and Family Services Act, 2017*, the court shall treat the application as if it were an application to vary an order made under this section.

Same

(3) If an order for access to a child was made under Part V of the *Child, Youth and Family Services Act, 2017* at the same time as an order for custody of the child was made under section 102 of that *Act*, the court shall treat an application under section 21 of this *Act* relating to parenting time or contact with respect to the child as if it were an application to vary an order made under this section.

Allocation of decision-making responsibility

(4) The court may allocate decision-making responsibility with respect to a child, or any aspect of it, to one or more persons.

Allocation of parenting time

(5) The court may allocate parenting time with respect to a child by way of a schedule.

Parenting time, day-to-day decisions

(6) Unless the court orders otherwise, a person to whom the court allocates parenting time with respect to a child has exclusive authority during that time to make day-to-day decisions affecting the child.

Parenting plan

(7) The court shall include in a parenting order or contact order any written parenting plan submitted by the parties that contains the elements relating to decision-making responsibility, parenting time or contact to which the parties agree, subject to any changes the court may specify if it considers it to be in the best interests of the child to do so.

Right to ask for and receive information

(8) Unless a court orders otherwise, a person to whom decision-making responsibility or parenting time has been granted with respect to a child under a parenting order is entitled to ask for and, subject to any applicable laws, receive information about the child's well-being, including in relation to the child's health and education, from,

(a) any other person to whom decision-making responsibility or parenting time has been granted with respect to the child under a parenting order; and

(b) any other person who is likely to have such information.

Among these potential orders are those dealing with the incidents of decision-making responsibility (it really was easier to write about "custody"). In the case of *CCAS of Hamilton v. V. A, N. E. and M. E.* (2022), 78 R.F.L. (8th) 116 (Ont. S.C.J.) the court set out "incidents of custody" that a court can order when making a s. 102 order as follows:

a. Decision-making responsibility;

b. Time-sharing — regular and holiday schedules;

c. Contact with persons other than a parent;

d. Communication between parties;

e. Prohibitions on changing a child's residence; and

f. Any other order the court considers necessary.

The question for Justice Sherr was whether the court could award similar "incidents of custody" when making a *temporary* care and custody order (as it was being asked to do in this case) rather than a final order. CAS argued that the court had jurisdiction pursuant to s. 94(2)(b) of the *CYFSA*:

Custody during adjournment

94(2) Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,

(a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;

(b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate.

Subsection 94(6) of the *CYFSA* sets out the terms and conditions that can be made in an order under s. 94(2):

Terms and conditions in order

94(6) A temporary order for care and custody of a child under clause (2) (b) or (c) may impose,

(a) reasonable terms and conditions relating to the child's care and supervision;

(b) reasonable terms and conditions on the child's parent, the person who will have care and custody of the child under the order, the child and any other person, other than a foster parent, who is putting forward a plan or who would participate in a plan for care and custody of or access to the child; and

> (c) reasonable terms and conditions on the society that will supervise the placement, but shall not require the society to provide financial assistance or to purchase any goods or services.

While the term “incidents of custody” or “incidents of decision-making responsibility” was not used, the court determined that the term “custody” *includes* incidents of custody, including the ability to obtain government documents for a child and to travel internationally. This gave the court the jurisdiction to allow the Aunt to take the child on the proposed trip to Ghana, as it determined that the trip would be in the child’s best interests.

Property

Anderson v. Anderson, 2023 SCC 13 – Opting Out of Provincial Property Regimes

Wanted: Precedents (*Miglin* need not apply).

On May 12, 2023, the Supreme Court of Canada released its decision in *Anderson v. Anderson*, in which the Court considered how courts should approach and weigh a domestic contract or "interspousal agreement" that purports to opt out of a provincial property scheme, but fails to meet the statutory requirements that would entitle it to presumptive enforceability. Of greater interest, however, the Supreme Court also considered whether the framework it developed in *Miglin v. Miglin*, 2003 SCC 24, which dealt with spousal support under the *Divorce Act*, is applicable to such a domestic contract (spoiler alert – it is *not*).

The Supreme Court commented – once again – that domestic contracts should generally be encouraged and supported by courts, absent a compelling reason to discount the agreement. This should not come as a surprise to many, considering the Court has a long history of supporting the freedom of parties to settle their domestic affairs privately and domestic contracts – all the way back to the *Pelech v. Pelec*h, 1987 CarswellBC 147 (S.C.C.), *Richardson v. Richardson*, 1987 CarswellOnt 315 (S.C.C.) and *Caron v. Caron*, 1987 CarswellYukon 43 (S.C.C.) "Trilogy", through *Hartshorne v. Hartshorne*, 2004 SCC 22, past *Miglin* and now up to *Anderson*.

In *Anderson*, at the end of a three-year marriage, the parties entered into a "kitchen table" separation agreement which essentially provided that each party would keep the property held in his or her name, with the exception of the family home and the household goods. The parties signed the agreement at the end of a meeting with two friends, who witnessed its execution. The parties did not exchange financial disclosure and neither party obtained independent legal advice.

The husband later sought an order for division of family property, arguing that the agreement was signed without legal advice and under duress, and should be disregarded by the court.

There was no dispute that the parties' agreement did not comply with s. 38 of Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3 (the "*FPA*") (similar to s. 55(1) of Ontario's *Family Law Act*), which sets out the formal requirements for a binding interspousal agreement under the *Act*, and was, therefore not presumptively enforceable; however, under s. 40, a court can give "whatever weight" to "any agreement, verbal or otherwise, between spouses that is not an interspousal contract."

The trial judge found that the parties' agreement was not binding on the parties and declined to give it any weight. He equalized the parties' family property under the *FPA* and ordered the wife to pay the husband an equalization payment of about $90,000. The wife appealed.

The Court of Appeal reversed the trial judge's decision, and applied the framework developed by the Supreme Court in *Miglin* (to the property agreement) to conclude that the agreement should be afforded great weight. The Court of Appeal divided the family property in accordance with the agreement and ordered the husband to pay the wife about $5,000.

The husband sought leave to appeal to the Supreme Court, and leave was granted in April 2022.

Justice Karakatsanis, writing for a unanimous Supreme Court, agreed with the Court of Appeal that the trial judge erred, but specifically and clearly declined to transpose the *Miglin* framework, which arose within a different statutory context, onto provincial family property legislation. As Justice Karakatsanis explained, "[w]hile useful general principles emerge from *Miglin* to guide courts in approaching domestic contracts, ***Miglin* is not, and was never intended to be, a framework of general applicability for courts in dealing with all types of domestic contracts**" [emphasis added]. We can all breathe a deep sigh of relief.

One of the useful principles that emerged from *Miglin* and from the Supreme Court's subsequent jurisprudence is that "domestic contracts should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement." As Justice Karakatsanis further explained,

> [33] … This deference flows from the recognition that self-sufficiency, autonomy and finality are important objectives in the family context. … Not only are parties better placed than courts to understand what is fair within the context of their relationship, but the private resolution of family affairs outside the adversarial process avoids the cost and tumult of protracted litigation. …

While courts must be alive to the vulnerabilities that can arise in the family law context, concerns about these vulnerabilities may be countered by the presence of procedural safeguards, such as the exchange of disclosure and the presence of independent legal advice – which itself is not a requirement to a binding domestic contract in most of the country.

Justice Karakatsanis helpfully set out a framework for how a court should approach an agreement that is not an interspousal contract, under s. 40 of the *FPA*:

> [8] **In determining whether to consider an agreement that does not qualify as an interspousal contract under the *FPA*, the court must first assess the agreement for its procedural integrity, where such concerns are raised**. By examining the integrity of the bargaining process for undue pressure, or exploitation of a power imbalance or other vulnerability, the judge can determine whether the parties executed the agreement freely and understanding its meaning and consequences. While safeguards like financial disclosure and independent legal advice provide critical protection in the family law context, they are not required by the legislation and their absence, without more, does not necessarily impugn the fairness of an agreement. Given the respect for spousal autonomy reflected in both the legislation and the jurisprudence, **unless the court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration under s. 21 of the *FPA*.**
>
> [9] **Once the court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division**. The weight to ascribe to the substance of the agreement will ultimately be determined by what is fair and equitable according to the scheme set out by the *FPA*. [emphasis added]

(While Justice Karakatsanis was considering the application of s. 40 of Saskatchewan's *FPA*, in particular, her analysis should assist those of us outside of Saskatchewan when we are dealing with an agreement that does not satisfy the enforceability requirements of the local neighbourhood family property statute.)

Justice Karakatsanis agreed with the Court of Appeal's conclusion that the parties' agreement was binding and there were no substantiated concerns with its fairness. The agreement was “short and uncomplicated” and reflected the intention of the parties to effect a clean break from their partnership. The lack of independent legal advice and formal disclosure was not troubling here because the husband could not point to any resulting prejudice – there was no suggestion that the absence of these safeguards undermined either the integrity of the bargaining process or the fairness of the agreement. The agreement was therefore entitled to serious consideration.

Given the circumstances, including the short duration of the marriage and the assets each party brought into the marriage, the agreement was fair and equitable, taking into account the criteria and objectives of the *FPA*. Justice Karakatsanis allowed the appeal, set aside the Court of Appeal's decision with respect to the division of family property, and divided the family home and household goods as of the date of trial, which resulted in an order that the wife pay the husband about $43,000.

El Rassi-Wight v. Arnold, 2024 ONCA 2 – The Formalities of Domestic Contracts

Have Gun – Will Travel; Have Witness – Will Enforce

In previous papers we have discussed the provisions in some provincial Acts that specify a domestic contract is not enforceable unless made in writing, signed by the parties and witnessed. See, for example, s. 55(1) of the Ontario Family Law Act, R.S.O. 1990 c.F.3 (the "Family Law Act").

In this case, the Ontario Court of Appeal dealt with whether a written and signed -- although unwitnessed -- agreement between two common law spouses was enforceable.

The parties were in a long-term common law relationship. They bought a home together in March of 2019, taking title as joint tenants. One year later, in the summer of 2020, the parties decided to end their relationship (home ownership is not for everyone). The parties disagreed as to how much the house had grown in value, being between $29,000.00 and $102,000.00.

On August 2, 2020, the parties signed a document that stated that the Husband would transfer his interest in the house to the Wife in exchange for $10,000.00 and a motorcycle that belonged to the Wife's father. The document specified that the Husband had agreed to forfeit "the house and all the assets, equity and so on" and that he would "give up all rights" in exchange for $10,000.00 and the motorcycle.

Both parties signed the document, but neither the Husband's nor the Wife's signatures were witnessed by a third party. The Wife, perhaps alive to the issue, actually video-recorded the Husband acknowledging that he had signed the document.

After the document was signed, the Husband refused to transfer his interest in the home to the Wife. The Wife then brought an application seeking a declaration that the document was a valid and binding Domestic Contract, and for an order that the Husband's share of the home be transferred to her. In response, the Husband brought a counterclaim for an order that the home be sold pursuant to the Partition Act, R.S.O. 1990, c. P.4.

The main issue at trial was whether or not the document was a binding domestic contract under the Family Law Act.

In *Gallacher v. Friesen*, 2014 ONCA 399, the Ontario Court of Appeal stated:

[27] [T]he strict requirements of section 55(1) may be relaxed where the court is satisfied that the contract was in fact executed by the parties, where the terms are reasonable and where there was no oppression or unfairness in the circumstances surrounding the negotiation and execution of the contract.

Notwithstanding the decision in Gallacher, the trial judge found that the "agreement" document did not comply with the requirements of s. 55(1) of the Family Law Act because it had not been witnessed -- despite the fact that the Husband did not dispute that he had signed it and the video record of him signing it.

The trial judge decided that this was not an appropriate case to relax the formal requirements of s. 55(1). Of particular significance was the fact that the “agreement” had not been witnessed and that the Husband had not received any legal advice before signing.

The trial judge also determined that the document was vague and imprecise:

The terms of any domestic contract should be clear enough to give effect to the reasonable expectations of the parties. In my view the August 2 Document, drafted by the parties without legal assistance, is overly broad and vague.

Specifically, the trial judge focused on the clauses wherein the Husband agreed to forfeit "the house and all the assets, equity and so on" [emphasis added] and where he would "give up all rights." The trial judge was of the view that the words "and so on" and "all rights" were so broad that they were incapable of properly narrow interpretation. The trial judge found that when the Husband signed the document, he had neither understood what those terms meant, and nor did he understand what was meant by the word "equity."

In the alternative, the trial judge determined that even if she had found the document to be a valid domestic contract, she would have set it aside under s. 56(4) of the Family Law Act on the basis that the Husband did not understand what he had signed.

The wife appealed. She argued that the “agreement” was an enforceable domestic contract; in the alternative, that the trial judge had erred in refusing to relax the formalities of s. 55(1) of the Family Law Act; and finally, that the trial judge erred in her determination that the document had been signed under duress.

Was the trial correct in finding that the document was not an enforceable domestic contract? Yes she was; the Court of Appeal upheld the trial judge's decision.

The Court of Appeal adopted a functional approach to the consideration of s. 55(1) of the Act. While the Wife had a video recording of the Husband acknowledging that he had signed the document, the requirement that a domestic contract be witnessed goes beyond just providing proof that the document was, in fact, signed by both parties. Rather, it is meant to ensure that there is a "measure of formality in the execution of a domestic contract" and to "avoid kitchen table agreements."

As set out by the Court of Appeal in *Virc v. Blair* 2014 ONCA 392:

> [78] The purpose of this provision is in part to provide some assurance that the parties were deliberate in reaching their agreement and understood the obligations being imposed [citations omitted]

Here, given the purpose of s. 55(1), there was no error in the trial judge's finding that the document was not a domestic contract despite the Husband having acknowledged signing the document and the video record. These were not adequate safeguards and were no substitute for the document having been properly witnessed, and the Court of Apeal endorsed the following policy statement by the trial judge:

In order to forgo compliance with section 55(1) of the FLA, both parties must understand the agreement they have reached and the obligations it imposes. Given the circumstances surrounding the preparation of the August 2nd agreement and the wording used, I am not satisfied that this condition has been met in this case.

Here, again, the trial judge was particularly concerned that the Husband did not understand what he was signing. However, query how the signature of a witness would have had any effect. The purpose of a witness it just that – to witness that a party signed a document.

As described by the Court of Appeal, the trial judge also had some concerns with respect to the video recording:

[15] In the circumstances here, we are not persuaded that the trial judge made any error in concluding that the video recording did not serve as a complete substitute for the document having been properly witnessed. Among other things, the video recording is only around 20 seconds long, and it does not capture the full extent of the discussions that led up to the document being drafted and signed. Some portion of these discussions was also audio-recorded by the appellant, and the trial judge found that this latter recording caused her "to have concerns about the circumstances surrounding the negotiation and execution of the contract".

As we predicted might start to happen, at the appeal, the Wife relied on the recent Supreme Court of Canada decision in Anderson v. Anderson, 2023 SCC 13 (which was released ten months after the trial judge's decision) ("Anderson"). But the Court of Appeal found that Anderson was distinguishable from this case on its facts: the agreement in Anderson was witnessed and there had been a specific finding that both parties understood the nature and effect of the terms of the agreement in that case. In Arnold, the trial judge specifically found that the Husband did not understand key aspects of the "agreement" and that it was overly broad and vague.

Although not mentioned by the Court of Appeal, there is another even more significant differentiating feature in Anderson. While in Anderson, there was no dispute that the parties' agreement did not comply with s. 38 of Saskatchewan's Family Property Act, S.S. 1997, c. F-6.3 (the "FPA") (similar to s. 55(1) of the Family Law Act) -- under s. 40 of the FPA, a court could give "whatever weight" to "any agreement, verbal or otherwise, between spouses that is not an interspousal contract." That is, in the Saskatchewan FPA (unlike other provinces) there is a specific a provision for dealing with agreements between parties that are not property signed and witnessed.

The appeal was dismissed.

The Court of Appeal determined that the trial judge had cited the correct test in *Gallacher* and correctly applied it. The Court of Appeal noted that the trial judge had particular care with respect to the underlying policy behind the test for relaxing the formal requirements under section 55(1):

> In order to forgo compliance with section 55(1) of the *FLA*, both parties must understand the agreement they have reached and the obligations it imposes. Given the circumstances surrounding the preparation of the August 2nd agreement and the wording used, I am not satisfied that this condition has been met in this case.

The trial judge was particularly concerned that the Husband did not know what he was signing when he signed the document.

At the Appeal, the Wife relied on the Supreme Court of Canada's decision in *Anderson v. Anderson*, 2023 SCC 13, which was released ten months after the trial judge's decision. The Court of Appeal found that *Anderson* was distinguishable from this case on its facts. The agreement in *Anderson* was witnessed. It had lacked the Saskatchewan specific requirement that the parties formally acknowledge that they understand the nature and effect of the terms of an agreement in the presence of independent counsel. Of particular importance for the Court of Appeal was the Supreme Court's finding that, in *Anderson,* both parties understood the nature and effect of the terms of the agreement in that case.

In the case at bar, the trial judge had specifically found that the Husband *did not* understand key aspects of the document and the agreement was overly broad and vague.

It is also important to remember that Saskatchewan, unlike Ontario, has a provision for dealing with agreements between parties that are not domestic contracts.

Finally, the Court of Appeal disagreed that there was an implicit finding of duress in the trial judge's determination that even if the document was a valid domestic contract, she would set it aside. The trial judge clearly set out that she made that determination because of her finding that the Husband did not understand what he was giving up as neither party had reviewed any financial records (including their own) prior to signing, and the Husband did not understand what the word equity meant.

Senthillmohan v. *Senthillmohan*, 2023 ONCA 280 – Third Party Creditors and Joint Tenants

No reason for alarm. Move along everyone.

There has been a fair bit of press about *Senthillmohan*, which deals with the rights of a third party creditor to proceeds of sale when a property that is jointly owned by the debtor and his or her spouse is sold. But, ultimately, the case is really much ado about nothing. As one would expect, despite the property being owned in joint tenancy, a creditor only has rights against ***the debtors interest*** in the property. Phew.

The wife and husband were married. During the marriage the husband racked up significant debts to the appellant company, 2401242 Ontario Inc. (the "Company").
The husband and wife separated.

In January 2020, the wife sought an unequal division of the parties' net family property or, in the alternative, an equalization of net family property and sale of their matrimonial home, which was owned by the spouses as joint tenants.

The home was ordered sole on January 28, 2021, and the net proceeds were ordered to be held in trust pending further agreement between the parties or court order.

In the meantime, Company third-party creditor, had obtained default judgment against the husband in a civil action, and a writ was filed in September 2021.

In October 2021, the husband and wife signed an Agreement of Purchase and Sale to sell the property. The home ultimately sold for $1.9 million, and the net proceeds, after the discharge of secured encumbrances, was about $925,000.

In November 2021 (that is, after the Agreement of Purchase and Sale was signed), the wife brought a motion to sever the joint tenancy in the matrimonial home. That order, granted on consent, was silent as to the effective date of the severance.

Of course, the wife then, understandably, wanted her money, and in February 2022, the wife brought a motion for the release of her 50% share of the net sale proceeds (which led to the Order under appeal).

The appellant Company argued that as the husband and wife were joint tenants when it got its default judgment (and when the writ was filed), it had priority over the wife's interest in the proceeds of sale. The motion judge rejected that argument, finding that the joint tenancy had been severed by the time the Company obtained the default judgment against the husband, because:

- When the motion judge made his order, he knew the Company was a creditor of the husband; and
- The husband and wife were already separated when the husband entered a debtor-creditor relationship with the Company, and there was "absolutely no way" that could defeat the wife's interest in the matrimonial home. He found the wife was entitled to her share of the net proceeds.

This was the Company's appeal of that Order.

In dismissing the appeal, the Court of Appeal summarized the situation succinctly: "Because a creditor cannot seize the interest of a non-debtor joint tenant, the appeal must be dismissed."

As this has always been the law, the Court of Appeal was of the view that the Company had fundamentally misunderstood the law of creditors' remedies as against jointly-held property, where only one of the joint tenants guaranteed the debt. That is, the severance of the joint tenancy was totally irrelevant, and the Company's arguments re the propriety of "retroactive severance" were pointless.

The appellant argued that each joint tenant held an undivided interest in the entire property: *Zeligs* v. *Janes*, 2016 BCCA 280 and *Royal & SunAlliance Insurance Co.* v. *Muir*, 2011 ONSC 2273 (each joint tenant "holds everything and yet holds nothing"). They argued that as joint tenants are essentially one owner until a joint tenancy is severed, a creditor has the right to claim against the full interest. However, neither of those cases stood for the proposition that where the debt itself is not jointly held -- the entire property is exigible.

However, it has long been the law that an execution creditor can execute against *the debtor's interest* in jointly held property. To accept the appellant's position would render the words "the debtor's interest in," meaningless.

The appellant also relied on a case from the Manitoba Court of Appeal that seemed to support its argument – the problem being that the Manitoba *Real Property Act*, C.C.S.M. c. R30 is different that the Ontario *Execution Act*, R.S.O. 1990, c. E.24 (the "*Execution Act*") – and the Ontario Court of Appeal happens to be located in Ontario. In Manitoba, before joint tenants are paid the net proceeds, encumbrances and liens (like a writ of execution) must be paid. But that ain't the law in Ontario.

In Ontario, s. 9(1) of the *Execution Act* provides that:

> 9(1) The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and **including any interest of the execution debtor in lands held in joint tenancy**. [**Emphasis** added.]

That is, the process of seizure and execution on debts only contemplates the execution against *the debtor's exigible interest* in land held in joint tenancy.

Therefore, the was, indeed, entitled to her half-share of the net proceeds of the sale of the home. Good thing for the wife they did not live in Manitoba. Not that Manitoba isn't lovely. Except maybe in January. And maybe February. And maybe…well…we love Manitoba. Really we do!)

***Falsetto v. Falsetto*, 2023 ONSC 1351 – Resulting Trusts**

Ugh…the *Planning Act*.

In 2011, Albert, who was married to Paula at the time, decided to purchase an investment property in Ottawa with his father, Luigi. Albert handled the negotiations and dealt with the bank.

The original plan was for Albert to take title to the property in his sole name. However, shortly before the scheduled closing date, Albert and Luigi's lawyer advised them that because Albert already owned the adjacent property in his sole name, by operation of the *Planning Act*, R.S.O. 1990, c. P.13, the two properties would merge if he took title to the new property in his name alone, such that he would lose the benefit of having two separate properties. As Albert didn't want the properties to merge, he tried to arrange to have Luigi added to title and the mortgage. However, most unfortunately, he wasn't able to do so because the bank did not have enough time to approve Luigi for financing prior to the closing. As a result, Alberta arranged to add Paula's name to the title and the mortgage instead. The rest of this practically writes itself . . .

Albert and Luigi paid the down payment equally without contribution from Paula. And, after the sale closed, Paula did not make any contributions whatsoever towards the mortgage or other expenses associated with the property.

Years later, Albert and Paula separated, and a dispute arose over whether Paula was holding her interest in the property in trust for Luigi.

Luigi argued that this was a clear case of a purchase money resulting trust, which as the Supreme Court of Canada explained in *Nishi v. Rascal Trucking Ltd.*, 2013 CarswellBC 1716 (S.C.C.), "arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property." In those circumstances, "the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution."

Furthermore, while prior to 2007 there was a serious question in law about whether the presumption of advancement should apply where, as in this case, a parent makes a gratuitous transfer to a child, in *Pecore v. Pecore* (2007), 37 R.F.L. (6th) 237 (S.C.C.), the Supreme Court of Canada definitively determined that the presumption of advancement does ***not*** apply when dealing with transfers between a parent and an independent adult child:

> [36] . . . First, **given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children.** As Heeney J. noted in *McLear* [*v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.)], at para. 36, parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. *Family Law Act*, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. *Family Law Act*, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. **There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.** [emphasis added]

What could be more clear than that?

Paula, on the other hand, argued that the registration in her name was *not* gratuitous because pledging credit (by going on the mortgage) constituted consideration. She also argued that since her name was put on title to avoid merger under the *Planning Act*, and as the only way merger could have been avoided was to ***give*** her both **legal *and* beneficial** title, Luigi must have intended to gift a beneficial interest in the property to her. The Ontario Court of Appeal dealt with a similar situation in *Holtby v. Draper*, 2017 ONCA 932 at paras. 68-69, where the Court of Appeal found that an intention to avoid merger under the *Planning Act* can be evidence that the transferor intended to gift beneficial ownership to the transferee. In fact, Paula argued that *Holtby v. Draper* offered a complete answer to Luigi's argument that he was the beneficial owner of the property. The plan to avoid merger under the *Planning Act* could not co-exist with a resulting trust in favour of Luigi, as Luigi and Albert, argued Paula, could not have it both ways. And, indeed, it is generally found that one cannot take one position for corporate, tax, trust, or other legal purpose and then try to take a different position for family law purposes. To do so is generally determined to be an abuse of process. See, for example: *Black v. Black* (1988), 18 R.F.L. (3d) 303 (Ont. H.C.); *Doucette v. Hache* (2010), 88 R.F.L. (6th) 115 (N.S. S.C.); *Wu v. Sun* (2010), 91 R.F.L. (6th) 24 (B.C. C.A.); *Rosenthal v. Rosenthal* (1986), 3 R.F.L. (3d) 126 (Ont. H.C.); *Battye v. Battye* (1989), 22 R.F.L. (3d) 427 (Ont. H.C.); *Dalgleish v. Dalgleish*, 2003 CarswellOnt 2758 (S.C.J.); *Fehr v. Fehr* (2003), 40 R.F.L. (5th) 71 (Man. C.A.); *Dillon v. Dillon* (2015), 65 R.F.L. (7th) 385 (Man. Q.B.); *Hu v. Li*, 2016 CarswellBC 3201 (S.C.); *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.); *Schroeder v. Schroeder* (2002), 23 R.F.L. (5th) 361 (Man. C.A.); *Este v. Esteghamat-Ardakani* (2018), 12 R.F.L. (8th) 120 (B.C. C.A.).

So where does that leave us?

After considering both parties' arguments, Justice Ryan Bell agreed with Paula. Since Luigi's intention ***at the time of the purchase*** (which is *the only time that matters* when determining intention with respect to a resulting trust) (see *Nishi* at para. 30 and *Pecore* at para. 59), was to avoid merger under the *Planning Act*, the only logical conclusion that could be drawn was that Luigi had intended to give Paula both legal and beneficial title to the property:

> [33] I reject this submission. On the whole of the evidence, **I find that Luigi and Albert's intentions were one and the same: to avoid merger under the *Planning Act* with a neighbouring property owned by Albert.** Luigi and Albert discussed the purchase of 415 Lisgar together. Luigi was aware of the *Planning Act* issue, having received advice from [the real estate lawyer], through Albert, that a second party was needed on title to avoid merger with an adjoining property. Albert's evidence is that he discussed adding Paula to title with Luigi and they agreed that they were "stuck" and "had no choice because there wasn't enough time to get [Luigi] approved." **The bank's internal notes confirm that Paula was added to title to deal with the merger issue.**
>
> . . .
>
> [38] In this case, **I find that Luigi intended to pass beneficial ownership in 415 Lisgar to Paula in order to avoid a legal consequence under the *Planning Act.* Accordingly, no purchase money resulting trust arose in Luigi's favour.** [emphasis added]

As a result, Justice Ryan Bell dismissed Luigi's claim for a beneficial interest in the property. She also concluded that she did not need to decide whether Paula's agreement to go on the mortgage

constituted sufficient consideration to defeat Luigi's resulting trust claim. But this being a full service Newsletter, in case you need to deal with this issue at some point in the future, you should be aware that the case law on this issue is most *entirely* inconsistent. For example, in *Banihashemi v. Behshad*, 2021 CarswellOnt 1668 (S.C.J.) at para. 44, Justice Nishikawa held that "a pledging of credit constitutes consideration such that a presumption of resulting trust will not arise." On the other, hand, Justice Kumaranayake held in *Bouffard v. Bouffard*, 2020 CarswellOnt 7066 (S.C.J.) at paras. 163-169 that a resulting trust can still be established "where a party is on title for the purpose of obtaining financing and remains liable on the mortgage with no contribution to the mortgage payments or the upkeep of the property." [See also: *Zajko v. Knight*, 2006 CarswellOnt 4858 (S.C.J.); *Andrade v. Andrade*, 2016 CarswellOnt 7727 (C.A.); *Engelage v. Engelage*, 1994 CarswellBC 1648 (S.C.); *Martiniak v. Riley* (1988), 14 R.F.L. (3d) 40 (B.C. S.C.); *J. (M.) v. W. (M.)* (2016), 80 R.F.L. (7th) 334 (B.C. S.C.)].

Ultimately, there can be no hard and fast rule as to whether going on a mortgage is sufficient consideration so as to defeat a claim of resulting trust. The correct approach, we suggest, was set out by the British Columbia Court of Appeal in *Bajwa v. Pannu*, 2007 CarswellBC 1143 (C.A.) at paras. 13-16, where it held that "if it is found as a fact that the person whose equitable interest is challenged did give value, there can be no resulting trust", but that "[w]hether value was given is a question of fact to be determined on the evidence in each case."

***Karatzoglou v. Commisso*, 2023 ONCA 295 – Trust Claims**

Can a Trust Claim be Weaponized? Still Constructively and Resultingly, "No."

In equalization jurisdictions, parties obviously want to assert as high a net worth as possible at the time of marriage (or the beginning of the relationship) and a low net worth at the time of separation so as to minimize their increase in net worth over the course of the relationship. That is standard strategic fare.

However, in both equalization and division of property jurisdictions, in the case of an asset that has declined in value during the relationship or post-separation, a titled spouse may wish the other spouse also has/had an ownership interest so as to force them to share in the declining value of the asset. And to do that, many years ago some clever spouses (or, should we say, some clever lawyers) came up with the idea of the "reverse resulting trust" or "reverse constructive trust" where by an ownership interest could be foisted/imposed upon the other spouse that was not actually claiming an interest in the property.

It may have been a clever idea, but the idea of imposing a trust interest on the other spouse was not looked upon favourably by the Courts. See, for example: *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. H.C.); *Amsterdam v. Amsterdam* (1991), 31 R.F.L. (3d) 153 (Ont. Gen. Div.); *Arshinoff v. Arshinoff*, 1993 CarswellOnt 1551 (Gen. Div.); *Arndt v. Arndt* (1993), 48 R.F.L. (3d) 353 (Ont. C.A.); *Serra v. Serra* (2007), 36 R.F.L. (6th) 66 (Ont. S.C.J.); and *Marshall v. Marshall*, 2017 CarswellOnt 10016 (S.C.J.) ("*Marshall*").

The reasons were well-explained by Justice George (as he then was) in *Marshall*. Generally, courts were concerned that to allow such claims of "reverse trust" (be it resulting or constructive) would lead to every asset purchased during a relationship possibly being subject to such a claim — and that certainly did not lead to judicial economy. Further, as Justice Weiler found in *Arndt v. Arndt* (1993), 48 R.F.L. (3d) 353 (Ont. C.A.) (albeit dissenting on the application of trust principles to that specific case):

> [6] The reverse constructive trust sits uncomfortably with trust principles. There is no real deprivation to the spouse who has put in work or money to the property. In fact it is this lack of deprivation that the titled spouse is complaining about. The deprivation to the titled spouse who has equally contributed work or money to the property does not arise as a result of the other spouse's actions but as a result of the fixed date chosen by the legislature for the calculation of the equalization payment.

So that was that. A clever idea that went down in flames.

But clever counsel cannot be deterred, and like an unjust enrichment Phoenix rising from the resulting trust ashes, it was not that long before similar, but different, arguments arose whereby upon separation one spouse ("Spouse A") claimed that the other spouse ("Spouse B") had a beneficial interest — not in the property of Spouse A — but in property owned by a third party, such as a parent. This would obviously serve to increase Spouse B's net worth on separation and reduce the equalization payment owed by Spouse A (or further increase the payment owed by Spouse B). As we said — clever — and interesting because this does not invoke the same floodgates argument as would a reverse trust argument.

This issue was recently addressed in *Morris v. Nicolaidis*, 2021 CarswellOnt 6258 (S.C.J.), where the husband sought to advance a trust claim on behalf of the wife against her father for a beneficial

interest in a condominium at the date of separation. Justice McGee dispatched with that claim as follows:

> [32] At the heart of this motion is an interesting question. Can a person advance a trust claim on behalf of a former spouse in order to increase that spouse's net family property and consequently, benefit the person's claim for, or defense to an equalization payment?
>
> [33] A claim for a constructive trust is a claim in equity that is privately held. It is not a public interest claim. The common law principle relating to private interest standing states that "one cannot sue upon an interest that one does not have." [citation omitted]
>
> [34] The Court of Appeal for Ontario outlined the legal tests for private and public interest standing in *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, a case in which a bank employee brought a civil suit against her employer because she believed that she had uncovered wrongdoing on the part of the bank against a third party. The Court of Appeal upheld the motion judge's dismissal of the case under Rule 21.01 (1), agreeing with the trial judge's analysis that the appellant lacked private interest standing because she did not have any financial interest in the outcome of the litigation, and had not pled any facts that demonstrated a direct personal legal interest in the trusts that were allegedly breached by the Bank.
>
> . . . . .
>
> [36] **Can an equalization claim create a direct personal legal interest that confers standing to make a trust claim on behalf of a spouse or a former spouse?**
>
> [37] **I find that it cannot. An equalization payment cannot change the titled or beneficial ownership of property between spouses.** The equalization scheme in Ontario is not based upon a division of property, but rather, it recognizes a spouse's non-financial contributions to a marriage by equalizing the increase in value in each party's net family property between the date of marriage and the date of separation, subject to variation per section 5(6) of the *Family Law Act*.
>
> [38] **A claim that a third person holds property in trust for a non-titled spouse, or that a non-titled spouse has a beneficial interest in property, or a monetary claim arising from the acquisition, maintenance or use of that property can only arise from the personal, direct deprivation of the non-titled spouse. An equalization claim is, at best, an indirect legal interest. It is therefore insufficient to confer standing to a person to make a trust claim on behalf of a non-titled spouse or former spouse.**
>
> [39] **Even trust claims between married persons are exceptional** because "[i]n the vast majority of cases any unjust enrichment that arises as a result of the marriage will be fully addressed through the operation of the equalization provisions of the *Family Law Act*," see *Martin v. Sansome*, 2014 CarswellOnt 759 (ONCA.) Writing for a unanimous court, Justice Hoy envisions in *Martin, supra*, that it will be a rare case in which monetary damages for unjust enrichment cannot be adequately addressed by an equalization payment; and in those cases, a variation of share per section 5(6) of the *Family Law Act*, should be invoked before consideration of a trust claim.
>
> [40] Although not in evidence here, there may be a situation in which a meritorious trust claim

> is not advanced by a non-titled spouse. **In such a case, the other spouse cannot step into the non-titled spouse's shoes and advance the claim himself because he has no direct personal legal interest in the trust claim; but he could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act.*** [**emphasis** added]

In *Karatzoglou*, a variant of this issue arose but as part of a motion for security for costs of an appeal. It arose in the discussion as to whether the underlying appeal was frivolous and vexatious and in considering the likely merits of the appeal.

Justice Harvison Young dealt with the issue as follows:

> [22] The underlying problem with [the Appellant's] position on this security for costs motion is that **it is premised on her assertion of an indirect trust claim which, as the authorities have recognized, effectively undermines the equalization scheme** as established by the *Family Law Act*, R.S.O. 1990, c. F.3. As McGee J. wrote in *Morris*, at para. 40, which the summary motion judge cited, it is not open to a spouse to step into the other spouse's shoes and advance a trust claim against a third-party on their behalf in the context of equalization proceedings. However, a spouse "could seek to vary the equalization between he and the non-titled spouse if the resulting payment is found to be unconscionable per section 5(6) of the *Family Law Act*." [**emphasis** added]

Therefore, whereas Justice McGee in *Morris* shut the door on one spouse making a trust claim on behalf of a former spouse, in *Karatzoglou*, Justice Harvison Young shut the door on one spouse actually claiming against a third party on behalf of the second spouse. By our count, that is two solid door closings.

However, while we agree with Justices McGee and Harvison Young, we do emphasize that there are *unquestionably* times where a spouse could assert a wholly valid resulting trust or unjust enrichment claim against a third party on separation, but does not actually assert such a claim, as that would increase their net family property. And that *unquestionably* creates unfairness. And if the reverse and "imposed" resulting and constructive trust are pushing up daisies, the only recourse we can see is to resort to a claim for unequal division, specifically s. 5(6)(h) of the *Family Law Act* in Ontario, which provides for unequal division where an equal division would be "unconscionable" having regard to "any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of **property**." As luck would have it, the definition of "**property**" in the *Family Law Act* is not restricted to property owned by the spouses and includes beneficial interests. Otherwise, we'd have a problem.

***Chhom* v. *Green*, 2023 ONCA 692 – Occupation Rent**

A Slightly New Bent on Occupation Rent

The law of occupation rent has changed significantly over the past few decades.

Ouster need no longer a requirement: *Foffano* v. *Foffano* (1996), 24 R.F.L. (4th) 398 (Ont. Ct. Gen. Div.); *Higgins* v. *Higgins* (2001), 19 R.F.L. (5th) 300; *Carmichael* v. *Carmichael*, 2005 NSSC 318; *Casey* v. *Casey*, 2013 SKCA 58; and *Hubley* v. *Fitzpatrick*, 2019 ONSC 305; *Virc* v. *Blair*, 2016 ONSC 49; *Holloway* v. *Devinish*, 2009 CarswellOnt 7235.

Occupation rent can now be an offensive claim rather than just a defence to an owner in possession claiming an accounting for (and contribution to) property expenses.

But courts have historically been, and continued to be, "slow" to award occupation rent in family law cases. Occupation rent in family law cases has been considered an "exceptional" award to be ordered "cautiously": *Foffano* v. *Foffano* (1996), 24 R.F.L. (4th) 398 (Ont. Ct. Gen. Div.); *Malesh* v. *Malesh*, 2008 CarswellOnt 3258; *Morrison* v. *Barclay-Morrison*, 2008 CarswellOnt 6956; *Guillemette* v. *Guillemette*, 2008 CanLII 3214; *Kazmierczak* v. *Kazmierczak*, [2001] A.J. No 955 (Q.B.); aff'd 2003 ABCA 227; *Kozun* v. *Kozun* (2001), 18 R.F.L. (5th) 115 (Sask. Q.B.); *McColl* v. *McColl* (1995), 13 R.F.L. (4th) 449; *A.(J.)* v. *A. (P.)* (1998), 37 R.F.L. (4th) 197 (Gen. Div.); *Seeman* v. *Seeman*, 2010 CarswellAlta 73.

And when occupation rent is ordered, it tends to be to just "even things up a bit": *Shen* v. *Tong*, 2013 BCCA 513; *McManus* v. *Mcmanus*, 2019 BCSC 123; *Stasiewski* v. *Stasiewski*, 2007 BCCA 205; *J.D.G.* v. *J.J.V.*, 2016 BCSC 2389.

No more, it would seem.

Along with the Court of Appeal for Newfoundland and Labrador (*Gosse* v. *Sorensen-Gosse*, 2011 NLCA 58), in *Chhom* v. *Green*, the Ontario Court of Appeal makes it clear that, in a family law case, while an award of occupation rent must be *reasonable*, it need not be exceptional. (In fact, in *Sorensen-Gosse*, the Newfoundland Court of Appeal held that the resisting party would have to show exceptional circumstances for an award of occupation rent to not be made.

In *Chhom*, the wife appealed a number of orders made following a half-day trial. The issues were straightforward: spousal support; equalization; and the disposition of the matrimonial home. This was a second marriage, there were no children of the marriage and the parties cohabited for nineteen years. The main assets were the matrimonial home and the husband's McMaster University pension.

The court ordered that the husband pay spousal support of $4,295.00 per month from December 1, 2022 to March 31, 2024, his retirement date, and $780 per month thereafter. He was also ordered to pay about $240,000 in equalization, most of this being on account of the husband's McMaster pension.
The matrimonial home was owned jointly, and the wife had enjoyed exclusive possession since the parties' separation in July 2017. For that reason, the trial judge ordered that the wife pay the husband $31,500 in occupation rent.

The wife argued that the trial judge erred in ordering her to pay occupation rent. She argued that the trial judge erred in not noting the requirement that an award of occupation rent be "exceptional." The Court of Appeal did not agree:

> [8]…We disagree. While it is settled law in Ontario that an order for occupation rent be reasonable, **it need not be exceptional**: *Griffiths* v. *Zambosco*, (2001) 54 O.R. (3d) 397. The appellant was unable to refer us to any Ontario authority in support of the argument to the contrary. [**emphasis** added]
>
> [9] In addition, the trial judge's reasons concerning the occupation rent were adequate. The relevant factors to be considered when occupation rent is in issue in a family law context are: the timing of the claim for occupation rent; the duration of the occupancy; the inability of the non-resident spouse to realize on their equity in the property; any reasonable credits to be set off against occupation rent; and any other competing claims in the litigation: *Griffiths* v. *Zambosco*, at para. 49.

The Court of Appeal was comfortable that the trial judge considered the relevant factors in concluding that an order for occupation rent was reasonable. Nothing to see here.

As a result of *Sorensen-Gosse* and *Chhom*, it should now be clear that an award of occupation rent is not exceptional. The claim (and award) must be grounded in the evidence and be reasonable.

***Ontario Securities Commission v. Camerlengo Holdings Inc.*, 2023 ONCA 93 – Fraudulent Conveyances between Spouses**

Leaving no *Stone* unturned.

Astute readers will notice that this is not a family law case. But it could be very useful for family law litigants as creative counsel might consider using it to further extend the reach of *Stone v. Stone* (2001), 18 R.F.L. (5th) 365 (Ont. C.A.), wherein the Ontario Court of Appeal considered the applicability of the Ontario *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*") where one spouse disposed of or transferred assets prior to separation and when his death was imminent.

By way of reminder, in *Stone*, the parties had been married for about 25 years. It was a second marriage for both parties and each had children from their first marriage.

Mr. Stone's death was imminent. In April 1995, without Ms. Stone's knowledge, Mr. Stone transferred most of his wealth to his two children from his previous marriage. Mr. Stone then died shortly later, in July 1995, and there was little left in his estate.

Ms. Stone elected to claim her equalization entitlement rather than under Mr. Stone's will. However, as Mr. Stone had given away the vast majority of his wealth to his children, Ms. Stone sought to void those transfers under the *FCA*.

The question was whether Ms. Stone qualified as a "creditor or other" under s. 2 of the *FCA*:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud **creditors or others** of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns. [**emphasis** added]

According to the Court of Appeal, in order to qualify as a "creditor or other," Ms. Stone had to have had:

> [25] . . . ***an existing claim*** against her husband at the time of the impugned conveyances, that is a right which she could have asserted in an action. [***emphasis*** added]

That is, for the transfer to be a fraudulent conveyance, Ms. Stone would have had to have a current right to equalization.

Furthermore, according to the Court of Appeal, there was no continuous running "debtor and creditor" account or relationship between spouses — so for a conveyance to be fraudulent, it would have had to take place on the occurrence of a "triggering event" under s. 5 of the *Family Law Act*, R.S.O. 1990, c. F.3:

> **Equalization of net family properties**
>
> **Divorce, etc.**
>
> 5 (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (1).

> **Death of spouse**
>
> (2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (2).
>
> **Improvident depletion of spouse's net family property**
>
> (3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation. R.S.O. 1990, c. F.3, s. 5 (3).

Therefore, because the Stones had *not separated* at the time of Mr. Stone's death, *and* because the Court of Appeal held that spouses are *not in a continual debtor-creditor relationship*, for Ms. Stone to be a creditor, she had to bring herself within s. 5(3) and show that Mr. Stone was improvidently depleting his assets. The problem, of course, was that, as Ms. Stone did not know that Mr. Stone was depleting his assets, how could she have brought an application under s. 5(3) to stop it?

To get themselves out of a slight jurisprudential corner, the Court of Appeal reasoned:

> [30] **Because Mr. Stone's death was known by all to be imminent, Mrs. Stone's claim to a right to equalization was also imminent** and would have been triggered by his death. One of the effects of s. 5(3) of the *Act* is to provide a remedy to a spouse in those circumstances where the other spouse seeks to divest himself or herself of his or her property in anticipation of death and in order to defeat the spouse's claim to equalization. **Had Mrs. Stone exercised that remedy by commencing an application, she would have been a "creditor or other"** of Mr. Stone within the meaning of s. 2 of the *Fraudulent Conveyances Act* on the date she commenced the application.
>
> [31] The trial judge made the following finding on the issue:
>
> . . . It is clear to me that Mrs. Stone may well have resorted to this provision and was at least entitled to the chance but of course **Mr. Stone kept the full extent and nature of his dealings a secret from her**. [citation omitted]
>
> [32] That finding is fully supported by the evidence including Mrs. Stone's stated intention to contest the will and, of course, by this litigation. I agree with the trial judge that **Mr. Stone and his children could not, by deliberate non-disclosure, deprive Mrs. Stone of her ability to establish the legal status of "creditor or other". Because she had the right to apply for equalization at the time of the transfers, but was deprived of her ability to exercise that right by the actions of Mr. Stone and his children, the parties to the transfers, she was a "creditor or other" within the meaning of the *Fraudulent Conveyances Act*.** [**emphasis** added]

Respectfully, it would have been simple — and "cleaner" — for the Court of Appeal to have accepted the proposition (put forward by the trial judge) that spouses — at least in an equalization province are, in fact, in (at least a quasi) continuous debtor-creditor relationship. And this is why *Camerlengo* is interesting.

In *Camerlengo*, the Ontario Court of Appeal held that it is not necessary for a creditor to actually be in existence — or even known — to the debtor at the time of an alleged fraudulent conveyance. Rather, it is sufficient that the debtor *perceived* the risk of a claim *from a general class of possible future creditors*, and conveyed property with the intention to evade such creditors — if they later arose.

A short recitation of the facts will suffice to show how *Camerlengo* may be useful in the hands of skilled family law counsel, or courts looking to do justice between parties.

Mr. Camerlengo was a retired electrician. He was the sole director of Camerlengo Holdings Inc. In 1996, Mr. Camerlengo transferred his interest in the matrimonial home to his wife, Ms. Camerlengo, for no consideration.

The plaintiff alleged that, at the time the property was transferred, Mr. Camerlengo was worried about exposure to personal liability from running his business, such that the transfer of the home was made with the intent of defeating present and future creditors.

Of course, by 2011, Mr. Camerlengo was in financial trouble (otherwise, this would not be much of a story). It was later discovered that one of Mr. Camerlengo's associates had defrauded many of his clients with a fraudulent investment scheme. To make a long story short, the plaintiff claimed that the transfer of Mr. Camerlongo's interest in the home was a fraudulent conveyance and sought to set it aside.

The motion judge dismissed the motion, concluding that the plaintiff was not within the class of people contemplated by s. 2 of the *FCA* because it was not a "creditors or others" at the time of the transfer of the home in 1996. Relying on *Wilfert v. McCallum*, 2017 CarswellOnt 18192 (C.A.), the motion judge concluded that a fraudulent conveyance claim must include particulars such as details of the creditors at the time of the transfer and/or of an impending risky financial venture.

The Court of Appeal overturned the motion judge:

> [11] We agree that the motion judge did not correctly interpret or apply s. 2 of the *FCA*. The case law interpreting s. 2 of the *FCA* is clear that a subsequent creditor — that is, a claimant who was not a creditor at the time of the transfer — can attack a transfer if the transfer was made with the intention to "defraud creditors generally, **whether present or future**.": *IAMGOLD Ltd. v. Rosenfeld*, [1998] O.J. No. 4690, at para. 11; see also *McGuire v. Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44. An intent to defraud creditors generally can be made manifest by taking steps to judgment proof oneself **in anticipation of starting a new business venture**. To plead a fraudulent conveyance on this basis, **it is not necessary that a claimant be able to identify a particular, ascertainable creditor that the debtor sought to defeat at the time of the conveyance**. It is enough, on the case law, to plead facts that support the allegation that **at the time of the conveyance the settlor perceived a risk of claims from a general class of future creditors** and conveyed the property **with the intention of defeating such creditors *should they arise*** . . . [all sorts of ***emphasis*** added]

The Court of Appeal found that the plaintiff had pleaded sufficient "badges of fraud" to support an *inference* of an intention to defraud future creditors so as to allow the fraudulent conveyance claim to at least continue to trial.

If the law is now "clear" that a claimant that was not a creditor at the time of a transfer can

subsequently attack a transfer if the transfer was made with the intention to defraud creditors generally — *whether present or future* — might it now be possible to argue that a spouse in the position of Ms. Stone would be a "creditor or other" and able to move against the conveyance without having to resort to s. 5(3)? In our opinion, that would make a great deal of sense. Time will tell.

Support

***Caron v. Caron*, 2023 ABKB 285 - Retirement**

May the Courts be With You

This case deals with a payor spouse's early retirement. It was particularly interesting as it involved a payor spouse seeking to vary support based on only his stated *intention* to retire and in the face of non-disclosure and considerable support arrears. Place your bets.

The parties separated in 2010 after 34 years of marriage. The Husband was 69 years old. The Wife had not worked outside of the home for 32 years and, due to health issues, was unlikely to be able to work again. Shortly after separation, the Husband was ordered to pay $3,500 a month in interim spousal support.

The Husband was, shall we say, "lackadaisical" in his payment of support and provision of disclosure; by the time of the trial in March of 2017, he was $6,478.96 in arrears of interim spousal support. After a two-week trial, the Husband was ordered to pay $4,500 a month in spousal support based on an income of $125,000.

The Husband failed to pay the support, and by June 2018, when he brought an application to stay enforcement of spousal support, cancel arrears and terminate spousal support, he was **$81,560.79** in arrears.

In her response, the Wife argued that the Husband's failure to pay the court-ordered support had caused her severe financial hardship, forcing her to rely on social assistance, having to live on approximately $800 a month.

In October of 2018, despite the Husband being over $80,000 in arrears, the Court ordered that the spousal support Order be stayed on the condition that the Husband pay $200 a month. It is unclear how the Husband managed to convince the Court to do this, as he had not provided proper disclosure for 2017 or 2018. This can only be explained by expert application of the Jedi Mind Trick. (If you don't get the reference, this is not the Newsletter you're looking for.)

The matter came before Justice Yungwirth in April of 2019. Her Honour set support using an income of $60,000 for the Husband and increased the monthly payment amount from $200 to $1,500. Justice Yungwirth set this amount on a "pre-disclosure" basis and remained seized of the matter. Her Honour also completed a few practical matters, such as actually having the Husband's pension divided as had been ordered at the 2017 trial.

Justice Yungwirth also set out a series of disclosure orders with which the Husband had to comply if his matter was to proceed. He did, eventually, do so.

At the hearing of the variation application, the Husband argued that the March 2017 spousal support order should be varied because he was about to retire. He claimed that a lifetime of working as a welder had caused him a number of health problems and that he would only be able to work at a reduced level for the next year before retiring altogether. The Husband was 69 years old at the time the variation was heard. The Wife was 65.

Justice Yungwirth confirmed that the Order being varied was the final spousal support Order from March 2017, and not any of the interim support orders. A court can vary an existing support Order

under section 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), with subsections 4.1 and 7 being particularly important:

> **Factors for spousal support order**
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
>
> **Objectives of variation order varying spousal support order**
>
> (7) A variation order varying a spousal support order should:
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

Now, as set out by the fine folks in Ottawa in *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.), a court must first determine if the conditions for variation — a material change in circumstances — exist. If they *do* exist, a court can then determine what variation of the existing order — if any — ought to be made in light of the change in circumstances. In making this determination, the court must consider the four objectives of spousal support set out in subsection 17(7) of the *Divorce Act*. Absent a material change, there is no jurisdiction to vary a support order: *Litman v. Sherman* (2008), 52 R.F.L. (6th) 239 (Ont. C.A.); *Droit de la famille - 132380* (2013), 37 R.F.L. (7th) 1 (C.A. Que.); *LMP v. LS* (2011), 6 R.F.L. (7th) 1 (S.C.C.).

In *LMP v. LS* (2011), 6 R.F.L. (7th) 1 (S.C.C.) (a to-this-day "must read") the Supreme Court confirmed the approach set out in *Willick*, and emphasized that a material change means a change which, if known at the time, would likely have resulted in different terms. The change must be substantial, continuing, and not considered in the prior Order.

In *Caron*, Justice Yungwirth is clear — and correct — that use of the terms "foreseeable" or "foreseen" in reference to when the previous Order was granted *should be avoided*. Words like "foreseeable" and "foreseen" are "*Miglin* words" not "*Willick* words." Circumstances such as retirement are always foreseeable — but that does not mean that retirement cannot be a material change. With respect to material change, the question is best thought of as "was this circumstance considered as part of the prior order?" or "what was actually contemplated by the parties or the Court in the previous agreement or Order?" Otherwise, we get into all sorts of trouble. For excellent explanations as to the differences, see *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.); *Stones v. Stones* (2004), 48 R.F.L. (5th) 223 (B.C. C.A.); *Moazzen-Ahmadi v. Ahmadi-Far*

(2016), 95 R.F.L. (7th) 88 (B.C. C.A.); *Goodkey v. Goodkey*, 2015 CarswellAlta 2269 (C.A.); *Droit de la famille - 141364*, 2014 CarswellQue 5386 (Que.); *Q.D.T. v. H.L.D.*, 2020 CarswellNB 142 (C.A.).

With this framework established, Justice Yungwirth considered the facts before her. A threshold issue was whether or not the Husband's application was premature as he had not yet actually retired; he only intended to retire — albeit quite imminently. *Generally*, the law frowns on variation applications based on anticipated future events: *Messier c. Delage* (1983), 35 R.F.L. (2d) 337 (S.C.C.); *Dufresne v. Dufresne*, 2009 CarswellOnt 5617 (C.A.); *Rondeau v. Rondeau* (2011), 90 R.F.L. (6th) 328 (N.S. C.A.); *Vaughan v. Vaughan* (2014), 44 R.F.L. (7th) 20 (N.B. C.A.); *Carey v. Carey* (2021), 59 R.F.L. (8th) 440 (B.C. S.C.).

In *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.), the Ontario Court of Appeal arguably developed an exception to this general principle: the "certainty of retirement exception." *Schulstad* involved a long-term traditional marriage. The Husband was a 69-year-old surgeon, and he applied to reduce his spousal support in 2 1/2 years, on his anticipated retirement date. The Court of Appeal found that there was enough evidence to allow the Court to conclude that the Husband's retirement was a certainty, *and* that there was also sufficient evidence regarding the parties' respective incomes and assets to enable the Court decide as to whether the Husband's application was premature:

> [21] The issue of prematurity is an issue at the first stage of the *Willick* analysis. In other words, prematurity is an issue impacting the threshold question of whether or not there has been a material change in circumstances. It is well-established that any decision to vary must not be made in accordance with events which may or may not occur: *Messier v. Delage*, [1983] 2 S.C.R. 401 (S.C.C.), at p. 416. An application to vary will be premature if based on speculative or uncertain changes in circumstances: *Dufresne v. Dufresne*, 2009 ONCA 682 (Ont. C.A.).
>
> . . .
>
> [28] **In most cases**, such an application so far in advance of the alleged material change in circumstances will run counter to the **fundamental principle articulated in both legislation and jurisprudence that a material change must have already occurred** in order for a court to have jurisdiction to vary a final order. This is because there is a real likelihood that the financial disclosure and other evidence in support of an alleged material change in circumstances will be speculative due to its prematurity. Encouraging premature, speculative applications to vary, which lack the necessary solid and certain evidentiary foundation, will simply increase the already extremely high costs of litigation in family law proceedings. [**emphasis** added]

That is, the Court must be satisfied that retirement is a near certainty, and there must also be sufficient evidence about the payor's current income and what it will be after retirement.

In *Caron*, the Husband was 69 years old. He claimed that his health issues were becoming worse as he got older due to the physical demands of his work as a welder. He stated that he wished to retire, but he wanted to know what his spousal support obligation would be in the event of his retirement.

The Husband had not set a retirement date. There was no evidence that he had given notice to his

employer that he intended to retire. He did begin collecting his union pension and CPP pension, but his overall circumstances, including his significant debt load, a bankruptcy in 2018 and his spousal support obligations had required him to continue to work.

Justice Yungwirth found that the Husband's advancing age, his worsening health issues and his desire to retire, considered together, amounted to a material change in circumstances. Her Honour was satisfied that the Husband had provided sufficient evidence to allow the Court to conclude that his retirement was a certainty.

With a material change established, Her Honour then considered the appropriate amount of spousal support. Justice Yungwirth took note of the Wife's difficult financial circumstances, her health issues and the impact she had suffered as a result of the Husband's failure to pay support. The Wife remained very much in financial need.

First, the Court set the arrears of support based on the Husband's actual income between 2017 and 2023 at $86,838. This was a *significant* discount as compared to what was owing under the final spousal support Order from March 2017, being $217,419.43.

Her Honour also pointed out that the Husband had been given a benefit by using the mid-range of the *Spousal Support Advisory Guidelines*, because with a marriage of this length, an argument could be made that the high range was more appropriate.

Justice Yungwirth found that, due to the Husband's failure to disclose, the income used to calculate the Husband's spousal support obligation at the trial in March 2017 was higher than his actual income, but the Court does not attach any consequences for that failure to disclose on the Husband. This is in stark contrast to the Supreme Court of Canada's direction regarding payors attempting to vary retroactive child support orders in *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.). It is also at odds with cases that deal with a variation application where a payor seeks to reduce support after income was previously imputed to them on account of insufficient disclosure; generally the payor must show that the basis for imputation has changed: *Trang v. Trang* (2013), 29 R.F.L. (7th) 364 (Ont. S.C.J.); *Power v. Power* (2015), 67 R.F.L. (7th) 138 (N.S. S.C.); *Ruffolo v. David* (2016), 75 R.F.L. (7th) 16 (Ont. Div. Ct.); *YMS Properties Inc. v. 9347-9285 Québec inc.*, 2022 CarswellQue 1309 (C.S.) at 338; *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.)); *Sugg v. MacNeil* (2016), 73 R.F.L. (7th) 171 (N.S. S.C.); *Beissner v. Matheusik*, 2015 CarswellBC 1848 (C.A.); *Pustai v. Pustai*, 2018 CarswellOnt 22491 (C.A.); *Janiten v. Moran* (2019), 32 R.F.L. (8th) 280 (Alta. C.A.).

Given the Wife's ongoing need and the possibility of the Husband continuing to work, Justice Yungwirth ordered that for as long as he was working, the Husband was to pay $1,000 a month in spousal support based on the employment income he claimed he might earn. Upon retirement, the monthly amount would drop to $328 a month.

Finally, Justice Yungwirth ordered that the Husband pay the $86,000 of arrears by way of monthly payments of $500 for as long as he was working — and that those payments reduce to $75 when he retires. By our math, it will take the Husband approximately 603 years to pay off the support arrears . . . without interest.

Lantz v. Lantz, 2023 ONSC 4220 – Child Support for High Income Payors

Ponies for Everyone!!

The parties married in 1995 and separated in 2019. They had two teenage children together.

After the parties separated, they agreed to appoint an arbitrator to resolve the issues arising out of the breakdown of their marriage. They reached a settlement in 2020 that was incorporated into a Consent Arbitral Award that was then incorporated into a Consent Order.

The husband was a partner at a large law firm in Toronto. His income was not straightforward, and when the parties settled, they did not know what he would earn in 2020. To address this issue, the Award and the Order provided that:

> a. the husband would pay full Table child support to the wife (since the children lived primarily with her) based on an income of $1,650,000 a year ($20,077 a month); but
>
> b. the husband's child support payments would be adjusted in accordance with his actual income for support purposes once more information was available.

The Award and Order also confirmed that the child support arrangements could be varied "if there is a material change in [one or both] of the parties or one or both of the children *whether foreseen or unforeseen*". [emphasis added]

Over the next several years, the husband ended up earning significantly more than $1,650,000 a year. He earned (approximately) $2 million in 2020, $2.5 million in 2021, and $2.6 million in 2022, which amounted to Table child support of $25,117 a month in 2020, $30,409 a month in 2021, and $31,321 a month in 2022 based on the child support tables.

The husband commenced a variation proceeding, taking the position that his increased income constituted a material change in circumstances, and that his monthly payments should be "capped" at $20,077 a month based on an income of $1,650,000 a year. Prior to the hearing, however, he changed his position, and raised the proposed "cap" to $25,477 a month based on an income of $2,100,000. According to the husband, anything more than $25,477 a month would "exceed the children's actual needs and would constitute an improper 'wealth transfer' from him to the [wife]" — an understandable position.

The wife responded by asking the court to enforce the Consent Order and require the husband to pay the additional child support he should have paid based on his income from 2020 to 2022, and to increase his monthly payments going forward.

In an effort to minimize costs and to ensure the case could be dealt with as quickly as possible, the parties agreed to ask the court deal with the matter by way of summary judgment. Justice Chang agreed that summary judgment would be an appropriate way to deal with the matter because "the facts necessary to adjudicate the competing claims are undisputed, the relevant evidence is entirely documentary, the determination of the disputed issues involves the application of the law to the facts, and, viewing the litigation as a whole, the summary judgment process will serve the interests of timeliness, affordability and proportionality."

We would add to this that by using a summary process, the parties and their lawyers complied with their obligation under Rule 2(4) of the *Family Law Rules* of helping the court promote its primary

objective under Rules 2(2) and 2(3) to "enable the court to deal with cases justly" by "(a) ensuring that the procedure is fair to all parties; (b) saving expense and time; (c) dealing with the case in ways that are appropriate to its importance and complexity; and (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases."

Since the terms of the parties' settlement had been incorporated into an Order, Justice Chang started his analysis by turning to s. 17(1)(a) and 17(4) of the *Divorce Act*, and s. 14 of the *Child Support Guidelines*, which state as follows:

> **Variation Order**
>
> 17(1) **A court of competent jurisdiction may make an order varying**, rescinding or suspending, retroactively or prospectively,
>
> > (a) **a support order or any provision of one**, on application by either or both former spouses; . . .
>
> . . . . .
>
> **Factors for child support order**
>
> 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.
>
> . . . . .
>
> ***Federal Child Support Guidelines*, SOR/97-175**
>
> **Circumstances for variation**
>
> 14 **For the purposes of subsection 17(4) of the *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;**
> >
> > (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
> >
> > (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the *Act*, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997). [emphasis added]

Justice Chang also considered the caselaw about the test for material change in the child support context, including *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.), where the Supreme Court of Canada explained that in addition to the list of circumstances set out in s. 14 of the *Guidelines*, a material change for child support purposes "could also include a change that, if known at the

time, would probably have resulted in different terms, such as a drop in income (Guidelines, s. 14(a); *Willick v. Willick* (1994), 6 R.F.L. (4th) 161 (S.C.C.), at p. 688; [*Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.)], at para. 39)."

The husband argued that the significant increase in his income (from an anticipated income of approximately $1.65 million to approximately $2 million in 2020, $2.5 million in 2021, and $2.6 million in 2022) met the test for a material change, while the wife argued that it did not, and suggested that "changes in the [husband's] income for child support purposes were anticipated and expressly provided for in the Final Order."

After considering both parties' arguments, Justice Chang agreed with the wife, and found that the husband had not established a material change that would allow the court to vary the consent order:

> [21] In my view, **the change in the [husband's] income is not one that, if known at the time that the Final Order was made, would probably have resulted in a different child support order being contained in it. As outlined above, the parties clearly contemplated possible changes in the [husband's] income and provided for adjustment of the amount of child support payable accordingly**. Indeed, on July 1, 2021, the [husband] upwardly adjusted his payments of child support in accordance with that mechanism, which increase was based on an income in excess of the $1,650,000.00 cap originally sought on his motion to change.
>
> [22] **There has therefore been no applicable material change in circumstances and, as such, I have no authority to vary the Final Order as requested by the [husband].** In light of my findings above, I need not determine the appropriateness of the [husband's] requested income cap and I decline to do so. [emphasis added]

As a result, Justice Chang dismissed the husband's request for a variation, and concluded that based on the husband's actual income for support purposes, the husband had underpaid child support by almost $220,000 from 2020 to 2022, and ordered the husband to pay that amount to the wife.

Very respectfully, we have some difficulty with the suggestion that an increase in a payor's income (from $1,650,000 a year to almost $2,600,000), and a corresponding increase in monthly support payments (from just over $20,000 a month to more than $31,000 a month) of the magnitude involved in this case would not constitute a material change in circumstances. Absent specific wording to the contrary in an agreement or court order, it is difficult to conceive of a scenario where a 55% increase in a payor's income (and corresponding child support payments), which is what happened in this case, would not constitute a material change. The impact of this decision is that a very significant increase in income — even if possibly contemplated — would not be a material change for child support purposes, despite s. 14(a) of the *Guidelines* noted above.

We wonder if what Justice Chang really meant to say was that: (a) the original Order required the husband to pay full Table child support based on his income for support purposes; and (b) the increase in the husband's income, while significant, was not so significant that it warranted varying the part of the original Order that required the husband to pay full Table child support based on his income as calculated in accordance with the *Guidelines*.

That being said, we think that the better way to analyze the issue before the court would have been to go back to first principles by considering s. 4 of the *Guidelines*, which deals with child support

payors who earn more than $150,000 a year, and states as follows:

> 4. **Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is**
>
> (a) the amount determined under s. 3; or
>
> (b) **if the court considers that amount to be inappropriate,**
>
> (i) **in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table** for the number of children under the age of majority to whom the order relates;
>
> (ii) in respect of the balance of the spouse's income, **the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children**; and
>
> (iii) the amount, if any, determined under s. 7. [emphasis added]

On this view of the case, the question to be answered would have been whether the court was satisfied that the $25,117 a month in 2020, $30,409 a month in 2021, and $31,321 a month in 2022 being sought by the wife was "inappropriate", which as you will recall from *Francis v. Baker* (1999), 50 R.F.L. (4th) 228 (S.C.C.) at para. 43, means "unsuitable", and requires the court to be satisfied that there is "clear and compelling evidence" in favour of departing from the Table amount determined under s. 3 of the *Guidelines*.

As there is no reference to any evidence about the children's needs in the decision, we suspect that this issue was not addressed in the materials before the Court, in which case there would have been no basis for the Court to conclude that the Table amount was inappropriate. But either way, since the husband effectively conceded that $25,477 a month would not be inappropriate (as that was the amount at which he proposed to "cap" his payments), clearly the wife was going to receive more than enough child support to meet all of the children's needs, whether reasonable or not.

We haven't written about s. 4 of the *Guidelines* in some time, but this case reminds us of the significant problems with it. For instance, while there is no question that raising children can be expensive, the levels of child support being awarded in some high income cases is simply outrageous, going well beyond what a parent could *possibly* spend on a child.

The *Guidelines* are also now 27 years old, so perhaps the time has come for the government to consider updating the $150,000 threshold for engaging s. 4, which at this point is so low as to be essentially meaningless. And, quite frankly, the Federal and Provincial governments should do more than that, because we can surely come up with a better system for dealing with these types of cases than a wholly discretionary regime where it is up to each individual judge to decide whether the Table amount of child support is "inappropriate" (read as "unsuitable") on a case-by-case basis.

We can do no better than repeat what Philip Epstein wrote about s. 4 almost 15 years ago in *This Week in Family L:aw* in his comment on *Desrochers v. Tait* (2008), 70 R.F.L. (6th) 165 (Ont. S.C.J.), a case where a motion judge ordered the father to pay the mother approximately $35,000

a month in interim child support for the parties' 5-year-old daughter. If you have not heard of the "three pony rule" (or if you do not remember it), make sure you read to the end:

> In 1997, while the Child Support Guidelines were still in draft stage, there was no provision initially for a "cap" on the amount of support that could be presumptively ordered, regardless of the payor's income. As a result of consultation with the senior family law bar, and by also looking at other "guideline" jurisdictions, the drafters of the legislation included Section 4, which allowed the court to deviate from the strict application of the Tables where the payor's income was over $150,000. The section provides that the court may look at the condition, needs and other circumstances of the children, if the court thinks the Guidelines are inappropriate. It was the intention of those advising on the Guidelines that the court would look at a reasonable means and needs test when determining appropriate child support in high-income cases.
>
> . . . . .
>
> The Court needs to take a fresh look at high-income child support cases. They represent a very small fraction of reported cases, and most high-income cases are settled out of court. Nevertheless, when judgments result in manifestly unfair awards, something needs to be done. We either need a comprehensive appellate review, or to reword the legislation and perhaps increase the cap to something like $350,000 (as in the Spousal Support Advisory Guidelines), or even $500,000, and change the language so that *Francis v. Baker* is legislatively overruled.
>
> That is not to say that children in high-income cases should not get significant support that includes discretionary amounts. No child, however, needs $35,000 per month, on a tax-free basis and legislation or court decisions that mandate that result simply create disrespect for the law. As some of the drafters of the legislation were told by an American expert while legislation was being considered, in high-income cases the child can have one pony, in extremely high-income cases, the child can have two ponies. In ridiculously wealthy cases, there can be three ponies, but three is the limit to the number of ponies.

***Zhao* v. *Xiao*, 2023 ONCA 453 – Special Provisions**

I will Gladly take a Matrimonial Home Today and pay you Tomorrow..

This was an appeal with respect to an application for child support and related relief. We are most interested in the child support claims.

The Appellant (the "Mother") argued that the original application judge and the Superior Court appeal judge made three errors to justify appellate intervention:

1. First, she argued that the application judge erred in dismissing her claim for retroactive child support from 2006 until 2013, granting it only from 2013 forward.

2. Second, she argued that the application judge erred in her approach to and calculation of the Mother's share of s. 7 expenses – which was ordered to be based on not individual income, but on *household* income.

3. Third, she argued that the application judge erred in determining that child support should end when the children reach the age of 25.

The Mother and the Respondent (the "Father") divorced in 2003. They had two children together: a son (born August 28, 1996) and a daughter (born June 17, 2002). In settling their affairs, they had agreed:

- the Father would pay child support of $950 a month for each child "according to the child support guideline";

- the amount of child support could be changed based on future changes in the Father's income, such that 17% of the Father's gross income would be paid monthly for each child until each child reached the age of 18;

- if the Mother remarried, the amount of child support would be reduced from 17% to 12.5% of the husband's gross income; and

- the matrimonial home would be transferred to the Mother in exchange for monthly payments totalling $74,600 (equivalent to the monthly child support commencing May 1, 2006) but to be repaid immediately upon the wife remarrying.

The Mother remarried in 2006, but she did not advise the Father, and the payment for the matrimonial home was not paid on an accelerated basis as stipulated in the agreement. Nor did the Father provide his annual income information, as would have been necessary to calculate the monthly child support payment to be offset against the amount owing on the property.

The Mother lived in China from 2003 to 2011, and since that time had been living in the United States.

In November 2016, having been unsuccessful in getting disclosure from the Father, the Mother commenced an application for child support and other relief.
The Application judge did not award retroactive child support for May 1, 2006 to June 2, 2013. The Superior Court appellate judge upheld that decision. The Mother was not happy about it. But the Court of Appeal was not concerned.

The Court of Appeal agreed that the agreement between the parties that child support would be offset commencing May 1, 2006 by the $74,600 owed by the Mother to the Father for the transfer of his share of the matrimonial home constituted "special provisions" that directly benefitted the children during this period. Ordering child support for this period would have been "unfair and inequitable" within the meaning of s.37(2.3) of the *Family Law Act*, R.S.O. 1990 c. F.3. (As the parties were divorced, query why the Court was not referencing s. 15.1(5) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp)).

Therefore, lest there be any doubt, allowing one spouse to reduce child support in exchange for the transfer of a home is an acceptable "special provision." The Court of Appeal specifically noted that, in considering the starting date for retroactive child support, the application judge was entitled to consider the property agreement – which was "intertwined" with the Father's child support obligations -- within the context of the special provisions set out in s. 37(2.3) of the *Family Law Act*. This is a very handy piece of information regarding special provisions, which can sometimes be risky: *Wright* v. *Zaver*, 2002 CanLII 41409 (Ont. C.A.). And, for the same reason, the application judge made no error in considering the property provisions when determining what weight to assign to the Father's failure to notify the mother of changes in his income between 2006 and 2013. It was a "no harm – no foul" situation.

The Court of Appeal also notes the "strong and well-known policy reasons for respecting agreements made between parties to family law proceedings whenever feasible." What is interesting here is that this oft-cited principle is here applied to an agreement respecting child support, which is reassuring to see. Here, as noted by the Court of Appeal, the agreement benefitted both Mother – *and the children* – who were then able to remain in the matrimonial home without any immediate payment obligation to the Father. In fact, it would have been unfair and inequitable to award retroactive child support for this period, ignoring these special provisions.

Well done Court of Appeal. It would have been concerning had this agreement not been given its due because "child support is the right of the child."

As noted above, the application judge also ordered that section 7 expenses be shared in proportion to the household income of the parties rather than in proportion to their individual incomes. And this was fine with the Superior Court appeal judge and with the Court of Appeal.

While the "guiding principle" in s. 7(2) of the *Divorce Act* is that section 7 expenses are shared by the spouses *in proportion to their respective incomes* – that is only a "guiding principle" that can be departed from in appropriate circumstances.

Here, the Father had remarried and was the sole support for his children and wife, who was ill and unable to work. On the other hand, the application judge had found that the Mother had been able to work in remunerative employment since 2008, but has decided not to. Furthermore, the children

were listed as her new spouse's husband's dependents for benefits purposes, and the new husband had covered all of the oldest child's educational expenses through his benefits as a university employee, along with the majority of medical and dental expenses.

In these circumstances, the application judge decided to set each party's share of s. 7 expenses based on their respective *household* income. That was just fine with the Court of Appeal and serves as a useful reminder that a "guiding principle" is not an "immutable principle."

Finally, the Court of Appeal also rejected the Mother's argument that the Superior Court appeal judge erred in upholding the application judge's finding that child support should end upon each child's 25th birthday. This was a discretionary determination by the application judge based on all the facts of this case -- which included the parties' original arrangement that child support would terminate at age 18. At the time of the appeal to the Court of Appeal, the older child was in medical school (and over 25) and the daughter was studying for an undergraduate degree. There was nothing "arbitrary" or "speculative" about ending support at age 25 on these facts. Good to know. For a relatively short decision, this case may proves very useful for some child support principles:

1. The notion of "special provisions" such that it would be "inequitable" to award Table child support is alive and well.

2. Section 7 expenses need not always be paid in proportion to individual income.

3. In appropriate cases, the Court can call for the termination of child support at a certain age in the future.

Eldridge v. Eldridge 2024 BCCA 21 – Determining Spousal Support Pursuant to a Review

If Harrison Ford Can work into His 80s…

This case started as most cases do – with the parties meeting on an archeological dig site in the late 1970s. If we had a dollar for every case that started that way…Anyway, the parties went on to work together, and they started an archeological consulting business in 1985.

The parties had four children, three of whom were independent, the last (and youngest) of whom had special needs.

The wife eventually got out of the "archaeology game" and focused on being the children's primary caregiver while Indiana Jones continued to work and grow the archeological consulting business. The parties separated in 2010 when the wife was 54 and the husband was 57.

After extensive negotiations, and with the assistance of a mediator/arbitrator, the parties executed a Separation Agreement in September of 2015. Under the terms of the Agreement the husband retained ownership of the consulting business, and the mother took sole title to the matrimonial home.

The husband was also required to pay spousal support in accordance with a formula: he was to pay $5,000 a month plus 30% of the his income in excess of $120,000.

The Separation Agreement specified that spousal support was to be paid starting in September 2016 and continuing up to and including the husband's 65th birthday. The Agreement permitted either party to request a full *review* of spousal support (entitlement and amount) under specified circumstances, including when either party reached the age of 65, when either party ceased employment after the age of 65, or if there was a change in income of 20% (either up or down).

In July of 2018, the husband moved to review the spousal support because he turned 65 years old. He also argued that he could review support because his income had increased by more than 20%. The husband argued that he intended to wind up the business in the near future; *but there was no concrete plans in that regard*.

The parties returned to their previous mediator/arbitrator. This time, the parties could not mediate their differences and the matter moved to arbitration. The arbitration began in January 2020 and ended in December 2020. At one point during the ongoing arbitration, there was an interim motion to reduce support.

The Arbitrator determined that the husband's spousal support obligation would gradually decline until it would end altogether in August of 2025, when the husband would be 72 years old. The Arbitrator's justification was that the husband required "certainty" so that he could make decisions regarding the sale of the business. The Arbitrator set out that this would give "substance" to the parties' Agreement which intended for the husband to work past age 65 only on a "voluntary" basis. As part of the Award, the Arbitrator stated, "I anticipate that his income will decline over the next five years and then any choice he makes to continue to work should be his to make without concern to his implication to spousal support."

The Arbitrator declined to award any support for the period between the start of the review -- July 2018 -- and the date he set for the new declining support amounts being May 2021. The husband had been paying $11,580.40 a month, which was based on his income in 2018, but he did not increase it as would have been required under the terms of the Separation Agreement.

Although the wife had made no such claim, the Arbitrator also set out in his award that the wife would have no claim to any of the future proceeds of the sale of the business.
The wife appealed to the B.C. Supreme Court.

The appellate judge overturned the Arbitrator's decision. The judge determined that the Arbitrator had erred in law by terminating support prior to the husband's retirement and by basing the amount of support on a speculative assessment of the appellant's future income. The Chambers judge ordered that the formula set out in the parties' Separation Agreement continue pending further court order or the agreement of the parties. The Chambers judge also ordered that the husband pay the wife the amount of spousal support owing to her under the Agreement for the period between the commencement of the review (July 2018) and her successful appeal.

Interestingly, the Chambers judge did not disturb the Arbitrator's decision that the wife would not share in the proceeds of the sale of the business in the future. The Arbitrator had the jurisdiction under the Separation Agreement to look at every aspect of the support regime and this gave certainty to both parties.

The husband then appealed the Chambers judge's decision to the Court of Appeal.

The first question to determine was the applicable standard of review in an appeal from a family law arbitration award under the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*") – presently not such an easy question to answer on the West Coast. As noted by the chambers judge at the first appeal, this issue has now been "percolating" in B.C. courts for some time -- the question being (at least in B.C.) whether *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65 requires appellate or administrative law standards of review to be applied in a statutory appeal from an arbitration award (see *Nolin* v. *Ramirez*, 2020 BCCA 274 at paras. 30–37 for a full discussion of the issue).

Ultimately – and unfortunately – the Court of Appeal was of the view that, in this case, as appellate intervention was justified under *any* standard of review, it was not necessary to answer the question. Therefore, the question lives for another day. [See also *Mann* v. *Grewal*, 2023 BCCA 88 at paras. 36–37.]

By way of comparison, in Ontario, the question was answered quite some time ago, and it was determined that the decision of an arbitrator deserves as much deference on appeal as does a decision of a trial judge. Therefore, in Ontario, for an arbitral decision to be overturned on appeal, the appellate court must find that the reasons reveal an error of law or a palpable and overriding error with respect to factual findings: *Rosenberg* v. *Yanofsky*, 2019 ONSC 6886; *Palmer* v. *Palmer*, 2010 ONSC 1565 (Ont. S.C.J.) at paras. 3 and 5; *Reati* v. *Racz*, 2016 ONSC 1967, at para. 28; *Gray* v. *Brusby*, 2008 CarswellOnt 4045 (Ont. S.C.J.) at para. 27.

In dismissing the husband's appeal, the Court of Appeal emphasized that this was a *de novo* review of support. Consequently, the decision-maker had to go back to consider the basic and fundamental principles of spousal support, including entitlement. And that is a good thing—at least for us – because it led to an *extensive* appellate summary of the fundamental principles of spousal support, including a discussion of the differences between compensatory and non-compensatory support. While this summary does not break any new ground, it is a helpful restatement of well-settled law. It is worth a read.

The Court of Appeal agreed with the Chambers judge that a termination of support was not appropriate, on the basis of an event that could – *at some time* -- happen in the future (the husband's winding down of the business and retirement). This was especially so given the lengthy relationship and the wife's strong entitlement to compensatory support. While the principles of certainty, autonomy and finality are certainly important; the Arbitrator had placed excessive weight on those factors – and the age of the payor -- allowing them to swamp the basic principles of spousal support, including the factors and objectives of support in the *Divorce Act*.

This is clearly the correct result based on the current state of the law. A Court should not determine support on the basis of a speculative future events that may or may not amount to a material change. This principle goes back to *Messier* v. *Delage*, [1983] 2 S.C.R. 401. See also *Dufresne* v. *Dufresne*, 2009 ONCA 682; *Rondeau* v. *Rondeau*, 2011 CarswellNS 15 (C.A.); *Armstrong* v. *Armstrong*, [1992] O.J. No. 3094; *Vaughan* v. *Vaughan*, 2014 NBCA 6; *Provoost* v. *Provoost* 2016 ONSC 1774; *Carey* v. *Carey*, 2021 BCSC 1537 at para. 37; *A.E.E.* v. *M.T.E.*, 2022 BCSC 1534 (future retirement); *Regisford* v. *Regisford*, 2017 ONSC 489 at para. 63; *Schmidt* v. *Schmidt*, 1998 CanLII 14586 (B.C.C.A.) at paras. 25 and 44. These cases stand for the proposition that an order terminating support should only be made when the payor's "working life has clearly come to an end": *Renwick* v. *Renwick*, 2007 BCCA 521; *Eldridge* v. *Eldridge*, 2024 BCCA 21.

Two notable exceptions to this rule can be found in *Schulstad* v. *Schulstad*, 2017 ONCA 95 and *Caron* v. *Caron*, 2023 ABKB 203, where the Ontario Court of Appeal and Alberta Court of King's Bench allowed variation based on retirement being a *near certainty* in the short term, whereupon the payor's income would *definitely* decrease. So there is some "wiggle room" in the rule, but we would not recommend relying on the exceptions in any but the clearest of cases.

The Court of Appeal did disagree with the Chambers Judge's decision on retroactive support. The Chambers judge did not consider whether the formulas set out in the Separation Agreement represented a fair amount of spousal support in the context of the review. Once the *de novo* review was triggered, it required a full and complete analysis as to what spousal support was payable. Absent some limiting conditions, in an agreement or order, a *de novo* review of support is just that – a *de novo* review – encompassing issues of entitlement, amount and duration: *Domitri* v. *Domitri*, 2010 BCCA 472 at paras. 38–39; *Morck* v. *Morck*, 2013 BCCA 186 at para. 17; *M.T.* v. *J.S.*, 2023 BCCA 64.

According to the Court of Appeal, the Chambers Judge should have either completed that analysis or remitted it back to the Arbitrator for determination, which is what the Court of Appeal ordered.

Disclosure Issues

***F.C.A.S. v. C.E.S.*, 2023 BCSC 1098 – Express Waiver of Privilege**

Express Waiver of Privilege and Clint Eastwood.

Sometimes we get so caught up in arguments about the implied waiver of solicitor-client privilege, we forget that privilege can also be *expressly* waived by disclosing and/or referencing otherwise privileged communications.

The parties started living together in 2012. They married in 2015, entered into a marriage agreement in 2016, had two children, and separated in 2020. Upon separation, the wife looked to set aside the agreement for duress.

On this interim application, the husband was claiming a declaration that the wife waived privilege over the following (the "communications"):

1. Her former lawyers' file;
2. All communications between the wife and her former lawyer with respect to:
    a. The parentage of the children;
    b. Family violence;
    c. The date of separation; and
    d. Parenting time with the children and drug test reports and results.

The husband was also seeking an order that the wife's former lawyers produce copies of the communications.

In 2022, the wife filed an application to amend her pleadings to withdraw admissions about the separation date and the children's parentage, to make allegations against the husband's parentage, and to allege family violence in 2016 when the marriage agreement was formed.

In support of that application, the wife filed an affidavit that attached email correspondence between herself and her former lawyers which discussed the biological parentage of the children, parenting time, and family violence.

The obvious question, therefore, was whether the wife had waived solicitor-client privilege over parts of her former lawyers' files by explicitly disclosing correspondence between her and her former counsel.

We are all used to saying that waiver of privilege can be express or implied. But we so regularly address the alleged implied waiver of privilege, that we sometimes forget about express waiver. A court will find that privilege has been waived where a party takes a position inconsistent with the maintenance of privilege — such as by disclosing them — or makes legal assertions that make it unfair for them to rely on privilege: *Glegg c. Smith & Nephew inc.*, 2005 CarswellQue 2643 (S.C.C.) at para. 19; *ProSuite Software Ltd. v. Infokey Software Inc.*, 2015 CarswellBC 320 (C.A.) at para. 23.

Or, as written by Justice McLachlin way-back-when in *S. & K. Processors Ltd. v. Campbell*

Avenue Herring Producers Ltd., 1983 CarswellBC 147 (S.C.):

> [6] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication . . .

Where privilege is waived, production of all documents relating to the acts contained in the communication will be ordered: *George Doland Ltd. v. Blackburn Robson Coates & Co.*, [1972] 3 All E.R. 959 (Eng. Q.B.). The waiver of privilege applies to the entire subject matter of the communications; a party may not "cherry-pick" privileged communications, disclosing what is helpful for that party and claiming privilege over the rest: *Leitch v. Novac*, 2017 CarswellOnt 18669 (S.C.J.); *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CarswellOnt 4488 (S.C.J.) . See also *Pacific Concessions Inc. v. Weir*, 2004 CarswellBC 3004 (S.C. [In Chambers]); *Spicer v. Spicer*, 2016 CarswellOnt 1745 (S.C.J.).

Here, the husband argued that the wife had expressly waived solicitor-client privilege over the areas of the communications she had appended to her affidavit.

In response, the wife argued that she did not intend to waive privilege — and to emphasize that, she pointed to a paragraph in her affidavit stating exactly that: "I do not generally waive privilege between my former counsel and me and only provide this correspondence to prove that the errors in the pleadings were inadvertent errors on the part of my counsel and me."

But, to paraphrase Clint Eastwood in The Unforgiven: "Intention's got nothin' to do with it."

Rarely would privilege be found to have been waived if it was a matter of intention. As noted by the B.C. Court of Appeal in *Brown v. Clark Wilson LLP*, 2014 CarswellBC 1340 (C.A.), the intention to waive privilege is essentially irrelevant to a determination of waiver of privilege:

> . . . A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. **He may elect to withhold or to disclose, but after a certain point his election must fail.** [**emphasis** added]

Here, there could be no question that, in actually *appending* the communications to her affidavit, the wife had expressly waived privilege; and by disclosing *part* of the communication, the wife had expressly waived privilege over *all* communications with respect to the issues raised in the emails. It was a matter of fairness.

As a result, Justice Murray quite properly found that the wife had expressly waived privilege over communications with her former counsel relating to the parentage of the children, family violence, date of separation, parenting time with the children and her drug test reports and results, and she ordered the wife's former lawyers to provide copies of all communications relating to these subjects.

Solicitor-client privilege is no longer an evidentiary principle. It is a general principle of substantive law and a principle of fundamental justice within the meaning of section 7 of the

Charter: *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 CarswellQue 2477 (S.C.C.); *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 CarswellBC 295 (S.C.C.); *R. v. McClure*, 2001 CarswellOnt 496 (S.C.C.); *Canada (Procureur général) c. Chambre des notaires du Québec*, 2016 CarswellQue 4459 (S.C.C.). But as important as it is, it can be lost in an instant. Fait attention.

McDonald v. McDonald, 2023 NSSC 153 – Disclosure and Proportionality

Ah…The Twin Warm Blankets of Relevance and Proportionality

We frequently come across cases where a judge has ordered a family law litigant to produce financial disclosure, and we have lost count of the number of cases that have referred to non-disclosure as the "cancer of family law." There are also, however, many litigants who try to weaponize the disclosure process, trying to force the other side to produce excessive and irrelevant disclosure. Some even use overbroad disclosure requests strategically to try to cajole concessions – or worse, in the hopes of defaults in disclosure that might then lead to pleadings being struck. And some are just looking to be nosy.

Despite the prevalence of this type of improper behaviour, only rarely do we see decisions where a judge acknowledges that although non-disclosure is a serious problem in family law, the answer cannot just be to order both parties to produce all of the disclosure the other party has requested. Although *McDonald v. McDonald* may not necessarily break any new ground, it is one of those rare decisions where a judge rejected a request for relatively basic financial disclosure (bank and credit card statements) on the basis that the requested information was not sufficiently relevant and proportionate to the issues in the case so as to warrant invading the other party's privacy or forcing them to spend time and money on producing it.

The parties in *McDonald* were married and had four children together. The husband was self-employed and ran several small businesses, while the wife worked for the government. The decision does not say when the parties separated. However, we suspect they did so in or around 2017 or 2018, because by January 2019 they had signed a final and comprehensive Separation Agreement that resolved all of the issues arising out of the breakdown of their relationship, including property division and support based on the husband earning $120,000 a year and the wife earning $79,000 a year.

Both parties received independent legal advice before they signed the Separation Agreement, and the Agreement contained express clauses confirming that:

- The parties had signed the Agreement "without undue influence, fraud, misrepresentation or coercion", and having "read the entire Agreement and is signing it voluntarily[.]"

- Both parties had provided full disclosure, and they were each satisfied they had "received sufficient financial information from the other and waive production of any further documents dealing with financial information[.]"

- The parties "hereby waive financial statements in respect of claims made in this action[.]"

In June 2020, the husband applied for a divorce. Although the parties had already signed their comprehensive Separation Agreement, the wife responded to the husband's Application by bringing a motion to compel him to produce extensive financial disclosure, including but not limited to his personal and business bank and credit card statements going back to at least the time

the parties signed the Separation Agreement (January 2019). In support of her motion, the wife alleged that she had signed the Separation Agreement "without any disclosure", and that she intended to "contest all issues arising from the Separation Agreement".

In response to the wife's motion, the husband voluntarily produced extensive financial disclosure, including personal and corporate tax returns and notices of assessment, and the financial statements and bank and credit card statements for his companies. He also confirmed that he was prepared to retain an expert to calculate his income for support purposes. Producing this information voluntarily was a wise strategic decision by the husband (or his counsel), as this information was undoubtedly relevant to the wife's claim for spousal support in the face of the Separation Agreement pursuant to *Miglin v. Miglin*, 2003 SCC 24, and her claim for child support in accordance with the *Child Support Guidelines*, SOR/97-175.

However, the husband was not prepared to produce his personal bank and credit cards statements from 2019 onwards, and he argued that his post-separation spending was irrelevant to the issues before the Court.

Associate Chief Justice O'Neil started his analysis by reviewing the leading cases about disclosure in Nova Scotia, including *Laushway v. Messervey & Sobeys Group Inc*., 2014 NSCA 7 where the Nova Scotia Court of Appeal set out the following non-exhaustive (and helpful!) list of ten considerations that Courts should consider when deciding whether a particular document or category of documents ought to be produced:

> [32] …
>
> 1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
>
> 2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;
>
> 3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
>
> 4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
>
> 5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
>
> 6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?

7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?

8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?

9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?

10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding? [underlining in original]

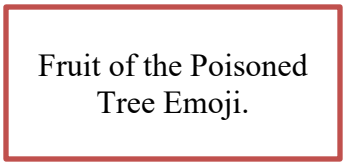
After considering the "*Laushway* critera", Associate Chief Justice O'Neil was not persuaded that further details about the husband's post-separation spending were relevant to the issues before the court, particularly when weighed against "the privacy interests of [the husband], the need for proportionality and the costs and inconvenience of procuring the sought-after information weights[.]" As a result, Associate Chief Justice O'Neil dismissed the wife's request to compel the husband to produce his personal bank and credit card statements since 2019.

The outcome would likely have been different had the wife had put forward a reasoned explanation for why she needed the information she had requested. For example, the husband's post-2019 personal bank and credit card statements may have become relevant had the wife adduced evidence to suggest that the husband had undisclosed sources of income as he was living a lifestyle beyond what he should have been able to afford based on his disclosed sources.

However, it appears that the only explanation the wife offered for why she was seeking the husband's personal bank and credit card statements was that she believed these documents were somehow "relevant" to the husband's child and spousal support obligations, and she felt she was "entitled" to them. These were not sufficient reasons to force the husband to tell his former spouse how he had spent every dollar he had earned in the almost four years that had passed since the parties' signed their Separation Agreement.

More disclosure is not always better; too much disclosure can be harmful. It is much easier to ask questions that to produce the answers and disclosure orders must be fair to both sides. We are going to keep this case on hand to send to opposing parties who insist on requesting extensive disclosure that is not relevant or proportionate to the issues in the case. You may want to do so too. You can put it in a folder along with cases like *Boyd* v. *Fields*, 2006 CarswellOnt 8975; *Abrams* v. *Abrams*, 2010 ONSC 2703; *Federation* v. *Babini*, 2014 BCCA 143; *Kochar* v. *Kochar*, 2015 ONSC 6650; *Chernyakhovsky* v. *Chernyakhovsky*, 2005 CarswellOnt 942 (S.C.J.); *Kovachis* v. *Kovachis*, 2013 ONCA 663; and *Mullin* v. *Sherlock*, 2018 ONCA 1063.

***D(SJ) v. P(RD)*, 2023 ABKB 84 — Surreptitiously Obtained Text Messages**



We have written about a number of recent cases dealing with the admissibility of surreptitious video and audio ***recordings*** in family law cases, including Justice Kurz's decision in *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) and Justice Turcotte's decision in *Heimlick v. Longley* (2022), 71 R.F.L. (8th) 454 (Sask. Q.B.) (see the 2022-16 (May 2, 2022) and 2022-21 (June 13, 2022) editions of *TWFL*).

But *D(SJ)* is the first family law case in recent memory that deals with the admissibility of surreptitiously obtained ***text messages***. [There are some criminal cases that deal with such evidence: *R. v. Pelucco*, 2015 CarswellBC 2386 (C.A.); *R. v. Marakah*, 2017 CarswellOnt 19341 (S.C.C.), rev'g, 2016 CarswellOnt 10861 (C.A.); and *R. v. Jones*, 2016 CarswellOnt 10858 (C.A.), aff'd, 2017 CarswellOnt 19343 (S.C.C.) (suggesting there is a reasonable expectation of privacy in text messages even once sent); *R. v. Bridgman*, 2017 CarswellOnt 20155 (C.A.); and *R. v. Mills*, 2019 CarswellNfld 161 (S.C.C.) (suggesting there is no reasonable expectation of privacy in social media chats).]

The parties were in a common law relationship for more than 20 years before they separated in 2018. They had two children together, but never married.

After they separated, the father retained possession of the parties' truck. Although the loan for the vehicle was in the parties' joint names, the record was unclear as to whether the truck was actually jointly owned or owned solely by the father.

The parties did not service the truck loan, and the bank took steps to repossess it. In early 2021, a bailiff contacted the mother, informed her that he would be seizing the truck the next day from the father's niece's home (where else would one keep a truck?), and asked her to meet him at the niece's home so he could serve her with various documents.

When the mother arrived at the niece's home, she noticed there were a number of personal items in the vehicle, including the father's old cell phone. When the bailiff advised the mother that he intended to dispose of the contents of the vehicle, she used her key to enter the vehicle and remove the personal items, including the father's phone.

Meanwhile . . . the father's niece saw the mother and the bailiff outside her house. She contacted the father, and he immediately started emailing the mother to tell her not to remove ***anything*** from the truck. The mother admitted she received the father's emails. She claimed she had already removed the contents from the truck by the time she received them, but this seems to be a distinction without a difference, as the mother clearly knew that the father did not consent to her taking his belongings, including his old phone.

After the mother left the father's niece's home, she used a computer program called "Decipher Tools" to download the father's text messages as a PDF. (As an aside, while we are not familiar with this particular program, this type of program is an invaluable tool for family law lawyers, because instead of having your client send you multiple screenshots of text messages, the client can simply download the complete text message chain in chronological order as a PDF. This will make it much easier for you, and the judge if you want to rely on the messages in court, to review them. If you have not already tried one of these programs, you should.)

The mother wanted to rely on some of the text messages she obtained from the father's phone as they apparently showed he had made arrangements with his employer to artificially reduce his income for support purposes, and that he intentionally let the bank foreclose on the family home — the proverbial "smoking text messages."

The father argued that the text messages should be excluded because of how they were obtained.

To decide the issue, Justice Leonard started by reviewing the Supreme Court of Canada's recent decision in *R. v. Schneider*, 2022 CarswellBC 2747 (S.C.C.), where the Court summarized the basic principles that apply when determining whether a particular piece of evidence is admissible, including the following:

- "Evidence that is relevant to an issue at trial is admissible, as long as it is not subject to an exclusionary rule and the trial judge does not exercise their discretion to exclude it[.]" [para. 36]

- When deciding whether to admit a piece of evidence, "[j]udges must consider: (a) whether the evidence is relevant; (b) whether it is subject to an exclusionary rule; and (c) whether to exercise their discretion to exclude the evidence." [para. 36]

Relevance

- To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact at issue[.] [para. 39]

- "Judges, acting in their gatekeeping role, are to evaluate relevance 'as a matter of logic and human experience'[.]" [para. 40]

- "The evidence does not need to 'firmly establish . . . the truth or falsity of a fact in issue' . . . , although the evidence may be too speculative or equivocal to be relevant[.]" [para. 40]

- "The threshold for relevance is low and judges can admit evidence that has modest probative value[.]" [para. 40]

- "A judge's consideration of relevance 'does not involve considerations of sufficiency of probative value' and 'admissibility . . . must not be confused with weight'[.]" [para. 40]

- "Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance." [para. 40]

Exclusionary Rules

- "Evidence that is relevant is ordinarily admissible, subject to various exclusionary rules." [para. 46]

Judicial Discretion To Exclude Evidence

- " . . . judges must determine whether they should exercise their discretion to exclude evidence by balancing probative value against prejudicial effect." [para. 59]

- "Probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence[.]" [para. 60]

- "Prejudicial effect relates to the likelihood that a jury [or trier-of-fact] will misuse the evidence[.]" [para. 60]

- "Weighing probative value against prejudicial effect has been referred to as a 'cost benefit analysis'[.]" [para. 60]

There was no real question in *D(SJ)*, that the evidence in question was *relevant* to the support issues. As Justice Leonard explained in her decision, "[a]n accurate determination of the parties' income is crucial to the determination of the amount of spousal and child support owed."

With respect to the other two parts of the test, while the father did not raise any specific exclusionary rules, he did argue that the court should exclude the text messages because they had been obtained in violation of his privacy rights and because their prejudicial effect outweighed their probative value.

Justice Leonard was clearly concerned about the effect the admission of surreptitiously obtained text messages could have on the administration of justice, and about whether admitting them in this case might "encourage these litigants and others to engage in odious behaviour in search of a litigation advantage." However, after making it clear that she was not condoning the mother's behaviour, Justice Leonard ultimately concluded that despite the mother's improper conduct, the probative value of the text messages, and risk that the mother and children would be deprived of appropriate support if they were excluded, persuaded her to permit the mother to rely on the text messages at trial:

> [19] However, **given the circumstances, I am of the view that [the mother's] actions do not rise to the level of being "highly offensive to a reasonable person," and therefore do not cry out for judicial intervention**. [The privacy tort cases of] *Shillington* [2021 ABQB 739] and *Jones* [2012 ONCA 32], were both cases where the privacy breaches at issue were the result of abuses of power on the part of the Defendants. The same cannot be said in this case. [The father] deactivated the Cell Phone after he obtained a new phone. **He left the Cell Phone in a truck that was being repossessed by bailiffs. [The mother] was jointly responsible with [the father] for the truck loan. [The mother] had a key to the truck and was present at the location of the truck to be served with paperwork by the bailiff. There is no evidence that [the mother] was aware that the Cell Phone was in the truck before she arrived on the scene**, nor is there any evidence that the bailiff at the scene or [the mother] were aware that [the father] had arranged with the bailiff's office to pick up his belongings two weeks later. **In the circumstances, I conclude that the text messages are not inadmissible because of the violation of [the father's] privacy interest.**
>
> . . . . .
>
> [40] **I acknowledge that admitting these text messages may give rise to concerns about**

> **the administration of justice.** Moreover, **I am particularly concerned that this decision may encourage these litigants and others to engage in odious behaviour in search of a litigation advantage.** I do not condone [the mother] taking the phone and accessing its contents. [The father] did not waive his privacy interest in these text messages. **However, the messages may shed light on an issue that is notoriously difficult to resolve. That probative value outweighs [the mother's] conduct in this case because of the unique circumstances that led to [the mother] being in possession of the Cell Phone.** [emphasis added]

As the father no longer had access to the text messages on his old phone, Justice Leonard also ordered the mother to give him a complete copy of all of the text messages she had downloaded, and allowed him direct access to the phone so he could verify that the mother had not altered or omitted any relevant messages.

So, it seems that, with this start, the question of admissibility of surreptitious text messages may be headed down the same path as that for surreptitious audio or video evidence: courts condemn the "odious" practice; courts say it should not happen; and then the evidence is allowed in if it is highly probative. So we ask this: Why the charade? Why not just default to the most basic rules of evidence: relevant evidence is admissible unless the probative value is outweighed by its prejudicial effect; and the method of obtaining the evidence can be considered at the "prejudicial effect" stage?

Applying that standard, we certainly understand why Justice Leonard admitted the evidence in this case. The evidence in question was directly relevant to the key issue of the father's true income; the evidence was highly probative; and the manner in which the evidence was obtained was not terribly offensive — certainly not as egregious as, for example, breaking into the father's house or hacking into his phone or computer. While we keep the sentiments of Justice Kurz from *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) in mind: "routinely allowing our courts to reward a party's attempt to secretly spy on the other by admitting the fruits of that conduct into evidence contributes to the corrosiveness of matrimonial litigation;" we note that the conduct in question here does not amount to one spouse "spying" on the other. Rather, the conduct here amounts to using the father's own texts to shed light on his own ill-conceived plan.

2177546 Ontario Inc. v. 2177545 Ontario Inc., 2023 ONCA 693 — Consequences for Intercepting Privileged Information

The next time a client brings you an e-mail that seems too good to be true.

Does this sound familiar? Your client seems to "know" information about the other side that they should not know? Or maybe even provides you with emails or other documents between the other side and third parties — possibly even counsel? Big problems. And the excuse usually offered is that "the emails were not password protected" or "s/he knew I knew the password." Does that matter? Read on.

This is not a family law case — but given the propensity of some family law clients to "snoop" family law counsel should take notice and offer appropriate warnings to clients. Curiosity killed the cat; and it might do the same to family law claims. Privilege is no less important in family law cases: *Eizenshtein v. Eizenshtein* (2008), 62 R.F.L. (6th) 182 (Ont. S.C.J.) and the principles at play here apply equally in family law cases. Spouses snooping through the private, confidential — and privileged — records of their separated spouses is common enough in family law cases that counsel must be aware of the possible very serious consequences when advising their clients. So again — read on.

In this case, the Court of Appeal for Ontario upheld an application judge's decision to strike the Respondent/Appellant's (the "Appellant") response to an application, allowing the Applicant/Respondent's (the "Respondent") application to proceed undefended. The application judge struck the Appellant's response because its principal, Mr. Halyk, accessed and reviewed the Respondent's privileged information relevant to litigation between the parties, including discussions between the Respondent's principal, Mr. Labiris, and his counsel regarding settlement offers, litigation strategy, and negotiating strategy.

As the Supreme Court of Canada has noted, a breach of privilege "creates a serious risk to the integrity of the administration of justice" and, to prevent this, the courts must act "swiftly and decisively": *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.) at para 34.

The facts are not complicated.

Mr. Halyk and Mr. Labiris were brothers-in-law and business partners. They worked together on various real property ventures under the name of the "Zitia Group".

In July 2008, their companies acquired, as tenants-in-common, a vacant piece of development land in Simcoe, Ontario. When their relationship broke down in 2021, an application was brought before the Committee of Adjustments to sever the property into two equal 51-acre parcels. Mr. Halyk's and Mr. Labiris' signatures appear on the partition application, and Mr. Labiris and a colleague swore that they witnessed Mr. Halyk sign it.

Mr. Halyk denied that he signed the partition application and claimed that his signature was forged. He insisted he did not want to sever the property because it was more valuable sold as a single parcel, and if it was partitioned, he would receive less developable land.

In April 2021, the Committee approved the partition application and issued a Consent to Sever, which will expire on April 21, 2024 if not fully implemented.

In May 2021, Mr. Halyk appealed the approval of the Consent to Sever to the Ontario Land Tribunal, claiming he did not consent to the partition application. In January 2022, he withdrew his appeal but refused to implement the Consent to Sever by signing documents to convey the property into two parcels. As a result, the Respondent started an application under the *Partition Act* to sever the property.

During the litigation, Mr. Halyk gained unauthorized access to Mr. Labiris' privileged emails, read some, and retained copies that pertained to the litigation. These email included Mr. Labiris' proposed settlement terms and discussions with counsel about negotiating strategy, litigation strategy, settlement proposals, and strategic advice. For example, he reviewed and printed an email thread that included emails between Mr. Labiris and his lawyer about the terms of an offer to settle.

In March 2023, Mr. Labiris suspected that Mr. Halyk might have accessed his confidential information. He contacted Mr. Kopke, a technician who had provided IT services to the Zitia Group. Mr. Kopke advised that he had granted Mr. Halyk full access to Mr. Labiris' email account in April 2021. This was two weeks after a contested shareholders' meeting that led to Mr. Halyk beginning an oppression claim in May 2021.

After discovering that Mr. Halyk had accessed Mr. Labiris' confidential information, the Respondent brought an application to stay the Appellant's proceeding and sought judgment in its favour.

At the hearing, Mr. Halyk did not deny that he had gained access to Mr. Labiris' email account. Instead, he argued that the email account was a general email account for the Zitia Group, that he did not review anything that impacted the Respondent's litigation strategy, and that it was doubtful that the materials were privileged.

The application judge disagreed and found that Mr. Halyk had deliberately accessed Mr. Labiris' privileged emails. However, the Court below was not prepared to grant judgment in the Respondent's favour without the benefit of a full record. Instead, His Honour struck the Appellant's response to the application, barred it from filing any evidence and ordered that the Respondent's application proceed before a judge at an undefended hearing, subject to leave being granted by the judge hearing the matter.

The Appellant — as appellants do — appealed, arguing that the application judge erred by:

(1) imposing a remedy that was neither pleaded nor proven by the Respondent; and

(2) failing to consider that lesser remedies such as appointing another director or officer of the Appellant to instruct counsel, or appointing a litigation trustee to act on behalf of the Appellant, could cure any prejudice.

Of note, the Appellant ***did not*** appeal the finding that he accessed privileged information relevant to the litigation, although he disputed that any such access was deliberate on his part.

Before analysing the application judge's decision, the Court of Appeal reiterated the three-part test to resolve the issue of unauthorized access to privileged documents, which test was set out in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.) and *Continental Bank of Canada v. Continental Currency Exchange Canada Inc.*, 2022 CarswellOnt 1053 (S.C.J.), aff'd 2023 CarswellOnt 873 (C.A.):

[12] At the first stage, the moving party (in this case, the respondent) must establish that the opposing party (in this case, the appellant) obtained access to relevant privileged material.

[13] At the second stage, **the risk of significant prejudice is presumed** and the respondent does not have the onus of proving "the nature of the confidential information" disclosed: *Celanese*, at paras. 42 and 48. Rather, the appellant has the onus to rebut the presumed prejudice flowing from receipt of privileged information: *Celanese*, at para. 48.

[14] The presumption of prejudice can be rebutted by identifying "with some precision" that: (i) the appellant did not review *any* of the privileged documents in their possession; (ii) the appellant reviewed *some* documents, but they were not privileged; or (iii) the privileged documents reviewed were nevertheless "not likely [to] be capable of creating prejudice": *Celanese*, at para. 53. The evidence must be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1260-63; see also, *Celanese*, at para. 42. "*A fortiori* undertakings and conclusory statements in affidavits without more" do not suffice: *MacDonald Estate*, at p. 1263.

[15] Where the precise extent of privileged information is unknown and possibly unknowable, "the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant": *McDonald Estate*, at p. 1290. . . .

. . . . .

[16] The third stage of the analysis is to fashion an appropriate remedy.

. . . . .

[18] A number of non-exhaustive factors should be considered in determining the appropriate remedy including:

i. How the documents came into the possession of the appellants or their counsel;

ii. What the appellants and their counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;

iii. The extent of review of the privileged material;

iv. Contents of the solicitor-client communications and the degree to which they are prejudicial;

v. The stage of the litigation; and

vi. The potential effectiveness of a firewall or other precautionary steps to avoid mischief: *Celanese*, at para. 59.

The Court of Appeal then explains the reasoning behind the presumption of prejudice and why the onus is actually on the responding party to *prove there was no prejudice* in accessing privileged information:

> [15] . . . As summarized in *Celanese*, at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the appellants in receipt of privileged information including:
>
> i. Requiring the respondent whose privileged information has been disclosed or accessed to prove actual prejudice would require them to disclose further confidential or privileged materials;
>
> ii. Placing the burden on the appellant who has access to the privileged information is consonant with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and
>
> iii. The respondent does not have to bear "the onus of clearing up the problem created by the [appellants'] carelessness".

In terms of a remedy, because a stay has significant consequences, a party seeking a stay must show "special circumstances." A stay is ***only*** granted where "there is prejudice to the right to a fair trial or the integrity of the justice system and there is no alternative remedy to cure the prejudice: *Etco Financial Corp. v. Royal Bank*, 1999 CarswellOnt 3071 (S.C.J.) at para. 3; *R. v. Babos*, 2014 CarswellQue 575 (S.C.C.) at para. 32."

The Court of Appeal concluded that the application judge made no error in applying the three-part test in *Celanese* and in crafting the appropriate remedy.

For the first part of the test, there was no dispute that Mr. Halyk had accessed Mr. Labiris' confidential and privileged information relevant to the litigation and that he had not disclosed it. The application judge found that the conduct was intentional:

> [77] . . . Halyk made the decision to go into the zitia@zitiagroup.com e-mail account. When he saw documents what [*sic*] were privileged and confidential, such as communications between Labiris and/or Ms. Cooper and their lawyers, he chose to read the documents. In the case of the January 30, 2023 e-mail thread between Ms. Cooper and Mr. Rosenbluth about the proposed offer to settle, Halyk chose to print and retain a copy. He appears to have attempted to provide at least some of the e-mails to his lawyer. **Although Halyk may not have stolen a password or hacked into a computer, his conduct was intentional**." [emphasis added]

So much for the "it was on the family computer" or "s/he knew I knew his/her password" excuse.

The Court of Appeal upheld the application judge's finding that Mr. Halyk's decision to read, download and print the privileged documents was deliberate, as he "could not have genuinely believed he had licence to read Mr. Labiris' privileged emails after the parties were engaged in litigation."

As for the second part of the test, the application judge concluded, and the Court of Appeal agreed, that the Appellant had not rebutted the presumption of prejudice. Apart from producing hard copies of four email threads he downloaded, Mr. Halyk did not provide any evidence that these were the only emails he reviewed. He did not explain what he did with the documents he printed. He was not cooperative in handing over his devices and allowing a forensic expert to review them (which would have shed light on what other emails and documents he may have reviewed). These were hardly the actions of someone with nothing further to hide.

In determining the appropriate remedy, the application judge was clearly driven by the very sensitive nature of the emails accessed by Mr. Halyk:

> [44] He [the application judge] noted however, that it would be inappropriate to order a remedy that would allow Mr. Halyk to "use to his benefit any confidential and prejudicial information he may have accessed." To do so would give the appellant an advantage in the litigation and reward him for accessing and reading e-mails that he would have known were privileged communications not intended for him.
>
> [45] The application judge noted that access to privileged information such as legal advice risks serious prejudice and that **since the appellant did not discharge its onus to rebut the presumption of prejudice, the court could draw an adverse inference and presume that the respondent suffered and would continue to suffer significant ongoing prejudice.** [emphasis added]

The Court of Appeal disagreed with the Appellant that the application judge reversed the onus at this stage of the test by relying on the Appellant's failure to rebut the presumption of prejudice in crafting a remedy. The Appellant argued that it was for the Respondent "to establish with some certainty the documents the appellant may have seen, in order to show that the prejudice suffered by the respondent justified the extraordinary remedy sought". But the Court of Appeal was in complete agreement with the application judge — requiring the Respondent to do so would mean disclosing further privileged information. There was, in fact, a reverse onus; and it was by design, not by accident.

Moreover, the Court of Appeal found that it was also completely proper for the application judge to rely on the Appellant's failure to rebut the presumption of prejudice in ordering that its response be struck. As a result of Mr. Halyk's lack of cooperation and failure to specify what information he accessed, and given what the application judge knew of the information he *did* access — including the Respondent's litigation strategy, his instructions to his expert witnesses, and his negotiation positions — there really was no other option than to strike the Appellant's response.

The Court of Appeal did not agree with the Appellant that there were lesser remedies available to the application judge. Mr. Halyk was not forthcoming with the Court about the information he accessed so as to allow the Court to assess the potential harm and perhaps tailor another appropriate remedy. Essentially, the Court of Appeal drew an adverse inference against Mr. Halyk:

> [52] As this court in *Bruce Power* observed in upholding a stay of proceedings, the court may presume that "if the [party in receipt of privileged material] had been able to lead evidence to rebut the presumption of prejudice, it would have done so": *R. v. Bruce Power Inc.*, 2009 ONCA 573, 90 O.R. (3d) 272, at para. 63. In the absence of such evidence, the appellant must "shoulder the consequences" at the remedy stage: *Celanese*, at paras. 62-63.

And none of the "lesser remedies" proposed by the Appellant, for example, appointing a litigation trustee, were appropriate in this case based on what was known of the privileged information Mr. Halyk did access. Not only was the information known to Mr. Halyk, but it was also now part of his court materials which could be reviewed by a litigation trustee. As colourfully noted by the English Court of Appeal: "the cat so generally out in the open cannot be rebagged": *G.C. v. J.C.*, [2001] EWCA Civ 469. There was no way to undo what had been done, except to strike the Appellant's response given the significant prejudice, not only to the Respondent, but to the administration of justice in allowing a party to continue participating in a proceeding and benefit

from their bad behaviour.

It is apparent in the Court of Appeal's decision that they were "unhappy" with Mr. Halyk. The Court and the Supreme Court of Canada have repeatedly stated that solicitor-client privilege is no longer just an evidentiary rule, but a general principle of substantive law. It is sacrosanct, and an "important civil and legal right and principle of fundamental justice in Canadian law." [*Maranda c. Québec (Juge de la Cour du Québec)*, 2003 CarswellQue 2477 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 CarswellAlta 2248 (S.C.C.) at para. 31; *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 CarswellNat 2244 (S.C.C.) at para. 9; and *Ontario (Auditor General) v. Laurentian University*, 2023 CarswellOnt 6202 (C.A.) at para. 24.] Mr. Halyk went out of his way to access, review and download solicitor-client privileged communications undoubtedly to gain an advantage in his dispute with Mr. Labiris. By upholding the application judge's decision, the Court of Appeal is sending a clear message to parties that there are serious consequences for such conduct.

It is important for family lawyers to be aware of the potential consequences should a client access the privileged information of an opposite party. Often spouses gain access to their spouse's phone (which is made easier with fingerprint and face ID to unlock cell phones), hack into their emails, or set up recording devices in their home. Many parties have solicitor-client information on their phones and in their emails, since most people have email on their phone and most people communicate with their lawyers by email. If a spouse accesses their spouse's cell phone or email that includes correspondence with counsel, they may have just "obtained access to relevant privileged material," and would then have to rebut the *presumption* of prejudice by explaining what they accessed, what they reviewed, and what they did with any information reviewed. And not only that, but any information they do obtain, even if not covered by solicitor-client privilege, might be inadmissible as evidence, as Courts do not want to encourage such "odious" behaviour: *D(SJ) v. P(RD)* (2023), 87 R.F.L. (8th) 210 (Alta. K.B.); and *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.).

And should counsel accidentally — even if innocently — review any such materials from their client, disqualification and removal as counsel is one of the possible "lesser steps" if it cannot be shown that there is no real risk of that confidential information being used: *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.); *Autosurvey Inc. v. Prevost*, 2005 CarswellOnt 5000 (S.C.J.). For this reason, clients should be warned about the consequences of breaching privilege at the very start of the retainer, and it should be made clear to them the consequences that might befall them — and you — if they do not follow your advice.

So let's all be careful out there.

***Moran v. Moran*, 2023 ONSC 6832 – Dealing with Surreptiously obtained Privileged Information**

Keep Your Laptop Out of My Zettabytes!

It is estimated that the total amount of data created, captured, copied and consumed in the world as of 2025 will be 175 zettabytes – the equivalent of 175 trillion gigabytes. One zettabyte is 8,000,000,000,000,000,000,000 bits of information. That's a lot of bits and bytes.

To some, this represents the complete amassed knowledge of humankind.

But to those engaged in family litigation, this represents a possible treasure trove of information. To some family litigants, the ability to access the private digital information of another proves just too tempting. (Not that this only applies to family litigants – see *2177546 Ontario Inc*. v. *2177545 Ontario Inc*., 2023 ONCA 694).

In this case, Justice Kraft had to decide what to do where a Wife was caught having surreptitiously accessed files on the Husband's computer. After being caught, it was agreed that the Wife had gained access to the Husband's private computer files, documents, e-mails and text messages by entering the matrimonial home and downloading his information onto her laptop. Specifically, the Wife accessed the Husband's files by making a backup of his hard drive through the Apple OS – and she was able to access all of this information simply by virtue of being connected to the matrimonial home's Wi-Fi. If that doesn't want to make you swear in a Newsletter…

At the motion, the Husband wanted to compel the Wife to deliver all computers she used to download his information so that a third-party forensic investigator could conduct a full audit of the electronic documents she took from the Husband and determine to whom those documents might have been distributed. (The Husband wanted to identify and inventory all the digital records the Wife had accessed.) The Husband further sought an order that he be permitted to choose the forensic investigator and that the Wife pay all the associated costs. And finally, he wanted an order restraining the Wife from distributing any of the documents/records/information she obtained from his computer and to disclose all of the third parties to whom she had sent any of the information.

The Wife had her own forensic investigator whom she proposed should handle the process of identifying and providing the electronic files and records.

Justice Kraft framed the issues before her as follows:

a. Which forensic investigator should be chosen to review the Wife's computer to determine the extent of what electronic documents she accessed surreptitiously and what is the nature and scope of review to be completed by this forensic investigator;

b. Who would pay for the cost of the forensic investigation;

c. Should the Wife be restrained from disseminating or distributing any information she obtained from the Husband's computer to any third parties; and

d. Should the Wife be required to produce a list of all third parties to which she had already sent the husband's electronic data to.

The parties did not dispute the background facts as to how the Wife had accessed the files. The Court did, however, highlight the fact that the Wife showed absolutely no remorse for her actions. Rather, she blamed the Husband for her having to take the steps she did to obtain the documents because of his persistent failure to provide timely disclosure. That's not quite the definition of chutzpah, but we're certainly in the area.

The parties also agreed as to how the Wife's actions had come to light. The Wife had attached documents as exhibits to an Affidavit; and had put documents to the Husband on Questioning, that he had not provided.

Then, during Questioning, the Wife admitted to having provided the Husband's documents to her lawyers and to her accountant and his team. However, she denied accessing any "privileged information," and when questioned she stated that she deleted the privileged documents without reviewing them. Well of course she did.

Justice Kraft first set out that the Husband was entitled to know what documents the Wife took from his computer, and what she reviewed, deleted and shared with her legal team. The Wife's counsel argued that the Wife did not "steal" the documents because a copy remained in the Husband's possession and that should be the end of it. A valiant try, but Justice Kraft made short work of this argument. The Wife copied and accessed the Husband's private and confidential information in such a way that he would not have known she had done so. He only realized it when she attached documents to her Affidavit.

While the Wife claimed that she had not accessed any privileged information, it was impossible for the Husband to know if that was true.

The legal test to decide the appropriate remedy where privileged information is accessed or received by an opposing party or its counsel is set out in *Celanese Canada Inc v. Murray Demoliton Corp*., 2006 SCC 36; *Continental Currency Exchange Canada Inc. v. Sprott,* 2023 ONCA 61; and *2177546 Ontario Inc. v. 2177545 Ontario Inc.,* 2023 ONCA 694. It is a three-part test as set out by Court of Appeal in *2177546*. Here it is in a nutshell:

a. At the first stage, the moving party (in this case, the Husband) must establish that the opposing party (in this case, the Wife) accessed relevant privileged material. In this case, the Wife acknowledged that she had accessed privileged documents, but said she deleted them. Without a forensic review of what was surreptitiously taken by the Wife, it would be impossible for the Husband to know the extent of privileged materials that she ahs obtained.

b. At the second stage, *the risk of significant prejudice is presumed.* The husband did not have to prove "the nature of the confidential information" disclosed: *Celanese*, at paras. 42 and 48. Rather, the Wife had the onus to rebut the presumed prejudice flowing from receipt of privileged information: *Celanese*, at para. 48.

The presumption of prejudice could have been rebutted by the Wife identifying "with some precision" that:

i. she did not review *any* of the privileged documents in their possession;

ii. she reviewed *some* documents, but they were not privileged; or

iii. the privileged documents reviewed were "not likely [to] be capable of creating prejudice": *Celanese*, at para. 53. The evidence had to be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1260-63; see also, *Celanese*, at para. 42. Again, a *fortiori* undertakings and conclusory statements in affidavits, without more, will not suffice: *MacDonald Estate*, at p. 1263.

Where the precise extent of privileged information is unknown and possibly unknowable, the court should *infer* that confidential information was imparted unless the party solicitor has satisfied the court that no information was imparted which could be relevant: *MacDonald Estate*, at p. 1290. Here, the Husband could not assess what had been taken without a third-party review of the electronic records. Once a complete review of the computers was undertaken, and depending on the outcome of that review, the Husband could be entitled to seek a stay of proceedings or to seek to remove the wife's legal team.

As summarized in *Celanese*, at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the appellants in receipt of privileged information including:

i. Requiring the Husband whose privileged information had been disclosed or accessed to prove actual prejudice would require him to disclose further confidential or privileged materials;

ii. Placing the burden on the Wife who has access to the privileged information accorded with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and

iii. The Husband did not have to bear "the onus of clearing up the problem created by" the Wife's actions.

c. The third stage of the analysis is to fashion an appropriate remedy.

With that in place, Justice Kraft set out that only after there was a complete record of the extent of the surreptitiously obtained evidence could the three-part test be applied.

During the Wife's Questioning, she had refused to provide her laptop, but she agreed to make best efforts to produce a complete record of which of the Husband's she had copied from his computer. However, the Wife's counsel had taken the computer into their possession for safekeeping since the questioning to preserve the electronic records. The Wife proposed retaining independent e-discovery counsel to assist with the process of producing an electronic record of the documents

she removed from the Husband's network. The Wife attached an eDiscovery proposal from her proposed expert:

1. The expert would be given access to the Wife's computer. It would collect identified folders of documents and e-mail data.

2. The collected data would be put in a Data Room.

3. Both parties would be given access to the Data Room and database to review.

4. The neutral expert would review the database and identify privileged information and relevant information

5. The Wife would ultimately be provided with the non-privileged relevant information. The Husband would be provided with the entirety of the database.

The Husband, however, wanted to use his expert to take an image of the Wife's computer so that his forensic investigators could undertake a full review of her laptop to identify what records were taken. This would also preserve the metadata on these records.

Ultimately, the real difference between the two proposals was that the Wife's proposal would essentially rely on her to identify the folders on her computer where the documents resided. The Husband's methodology, however, would see all of the folders searched. The Wife argued that the Husband's proposal could violate her privacy. OK – now we're in chutzpah-ville.

Caught between these two extremes, Justice Kraft accepted the Wife's proposal as being appropriate, but expanded the scope of her expert to include the investigatory role that the Husband was seeking.

The Wife was ordered to pay the up front costs subject to reapportionment at trial.

Justice Kraft then considered whether the Wife should be restrained from sending any of the Husband's private records to any third parties. The Wife argued that the Husband was "overreaching" and that a restraining order was not necessary.

Justice Kraft determined that section 46(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 would permit this kind of restraining order. The Court set out that the purpose of an interim restraining order was to "permit both litigants the opportunity to conduct their litigation in as reason an atmosphere as possible" and to "provide the litigants with some element of order in the context of difficult and acrimonious litigation."

Justice Kraft disagreed with the Wife's claim that the Husband's request was "overreaching." The Wife had taken digital records from the Husband without his consent. And she had already shown she had no problems disseminating this information to third parties. Allowing her to continue to do so would not be fair to the Husband in these circumstances. The Husband was entitled to know, at least until the forensic audit was completed, that the Wife would be restrained from distributing any of his documents to third parties.

Finally, Justice Kraft determined it was reasonable to order the Wife to produce a list of all contacts, including their names and contact information, to whom she had sent the Husband's documents.

Computer-surfing can come with significant costs when the computer on which you are surfing is not your own.

Grab-bag

***Mitchell v. Mitchell*, 2023 ONSC 2341 - Obtaining A Significant Costs Award At A Settlement Conference**

Show up on time and ready to your conference…or pay the price..

In Ontario, Rule 17(18) of the *Family Law Rules*, O. Reg. 114/99 (the "*Rules*"), provides that, while parties will generally bear their own costs for Case Conferences, Settlement Conferences, and Trial Management Conferences, costs ***shall*** be awarded against a party if s/he was not adequately prepared for the attendance:

> 17(18) Costs **shall** not be awarded at a conference unless a party to the conference was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules, **in which case the judge shall**, despite subrule 24 (10),
>
> (a) **order the party to pay the costs of the conference immediately**;
>
> (b) decide the amount of the costs; and
>
> (c) give any directions that are needed. [emphasis added]

Even though Rule 17(18) is mandatory, historically, it has not been regularly invoked to sanction those that that are not prepared for a conference, especially a Settlement Conference.

Until now, perhaps.

In *Mitchell*, Justice Kraft relied on Rule 17(18) to send a clear message to the husband in the case, and other litigants, that not being prepared for court is simply unacceptable, and will not be tolerated.

Hopefully, instead of being an outlier, *Mitchell* will be the start of a trend. A wasted conference deprives other parties of court time that could be used to settle cases, and should rarely be tolerated.

The facts in *Mitchell* were straightforward. The husband was not prepared for a Settlement Conference that took place on March 29, 2023. Among other things, he had not complied with two disclosure orders (one of which was over a year old), and he did not comply with his obligations under the *Rules* to serve an updated sworn Financial Statement, a Net Family Property Statement, and his expert report(s) before the Settlement Conference. His previous Financial Statements were also clearly inaccurate as they omitted significant assets.

As a result of the husband's failure to comply with multiple court Orders and his obligations under the *Rules*, about an hour before the Conference started, the wife served a Bill of Costs. She then asked Justice Kraft to order costs against husband -- and her Honour agreed to receive submissions from both parties about the issue.

After the Conference, the wife served an updated Bill of Costs for $34,500 (rounded), which represented 60% of the costs she had incurred since the first disclosure order was made back in February 2022 (with which the husband had still not complied).

The husband conceded that the wife was entitled to costs, but argued that the costs she was seeking were excessive, and included a significant amount work that was unrelated to the Conference.

After reviewing the leading Ontario cases about costs in family law matters, including *Mattina v. Mattina*, 2018 ONCA 867 and *Beaver v. Hill*, 2018 ONCA 840, Justice Kraft concluded that Rule 17(18) allowed her to award costs not just for the time spent on the Conference itself, but also for work that was done in relation to "the [husband's] failure to provide disclosure in accordance with the *FLRs* and the court-ordered disclosure which are directly related to Rule 17(18)." In other words, she accepted the wife's argument that the Court could use Rule 17(18) to award the wife more than just her costs wasted at the actual Settlement Conference.

In the circumstances, Justice Kraft determined it would be fair and reasonable for the husband to pay the wife $18,000 in costs. And, she ordered that the costs be paid within 10 days. Not in 30 days; not as determined by a later Conference judge; but in *10 days*. If this does not encourage recalcitrant litigants to show up prepared and to comply with court orders, we do not know what will.

We hope to see more of these decisions, in appropriate circumstances. As noted, court time – especially at Conferences designed to settle matters and narrow issues – is a precious resource.

We also want to offer two suggestions for counsel when dealing with these types of situations. First, include the request for costs, and a Bill of Costs, in your Conference Brief, along with a list of everything that the other party has not done in your materials. That way, it will be clear to both the court and the other party exactly what you are seeking and why, and thus increase the chances that the presiding judge will be willing and able to fix the amount of costs at the conference (instead of having to give the other side a further opportunity to file written submissions, as happened in *Mitchell*).

Second, ask the conference judge to make it clear in his or her Endorsement that the costs Order is without prejudice to your client's right to seek further indemnification for any portion of the costs claimed but not awarded for the Conference at a later date. For example, in *Mitchell*, the wife's actual costs for the period in question totalled $57,500 (rounded). Since she only requested $34,500 (rounded) in costs on a partial recovery basis, and was only awarded $18,000, it should still be open to her to ask for some or all of the remaining $39,500 she actually incurred should circumstances warrant it, especially if the initial $18,000 award doesn't cause the husband to change his behaviour.

***Aroma Franchise Company Inc. et al.* v. *Aroma Espresso Bar Canada Inc. et al.*, 2023 ONSC 1827 – Reasonable Apprehension of Bias in Arbitral Awards**

They Always Hide the Good Stuff in the Footnotes

Every few decades a case comes along that is a paradigm shift; a truly transformative case that changes or impacts the law as never before. Think *Hrniak* v. *Mauldin*, 2014 SCC 7.

This is not one of those cases.

One would not know that from the amount of chatter it has generated, but in our respectful view it is much ado about the obvious.

In *Aroma*, Justice Steele of the Ontario Superior Court of Justice set aside two arbitral awards on the basis that there was a reasonable apprehension of bias. This determination was based on the fact that the arbitrator accepted a new arbitration mandate on an unrelated file with one of the same counsel part-way through the Aroma arbitration – and the fact of the new mandate was not "disclosed" until it was accidentally discovered after the Aroma award was delivered.

Therefore, many have suggested that Aroma stands for the proposition that a failure to disclose past and current engagements, including engagements accepted by an arbitrator while in the midst of an existing arbitration, could lead to a finding of a reasonable apprehension of bias.

But, respectfully, we suggest that this overstates what happened in this case. We suggest that the result is entirely fact specific and that the same result, absent specific facts, would not likely be the result in a family arbitration. And here's why.

The Aroma case was about the alleged wrongful termination of a Franchise Agreement. Pursuant to that Franchise Agreement, such disputes were to be arbitrated – specifically by someone with "**no prior social, business or professional relationship with either party**." This requirement was clearly important to the parties. Not only was it specifically part of the Franchise Agreement, but *the parties rejected three potential arbitrators* on account of this clause before selecting one that had never previously acted as a mediator or arbitrator for either party or their lawyers.

The arbitration took place over two years, after which the arbitrator determined that the Franchise Agreement had been wrongfully terminated and awarded damages of $10 million.

When the arbitrator delivered the final award to counsel by email on January 12, 2022, the arbitrator accidentally copied another lawyer from the respondent's law firm that had not been involved in the arbitration. After further back-and-forth and correspondence, it turned out that the respondent's law firm had engaged the arbitrator for another arbitration 17 months after the Aroma arbitration began. (The lawyer that was accidentally copied was counsel on that second arbitration.) The second arbitration involved different parties but the same senior counsel.

As a result, the applicants moved to set aside the arbitration award based on a reasonable apprehension of bias.

The Court first specifically noted the importance to the parties of the neutrality of the arbitrator:

> [89] It comes down to context. As set out in *Dufferin* at para. 112, citing *Telesat*: "when considering bias, whether actual or the appearance of bias, **context matters**." **A significant factor** in this matter is the emphasis that was placed, in the pre-appointment correspondence, on **whether there had been any prior dealings with the chosen arbitrator by the parties, their lawyers or law firms. As set out in detail above, it was very important to both parties, but perhaps even more important to the applicants, who are not based in this country, that the selected arbitrator not have a professional or personal relationship with either party or their counsel.** After considerable correspondence and at least three proposed and rejected potential arbitrators, the parties ultimately selected an arbitrator that had not acted as a mediator or arbitrator previously for either party or their lawyers. **The "neutral" status of the arbitrator was clearly important to the parties in selecting the arbitrator.** ***It is not as though it would be less important while the arbitration was extant.*** [***emphasis*** added]

The importance of this factor to the parties cannot be overstated. The parties specifically bargained for an arbitrator that had no prior professional or personal relationship with either party or their counsel.

The Court then considered the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, (the "IBA Guidelines"). The Court accepted that even where not expressly adopted by the parties, the Guidelines are recognized as authoritative as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases.

The IBA Guidelines set out colour-coded lists of specific situations indicating whether they required disclosure or disqualification of an arbitrator. Notably, this includes potentially disclosing appointments of the arbitrator made by the same party or the same counsel while a case is ongoing. The applicants argued that, in these circumstances, the arbitrator should have disclosed the second arbitration mandate.

Within those Guidelines, the "Orange List" is a non-exhaustive list of specific situations that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. Therefore, the "Orange List" reflects situations that would suggest the arbitrator has a duty to disclose. Paragraph 3.1.3 on the "Orange List" calls for disclosure in the following situation:

> **3.1.3** The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

However, footnote 5 to paragraph 3.1.3 states:

> It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. **If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.** [**emphasis** added]

Given the relatively small arbitration bars in most provinces and territories, we would add family law arbitration to this list of areas where it is the practice to draw arbitrators from a smaller or specialised pool of individuals. To suggest that – absence a specific requirement to do so at the behest of the parties -- an arbitrator dealing with a family matter must disclose the fact that s/he had previously arbitrated for counsel involve in a case, means that such disclosure is likely going to have to be made in most cases. Counsel that arbitrate matters with clients know this to be true, and it is up to them to educate their clients. Ultimately, one of the advantages of arbitration is that you get to pick your arbitrator; so don't pick an arbitrator in whom you do not repose the trust and confident to adjudicate fairly.

If the use of arbitrators on multiple family law matters amounted to a reasonable apprehension of bias, then the pool of available family law arbitrators would be severely restricted. Fortunately, Justice Steele also emphasized the presumption of impartiality on the part of by an arbitrator is high – and the fact that an arbitrator accepts another unrelated arbitration from the same law firm does not in and of itself give rise to a reasonable apprehension of bias.

In *Aroma*, it was not difficult for Justice Steele to find a reasonable apprehension of bias:

- The importance to the party of the lack of a previous relationship with the parties or counsel was clear.

- The second mandate was not openly disclosed. Rather, it appears to have been hidden for over a year while the first arbitration was proceeding.

- The second mandate was only inadvertently discovered.

In all the circumstances, as determined by Justice Steele, a reasonable person would lose confidence in the fairness of the proceeding and, in particular, the equal treatment of the parties. That is, a fair-minded and informed person, considering the facts and circumstances of this matter, would conclude that circumstances existed that gave rise to a reasonable apprehension of bias. Considering the importance to the parties of an arbitrator that had no prior involvement with either party or counsel, this was a situation the Court could not permit to stand. The award was set aside. Places everyone – places. Two-year-long arbitration hearing: Take 2.

***Wu v. Di Iorio*, 2023 ONSC 3352 – Experts Attending Questionings/Cross-examinations**

Who wouldn't want some company on a questioning?

This motion argued before Justice Myers was about whether the wife had the right to have her financial expert attend the husband's cross-examination — or whether the husband could refuse to attend the cross-examination if an expert he objected to was present.

As part of the terms for an adjournment of the wife's disclosure motion in a complicated cryptocurrency matter, both parties agreed to undergo cross-examination on their motion material. The husband was scheduled to be questioned on May 18, 2023, and the wife was to be questioned on May 19, 2023. The issue arose when counsel for the wife communicated to the husband's counsel that her expert would be attending the husband's questioning for the purpose of assisting the wife's counsel with the technical issue of the use and tracing of cryptocurrencies.

The husband objected to the wife's expert attending. (In fact, he objected to the wife's expert acting as an expert.) His position was rooted in previous allegations that the wife's expert was in a conflict of interest and could not act as an impartial expert in the matter. The day before the examination, the husband stated that he would not attend the examination if the wife's expert was going to be there.

The husband then failed to show up for questioning (even though properly served with a Notice of Questioning) and counsel for the wife obtained a Certificate of Non-attendance.

The wife then brought an urgent motion seeking to compel the husband's attendance for questioning (so as to not put the cross-examination and motion date in jeopardy).

Justice Myers considered the issue of whether a party could refuse to attend questioning as a result of opposing counsel having an expert present.

First, his Honour noted that the examination was to be a cross-examination of affidavits, not an examination for discovery. While this was an important distinction, Justice Myers determined that the test for whether an expert can attend an examination to assist counsel is not different on a cross-examination or a discovery.

Justice Myers outlined that the "traditional" (read as: old) analysis on this point was set out in the case of *Al's Steak House & Tavern Inc. v. Deloitte & Touche*, 1998 CarswellOnt 5282 (Gen. Div.). In *Al's Steak House* Justice Binks held that, with limited exception, only the parties and their lawyers could attend a questioning in the nature of an examination for discovery. An exception could be an expert witness to advise and assist examining counsel when the technical complexity of the evidence was "of such a nature that the party attempting to justify his or her presence could not proceed or could proceed only with difficulty to a satisfactory examination." Notably, Justice Binks also stated that an expert assisting examining counsel *should not* be a witness at the subsequent trial.

Justice Myers determined that the traditional analysis set out in *Al's Steak House* had to be reconsidered in light of the changed litigation landscape. In the 25 years since *Al's Steak House*, litigation has gone through significant changes. Expert witnesses have become much more common — and much more important. *Stare decisis*, while a fundamental building block of our jurisprudential system, is not a straitjacket that condemns the law to stasis. Courts may reconsider

and reassess settled rulings of higher courts in two situations:

1. Where a new legal issue is raised; and

2. Where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."

[See: *Bedford v. Canada (Attorney General)*, 2013 CarswellOnt 17681 (S.C.C.), *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 CarswellOnt 18344 (C.A.) and *R. v. Sullivan*, 2022 CarswellOnt 6589 (S.C.C.)]

Justice Myers was of the view that 25 years of litigation developments — and especially the way in which family cases are conducted — have fundamentally shifted the parameters of the debate:

> [51] . . . It simply can no longer be the law that counsel needs leave every time she wishes to bring someone to help her at an examination. That would mean that in each — case, a motion that could take up to a year to be heard would be required every single time the party opposite objects to counsel bringing someone to an examination to help him or her.

In terms of the issue of the "examination" expert not being called as a witness, Justice Myers found:

> [53] In a day when the need for expert witnesses was exceptional and costs and delay were perhaps less an issue for civil litigants, the notion of hiring two experts — one for discovery and one for trial — may have been seen to be appropriate doctrinal purity. Today however, the idea borders on lunacy. [Justice Myers is known for calling it as he sees it.]

In an environment of increasingly complex and complicated files, counsel on an examination might need assistance managing all of the documents, and this may not be an expert but could be a junior or another individual hired to assist them. Justice Myers determined that it ought not be the examining party that has to bring a motion to allow for this. Instead, the Court ought to take the examining counsel at their word, and if they state they need assistance then it should be respected.

Justice Myers stated that the new test required the party being examined to bring forward a motion to exclude an expert (or assistant) that the questioning party proposes to have present at the examination. To exclude such individuals, the questioned party will need to establish prejudice. This, of course, means that counsel must provide reasonable notice of such a "guest" attending at the examination.

In the case at bar, there was no prejudice to the husband by the wife's expert being present, even if he was unable to testify as an expert at later stages. He was there to assist the wife's counsel with the technical aspects of the questioning.

Justice Myers ordered that the husband re-attend for questioning, noting that neither a party, *nor counsel*, have colour of right to simply ignore a properly served Notice of Questioning. And now there is a decision that counsel will have to address if they do.

***Casey v. Casey*, 2023 ONSC 2512 – Costs After a Settlement**

A claim for Costs in the Dark.

Costs after litigation is relatively straight forward. With some provincial variation, all Canadian provinces and territories have some form of "loser pays" system.

But how does one determine the "winner" and "loser" after a settlement? After a settlement, sometimes there is a clear "winner" and "loser"; but, sometimes — not so much.

In *Casey*, Justice Pazaratz found himself tasked with determining costs for two motions in which he was wholly uninvolved. Both motions were brought by the father. One was a "travel motion" which the parties were ultimately able to resolve on their own. The second was a motion about parenting time exchanges, which the parties were also able to resolve.

Of course, both sides claimed costs.

The mother claimed costs of $2,431 for the "travel" motion and $2,373 for the "exchanges" motion — both amounts being less than full indemnity which would have totalled something in the range of $7,000. The father claimed costs of $2,500 for each motion.

As noted by Justice Pazaratz, he had absolutely nothing to do with the resolution of these particular motions.

His Honour first noted that, where parties reach their own settlement, leaving only the issue of costs to be determined by the court, costs can be awarded to a party even on settlement, but the analysis regarding costs calls for a cautious approach in such circumstances.

Then, his Honour suggested that, in the case of costs after settlements, "there should generally be a compelling reason to justify costs." For example, see: *Davis v. Fell*, 2016 CarswellOnt 2115 (C.J.); *Muncan v. Muncan*, 2021 CarswellOnt 2843 (S.C.J.); *Krueger v. Krueger*, 2017 CarswellOnt 3169 (S.C.J.); *Frape v. Mastrokalos* (2017), 6 R.F.L. (8th) 486 (Ont. C.J.); *Witherspoon v. Witherspoon*, 2015 CarswellOnt 15823 (S.C.J.); *Cummings v. Cummings* (2022), 81 R.F.L. (8th) 214 (Ont. S.C.J.).

Obviously, the main concern here is the sufficiency (or insufficiency) of evidence to support any necessary findings regarding costs. Settlements usually involve a global resolution of multiple issues based on compromises and concessions. In turn, this makes it a challenge for the court to apply the factors relevant to a determination of costs. One party may have made a large compromise where the other made several smaller compromises. As there has been no final determination by the court, the usual cost rules about "beating" one's own offer are not really applicable. One party may have capitulated a reasonable position simply to avoid further litigation costs. Where there has been no adjudication, it becomes difficult — if not impossible — to apply the "touchstone" considerations of reasonableness and proportionality: *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.); *Ball v. Ball* (2014), 52 R.F.L. (7th) 244 (Ont. S.C.J.); *DeSantis v. Hood*, 2021 CarswellOnt 11528 (S.C.J.); *Goetschel v. Goetschel*, 2022 CarswellOnt 15607 (S.C.J.). You get the idea . . .

In fact, it can be such a challenge, that some courts have opined that to award costs after settlement is so fundamentally misconceived and inappropriate, it should not be done — even where Minutes of Settlement provide for it: *Talbot v. Talbot* (2016), 76 R.F.L. (7th) 370 (Ont. S.C.J.). However,

in our opinion, this overstates the case. While it can be challenging, sometimes costs after settlement are warranted, especially where the unreasonableness or intransigence of one party has run up costs. An unreasonable party should not be able to avoid responsibility for costs simply because they "have seen the light." If a party claims "everything" and ultimately agrees to receive "nothing", the determination of success should not be difficult.

That said, if parties place the issue of costs before the court after settlement, the parties must put sufficient evidence before the court about the case: *Gibeau v. Parker*, 2017 CarswellOnt 830 (S.C.J.); *Parkinson v. Parkinson*, 2019 CarswellOnt 19938 (S.C.J.).

As Justice Pazaratz noted, costs usually go to the successful party. But only knowing how a case ended, without knowing how the case was litigated, may make it hard for the court to get a clear sense of which party "won" and the extent to which the settlement represents divided success, capitulation or an end to unreasonable behaviour: *Hmoudou v. Semlali*, 2020 CarswellOnt 2980 (S.C.J.); *Moreno v. Tuey* (2019), 25 R.F.L. (8th) 424 (Ont. C.J.).

And once a matter has settled, the court should be reluctant to spend too much time investigating the background to the settlement in an effort to determine which party's position on each issue was most likely to have been accepted at trial; having a mini trial about who would have won a given issue had there been an actual trial? Ridiculous. [See, for example: *O'Brien v. O'Brien*, 2009 CarswellOnt 7194 (S.C.J.); *Upton v. Harris*, 2016 CarswellOnt 6721 (S.C.J.); and *Moreno v. Tuey* (2019), 25 R.F.L. (8th) 424 (Ont. C.J.).] That said, sometimes, as noted above, it is not hard to determine the (un)successful or (un)reasonable party.

Ultimately, Justice Pazaratz agreed that, while caution is required, a blanket refusal to award costs in settled matters is not appropriate and could, in fact, have unintended — and undesirable — consequences for both the parties and the administration of justice. To quote Justice Pazaratz:

> [8] . . . a. Our family court system consistently encourages parties to settle their cases, to avoid costs. So we must be careful not to undermine our messaging in case management, by imposing post-settlement costs orders which may inadvertently eliminate an incentive to settle: *Moreno v. Tuey*, 2019 ONCJ 418 (OCJ). If litigants do what we urge them to do — reach their own negotiated settlement — the court should carefully assess whether compelling reasons remain to award costs: *Shute v. Shute*, 2017 ONCJ 533 (OCJ).
>
> b. But equally, costs should not be a barrier to settlement. Sometimes after protracted litigation the parties can agree on everything except costs. It is in neither the parties' nor the court's interest to waste an opportunity to resolve substantive issues. Litigants should not be forced to go to trial and achieve success in order to recover disputed costs. Parties should have confidence that if they settle all other issues, any residual costs claim will be given fair consideration by the court, on the merits: *Wunsch v. Wunsch*, 2013 ONSC 5208 (SCJ); *Hassan v. Hassan*, 2019 ONSC 1199 (SCJ).
>
> c. A successful party who has behaved reasonably should not be precluded from pursuing their costs, simply because their opponent waited until the last moment to abandon a meritless or unreasonable position: *Atkinson v. Houpt*, 2017 ONCJ 316; *Moreno v. Tuey*, 2019 ONCJ 418 (OCJ).
>
> d. If a party eventually makes a good litigation choice by signing Minutes, that epiphany doesn't automatically wipe out any history of *bad litigation choices* which would otherwise

justify costs. Settling in the face of the inevitable may be little more than damage control. *Scipione v. Del Sordo*, 2015 ONSC 5982 (SCJ).

e. While there may be public policy reasons against costs orders in the face of negotiated resolutions, there are also public policy reasons to hold parties liable for needless expense they created during whatever period they maintained an unreasonable position: *Horowitz v. Duthie* 2021 ONSC 7902 (SCJ).

Here, Justice Pazaratz was concerned that he did not have sufficient evidence before him to apply the general rules and principles regarding costs. When counsel ultimately suggested that they might return at a later date to argue costs, the court was — understandably — not happy. Having booked a long motion (to deal with relatively small cost claims), the Court was of the view that the booked court time was to be used. This was their opportunity to argue their case for costs, knowing that judges dealing with costs claims in settled matters require an evidentiary foundation for their decision. And if they did not marshal the necessary evidence for the motion they booked, they should not be allowed to use still more court time later or at another court event.

Justice Pazaratz ultimately ordered the mother to pay the father costs of $1,500.

***Giann* v. *Giannopoulos*, 2023 ONSC 5412 – Affidavits and Advocacy**

You Spin Me Right Round Baby, Right Round like an Affidavit Right Round Round Round

This is not a family case, nor is it ground-breaking – in the words of Justice Myers, it is a "classic situation, seen every day in estates court." However, family law practitioners would be wise to take note of Justice Myers prudent comments about "evidence" vs. "spin".

The late Fortis Giannopoulos executed two wills, the first, executed in 2016, more or less divided his assets equally between his four children. He then executed a second will, in 2021, which was much the same, except he left the entirety of his business assets to only one child. Additionally, the new will stated that, should the majority beneficiary, Nick, die before his father, the business would be left to a non-family member, Panagiota Papastefanou. On one side, the respondent, and majority beneficiary, argued he was preferred by his late father as a reward for the extra effort he put into caring for him. On the other, the jilted applicant siblings asserted that the respondent took advantage of having their father's ear to influence his own entitlement.

To avoid all estates being subject to applications, the law implies a minimum evidentiary burden which must be met in order for an application to proceed. Here, Justice Myers was trying to determine whether there was sufficient evidence to raise a *prima facie* case for a challenge to the will. Justice Myers found that the concerns raised by the applicants were "just conjecture, assumption, and allegations, spun together to try to create a negative atmosphere based on distrust and suspicion." (Sure *sounds* like a family law case.)

This distinction between "evidence" and "spin" is emphasized throughout the decision. In one of the applicant's affidavits, she refers to family and caregivers warmly by their first names. But she introduces Ms. Papastefanou as follows:

> Panagiota Papastefanou ("Papastefanou"), who is named as an alternate beneficiary in paragraph III(b)(1) of the Purported 2021 Will in the event Nick had predeceased my father and is described as my father's "caregiver".

Justice Myers notes three things from this introduction: (1) that Ms. Papastefanou is apparently not deserving of an honorific; (2) that Nick Giannopoulos survived his father, and was always anticipated to do so, therefore the introduction of Ms. Papastefanou by reference to her moot role as alternate beneficiary is used for colour; and (3) the quotation marks around "caregiver" were added for colour and suggest that her caregiving was not real.

Similarly, see the below passages from the same affidavit:

> 19. Prior to my mother's death, I do not recall having any idea of who Papastefanou was, nor of ever having been introduced to her. I do recall, however, a few days after my mother's death, while walking into our church hall following Sunday Liturgy, a woman stopped me and offered her condolences. I had never seen this woman before. Months later, recalling this woman, although I knew nothing of her,

> not even her name, I described her to Nick (everyone was always trying to find a single girl for him) and suggested that he introduce himself and think about asking her out for a date. As I was in the midst of describing her, Nick said, "Who, Yiota?" I responded, "Is that her name?", and he proceeded to tell me that she was already married and had a grown daughter. This was Papastefanou. I do not know how or when Nick knew of this woman. If Nick had known Papastefanou prior to my mother's passing, he did not share that with me.
>
> 20. Surprisingly enough, I later began to hear from Nick that Papastefanou was bringing our father food and giving him rides home from the Danforth Store. Despite us not having known her before, Papastefanou presented herself to my siblings and close family friends as my mother's and father's friend and insisted that she was interested in helping my father after my mother's passing. To this day, I do not know with certainty how Papastefanou was introduced to my parents.
>
> 21. Initially, Papastefanou's involvement seemed relatively innocuous. But over time Papastefanou began to take an increasing and disruptive role in my father's care, while Nick was increasingly cutting me out of decision making."

Justice Myers considered this to have been drafted "disrespectfully to arouse suspicion." The applicant referred to Ms. Papastefanou suspiciously as "this woman". There was nothing inherently surprising in paragraph 20 to justify commencing the paragraph with “Surprisingly enough.” This applicant, his Honour noted, lives in Florida. What did it matter that the Floridian applicant did not know how Ms. Papastefanou met her parents? Finally, in this passage, the applicant attributed an increasing and disruptive role played by Ms. Papastefanou in relation to her feeling that Nick Giannopoulos was cutting her out of the loop. But what did that have to do with Ms. Papastefanou? It was a giant leap with no connection. Absent the spin, the facts plead were simply:

a. An unknown attendee at a funeral offered condolences to a member of the family;

b. Ms. Papastefanou was bringing Fotios Giannopoulos food and giving him rides home from work;

c. She said she was a close to their mother and that she was interested in helping their father.

According to Justice Myers, the tone of disrespect and objectification in this affidavit was "lawyer’s spin dressing up innocuous facts." Justice Myers presents an alternative, unspun, paragraph pleading the same facts:

> I met Ms. Papastefanou at my mother’s funeral when she offered me condolences. I did not know who he was. When I asked Nick about her, he told me that she was married, had a grown daughter, and was bringing food and giving our father lifts from work.

Another applicant's affidavit contained the following:

> 20. I'm not sure how or when Panagiota Papastefanou came into the picture. I am not exactly sure when I learned that this woman, who I had never heard of before, had begun spending time with my dad, bringing him lunch, picking him up from work at the end of the day, and having dinners at my dad's home with him and [the hired caregiver].
>
> 21. I was quite uneasy with the situation, but Nick reassured me that it was innocent and was best for my dad. I asked Nick why this stranger would want to take on this responsibility without payment. He told me that Papastefanou had a poor relationship with her father and really loved our father, as a father figure, and wanted to help.
>
> 22. Though I understood that Papastefanou had a home of her own in Toronto, she ended up moving into my father's home in early 2021. Nick told me that her work for the Ontario Ministry of Health allowed her to work remotely and that with the COVID pandemic she worked full time from my father's home.
>
> 23. Not long after learning this news, I then learned that [the caregiver] had quit the job and now Papastefanou was living full time in the home and taking care of my dad. This made me more uncomfortable and I let Nick know, but once again he reassured me that it was all innocent. I told him that we needed to put a contract together to protect our father's assets and avoid any claims down the road. Nick told me that he had broached the subject with Papastefanou and that she was willing to sign a document to that effect, but it never happened.

Again, Justice Myers asks that we consider the actual bare facts:

a. A woman that the applicant did not know had begun bringing his father lunch, picking him up from work, and having dinners with him;

b. Nick Giannopoulos, who worked and slept with his father, assured the applicant that the relationship was innocent. She loved their father, as a father figure and wanted to help, for free;

c. Although Ms. Papastefanou had a home of her own, she moved into the father’s home in early 2021. Her position with the Ontario government let her work remotely; and

d. The caretaker who had been hired quit and Ms. Papastefanou was living fulltime in the home taking care of the father.

As noted, the only things indicative of wrongdoing in the excerpt above are spin – and spin is not evidence. Calling Ms. Papastefanou "this woman" and expressing the applicant's suspicion were both elements entirely removed from any material evidence.

Justice Myers succinctly summarized the applicant's evidence, making clear that the "actual facts adduced offer no basis to find suspicious circumstances at play." Rather, the *suggestion* of wrongdoing by Ms. Papastefanou comes from the choice of words, adjectives, and spin rather than admissible evidence. To establish a *prima facie* will challenge is not a high hurdle. It can be readily overcome with evidence that there is a real basis for the claim. In this case, the only basis for suspicion was spin.

Is this that different from what we see in family law affidavits every day? We think not. Is it worth considering this and saving “spin” for your factum? We think so.

De Longte v. De Longte, 2023 ONSC 5512 – The Rule in *Browne v. Dunn*

Browne There…Dunn That..

… if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

Lord Herschell, L.C. - *Browne v. Dunn* (1893), 6 R.67 (H.L.)

While we've all (hopefully) heard of the "rule" in *Browne v. Dunn*, it seems that it continues to be misunderstood, misapplied, and sometimes (unfortunately) forgotten. This can be a real problem because, while not often the case (and while exceedingly rare in a civil case), a breach of the Rule in *Browne and Dunn* can be serious enough to warrant a new trial: *R*. v *Abdulle*, 2016 ABCA 5 Fortunately, Justice Fowler Byrne's recent decision in *De Longte v. De Longte* provides an excellent opportunity for a quick refresher.

One the main issues in *De Longte* was whether, and to what extent, the Applicant wife's corporations had unreported cash sales (with the husband claiming they were more extensive than the wife was willing to admit).

As part of her case, the wife and her bookkeeper gave evidence about the corporations, and their knowledge of any unreported cash sales. They were also cross-examined on their evidence.

After the wife closed her case, the Respondent husband opened his. During his examination in chief, the husband tried to give evidence about various events that, if accepted, would support his allegations that the wife had not disclosed the full extent of unreported cash sales. The problem, however, was that the husband had not put these specific allegations to the wife or to her bookkeeper when they were each cross examined. The wife objected, and alleged that the husband's evidence violated the Rule in *Browne v. Dunn*. Was she right?

This resulted in a mid-trial ruling from Justic Fowler Byrne.

Her Honour started her analysis by providing a succinct summary of the rule in *Browne v. Dunn*, and confirming (despite some vague suggestions to the contrary) that the rule absolutely applies in the family law context:

> [9] While more readily identified in criminal proceeding, **the rule in *Browne v. Dunn* is equally applicable to family law trials**. Some examples of its application can be found in *Liu v. Huang*, 2020 ONCA 450 at para. 13-25 and *Alajalian v. Alajajian*, 2019 ONSC 4678 at para. 17.
>
> [10] The rule can be summarized as follows. **If a party intends to impeach a witness called by the opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence**: *Browne v. Dunn*, 1893 CanLII 65, at pp. 70-71; *R. v. Quansah*, 2015 ONCA 237 at para. 75.

> [11] **The rule in *Browne v. Dunn* is a rule that ensures trial fairness.** It ensures fairness to the witness whose credibility is attacked, fairness to the party whose witness is impeached, and fairness to the trier of fact. With respect to the last principle, it ensures that the trier of fact will not be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict: *Quansah*, para. 77. [**emphasis** added]

To further elaborate, as stated by Justice Watt in *R*. v. *Quansah*, 2015 ONCA 237, at para. 70, the Rule is rooted in the following considerations of fairness:

i. Fairness to the witness whose credibility is attacked:

   The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: R. v. Dexter, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; Browne v. Dunn, at pp. 70

ii. Fairness to the party whose witness is impeached:

   The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

   Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

In other words, you can't call evidence to try to prove a witness is lying ("attack their credibility") without giving that witness a chance to tell their side of the story while they are in the witness box. That being said, the rule of *Browne v. Dunn* is not meant to be applied over-zealously. It does not require the cross-examiner to, as the Ontario Court of Appeal colourfully put it in *R. v. Verney* (1993), 67 O.A.C. 279 and *R. v. Dexter*, 2013 ONCA 7, "slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept". Rather, "[o]nly the nature of the proposed contradictory evidence and its significant aspects need be put to the witness." [See also *R*. v. *Drydgen*, [2013] B.C.J. No. 1091 (C.A.); and *R*. v. *K.W.G*., [2014] A.J. No. 352 (C.A.)] The Rule also does not apply to previous contradictory evidence from the very person being cross-examined: *Yan* v. *Nadarajah*, 2015 ONSC 7614; *Curley* v. *Taafe*, 2019 ONCA 368 – as there could not, in that instance, be claims of "unfair surprise." For the same reason, it does not apply to a witness's own documents or affidavits: *Curley* v. *Taafe*, 2019 ONCA 368; *Yan* v. *Nadarajah*, 2017 ONCA 196. If a witness clearly knows the evidence against him, there is no need for additional notice: *R*. v. *M.L.W*. (1995), 82 O.A.C. 397 (C.A.).

In *De Longte*, the wife had notice of ***some*** of the evidence the husband would be raising to support his claims of unreported cash income, because it was raised in the affidavits that the husband had filed as evidence-in-chief for the trial from some of his witnesses. As the wife had notice of this

particular evidence and had been able to address it as part of her case, this subset of evidence did not violate the rule of *Browne v. Dunn*.

However, the husband also tried to give evidence of events relating to the unreported cash income issue that was ***not*** raised in the Affidavits (including, for example, about a dinner when the husband claimed to have seen the wife accept a cash payment, and about a time when the wife had directed the husband to pick up a cash payment for her). As the wife did not know the husband would be adducing this evidence as part of his case, and as these allegations had not been put to her in cross-examination, she had not had an opportunity to address them. And, as the husband was clearly trying to adduce this evidence to prove that the wife had not been forthcoming about the cash income issue, he conceded that this evidence violated the rule of *Browne v. Dunn*.

As there was no dispute that the husband had not complied with the rule of *Browne v. Dunn*, the real question for Justice Fowler Burne was that of the appropriate remedy would be. This required her to consider a number of factors that were summarized by the Ontario Court of Appeal in *R. v. Quansah*, 2015 ONCA 237 at para. 117, including:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

[See also *Curley v. Taafe*, 2019 ONCA 368 at para. 31, where the Ontario Court of Appeal confirmed that these factors apply in the family law context.]

Although trial judges have broad discretion when it comes to remedying breaches of the Rule in *Browne v. Dunne*, the most common remedies are to "take into account the breach of the Rule when assessing a witness's credibility and deciding the weight to attach to that witness's evidence", or to "allow counsel to recall the witness whose evidence was impeached without notice": *Curley v. Taafe*, 2019 ONCA 368 at para. 31. Excluding the offending evidence may also be available in certain circumstances, although it "should be a last resort and only exercised where any other remedy would be unduly prejudicial to the other party": *Audmax Inc. v. Ontario (Human Rights Tribunal)*, 2011 ONSC 315 (Div. Ct.).

In this case, Justice Fowler Byrne found that the breaches were serious but unintentional. She was also of the view that it was essential to ensure that "all relevant evidence be heard by me, and that I have every opportunity to assess the credibility of all witnesses." Accordingly, she decided the appropriate remedy would be to allow the wife and her bookkeeper to be recalled to address the husband's evidence on the unreported cash income issue that had not been put to them in cross

examination. She also ordered that the husband pay any extra costs that would be incurred as a result of these witnesses having to be recalled.

Given that the wife was asking the court to exclude the evidence in question entirely, this was a fortunate, albeit potentially expensive, lesson for the husband. That said, this case offers an important lesson for all of us: pay attention. Breaches of the Rule in *Browne and Dunn* are not always readily apparent in real time and are easily missed if trial counsel is not on top of the testimony *is* being given, and that *was* previously given. If your witness is being cross-examined on allegations of fact that are new to you, there is a *possible* breach of the Rule in play. And if you are about to elicit evidence from one witness to impeach the evidence of another, you have to make sure your eagerness did not accidentally lead to a violation of the Rule.

A.M. v. *D.M.*, 2023 ONSC 2113 – Hearsay Evidence

This Brief Evidence Refresher Brought to You by the Hearsay Rule

Principle 1: In most (if not all) Canadian jurisdictions, hearsay evidence (or evidence based on "information and belief") is allowed in affidavits for interim motions if the source of the evidence is identified along with belief in the veracity of the evidence.

Principle 2: In many jurisdictions – especially in the busiest trial courts -- for reasons of judicial economy and in an effort to shorten trials and save expense, the use of affidavit evidence at trial is becoming increasingly common.

Principle 3: It is generally accepted that the rules of evidence should be applied with some degree of flexibility when considering the best interests of the children. For example, from *Gordon* v. *Gordon* (1980), 23 R.F.L. (2d) 266 (Ont. C.A.):

> A custody case, where the best interests of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. It is not necessary for us to go into details.

See also *Powers* v. *Powers*, 2004 ONCJ 281

However, the combination of these three principles sometimes lead counsel to include hearsay in affidavits for use at *trial*, thinking that, when it comes to a best interests analysis, "anything goes." But that is most assuredly not the case. When drafting affidavits for use at trial, counsel must get out of "interim motion mode." The Hearsay Rule (or, more properly, the "Rule Against Hearsay") cannot be relaxed at trial simply because a witness provides evidence in chief by way of affidavit.

This was the problem Justice Mills faced in *A.M.* v. *D.M.* -- D.M.'s direct evidence by way of affidavit was replete with hearsay -- sometimes double or triple hearsay. In her affidavits, D.M. would recounts what was said to her by the children and what the children told others. There was a similar problem with affidavit evidence put forward by some of D.M.'s collateral witnesses.

A.M. opposed the admission of the hearsay statements.

Generally, to avoid having children testify at trial, hearsay evidence of the children is admissible as a principled exception to the hearsay rule if the evidence is necessary and if it is reliable. And, again generally, the "necessity" criterion is satisfied where it would be inappropriate to call the child as a witness to give evidence. [See, for example: *Collins* v. *Petrie* (2003), 41 R.F.L. (5th) 250 (S.C.J.); *G(JD)* v. *G(SL)*, 2017MBCA 117.]

After considering "necessity", as noted by Justice Mills, threshold reliability may be met if the child has repeated the same statement to more than one person, or where the statement has been made to a person who has a demonstrated skill in interviewing children. Then, if admitted, the weight to be given to the hearsay statement of a child will depend on the (physical and mental) age of the child, the circumstances surrounding the taking of the statement, the risk the child was influenced or manipulated when giving the statement or that the statement itself was edited or

manipulated, and the desire of the child to please or appease the parent taking or requesting the statement: *Wilson* v. *Wickham*, 2018 ONSC 2574 at at paras. 30 and 31:

The task before Justice Mills was to satisfy herself that the circumstances surrounding the hearsay statements met the test of "threshold reliability" to be admitted. This requirement will generally be met where there is no concern about the truth of the statement having regard to the circumstance in which it was made (giving rise to circumstantial guarantees of trustworthiness), or where the statement can be sufficiently tested by means other than contemporaneous cross-examination. [*R.* v. *Khelawon*, 2006 SCC 57, at paras. 51, 62-63]

D.M. relied on the (common) argument that the statements be admitted not for the truth of their contents, but rather for the simple fact that they were made. This – that a statement was not made for the truth of its contents but merely for the fact that it was said -- is the classic "non-hearsay purpose" argument for the admission of what otherwise *appears* to be hearsay adopted by the Privy Counsel in *Subramanian* v. *Direction or Public Prosecution*, [1956] 1 W.L.R. 965 (P.C.). (In fact, this is not an exception to the Hearsay Rule; rather, it is an argument that the statement is not being admitted for a hearsay purpose, the truth of the contents of the statement.)

This is perhaps one of the most misunderstood hearsay concepts. To very briefly recount the facts from *Subramanian*, Mr. Subramanian was charged with possession of ammunition for the purpose of helping a terrorist. He pleaded a defense of duress, claiming that he had no choice because the terrorists had threatened to kill him if he did not follow through with their requests. Of course the terrorists were not available to testify and, as a result, the trial court excluded the statements of the threats as hearsay. However the Court of Appeal determined (and the Privy Counsel agreed) that the evidence was not hearsay. The import of the evidence was not that the statement was true – that the terrorists would kill Mr. Subramanian. Rather, the import of the evidence was the simple fact that it was said, causing Mr. Subramanian to fear for his life. Here, it did not matter whether the statements were true; it only mattered that the statements were made to Mr. Subramanian who was present to be cross-examined.

Here, D.M. was looking to use the hearsay statements to provide insight into the family and the challenges faced by the parents in implementing and adhering to the agreed upon parenting schedule. It was argued that the hearsay statements were necessary for the Court to fully appreciate the family dynamics. But that use would require the Court to accept the statements for the truth of their contents – a hearsay purpose. Therefore, the statements were hearsay and presumptively inadmissible.

In addressing the "necessity and reliability" exception to the Hearsay Rule, counsel for D.M. argued that the voices of children in this case could only be heard through the hearsay evidence of parents and that the exception generally reserved for therapeutic professionals should be extended to D.M. a parent. Although the children did meet with professionals, some of the reports were dated. Therefore, D.M. believed herself to be the only source available to provide a full narrative and to offer current evidence respecting the children. That was the basis of the "necessity" argument.

With respect to "reliability", counsel for D.M. argued that the proffered evidence was reliable because D.M. had never been faulted for a lack of credibility or reliability over the 10 years the case had been in litigation. Based on that, D.M. argued that the hearsay statements from her should essentially be afforded a "presumption" of reliability. Essentially Justice Mills was being asked

to expand the test for reliability and to be "more practical" in the application of the rules of evidence in family disputes.

Although a lovely invitation, her Honour respectfully declined:

> [12] In the absence of any legal or statutory authority directing me to depart from the existing rules of evidence or to re-write the rules of evidence in family law proceedings, I decline to do so. The impassioned pleas of counsel to change the way evidence is received in family law trials would result in the admission of unfettered hearsay evidence. There would be no gatekeeper; rather, everything said by a parent would be admitted as being necessary and reliable unless and until proven otherwise. This approach would inevitably result in longer and more acrimonious family law proceedings, a result that will benefit no one.

Here, the children had independent counsel and had participated in assessments and counselling with therapeutic professionals who were going to be witnesses at the trial. The voices of the children would be heard without having to resort to hearsay.

The proffered hearsay statements lacked both procedural/threshold and substantive reliability. There were insufficient circumstantial guarantees of trustworthiness or evidentiary guarantees that the statements were inherently trustworthy. [*R*. v. *Bradshaw*, 2017 SCC 35, at para. 27]

Furthermore, here, there was reason to believe that any statements attributed to the children lacked inherent trustworthiness. Both children had been diagnosed with autism spectrum disorder and cognitive disabilities. Both of the children had admitted to lying to his parents and his teachers and the police. One of the children was highly suggestible and would say what he felt necessary to alleviate situational discomfort.

The statements in question were inadmissible.

And as if a reasonably clear decision was not enough, the decision includes two schedules setting out the impugned statements, explaining why they were or were not admissible. Very helpful.

***Laxmikantha* v. *Adapa*, 2023 ONSC 7151 – Motions at Case Conferences**

Uh, No. And Just When We Thought it was Safe to Forget Latin

A motion is a motion; a Case Conference is a Case Conference – never the twain shall meet…or at least never the twain *should* meet. But in *Laxmikantha*, they met. And in our view, this is a serious problem.

In *Laxmikantha*, the Court decided that Rule 17(8) of the Ontario *Family Law Rules*, 114/99 bestowed upon the Court jurisdiction to award interim decision-making and interim support at a Case Conference, where the payor parent/spouse does not attend to oppose.

In her Case Conference Brief, the Applicant/Mother asked for sole decision-making authority and for significant child support and spousal support. The Respondent/Father did not file an Answer or a Case Conference Brief – and he did not attend the Case Conference. The Mother's proposed support amount was based on the Father's most recent disclosed annual income of $621,393 and the Mother's self-imputed income of $32,000.

There were two children, aged 16 and 13. The Court determined that the Mother was the children's primary caregiver during the 21-year marriage. And how did the Court come to that conclusion? Well -- that is what the Mother claimed in her Application and stated in her Case Conference Brief – both unsworn documents. And this is the problem with all the "findings" on which the Court's decision was made – they were made (presumably) without the benefit of sworn evidence.

The same is true for the "finding" that, as a pharmaceutical executive, the Father travels frequently and only visits the children sporadically.

As noted by the Court:

> [3] **These facts and the details regarding them are not in evidence**, but rather they are facts set out in a Form 17A Case Conference Brief to which the father has not cared to respond with his own brief. Based on this **uncontested data**, the DivorceMate calculations for child support amount to $7,734 per month. The same software produced a range of $11,304 to $14,384 under the Spousal Support Advisory Guidelines' 'with-child-support' formula. In the brief, the mother has sought a temporary and without-prejudice order for child support starting from December 1, 2023, and spousal support in the mid-range figure of $12,852. [emphasis added]

With respect, "uncontested date" is not "uncontested evidence." Even assuming that the Father was properly served and had simply defaulted on filing an Answer and attending the Conference – the Father's bad conduct does not convert the Mother's unsworn statements into evidence on which major substantive decisions can be made.
The Court goes on to state:

> [4] …Had this been a rule 14 motion, the court would have no difficulty ordering the support on an interim and without prejudice basis. Usually, a case conference judge would also attempt to broker a consent order that obviates the need for a contested motion. Here, the father has not defended and did not appear at the hearing of the conference. If he were to bring a motion to set the order aside or appeal this decision, he would have to file evidence and establish that the result on a formal motion would have led to a different order: *Heston-Cook* v. *Schneider*, 2015 ONCA 10, [2015] O.J. No. 120, at para. 12.

While this statement has the ring of accuracy, there are some notable issues:

1. "Had this been a motion" there would have been sworn evidence before the Court on which to base an interim decision.

2. Just as with bad behaviour, the fact that there is no opposite party with whom to "broker" a Consent Order does not convert unsworn information into sworn evidence.

3. *Heston-Cook* v. *Schneider* speaks to a person trying to appeal an order from a motion (at which there was evidence) that person did not attend – not from a Case Conference.

4. Paragraph 12 of *Heston-Cook* v. *Schneider* does actually stand for the cited proposition. Paragraph 12 of Heston-Cook v. Schneider simply states:

> [12] Having regard to the submissions made, we make one further comment. It is trite law that an appeal is always from the order of the court and not the reasons. In dismissing the appeal, the motion judge stated in obiter that, "[T]he respondent should have the right to assert any limitation period defences that may also arise as a result of the need to commence a new action in view of the defective action commenced by the applicant." Any motion invoking a limitation period defence will have to be determined on the basis of the proceedings and pleadings as they stand at the time that motion is heard and the motion judge's comments should not be taken to be determinative of the outcome of that issue.

His Honour justifies the order for decision-making authority and interim child support with reference to the powers provided to the Court by Rule 17(8) of the *Family Law Rules*, which set out the procedural jurisdiction for the granting of orders at a Case Conference:

> **Orders at conference**
>
> (8) At a case conference, settlement conference or trial management conference **the judge may, if it is appropriate to do so**,
>
> (a) make an order for document disclosure (rule 19), questioning (rule 20) or filing of summaries of argument on a motion, set the times for events in the case or give directions for the next step or steps in the case;
>
> (a.0.1) make an order about expert opinion evidence, including,

(i) the engagement of an expert by or for one or more parties,

(ii) the use of expert opinion evidence in a case, or

(iii) the provision, service or filing of experts' reports or written opinions;

(a.1) make an order requiring the parties to file a trial management endorsement or trial scheduling endorsement in a form determined by the court;

(b) make an order requiring one or more parties to attend,

(i) a mandatory information program,

(ii) a case conference or settlement conference conducted by a person named under subrule (9),

(iii) an intake meeting with a court-affiliated mediation service, or

(iv) a program offered through any other available community service or resource;

(b.1) <u>if notice has been served</u>, make a final order or any temporary order, including any of the following temporary orders to facilitate the preservation of the rights of the parties until a further agreement or order is made:

(i) an order relating to the designation of beneficiaries under a policy of life insurance, registered retirement savings plan, trust, pension, annuity or a similar financial instrument,

(ii) an order preserving assets generally or particularly,

(iii) an order prohibiting the concealment or destruction of documents or property,

(iv) an order requiring an accounting of funds under the control of one of the parties,

(v) an order preserving the health and medical insurance coverage for one of the parties and the children of the relationship, and

(vi) an order continuing the payment of periodic amounts required to preserve an asset or a benefit to one of the parties and the children;

(c) make an unopposed order or an order on consent; and

(d) on consent, refer any issue for alternative dispute resolution. [emphasis added]

A review of this section makes one thing perfectly clear – all the listed examples of orders a court can make on a Case Conference – whether with or without notice – are either procedural in nature or the type of order that will preserve *status quo* rights until further agreement or order, to avoid any prejudice to a party. But none of the listed examples could be called substantive.
His Honour determined that the "notice" requirement referenced in Rule 17(8)(b.1) was met by service of the Case Conference Brief. We take no issue with that. That is one of the purposes of the Case Conference Brief. Notably, the Rule does not state what form the notice must take: *Hoque* v. *Mahmud*, 2007 CanLII 39366 (ONSC) at para. 15.

Although the Court in *Hoque* notes that it is "less clear" whether the Rule conferred authority to grant substantive relief, here the Court suggests there is really no ambiguity:

> [7]…The ambiguity can be resolved readily by assuming the drafters followed the usual rules of legislative construction. On first impression, it would appear that para. (b.1) is limited by subject matter to preservation orders and maintenance of financial status quo. However, the specific list of preservation mechanisms follows a general phrase "*any* temporary order" (emph. added) and is connected by the word "including." This grammatical structure takes the meaning outside the *ejusdem generis* rule (limited class interpretation) and protects the generality of the antecedent. See: Sullivan, The Construction of Statutes, Seventh Ed. (Toronto: LexisNexis, 2022), at p. 242, citing National Bank of Greece (Canada) v. Katsikonouris, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029, at 1040-41. It therefore follows that the case conference judge is authorized to grant any temporary orders, if satisfied that the other party has been given due notice.

His Honour therefore concludes that Rule 17(8) confers jurisdiction on a Case Conference:

> [9] I conclude from the foregoing that subrule 17(8) of the FLR confers jurisdiction on a case conference judge to award interim relief of the kind sought by the mother, provided notice is clearly given and stated in the Case Conference Brief and the relief is an appropriate remedy in the circumstances. This interpretation of the rule places the burden on the erstwhile non-participatory spouse/parent to bring a motion to set the order aside, instead of requiring the presumed recipient of support to bring a separation [sic] motion. This would have the effect of reducing steps in most cases and promoting general principles of the FLR in streamlining cases, getting payor spouses used to the idea of paying support, and of rounding up recalcitrant parties into the precinct of the court.

And based on this – but not on any actual evidence – on an interim basis, the Court ordered that the Mother have sole decision-making authority; that the Father pay monthly child support of $7,734; and that the Father pay monthly spousal support of $12,852.

While regular readers will know we are all for measures that enhance judicial economy; procedural fairness must not be sacrificed at that alter. Where one party is truly recalcitrant, they are not likely to respond to a motion after a Case Conference. And if they do, without adequate explanation, they will certainly have to pay costs for wasting the Court's time at the Case Conference.

The fact that *ejusdem generis* does not technically apply (because, here, the specific follows the general rather than the general following the specific) is not a reason to ignore what is otherwise the pretty clear intent of Rule 17(8) the list of 17 example orders that are procedural in nature housed within it.

Furthermore, one good Latin cannon of statutory interpretation perhaps deserves some others?

a. *Noscitur A Sociis*: "it is known by its associates". The meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context – just as the list of procedural orders.

b. *Expressio Unius est Exclusio Alterius*: When a legal document includes a list, anything not in that list is assumed to be purposely excluded – such as substantive orders.

But, then again, any we need not have any Latin philosophers tell us that Orders cannot be made without evidence.

As there is no notion of "noting in default" in the *Family Law Rules*, it further stands to reason that a Court cannot make a final order at a Case Conference -- even where other side does not file Answer: *Rice* v. *Strachan*, 2012 CarswellNfld 395. The fact that the Court here made an interim Order does not really detract from this general principle. And other cases have also clarified that substantive orders should not be made at a Case Conference: *Kocsis* v. *Kocsis*, [2005] O.J. No. 3169; *Jones* v. *Jones*, 2014 ONSC 2122; *Gyan* v. *Bobb*, 2102 CarswellOnt 17489; and that the Court should not rule on (contested) substantive issues without affording parties the chance to tender evidence, test evidence and make submissions: *Lower* v. *Stasiuk*, 2006 BCSC 864; *Robinson* v. *Morrison*, 2000 CarswellOnt 2776.

The one case that *might* support the result in this case is *Burke* v. *Poitras*, 2018 ONCA 1025, where the Court of Appeal suggested that any order that promotes the overall objectives of the *Rules* may be made at any time, including at a Settlement Conference. In that Case, the Court of Appeal notes:

> [5] First, subrule 17(8)(b.1), which sets out a list of final or temporary orders that may be made at conference so long as notice has been served, contains no explicit restrictions on the kind of final order that may be made at a settlement conference beyond the provision of notice.

However, it is important to understand that in *Burke*, the Court of Appeal was actually dealing with other provisions of the *Family Law Rules* – including Rule 1(8) – that specifically provides for the Court striking pleadings where a person fails to obey an order:

> [7] The express purpose of the *Family Law Rules* is to ensure fairness, save time and expense, and give appropriate resources to the case (while allocating resources to other cases), in order to manage the case, control the process, ensure timelines are kept, and orders are enforced. As clearly stipulated in subrules 1(7.1), (8) and (8.1), an order, including an order to strike pleadings, can be made at any time in the process, including the settlement conference, to promote these overarching

> purposes. In this way, any order that promotes the overall objectives of the rules may be made at any time, including at a settlement conference.

Therefore, it is not entirely clear whether Burke supports the result in this case.

We're now going to have a drink. *In vino veritas*.

***Mehralian v. Dunmore,* 2023 ONCA 806 – Attornment and Recognition of Foreign Divorces**

Oh 2 A-Torn in O-man

This case involved two appeals from two jurisdictional decisions in the same matter, the decision of Justice Myers recognizing the validity of an Omani divorce, and the decision of Justice Brownstone dismissing the Husband's motion seeking the return of their child to Oman.

The parties really got around. The Husband is Canadian; the Wife, Iranian. They met while working in Malaysia. They married in Japan in June 2015 and lived there for one year. They moved to the United Arab Emirates in 2016 after the Husband got a job there. They separated for a period in 2017 and reconciled in 2018. They moved to Oman in 2018 and lived there until March 2020. The parties traveled to Ontario in March 2020 to visit with the Husband's family, intending to return to Oman in April. But Covid-19 forced them to stay in Ontario until January 2021, living with the Husband's family. During that time, the Wife became pregnant (as all family lawyers know, children always make it better), and in December 2020, she gave birth to their first and only child.

The family returned to Oman in January 2021. The Husband got a new job in Oman, but he was terminated just over one month after they returned. He then signed a fixed-term contract with an Ontario employer, and the parties returned to Ontario in April 2021.

The parties purchased a chalet in Quebec and were vacationing there in May 2021 when an "incident" occurred. The police were called. The Husband was charged. The marriage was over. The Husband started an application in the Ontario Court of Justice to deal with parenting issues. He brought a 14B Motion claiming the issue was urgent because he was leaving Ontario for work (he found a job in the UAE). A motion was scheduled, but the Husband later withdrew his claims in the OCJ and vacated the motion.

In June 2021, the Wife also brought an application, but in the Ontario Superior Court of Justice, seeking a divorce, corollary relief, and equalization of net family properties. However, as the Wife had not lived in Ontario for the year preceding the Application, Ontario had no jurisdiction to do *anything* under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).

Although this point was not really addressed by the Court below or the Court of Appeal, a quick reminder about *Divorce Act* jurisdiction can save us all some time, trouble and embarrassment – and no time like the present. Recall sections 3 and 4 of the *Divorce Act*:

> **Jurisdiction in divorce proceedings**
>
> 3 (1) A court in a province **has jurisdiction** to hear and determine a divorce proceeding **if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding**.
> **Jurisdiction in corollary relief proceedings**
>
> 4 (1) A court in a province **has jurisdiction** to hear and determine a corollary relief proceeding **if**

(a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
(b) both former spouses accept the jurisdiction of the court.

That is, a spouse cannot claim a divorce until one of the spouses has been habitually resident in the province for a year -- and a spouse cannot claim corollary relief under the *Divorce Act* without already having been divorced in Canada or without also claiming a divorce in Canada -- remember that whole *Rothgiesser* v. *Rothgiesser* (2000), 46 O.R. (3d) 577 (C.A.) thing?) ("*Roghgiesser*"). Therefore, the wife's divorce proceeding was a nullity: *Robar* v. *Robar*, 2010 CarswellNB 15; *Enman* v. *McCafferty*, 2010 CarswellNB 167; *Nafie* v. *Badawy*, 2015 ABCA 36; *Green* v. *Green*, 2009 CarswellBC 2006; *Zalizniak* v. *Zalizniak* et al., 2006 MBCA 161; *S.L.* v. *M.E.F.*, 2007 NLCA 12.

Now back to the main show.

The Husband took the position that Ontario was not the appropriate jurisdiction to deal with their family law claims, but he did not bring a motion to dismiss it. Instead, he moved back to the UAE, then to Oman, and commenced a proceeding in Oman in March 2022 seeking a divorce and joint custody of their child.

Although the Wife contested the Omani court's jurisdiction, the Omani Court of Appeal disagreed with her and found Oman had jurisdiction, sending the matter back to the lower Court for a determination on the merits as to the validity of the divorce and custody under Omani law. The Wife participated in the Omani proceeding, taking the position that, under Omani law, her marriage was invalid and seeking custody of their child. The Omani Court found that her marriage, and divorce, were valid, and granted her custody of their child.

The Husband then brought a motion in the Ontario proceeding for an Order recognizing the validity of the Omani divorce. He brought a second motion for an Order returning their child to Oman, where he claimed the child habitually resided. His motions were heard by two different judges on two separate dates.

At the divorce recognition motion before Justice Myers, the Wife argued that the Ontario Court should not recognize the Omani divorce for several reasons, including that it did not have subject-matter jurisdiction and on public policy grounds, claiming the Husband only sought a divorce in Oman to avoid his support obligations to her in Canada. Again, recognition of the Omani divorce in Ontario would meant that the Wife had no standing to claim spousal support under the *Divorce Act* (there's that pesky *Rothgiesser* again). And she, also could not seek spousal support in Ontario under the *Family Law Act,* RSO 1990, c. F.3, which only allows "spouses", and not "former spouses" to claim spousal support.

Justice Myers disagreed with the Wife. His Honour found – properly in our view -- that the Wife had attorned to the jurisdiction of the Omani Court when she actively participated in the proceeding there. His Honour briefly considered the issue of whether recognizing the Omani divorce would violate Canadian public policy because there is no provision for spousal support under Omani law, but noted that he was not provided with sufficient evidence so as to understand what Omani law might provide for separating spouses in general. It is also far from clear that Oman not providing

for spousal support would suffice for the public policy defence to the recognition of the Omani divorce. Justice Myers recognized the Omani divorce. Again -- correct decision.

As for the Husband's motion for the return of the child to Oman, Justice Brownstone found that the child was habitually resident in Ontario at the time the Wife commenced her Application, and therefore, the Ontario court had jurisdiction under section 22(1)(a) of the *Children's Law Reform Act,* RSO 1990, c. C.12 (the "*CLRA*").

Section 22(1)(a) provides:

> 22(1) A court shall only exercise its jurisdiction to make a parenting order or contact order with respect to a child if,
>
> (a) the child is habitually resident in Ontario at the commencement of the application for the order…

Section 22(2) defines habitual residence as follows:

> (2) A child is habitually resident in the place where the child resided in whichever of the following circumstances last occurred:
>
> 1. With both parents.
>
> 2. If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order.
>
> 3. With a person other than a parent on a permanent basis for a significant period of time.

Justice Brownstone dismissed the Husband's motion.

Not to be deterred, the Wife appealed Justice Myers' Order and the Husband appealed Justice Brownstone's Order. The appeals were heard together.

The Court of Appeal dismissed the Wife's appeal. It rejected the Wife's argument that she only participated in the Omani proceeding to dispute jurisdiction. Justice Myers made no palpable or overriding error when he concluded, based on facts which the Wife did not contest, that she litigated the merits of the divorce in Oman, and sought and obtained relief from the Omani court – i.e custody of their child. Her participation was determinative of the issue:

> [30] Parties to an action are free to select or accept the jurisdiction in which their dispute is to be resolved: *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 37. As the Divorce Recognition Judge noted, a party that has voluntarily attorned to the jurisdiction of a court has consented to having the issues in dispute determined by that court. **Where jurisdiction is established through such consent, as in this case, it is unnecessary to consider whether there are other grounds upon which a court's jurisdiction might be either recognized or**

> **challenged, such as whether the parties had a real and substantial connection with the jurisdiction in question**: *Wolfe v. Pickar*, 2011 ONCA 347, 332 D.L.R. (4th) 157, at paras. 43-44.
>
> [31] For the same reason, the Divorce Recognition Judge did not err in his finding that the applicant could not relitigate issues that she had unsuccessfully raised before the Omani court. These issues included whether the applicant had received valid notice of the Omani divorce and whether the respondent had committed fraud in obtaining the divorce.

For the same reason, the Wife could not resist enforcement of the Omani divorce on public policy grounds:

> [32] Although the Divorce Recognition Judge did consider whether the Omani divorce should not be recognized in Ontario because the divorce laws of Oman are contrary to Canadian public policy, in my view it was unnecessary for him to do so. **This is because consent to the jurisdiction of the foreign court necessarily involves consent to the laws applicable in that jurisdiction.**
>
> [33] The Divorce Recognition Judge found that although the applicant was not required to agree that the validity of the parties' divorce should be decided by the Omani courts, she voluntarily chose to do so. In so doing, she agreed to have the validity of the divorce determined in accordance with Omani law. **Having consented to the application of Omani law, the applicant cannot now argue that the decision of the Omani court should not be recognized in Ontario because the law on which it was based is contrary to Canadian public policy.**

Three points are worth emphasizing about attornment:

1. Where jurisdiction is established through attornment – that is the end of it. After a party attorns to the jurisdiction of a Court, there is no need to consider other possible methods of securing jurisdiction, such as real and substantial connection.

2. Attorning to the jurisdiction of a foreign court *necessarily* means consenting to the laws applicable in that jurisdiction.

3. Attorning to the jurisdiction of a foreign court *necessarily* means surrendering the chance to argue that the foreign law is contrary to Canadian public policy.

Or, to put it more gastronomically – one can't have one's jurisdictional cake and eat it to. Maybe that doesn't work so well – but you get our point.

The Court of Appeal also dismissed the Husband's appeal. It rejected his argument that Justice Brownstone failed to consider the "settled intention" of the parties in determining whether the child was habitually resident at the time the application was commenced. He claimed the parties did not intend to move to Ontario when they traveled here in April 2021, but that Ontario was merely a "way station" until they returned to the Middle East.

The Court of Appeal acknowledged that while Justice Brownstone did not specifically refer to "settled intention", she concluded based on her careful and detailed review of the evidence that the parties agreed to move to Ontario in April 2021 – and that residence in Ontario *at the time* was sufficient to establish habitual residence Her Honour rejected the Husband's evidence that they were merely visiting, finding that he was not credible. These were factual findings were entitled to deference, and the Husband had identified no palpable and overriding error that would justify setting her decision aside.

Of some interest is the following statement by the Court of Appeal:

> [42] I see no reviewable error in the Parenting Jurisdiction Judge's factual finding that the parties were residing in Ontario at the relevant time, or in her conclusion that this was sufficient to establish habitual residence of M. **for purposes of s. 22(1)(a) of the CLRA**. [emphasis added]

Personally, we would have appreciated the Court of Appeal more directly addressing the appropriate test to apply when determining "habitual residence" under the *CLRA*, as the above statement suggests that the test is where the parties agreed to and did reside. It It is unclear whether Justice Brownstone was even required to decide the child's "habitual residence" based on (or solely on) whether the parties had a "settled intention" to live in Ontario. The *CLRA* says nothing about "settled intention". But the Court of Appeal gives no further guidance, that is, until a few weeks later when it released its decision in *Zafar v. Azeem,* 2024 ONCA 15 ("*Zafar*").

In *Zafar,* the Court of Appeal suggests (in *obiter*) that the the Supreme Court of Canada's decision in *Office of the Children's Lawyer* v. *Balev,* 2018 SCC 16 dealing with habitual residence under the *Hague Convention* applies equally in non-Hague Convention cases. Recall that in *Balev,* the majority of the Supreme Court concluded (to the chagrin of many) that in deciding "habitual residence" under the *Hague Convention,* a "hybrid approach" should be adopted in Canada over the "parental intention" (or "settled intention") approach. The hybrid approach requires an analysis of "all relevant considerations arising from the facts of the case at hand". The parents' intentions are still important, but they are not the sole focus of the analysis. Under *Balev*, the Court should also consider the age of the child, the focal point of his or her life, the child's links to and circumstances in Country A vs. Country B, and the child's nationality, among other things, in determining the child's habitual residence.

However, as noted above, *Balev* deals with the interpretation of "habitual residence" under the Hague Convention. It is not at all clear that the same analysis applies under the *CLRA* or other provincial acts, all of which have their own "baked it" definition of "habitual residence." There are conflicting decisions on the question:

- On one hand, there are cases that suggest the definition of "habitual residence" under the Hague Convention has no bearing on the definition of "habitual residence" under provincial statutes: *Chan* v. *Chow*, 2001, BCCA 276; *Korutowska-Wooff* v. *Wooff*, [2004] O.J. No. 3256 (C.A.); *Smith* v. *Smith*, 2019 SKQB 280; *Kong* v. *Song*, 2019 BCCA 84; *Guo* v. *Chan*, 2020 ONSC 7237; *Logan* v. *Logan*, 2022 ONSC 4927 (CanLII) at 26-28;

- On the other hand, there are cases that suggest that "habitually resident" has the same meaning under both: *Medhurst* v. *Markle* (1995), 26 O.R. (3d) 178; *Rogala* v. *Rogala*, [2001] O.J. No. 1683; *Solem* v. *Solem*, 2013 CarswellOnt 1699; *Sanders* v. *Aerts*, 2014 ONCJ 20; *Maldonado* v. *Feliciano*, 2018 ONCJ 652; *Moussa* v. *Sundhu* (2018), 11 R.F.L. (8th) 497 (Ont. C.J.); *McKay* v. *Labelle*, 2019 CarswellOnt 4524 (Ont. C.J.); *A.M.* v. *D.L.*, 2019 ONCJ 155 at paras. 44 and 45.

And to make you wring *both* hands, *Zafar* appears to contradict another recent Court of Appeal decision, *Gelieden* v. *Rawdah*, 2020 ONCA 254, where the Court was of the view that the determination of "habitual residence" is **not** the same under the Hague Convention and the provincial statutes.

To us, it makes sense that if the provincial statutes include a definition of "habitual residence" that is the definition that should apply in non-Hague Convention cases. They are entirely different regimes informed by different principles. The whole point of the Convention is to create consensus between signatory countries that parenting issues will be dealt with based on the best interests of the children. That same assumption does not apply in non-Hague cases. Moreover, whereas the *CLRA* specifically states that a parent cannot unilaterally change a child's habitual residence, this is completely at odds with the Supreme Court of Canada's comment in *Balev* that "there is no 'rule' that the actions of one parent cannot unilaterally change the habitual residence of a child" – see para 46. (There *should* be a rule in our opinion, but there is not.)

At least for now, remember the lessons of attornment and stop wringing your hands.

Torgersrud v. *Lightstone*, 2023 ONCA 580 – Enforceability of Foreign Marriage Contracts

Foreign Marriage Contracts: Words Matter

This decision from late 2023 about the enforceability of foreign marriage contracts is worth brief comment – not because the decision is wrong – but because some of the *obiter* is concerning.

The spouses signed two marriage contracts in Quebec. Both contracts provided that the parties were separate as to property. Below, the wife was successful in her bid to have the contracts set aside pursuant to s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"). This was the husband's appeal.

The parties were married on March 31, 1987, and they lived in Montreal. After the marriage, the husband asked the wife to sign a marriage contract to protect his family's business interests. This contract (signed in 1988) provided that the parties renounce their property rights to a "partition of acquests", declare that they are "separate as to property", and acknowledge they would not be liable for each other's debts. Under Quebec law, this meant there would be no division of assets of any nature upon marriage breakdown.

The parties signed a second Quebec contract in 1990 in which they agreed to opt out of the family patrimony regime that had recently been legislated into Quebec law. This regime provided that the net value of family patrimony be divided equally upon separation. The family patrimony regime excludes inheritances, property existing at the date of marriage, and gifts, from division.

The parties moved to Ottawa in 1993, where they lived until they separated in 2015, at which time the wife claimed equalization under Part I of the *FLA*. The husband asserted that the Quebec marriage contracts ousted the *FLA*.

The expert evidence from Quebec legal practitioners was that the contracts *would* be recognized in Quebec. The court below concluded that the documents *were* marriage contracts -- but that they did not oust the application of the *FLA*.

The court below found that the Quebec contracts did not include any renunciation, releases, or waivers and that they did not "deal with" or release equalization claims, the statement that the parties were "separate as to property" insufficient. Therefore, the judge below held that the Quebec contracts did not bar the wife's equalization claim. So far – no problem.

However, the court below then went further, saying that there is a "high threshold" for finding an out-of-jurisdiction marriage contract prevails over the *FLA's* equalization provision. The Court of Appeal did not distance itself from that comment, and that is the obiter with which we take issue.

The court below also found that she would have set aside the contracts under s. 56(4) of the *FLA*, because the husband had failed to disclose significant assets at the time of the contracts and the wife did not appreciate the nature and consequences of the contracts. The wife did not have a full appreciation of the husband's financial position at the time the contracts were executed. These were findings the court below was entitled to make.

Referring to the factors in *Dochuk* v. *Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.) and *Demchuk* v. *Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.), the court below found that this was a proper case to set aside the marriage contracts.

The husband's appeal was primarily focussed on the argument that the court below erred in finding that the Quebec contracts did not oust the *FLA's* equalization provisions.

But based on the finding of insufficient disclosure under s. 56(4)(a) of the *FLA*, the Court of Appeal did not have to decide this issue. Section 56(4)(a) provides that a court can set aside a domestic contract (or a provision within it) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made.

As noted above, our concern is with that one line -- that there is a "high threshold" for finding an out-of-jurisdiction marriage contract prevails over the *FLA's* equalization provision. That, respectfully, is not the law.

In this regard, two sections of the *FLA* come to mind.

The first is section 2(10):

> **Act subject to contracts**
> (10) A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise.

The next is section 51 which defines "domestic contract" as including a marriage contract. Then, there is section 52(1):

> **Marriage contracts**
> 52 (1) Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,
> (a) ownership in or division of property;
> (b) support obligations;
> (c) the right to direct the education and moral training of their children, but not the right to decision-making responsibility or parenting time with respect to their children; and
> (d) any other matter in the settlement of their affairs.

Notably, section 52 does not say that the contract cannot be a foreign marriage contract. And finally, we have section 58:

> **Contracts made outside Ontario**
>
> 58 The manner and formalities of making a domestic contract and its essential validity and effect are **governed by the proper law of the contract**, except that,
>
> (a) a contract of which the proper law is that of a jurisdiction other than Ontario **is also valid and enforceable in Ontario if entered into in accordance with Ontario's internal law**;

(b) subsection 33 (4) (setting aside provision for support or waiver) and section 56 apply in Ontario to contracts for which the proper law is that of a jurisdiction other than Ontario; and

(c) a provision in a marriage contract or cohabitation agreement respecting the right to decision-making responsibility or parenting time with respect to children is not enforceable in Ontario. [**emphasis** added]

And on top of this, we have the Ontario Court of Appeal specifically saying there is no presumption that courts will be hesitant to enforce marriage contracts: *Dougherty* v. *Dougherty*, 2008 CarswellOnt 2203 (C.A.).

Therefore, neither the statutory regime nor previous authority from the Court of Appeal suggest that there is a "high threshold" for finding that a foreign marriage contract prevails over the *FLA's* equalization provision.

What the Court of Appeal *has* made clear, however, is that to exclude property from equalization, the foreign contract must evince an intention to exclude certain (or all) property from the property equalization regime (even absent a specific reference to "equalization"): *Lay* v. *Lay* (2000), 47 O.R. (3d) 779 (C.A.) and *Bosch* v. *Bosch* (1991), 6 O.R. (3d) 168 (C.A.).

Stated otherwise, s. 58(a) provides an alternative ground for *upholding* a domestic contract that is governed by foreign law: *Jasen* v. *Karassik*, 2009 CarswellOnt 1507 (C.A.). It is *expansive*, not limiting. Therefore, is it, we respectfully suggestion, inaccurate to suggest that a "high threshold" applies for finding that a foreign marriage contract prevails over the equalization provisions of the FLA.

Casa Margarita Enterprises Ltd. v. *Huntly Investments Ltd.*, 2024 BCCA 31 – The Oppression Remedy in Closely Held Corporations

Wasting Away Again (with Oppression Claims) in Margaritaville (R.I.P. Jimmy Buffet)

The very astute amongst our readers will notice this is not a family law case. But, as regular readers will know, we here at *This Week in Family Law* scour the law reports to let you know about *all* cases – big and small, from every area of law – that might be of use to family law counsel and courts. And while this is, indeed, not a family law case, it details important principles with respect oppression claims in closely held corporations, something which is very common in family law cases, especially for professional like doctors and lawyers that have professional corporations.

In this case, the British Columbia Court of Appeal upheld an order requiring the shareholder majority to purchase a minority shareholder's interest in the company pursuant to an oppression claim.

The primary company, Huntly Investments Ltd. ("Huntly"), had been started by two brothers in 1966. Over time, a small number of shares were sold or given to people outside of the brothers' families. One entity receiving these shares was the respondent, Casa Margarita Enterprises Ltd. ("Casa"), which was owned by Ms Margaret Cowan. The Cowan family had business connections with the brothers in the 1960s and early 1970s.

As time marched on, the brothers died, and their families took over Huntly. Eventually, all of the smaller shareholders were bought out until only the Wolverton family and Casa remained as owners. Casa owned only 1.82% of the common shares of Huntly.

When Ms. Cowan passed away, the Administrator of her estate, understandably, wanted to sell Casa's shares to Huntly in order to wind up the estate. The Administrator tried to have one or more of the Wolverton family members buy the shares so it could distribute Ms. Cowan's estate to her 17 beneficiaries, but his efforts were unsuccessful. None of the Wolvertons were interested in buying the shares.

Casa commenced an action against the Wolvertons and Huntly, claiming oppression under section 227 of the *Business Corporations Act*, SBC 2002, c. 57 (which, for the interest of all, contains similar oppression provisions to similar provincial statutes):

> 227 (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

Casa successful argued that it had a "reasonable expectation" that Huntly or another Huntly shareholder would purchase Casa's shares. ("Reasonable expectations are the touchstone of an oppression claim: *BCE Inc*. v. *1976 Debentureholders*, 2008 SCC 69 ("*BCE*"); *Wilson* v. *Alharayeri*, 2017 SCC 39). The trial judge further found that Huntly had failed to meet those reasonable expectations by, among other things, refusing to facilitate a share purchase and failing to provide information allowing Casa to value its shares.

One of the key issues in the trial was the fact that Huntly refused to permit valuations of the underlying real estate assets which made up most of Huntly's portfolio -- going so far as to block Casa's valuators from being able to enter buildings. At trial, Huntly argued that appraisals were not needed because Casa had access to property tax assessments and some informal internal valuations. The trial judge determined this to be insufficient, particularly given evidence that the assessments and internal valuations were not accurate indications of value.

The trial judge ordered that Casa's shares were to be purchased by Huntly or by two of the controlling shareholders and/or one of the other companies owned by the Wolvertons.

The Court of Appeal upheld this decision.

First, with respect to the standard of review, a finding of "reasonable expectations" is a finding of fact reviewable on the palpable and overriding standard. Whether a reasonable expectation was *violated* by oppressive or unfairly prejudicial conduct is a finding of mixed fact and law subject to review on the same deferential standard (absent an extricable question of law): *Radford* v. *MacMillan*, 2018 BCCA 335 at para. 54.

The Wolvertons argued that Casa could have sold its shares on the open market as there was no shareholder agreement preventing this or requiring that the shares be purchased by another shareholder. At most, they argued, the head of the company could try to arrange a sale.

Oppression is established by first proving that the claimant had a reasonable expectation, and then proving that reasonable expectation was blocked through conduct "[falling] within the concepts of 'oppression', 'unfair prejudice' or 'unfair disregard' of the claimant's interest": *BCE* at para. 89. Further, it is no defence to an oppression claim to rely solely on the otherwise *lawfulness* of the conduct of the corporation and its directors. As noted by the B.C. Court of Appeal in *Canex Investment Corporation* v. *0799701 B.C. Ltd*., 2020 BCCA 231 at para. 13:

> … [T]he remedy is available to address the objective and substantive reality of the manner in which the affairs of a company are conducted. It is not limited by mere formalities of corporate structure. **What matters is substance, not form**. Hence, courts are entitled to examine the realities of how a company is controlled and by whom, and the true nature of relationships within and between related companies. [**emphasis** added]

The Court of Appeal noted that the trial judge properly considered "what was actually happening in the company." There was also evidence that the Wolvertons has purchased other minority shareholder interests in the past. In fact, the Wolvertons had bought some shares Ms. Cowan owned

in another company owned by the family in 1990. This pattern created a reasonable expectation on the part of Ms Cowan's and the Administrator of her estate.

The Court of Appeal did, however, agree with the appellants that Huntly itself could not be required to purchase the shares. The order had to be against the *shareholders*, and against the company itself.

The Court of Appeal also upheld the trial judge's finding that taking steps to prevent a proper valuation of Casa's shares was oppressive conduct. The majority shareholders was responsible for facilitating a reasonable buyout of Casa's interest in Huntly.

This case has clear and obvious implications in family law situations where professional spouses (again, doctors, lawyers, accountants, etc.) often create professional corporations where the spouse hold a minority interest or an interest in a separate class of common or preferred shares without voting rights – and without fair market value. Should the majority shareholder spouse not be willing to purchase the minority interest in such a situations? Well – who knows. But at least Casa Margarita Enterprises Ltd. offers the law you need if you can marshal the necessary facts. We suggest you give the matter the most serious contemplation and consideration – over a Margarita, of course.

Law Society of Ontario | Barreau de l'Ontario

TAB 3

Family Law Refresher 2024

Navigating Financial Statements in Family Law: Practical Tips (PowerPoint)

Christopher Burrison
Burrison Hudani Doris LLP

Brandon Lewis, CPA, CA, CBV, ABV, CFF, CTCE
White & Lewis

April 5, 2024

cpd

Navigating Financial Statements in Family Law: Practical Tips

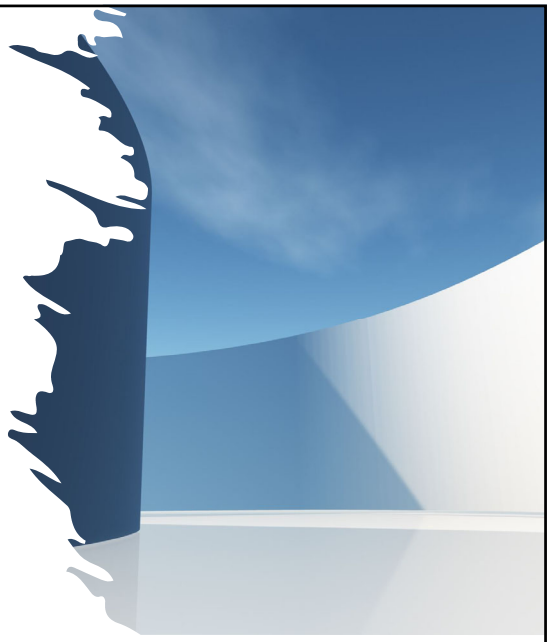
Family Law Refresher 2024, Law Society of Ontario

April 5, 2024

Presented By:

Christopher Burrison
Partner, Burrison Hudani Doris LLP

Brandon A. Lewis, CPA, CA, CBV, ABV, CFF, CTCE
Partner, White & Lewis Inc.



Burrison Hudani Doris LLP

White & Lewis

1

Areas of Focus

- **Form 13.1: Financial Statement (Property and Support Claims)**
  - When to use this form versus Form 13
  - Legal obligations and document requirements
  - Tips for completing Part 1 Income
    - Self-employment income
    - Other sources of income (Schedule A)
  - Tips for completing Pat 4(e): Business interests
  - Contingent costs of disposition: what are they and where do they go?
  - Role of legal counsel / role of Chartered Business Valuator (CBV)

2

When to Use Form 13.1

- **Making or responding to a claim for property or exclusive possession of the matrimonial home and its contents, or**
- **Making or responding to a claim for property or exclusive possession of the matrimonial home and its contents <u>together with other claims for relief.</u>**
- **Use Form 13 instead, if:**
  - You are not making a responding claim for property or exclusive possession of the matrimonial home.

3

Legal Obligations and Document Requirements

- **Complete and truthful.**
  - Rule 13 is instructive
- **Provide other side with documents relating to support and property**
- **Form 13A: Certificate of Financial Disclosure**
- **Best practices:**
  - Understanding the calculation of net family property
  - Advancing the theory of your case
  - Advocacy through presentation

4

Tips for Completing Part 1: Income

- **Required to disclose sources of income whether taxable or not**

(In this table you must show all of the income that you are currently receiving whether taxable or not.)

Income Source		Amount Received/Month
1.	Employment income (before deductions)	$
2.	Commissions, tips and bonuses	$
3.	Self-employment income (Monthly amount before expenses: $.....	$
4.	Employment Insurance benefits	$
5.	Workers' compensation benefits	$
6.	Social assistance income (including ODSP payments)	$
7.	Interest and investment income	$
8.	Pension income (including CPP and OAS)	$
9.	Spousal support received from a former spouse/partner	$
10.	Child Tax Benefits or Tax Rebates (e.g. GST)	$
11.	Other sources of income (e.g. RRSP withdrawals, capital gains) *(*attach Schedule A and divide annual amount by 12)*	$
12.	**Total monthly income from all sources:**	$
13.	**Total monthly income X 12 = Total annual income:**	$

Self-employment income

Other sources of income

5

Self-Employment Income

- **Canada Revenue Agency ("CRA"), indicates that a person may have "self-employment" from the following sources:**
  - Business
  - Profession
  - Commissions (e.g. real estate commissions)
  - Farming or fishing activities
- **Self-employment income is reported as a separate line item on a personal tax return**
- **Example: extract from Total Income section of T1 personal tax return:**

Self-employment (see Guide T4002):							
Business income	Gross 13499		Net 13500			20	
Professional income	Gross 13699		Net 13700	+		21	
Commission income	Gross 13899		Net 13900	+		22	
Farming income	Gross 14099		Net 14100	+		23	
Fishing income	Gross 14299		Net 14300	+		24	
Add lines 20 to 24.		Net self-employment income	=		► +		25

6

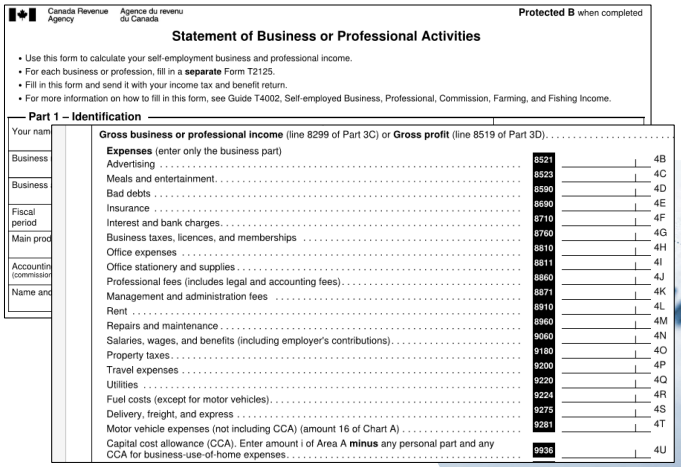
Self-Employment Income

- **What is Business income? There are 3 types:**
  - Sole proprietorship
  - Partnership
  - Corporations
- **Only income from sole proprietorships and partnerships are classified as "self-employment" income.**
- **Sole proprietorships and partners are not separate from the person.**
- **Corporate income is separate and not reported in personal tax return.**
- **Corporate income is reported on T2 corporation income tax return.**

7

Self-Employment Income

- **Gross income and net income (income after expenses) are both reported.**
- **Gross income and net income are usually calculated using "T2125 Statement of Business Activities"**



Canada Revenue Agency / Agence du revenu du Canada — **Protected B** when completed

Statement of Business or Professional Activities

- Use this form to calculate your self-employment business and professional income.
- For each business or profession, fill in a **separate** Form T2125.
- Fill in this form and send it with your income tax and benefit return.
- For more information on how to fill in this form, see Guide T4002, Self-employed Business, Professional, Commission, Farming, and Fishing Income.

Part 1 – Identification

Your nam
Business
Business
Fiscal period
Main prod
Accountin (commissio
Name and

Gross business or professional income (line 8299 of Part 3C) or **Gross profit** (line 8519 of Part 3D)

Expenses (enter only the business part)

Advertising	8521	4B
Meals and entertainment	8523	4C
Bad debts	8590	4D
Insurance	8690	4E
Interest and bank charges	8710	4F
Business taxes, licences, and memberships	8760	4G
Office expenses	8810	4H
Office stationery and supplies	8811	4I
Professional fees (includes legal and accounting fees)	8860	4J
Management and administration fees	8871	4K
Rent	8910	4L
Repairs and maintenance	8960	4M
Salaries, wages, and benefits (including employer's contributions)	9060	4N
Property taxes	9180	4O
Travel expenses	9200	4P
Utilities	9220	4Q
Fuel costs (except for motor vehicles)	9224	4R
Delivery, freight, and express	9275	4S
Motor vehicle expenses (not including CCA) (amount 16 of Chart A)	9281	4T
Capital cost allowance (CCA). Enter amount i of Area A **minus** any personal part and any CCA for business-use-of-home expenses	9936	4U

8

Self-Employment Income

- **Resources:**

Reference	Source	Link
What is self-employment income?	Canada Revenue Agency website	https://tinyurl.com/2p8zt87f
How to report self-employment income?	Canada Revenue Agency website	https://tinyurl.com/4y8y2hca
Guidelines for Reporting Self-Employment Income	TurboTax	https://tinyurl.com/yckjy9hu
T2125 Statement of Business or Professional Activities	Canada Revenue Agency website	https://tinyurl.com/mpun5rxj

9

Other Source of Income: Schedule A

(In this table you must show all of the income that you are currently receiving whether taxable or not.)

	Income Source	Amount Received/Month
1.	Employment income (before deductions)	$
2.	Commissions, tips and bonuses	$
3.	Self-employment income (Monthly amount before expenses: $.....)	$
4.	Employment Insurance benefits	$
5.	Workers' compensation benefits	$
6.	Social assistance income (including ODSP payments)	$
7.	Interest and investment income	$
8.	Pension income (including CPP and OAS)	$
9.	Spousal support received from a former spouse/partner	$
10.	Child Tax Benefits or Tax Rebates (e.g. GST)	$
11.	Other sources of income (e.g. RRSP withdrawals, capital gains) *(*attach Schedule A and divide annual amount by 12)*	$
12.	**Total monthly income from all sources:**	$
13.	**Total monthly income X 12 = Total annual income:**	$

Other sources of income

10

Schedule A

- **Sources are itemized on Schedule A carried up to Line 11**
  - Sole proprietorship
  - Partnership
  - Corporations
- **Example: extract of Schedule A for Form 13.1 Financial Statement:**

Schedule A: Additional Sources of Income

Line	Income Source	Annual Amount
1.	Net partnership income	$
2.	Net rental income (Gross annual rental income of $)	$
3.	Total amount of dividends received from taxable Canadian corporations	$
4.	Total capital gains ($) less capital losses ($)	$
5.	Registered retirement savings plan withdrawals	$
6.	Income from a Registered Retirement Income Fund or Annuity	$
7.	Any other income *(specify source)*	$
	Subtotal:	$

11

Schedule A

- **Other income sources can be found from persons' tax return (Total Income section)**

Schedule A: Additional Sources of Income

Line	Income Source	Annual Amount
1.	Net partnership income	$
2.	Net rental income (Gross annual rental income of $)	$
3.	Total amount of dividends received from taxable Canadian corporations	$
4.	Total capital gains ($) less capital losses ($)	$
5.	Registered retirement savings plan withdrawals	$
6.	Income from a Registered Retirement Income Fund or Annuity	$
7.	Any other income *(specify source)*	$
	Subtotal:	$

Step 2 – Total income

As a resident of Canada, you need to report your income from all sources inside and outside Canada.

Employment income (box 14 of all T4 slips)		10100	
Tax-exempt income for emergency services volunteers (see line 10100 of the guide)	10105		
Commissions included on line 10100 (box 42 of all T4 slips)	10120		
Wage-loss replacement contributions (see line 10100 of the guide)	10130		
Other employment income (see line 10400 of the guide)		10400	+
Old age security (OAS) pension (box 18 of the T4A(OAS) slip)		11300	+
CPP or QPP benefits (box 20 of the T4A(P) slip)		11400	+
Disability benefits included on line 11400 (box 16 of the T4A(P) slip)	11410		
Other pensions and superannuation (see line 11500 of the guide and line 31400 of the return)		11500	+
Elected split-pension amount (complete Form T1032)		11600	+
Universal child care benefit (UCCB) (see the RC62 slip)		11700	+
UCCB amount designated to a dependant	11701		
Employment insurance and other benefits (box 14 of the T4E slip)		11900	+
Employment insurance maternity and parental benefits, and provincial parental insurance plan benefits	11905		
Taxable amount of dividends from taxable Canadian corporations (use Federal Worksheet): Amount of dividends (**eligible** and **other than eligible**)		12000	+
Amount of dividends (**other than eligible**)	12010		
Interest and other investment income (use Federal Worksheet)		12100	+
Net partnership income (limited or non-active partners only)		12200	+
Registered disability savings plan income (box 131 of the T4A slip)		12500	+
Rental income (see Guide T4036) Gross 12599		Net 12600	+
Taxable capital gains (complete Schedule 3)		12700	+

12

Tips for completing Pat 4(e): Business interests

- **List the value of incorporated and unincorporated business in this section.**
- **Include:**
  - Name of business/company;
  - Describe the interest (e.g., a 75% in the common shares of ABC Inc.); and
  - Value at applicable dates (marriage, separation, and today (in certain cases its relevant but ok to leave blank if interest hasn't changed significantly between separation and current dates).

PART 4(e): BUSINESS INTERESTS

Show any interest in an unincorporated business owned on the dates in each of the columns below. An interest in an incorporated business may be shown here or under "BANK ACCOUNTS, SAVINGS, SECURITIES, AND PENSIONS" in Part 4(c). Give your best estimate of the market value of your interest.

Name of Firm or Company	Interest	Estimated Market Value of YOUR Interest		
		on date of marriage	on valuation date	today
		$	$	$
19. TOTAL VALUE OF BUSINESS INTERESTS			$	$

13

Tips for completing Pat 4(e): Business interests

- **How to determine the value of a business interest?**
- **Agreement amongst the parties.**
- **Recent transactions.**
- **Chartered Business Valuator (CBV)**
  - CBVs determine the value of businesses, business interests, intangible assets, and complex liabilities for a variety of purposes, such as Family Law.

https://cbvinstitute.com/wp-content/uploads/2021/06/what-cbvs-do.pdf

14

Tips for completing Pat 4(e): Business interests

- **CBVs prepare business valuation reports. CBVs are accredited finance professionals with extensive knowledge and expertise in the specialized field of business valuation. CBVs are trained and governed by CBV Institute.**
- **Valuation and expert report types and standards are governed by CBV Institute.**
- **For valuation reports, there are three types:**
  - Calculation Valuation Report;
  - Estimate Valuation Report; and
  - Comprehensive Valuation Report.
- **Higher the level of assurance, greater the scope of work and cost.**
- **CICBV professional practice standards:** https://cbvinstitute.com/members-students/standards-ethics/practice-standards/

15

Contingent Costs of disposition: What are they and where do they go?

- **Need to account for and calculate contingent costs of disposition on notional sale of certain assets, where applicable.**
- **Such as, but not limited to:**
  - Businesses;
  - Investments;
  - Real property;
  - RRSPs;
  - Employee compensation (RSUs, options, restricted stock, etc.)
- **Contingent costs of disposition can be reported as liabilities in Part 5 of Financial Statement, or within Part 4 (c) or (e), immediately below the value of the investment or business interest.**

16

Role of Legal counsel / Role of Chartered Business Valuator (CBV)

- **Role legal counsel**
  - Recognizing the need for the CBV: Rule 3.1 of the Rules of PC
  - Litigation expert or joint litigation expert: Rule 20.2
  - Properly retaining and instructing the CBV
  - Understanding the role of the CBV as counsel

17

Role of Legal counsel / Role of Chartered Business Valuator (CBV)

- **Role of the CBV**
  - Financial expert in business valuation, income for support calculations, quantification of contingent costs of disposition.
  - Can be retained by one side, or jointly.
  - As defined in Form 20.2 Acknowledgement of Expert's Duty:
    - Opinion evidence that is fair, objective and non-partisan;
    - Opinion evidence that is related only to matters that are within my area of expertise; and,
    - Such additional assistance as the court may reasonably require to determine a matter in issue.
    - Duty prevails over any obligations which I may owe to any party by whom or on whose behalf I am engaged.

18

Law Society of Ontario | Barreau de l'Ontario

TAB 4

Family Law Refresher 2024

Thoughts and Tips on ADR, Offers, Drafting, and More

ADR, Drafting Agreements, Offers and More (PowerPoint)

Seema Jain
Jain Family Law and Mediation

April 5, 2024

THOUGHTS AND TIPS ON ADR, OFFERS, DRAFTING, AND MORE

PROGRAM: FAMILY LAW REFRESHER 2024

BY: SEEMA JAIN

ADR

As a result of the changes to the Divorce Act in March 2021, counsel and parties must consider Dispute Resolution rather than simply starting a court application.

Family dispute resolution process

7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

Rules of Professional Conduct

Encouraging Compromise or Settlement

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

[*Amended - October 2014*]

Commentary

[1] It is important to consider the use of alternative dispute resolution (ADR). When appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.

Mediation: Mediation is when parties are assisted by a neutral third party in their negotations. Mediation has become a common method to attempt to resolve matters, particularly since the court system is so bogged down. The mediation process is an opportunity to have a discussion, obtain a third party opinion, find compromises, look at underlying interests, and even get creative. But despite the many benefits, there are limits to the process as it is voluntary with no decision-maker in the event of continued impasse.

Mediation can be a process used to apply the legal model to a case; however, more often than not, psychologically, parties or their lawyers are looking for some sort of deal rather than legal model. This is when apologies or other types of emotional discussions can take place and catapult matters to a resolution.

To be helpful, attend negotations prepared; prepare the client and know what they want to accomplish on an in-depth basis. I can't stress enough how helpful it is to attend negotiations with clients prepared. When people are unprepared or "surprised" they can make decisions based only on emotions rather than with clarity. Of note, in *Raichura v Jones*, 2020 ABQB 139, the Alberta Court of Queen's Bench found a lawyer was negligent for not having prepared his client well for negotation in mediation. The client felt pressured into a settlement. This lawyer was ordered to pay his former client almost $132,000 in damages.

Mediation Briefs: Good ways to prepare your client. Six tips:

1. Share your calculations in word with the mediator.
2. Make sure you show the difference between the positions. Differentials and gaps are what mediators are trying to understand so they can attempt to bridge.
3. The narrative should not be excessively harsh. Including relevant facts is appropriate but there is no need to be over the top. If it is critical to include facts that make the other party feel small, it is better to submit previous documents which have been shared already. This will lessen an emotional reaction.
4. Include caselaw.
5. Include expert reports.
6. Include a proposal.
7. Discuss process with the mediator. The mediator wants to set up matters for success. If your client needs virtual or shuttle, speak up and help to create a process that is likely to result in success.

Agreements: Come to mediation with a draft agreement started even if based on your proposal to resolve only. This will allow everything to proceed more quickly and efficiently. You will need these clauses and terms at your fingertips and will help with the concerns over drafting which I cover below.

Mediation-Arbitration: In this process, the parties negotiate with the assistance of a neutral third party but if the mediation portion fails then the parties have agreed to be bound to an arbitration process.

Of interest, arbitrators do not have authority to make third party disclosure awards as third parties are not signatories to the arbitration agreement. Many third parties may be willing to follow an award but they are not bound, even if served with a motion.

If your case requires third party disclosure you may need to involve the Court during the arbitration process or you should consider granting the arbitrator jurisdiction to require that one party sign a consent.

See cases:

Garnet v Garnet et al, 2016 ONSC 949 (CanLII), <https://canlii.ca/t/gn8lv>
Lafontaine v. Maxwell, 2014 ONSC 700 (CanLII), <https://canlii.ca/t/g3gpg>

Collaborative Family Law: In this process, the parties sign a contract (Participation Agreement) that binds them not to use their collaborative lawyers in a court process. The parties themselves can pursue a court process but the lawyers cannot. This allows the lawyers to focus on helping the parties problem solve. There are no threats permitted.

The collaborative process is very powerful and can be extremely helpful to parties as the lawyers are helping both clients and concerned about both of them while maintaing a lawyer relationship with just one of the clients. It can be difficult for lawyers to adapt to this type of process and manage the interests of the client and the process at the same time.

There are inclusions in the Participation Agreement that can make lawyers used to the traditional lawyering process unsure of how to move forward. These are things such as:

Process Guidelines

2.1 We will not:

(a) use the threat to withdraw from the collaborative process or to go to court as a means of achieving a desired outcome or forcing a settlement, or

(b) take advantage of mathematical or factual errors and will instead identify them and seek to have them corrected.

As discussed, there is no threatening court. The procedure to work through impasse is also outlined in the Participation Agreement. Not referencing a motion in order to move beyond unreasonableness can be difficult for many lawyers and it can feel as a waste of client resources to continue negotiations. But the clients want the collaborative process to reign and want to attempt negotiations without resorting to threats.

In a non-collaborative processe, lawyers don't normally help the "other side". While in certain circumstances a lawyer may point out errors to help the bigger context, it is not strategic to give an advantage to the opposing party. But in the colloborative process there is an obligtation in all contexs for lawyers to help each other. This ultimately helps the clients to achieve accuracy and avoid later proceedings, which is valuable, but it is a very different approach from the normal process. It is important to point this difference out to clients who elect the collaborative process, as they can have the mistaken impression that you are also representing the other party instead of only representing them.

The collaborative process also makes use of a team, and uses family and financial neutrals. These people are added to the team to help create neutrality and trust in the process. They also help work through impasse issues.

I highly encourage lawyers to consider becoming collaboratively trained. The process is valuable.

2. Mandatory Termination By Lawyer

2.1 A lawyer must withdraw from the collaborative process if his or her client has withheld or misrepresented important information and continues to do so, refuses to honour this or other agreements, delays without reason, or otherwise acts contrary to the principles of the collaborative process referred to in this agreement.

2.2 A lawyer withdrawing under this section will only advise the other collaborative professionals that he or she is withdrawing from the collaborative process.

This is different from a traditional process. In the collaborative process, if you know that your client is not sharing all of their financial information, for example, and will not take your advice to share it, you must withdraw from the process. Trusting accuracy and transparency are integral to the trust in the process but it also means that this process is not suited to all clients and screening for suitability to the process is critical.

Limited Scope Retainers and ADR

I have seen an uptick of individuals attending ADR with either a limited scope retainer or self-represented person on the other side.

There are ongoing issues that can arise if a lawyer is retained on some aspects of the case and not on others. Collaborative Family Law is not an option if this type of retainer exists. Mediation or Mediation-Arbitration may be an option depending on whether the mediator or arbitrator will take it on.

Legal Services Under a Limited Scope Retainer

3.2-1A Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.

3.2-1A.1 When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

Commentary

[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

[1.1] In certain circumstances, such as when the client is in custody, it may not be possible to give him or her a copy of the document. In this type of situation, the lawyer should keep a record of the

limited scope retainer in the client file and, when practicable, provide a copy of the document to the client.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the lawyer is providing services to the client under a full retainer.

[3] [FLSC - not in use]

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed. See rule 7.2-6A and rules 7.2-8 to 7.2-8.2.

[5] [FLSC - not in use]

[5.1] A lawyer should ordinarily confirm with the client in writing when the limited scope retainer is complete. Where appropriate under the rules of the tribunal, the lawyer may consider providing notice to the tribunal that the retainer is complete.

[5.2] In addition to the requirements of Rule 3.2-9, a lawyer who is asked to provide legal services under a limited scope retainer to a client who has diminished capacity to make decisions should carefully consider and assess in each case if, under the circumstances, it is possible to render those services in a competent manner.

[5.3] Where the limited services being provided include an appearance before a tribunal, a lawyer must be careful not to mislead the tribunal as to the scope of the retainer, and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

[5.4] A lawyer should also consider whether the existence of a limited scope retainer should be disclosed to the tribunal or to an opposing party or, if represented, to an opposing party's counsel and whether the lawyer should obtain instructions from the client to make the disclosure.

Communications with a Represented Person

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner

[*Amended - September 2011*]

(a) approach or communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

[*Amended - June 2009*]

7.2-6A Subject to rule 7.2-7, if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the

legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

There are often increased costs to the party who has a lawyer if the limited scope lawyer is in and out of the process. ADR may assist to move matters forward and it may be wise to have the limited scope retained lawyer participate so they can understand the gives, trades, compromises and agreement fully.

DRAFTING AGREEMENTS

Reaching an agreement seems like the climax of the negotiation process. However, as lawyers we often do not rest until there is a signature on that agreement. Many lawyers attend mediation and as they near the end of the day, excited about seeming success, they want to "lock it down" by having something signed. A lawyer is well prepared if they attend a mediation with either:

a. Knowledge of and access to precedent language they wish to include in their possible agreement; or
b. A prepared document that is either on point, or it becomes the working paper and the document that dominates the mediation;
c. The client has already reviewed this document so there aren't surprises and a need to hold off;
d. Be prepared to list a 24 hour cooling off period rather than no signed agreement. I appreciate not wanting to have people change their mind but it is better that something is signed and has to be returned than not signed at all.

Having the above prepared allows for a more seamless end product and allows essentials to be covered. This avoids difficulties down the road.

As I am involved in many secondary arbitrations, there are common Agreement drafting *Faux Pas* that I think deserve highlighting.

"Unfair or poorly drafted agreements are fodder for conflict. Conflict may lead to litigation. Litigation will likely lead to loss of time and money, and perhaps other things, even when a party prevails after trial.": *Mantella v. Mantella*, 2006 CanLII 10526 (ON SC), at para 44.

Common separation agreement or domestic contract or Minutes of Settlement drafting *faux pas* include:

- **Failure to use clear and concise language.** An ambiguous agreement on its face may lead to litigation. Especially as agreements reached during negotiations and mediation can be creative, it is vital to include the assumptions, gives, and trades. Failing to spell out the gives and trades out of fear there will be no agreement can result in a lack of clarity. The case of *Rideout v. Rideout*, 2021 ONSC 1107 (CanLII), at paras 130-131 is an example of a creative resolution that resulted in different understandings of the agreement. The court

was left piecing together the intentions of the parties through different areas of their agreement. Including the gives and trades more clearly and using standard family law language, or even simple accessible language, would have helped these parties avoid a lack of clarity. While the clarity could have prevented their agreement, it would have also prevented unnecessary stress and litigation years later.

- **Failure to set out agreement on key terms.** To reach a binding agreement, the terms of an agreement must be "clear enough to give effect to the reasonable expectations of the parties". When one of the terms of the separation agreement included that "the parties will negotiate the exchange of personal property", there was no agreement on all essential terms: *Aberback v. Bellin*, 2019 ONSC 3866 (CanLII), at para 23. Impasses during negotiation can lead desperate folks to make agreements on vague terms, resulting in further litigation.

- **Failure to set out all relevant financial information.** Set out how much is payable, for what, by whom, to whom, what the terminating date or conditions are, and what the underlying assumptions are, such as each party's incomes: see, e.g., *Hesson v. Shaker,* 2020 ONSC 1319 (CanLII), at para 26; *Francisco v. Francisco*, 2017 ONCJ 323 (CanLII), at para 116.

- **Failure to set out any and all releases.** Where a separation agreement sets out that "each of the parties is financially independent and does not require financial assistance from the other after divorce", this is not the same as a release of spousal support claims: *Zheng v. Xu*, 2019 ONSC 865 (CanLII), at paras 35-36.

- **Failure to include a Miglin release.** Often as lawyers are quickly drafting to lock down an agreement, they don't carefully consider whether a Miglin release is needed and appropriate. Pay attention to the facts of your case and whether a simple release or a Miglin style release is necessary.

- **Failure to properly execute the dispute resolution clause:** Case law suggests that a dispute resolution clause in a separation agreement is *not* a valid and binding family arbitration agreement if it does not contain the formal requirements for secondary arbitration agreements as set out in the *Family Arbitration Regulation*: *Horowitz v Nightingale*, 2017 ONSC 2168 (CanLII), at para 45; followed in *Magotiaux v. Stanton*, 2020 ONSC 4049 (CanLII), at paras 18-20, *Shinder v. Shinder*, 2022 ONSC 181 (CanLII), at paras 46-47, and *Monteiro v. Monteiro*, 2022 ONSC 2642 (CanLII) at paras 13-14.

  If the parties wish to enter into the arbitration process through a consent order, the steps available to the parties are to: (1) sign an arbitration agreement that observes the formalities at the time the consent order is requested; and (2) ask the court to stay the legal proceeding when the consent order is requested: *Horowitz v Nightingale*, 2017 ONSC 2168 (CanLII), at para 70.

  However, the situation may be different if the parties expressly undertake to execute an arbitration agreement that complies with the governing *Family Law Act* and Regulation:

Magotiaux v. Stanton, 2020 ONSC 4049 (CanLII), at paras 7 & 21-23 & *Giddings v. Giddings*, 2019 ONSC 7203 (CanLII), at paras 41 & 44.

The court may also require the parties to enter into a formal secondary arbitration agreement when their agreement to arbitrate is incorporated into a consent order: *Moncur v. Plante*, 2021 ONSC 5164 (CanLII), at paras. 18-19 & 22; and *Lopatowski v. Lopatowski*, 2018 ONSC 824, at paras 55-61.

It is clear that there case law diverges on these issues. It is quoted well in *Fekete v Brown*:

> "[21] Case law diverges on the issue of whether a private agreement between the parties to arbitrate future disputes that does not, itself, constitute a family arbitration agreement may be enforced by a subsequent court order. In *Giddings v. Giddings*, 2019 ONSC 7203, Justice Gray relied on the contractual obligation of good faith contractual performance, to enforce an agreement that took the form of minutes of settlement that were intended to be final but had not been made into a court order, and directed the parties to execute a formal, enforceable family law arbitration agreement.
>
> "[24] In *Moncur*, Justice Laliberte described this area of the law as unsettled, however, there does not appear to be divergent case law on the point of whether the court may enforce its own order by requiring parties to execute a compliant family law arbitration agreement.

Paragraphs 25-27, relying on the conduct of the parties as evidence that they knew and intended to be bound by their Minutes of Settlement which required arbitration, and that Justice Shelston's consent order for the parties to arbitrate was enforceable:

> "[25] In addition to the clear statement of law in *Lopatowski*, I also note that after Shelston J. made the final order, both parties conducted themselves in a way that is consistent with the provision requiring dispute resolution by arbitration with Ms. Guindon. To the extent that the order was based on their consent and signed Minutes of Settlement, the preliminary steps they both participated in is evidence of their knowledge and intention to be bound by them.
>
> [26] The applicant submits there are two reasons why the preliminary steps taken are "vitiated": first, she says she only participated in October because of the erroneous information given to her by the respondent's lawyer that the meeting was a pre-arbitration meeting; and second, because the arbitrator had no power to proceed with the arbitration in the absence of a fully executed family arbitration agreement. Notwithstanding how the arbitrator titled her endorsements pertaining to the October meeting and the November timetable extension, both were pre-arbitration steps. Moreover, the arbitrator did not commence the arbitration. She was waiting for all parties to sign an arbitration agreement and for the court to rule on the jurisdictional issue raised by the applicant.

> [27] The relevance of the parties' participation in the preliminary steps is confirmation that the final order expressed their intention and agreement regarding their future dispute resolution process. Irrespective of the timing of the applicant's objection, and whether she objected to the arbitration process and argued that the final order was unenforceable in October 2020 or January 2021, it would not change the outcome of this motion. Justice Shelston's order is enforceable."

Shinder v Shinder also discusses the issue in paragraphs 49 to 50. Quoting only paragraphs 54 to 56 below:

> [54] In one of the more recent decisions, the court concluded that it would uphold the parties' express intention in signed minutes of settlement to mediate and then arbitrate disputes arising out of a settlement of family law matters by requiring them to sign a family arbitration agreement in the prescribed form, as a means of conferring jurisdiction upon the arbitrator even in the absence of a finding that they had contemplated entering into a further agreement: see *Moncur v. Plante*, 2021 ONSC 5164, at paras. 22 – 23, and 33. Insofar as this case might be interpreted to suggest that the prescribed form of family arbitration agreement is always required to confer jurisdiction upon an arbitrator in family arbitrations or secondary family arbitrations, with the greatest of respect to my learned colleague, I disagree if that was the intended conclusion.
>
> [55] The *Moncur* decision did not engage in an analysis of the various statutory provisions, detailed above. The court did, however, expressly recognize at para. 15 that:
>
> > This matter touches on an unsettled area of the law which requires appellate review. The issues to be decided by the Court raise some difficulty when looked at in the context of the conflicting jurisprudence on the subject matter of family arbitration. Both sides are able to offer cases from the Ontario Superior Court of Justice which support their respective opposite positions. The Applicant relies upon the Court's reasoning in *Magotiaux v. Stanton*, 2020 ONSC 4049, while the Respondent bases her position on *Giddings v. Giddings*, 2019 ONSC 7203.
>
> [56] In the absence of any appellate guidance directly on point, I have tried to make sense of the previous decisions and the statutory framework that exists under both the Arbitration Act, the Regulation, and the Family Law Act on the specific and narrow question that I must decide in this case, which is concerned with when and how originating jurisdiction is conferred on the arbitrator.

Ultimately, the best practice is to have parties select their dispute resolution provider and attach the executed contract to their agreement.

- **Failure to address the RESPs:** These are often thrown in as a catch all and simply state that a first joint contribution will be made from the RESP. While I see lawyers addressing

that the amount on the date of separation will be a joint contribution, I don't see always see lawyers addressing what happens to the growth on the RESP if one of the parties is taking that over and makes further contributions. The initial growth has a growth value on its own. Simply subtracting the date of separation value overlooks that growth. There should be close attention paid to the RESP, growth aspects, further contributions, and who can claim the government benefits.

- **Failure to structure shared parenting child support payments:** Following *Harder v. R.*, 2016 TCC 197 (CanLII), at paras 7-10, it is no longer sufficient in a shared parenting arrangement to identify that both parties are paying support and to specify the amounts owing, but to ultimately have a set-off payment made by only one parent, or for an order to state, e.g., that "for the convenience of the parties, the mother (or the father) will make a monthly payment of 'X', being the set-off amount."

  Instead, for both parents to claim the child tax credit or equivalent to the dependent spouse tax credit and take advantage of the exception in s. 118(5.1) under the *Income Tax Act*, the parties must:

  Obtain a court order or craft an agreement which:

  - States that both parties have an obligation to pay;
  - Sets out the incomes of each of the parties;
  - Set out the specific amount each parent must pay to the other; and

  Clients should know there is a risk if they do not pay each other the specified amounts of support using cross payments (e.g., cheques, e-transfers, or other conclusive evidence of actual payments going both ways) rather than attempt to use a set-off. For recent family law cases that discuss *Harder v. R.,* and these requirements, see *B.N.M. v. P.J.M.,* 2017 SKQB 331 (CanLII), at para 190; *C.M. v. S.K.*, 2017 SKQB 289 (CanLII), at para 88; & *De Matos v. De Matos*, 2017 ONSC 5063 (CanLII), at para 9.

OFFERS TO SETTLE

Lawyers should not underestimate the value of offers to settle. Some may worry that an offer to settle limits the negotiation; the truth is that they may but generally speaking, they have much importance in settling a matter and mitigating the ever worriesome possibilty of costs.

The Importance of Offers to Settle in Family Law Proceedings

Offers to settle play an important role in saving time and expense by promoting settlements, focusing parties, and often narrowing issues in dispute: *DeSantis v. Hood*, 2021 ONSC 5496 (CanLII), at para 35, citing *J.V.M. v. F.D.P.*, 2011 ONCJ 616 (CanLII), at para 5.

Offers to settle, even at a mediation or settlement meeting, ensure that people have enough information to make informed decisions. While many lawyers employ the idea of preparing one offer before a negotiation process and an even better offer prior to a trial of a matter, know that all of these offers will be reviewed closely if your matter proceeds to a hearing, motion, arbitration, or trial.

The presence or absence of settlement offers can properly be taken into account in fixing costs. Although there is no obligation to make an offer, it is a good idea to make settlement offers and counter-offers early and often, since the absence of an offer to settle may be used against a party in assessing costs where it was realistic to expect offers to be made: *McLean v. Shannon*, 2020 CanLII 61513 (ON CJ), at para 24, citing *Beaver v. Hill*, 2018 ONCA 840 (CanLII), at paras 15.

Further, the court may find that not serving an offer to settle is unreasonable behaviour: see, e.g., *Firuz v. Said*, 2022 ONCJ 17 (CanLII), at para 22 & *DeSantis v. Hood*, 2021 ONSC 5496 (CanLII), at para 35.

Offers to settle should:

- **Be made early.** The obligation to attempt to settle arises from the very beginning of a family law case: *DeSantis v. Hood*, *ibid*, at para 34, citing *Serra v. Serra*, 2009 ONCA 395 (CanLII), at para 6.

- **Contain "a true element of compromise"**: *Quesnelle v. Todd*, 2021 ONSC 7259 (CanLII), at para 34, citing *Beaver v. Hill, supra*, at para 16.

- **Comply with the requirements set out in Rule 18(14) of the *Family Law Rules***, although other written offers to settle may still be considered by the court in fixing costs: *Family Law Rules,* Rules 18(14) and 24(12).

- **Have severable terms**. A court is to consider the complete offer unless that offer is severable. See *Brar v. Brar*, 2017 ONSC 6372 (CanLII) at para 19, citing *Paranavitana v. Nanayakkara*, 2010 ONSC 2257 (CanLII), at para 14:

> "[19] Sub-rule 18(14) of the Rules addresses the costs consequences of failing to accept "an" offer. I find from that wording that I am to consider the complete offer unless it is clear that the distinct individual provisions within it are severable. I agree with Justice Wildman in *Paranavitana v. Nanayakkara*, 2010 ONSC 2257 (CanLII), [2010] O.J. No. 1566 (S.C.J.) where she comments that discrete offers for each issue in play are an underused tool that can confer considerable settlement and cost advantages, and where she found at para. 14:
>
> > "… as the offer was not severable, the wife would have to do as well or better than **all** the terms of the offer, in order to take advantage of the full recovery cost provisions of Rule 18(14)."

- **Severable offers, cont'd.** Severable offers are an underused tool that can confer considerable settlement and cost advantages: *Iacobelli v. Iacobelli*, 2020 ONSC 6128 (CanLII), at paras 17-18, citing *Paranavitana v. Nanayakkara*, 2010 ONSC 2257 (CanLII), at para 13. A court can order full recovery of costs under Rule 18 for specific terms or sections in an offer that are severable from other parts in an offer to settle, so long as the requirements of Rule 18 have been met: *Daniel v. Henlon*, 2020 ONCJ 259 (CanLII), at para 66, citing *Paranavitana v. Nanayakkara*, *supra*, at para 13

Stolen from Brahm Siegl's Caselaw Update in ADR

A court can help during an arbitration

Nugent v. Nugent, 2022 ONSC 7370 (CanLII) at paras 7 to 9
Parties are in a med-arb process. Wife brings *ex parte* motion to court for a preservation order after learning husband recently took steps to withdraw $1.25 million dollars from a specific account, which, by agreement, were not to be distributed without her consent. Court grants motion, orders on a temporary and without prejudice basis that husband be restrained from depleting his assets and that he preserves his assets. Court notes that *ex parte* motion could have been brought before arbitrator but recognizes that might not have been practical if time was of the essence.

[7] Under section 6 of the Arbitration Act, the court retains jurisdiction to intervene in the conduct of an Arbitration to "assist in conducting" an arbitration, to ensure that arbitrations are conducted in accordance with arbitration agreements, and to prevent unfair or unequal treatment of parties to arbitration agreements.

[8] Under section 8 of the Arbitration Act, the court specifically retains the power to intervene with respect to the preservation of property. That section reads: "The court's powers with respect to the detention, preservation, and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as ion court actions."

[9] I have considered whether this motion should have been brought before Mr. Sadvari, on notice or otherwise. While the motion could likely be brought ex parte, given the applicability of the Family Law Rules to the any Arbitration under that Agreement, practically speaking that is not helpful. Any Arbitration Award made by Mr. Sadvari would be unlikely to be enforced by financial institutions without having been taken out as a Court Order. Meanwhile, time would pass during which further dissipation could transpire, if that is indeed happening.

Reminder to Turn Awards into Court Orders

Hristovski v Hristovski, 2022 ONSC 5972 at paras 31-33.

In this case, the parties had a final arbitration award on child support, but neither party turned the award into a court order. Father's motion and mother's cross-motion were brought as though

they were in an original application, but Court said this was really a motion to change and dealt with both motions accordingly. Court dismissed father's motion to reduce child support as awarded by the arbitrator to "summer support" due to kids at university. Court said that before making a child support variation order, the court must be satisfied that there has been a material change in circumstance. The court at this motion did not find the arbitrator's approach in the original award was inappropriate. At paragraph 52, court said: "William may have an argument for a change to the award at a trial of a motion to change. But, until then, the award should remain in place unless he can show why "drastic intervention" is necessary now."

Paragraphs 31 to 33 discuss the "procedural gap":

[31] William and Sonya are really asking this court to make a temporary order varying Arbitrator Kruzick's award. Though Arbitrator Kruzick's award has not yet been made into an order and there is no motion to change, the effect of my order on these motions would be the same—it would temporarily vary the binding determination about child support made on the parties.

[32] Though I could dismiss the parties' motions, require them to ask the court to make an order in the same terms as Arbitrator Kruzick's award, request they start a motion to change, and then they could move for a temporary order in the motion to change proceeding, I decline to do so.

[33] Instead, I will consider these motions as if they were motions for a temporary order properly brought in a proceeding to change a final order. William and Sonya have evinced an intention to make the award into a final order. Sonya did not argue that I should dismiss William's motion on jurisdiction grounds. Both parties filed extensive evidence and briefed the issued. In my view, that is the best way of dealing with this case justly, which is the primary objective of the Family Law Rules (rule 2(2)). By dealing with the motions now, it will save the parties expense and time and avoiding wasting court resources.

Memorandum of Understandings or Agreement?

***Butler v. Butler*, 2022 ONSC 4675 (CanLII), https://canlii.ca/t/jrff4**
The Applicant father brings a motion to enforce the Memorandum of Understanding (the "MOU") that was dictated (the "dictated MOU") at the conclusion of a mediation held with Dani Frodis, and was provided to the parties thereafter (the "written MOU"). The Respondent mother states that there was no agreement. (Court concurred.) Mother also argues that it is improper for details respecting the alleged agreement to have been disclosed as part of the motion materials on the basis of settlement privilege.

Court disagrees with mother re: settlement privilege and relies on a 2021 SCC decision: *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54, 464 D.L.R. (4th) 383 ("Bouvier"). The SCC at paragraph 97 held that the settlement exception applicable in the context of commercial mediations, recognized in *Bombardier inc. c. Union Carbide Canada inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, **"generally applies" to communications in family mediations**. In other words, a settlement exception allows the court to recognize and protect the

confidential nature of family mediation while also allowing, as an exception, communications to be disclosed despite confidentiality if their disclosure is necessary to prove the existence or scope of an agreement.

Court said in paragraph 14: "The parties' mediation agreement contemplates that the materials may be discoverable (Paragraph 9), as may be required by law. **They did not contract out of the settlement exception.** The SCC's recent ruling renders these materials discoverable. The impugned materials form the basis upon which the court can determine whether there is an enforceable agreement. The need to ensure that relevant evidence (on the issue of the enforceability of an agreement) is before the court overrides the parties' intention that the process be closed."

I question whether parties can opt out of the settlement exception but the Court ponders this possibility. I am not sure it is valuable to do so as it may be necessary during an arbitration to determine if the parties have reached a settlement in advance of the hearing.

In paragraph 26, the Court found that the written MOU does not comply with section 55(1) of the Family Law Act (that is, it's not a separation agreement) and in para 27, the court found that there was no meeting of the minds:

[27] While the court can enforce a settlement in the absence of compliance with the Act, there must be a meeting of the minds: Williams v. Williams, 2022 ONSC 3867. Moreover, in order to relax the strict provisions of section 55(1) of the Act there must be consensus between the parties. In order to reach a consensus, the terms of an agreement must be clear enough to give effect to the reasonable expectations of the parties.: Aberback v. Bellin, 2019 ONSC 3866.

Arbuckle v. Arbuckle, 2023 ONCA 80 (CanLII), https://canlii.ca/t/jvc36, is another case about whether an agreement at mediation is binding. Unlike the Butler case, the Court of Appeal upheld the decision of the motions judge that yes, there was an agreement even if it was oral, not written.

El Rassi-Wight v. Arnold, 2024 ONCA 2 (CanLII), https://canlii.ca/t/k20ln, is a case where the parties signed a document without financial disclosure or ILA, to deal with property at separation. The respondent later resiled, and the appellant tried to enforce it as a separation agreement. Appellant cited the 2023 SCC decision of *Anderson v Anderson*, in which the SCC found that a separation agreement, signed and duly witnessed, without financial disclosure or ILA, but which was simple and understood by the parties, was a binding agreement. But the Court of Appeal found that the SCC decision of Anderson could be distinguished. Paragraphs 23 to 27:

[23] The appellant also relies on the Supreme Court of Canada's recent judgment in *Anderson v. Anderson*, 2023 SCC 13, 481 D.L.R. (4th) 1, which was released some ten months after the trial judge's decision in the case on appeal. We are not persuaded that anything that was said in *Anderson* undermines the trial judge's analysis or conclusions.

[24] Several features of *Anderson* render it distinguishable from this case on the facts. First, unlike in the present case, the agreement in *Anderson* was witnessed. The issue with the agreement in that case was the absence of an additional safeguard under Saskatchewan legislation, namely, that "the parties formally acknowledge that they understand the nature and effect of the terms of the agreement in the presence of independent counsel": Anderson, at para. 4.

[25] In Anderson, at para. 42, Karakatsanis J., writing for a unanimous court, emphasized the importance of statutory formalities, noting that they "serve to impress upon spouses the significance of their agreement and to encourage and preserve the validity of binding family property settlements". She explained further at para. 35:

> "Concern about vulnerabilities may be countered by the presence of procedural safeguards. For example, full and frank disclosure of all relevant financial information between the parties can go far to assuage concerns of informational asymmetry …. Similarly, professional assistance, such as independent legal advice, can serve as a hallmark of a fair bargaining process … although the curative impact of legal advice in the negotiation of domestic contracts should not be taken as given. [Citations omitted]."

[26] Karakatsanis J. held further that the domestic agreement in that case, which was in writing, and signed and witnessed, should be enforceable despite the absence of the additional safeguard stipulated in the Saskatchewan legislation that the parties acknowledge their understanding of it in the presence of a lawyer. Importantly, however, she also held at para. 71, that "there was nothing to suggest that the parties did not understand the terms or effect of their agreement".

[27] In contrast, the trial judge in the case at bar found as fact that the respondent did not understand key aspects of the August 2 Document, in part because the agreement itself was "overly broad and vague". As we have already noted, we are required to defer to her assessment of the evidence and her findings of fact.

IPV and Family Violence

We can't escape speaking about family violence. It exists and the consequences are fatal. I believe strongly that lawyers need to ask their clients in-depth questions about power imbalances and family violence. Separation is listed as a significant factor present in cases that involve death. While lawyers are not required to screen, it is difficult to understand how they are keeping their clients safe if they do not.
A helpful tool can be found at https://www.justice.gc.ca/eng//fl-df/help-aide/docs/help-toolkit.pdf.

ADR, Drafting Agreements, Offers and More

1

ADR

As a result of the changes to the Divorce Act in March 2021, counsel and parties must consider Dispute Resolution rather than simply starting a court application.

- Family dispute resolution process
- 7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

2

Rules of Professional Conduct

- **Encouraging Compromise or Settlement**
- **3.2-4** A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.
- [*Amended - October 2014*]
- **Commentary**
- [1] It is important to consider the use of alternative dispute resolution (ADR). When appropriate, the lawyer should inform the client of ADR options and, if so instructed, take steps to pursue those options.

3

Alternative Dispute Resolution

Primary	Secondary
Mediation	Mediation (Domestic or Child Welfare)
Collaborative Family Law	Collaborative Family Law
Mediation-Arbitration	Mediation-Arbitration
Arbitration	Summary Arbitration
	Parenting Co-ordination

4

Prepare Clients

- Raichura v. Jones ABQB 139

5

Mediation Briefs

1. Share your calculations in word with the mediator.
2. Make sure you show the difference between the positions. Differentials and gaps are what mediators are trying to understand so they can attempt to bridge.
3. The narrative should not be excessively harsh. Including relevant facts is appropriate but there is no need to be over the top. If it is critical to include facts that make the other party feel small, it is better to submit previous documents which have been shared already. This will lessen an emotional reaction.
4. Include caselaw.
5. Include expert reports.
6. Include a proposal.

- Agreements: Come to mediation with a draft agreement started even if based on your proposal to resolve only.

6

Mediation-Arbitration or Arbitration

7

Jurisdiction Issues with Arbitration

- Garnet v Garnet et al, 2016 ONSC 949 (CanLII), <https://canlii.ca/t/gn8lv>
- Lafontaine v. Maxwell, 2014 ONSC 700 (CanLII), <https://canlii.ca/t/g3gpg>

- Suggestions: Court or Consent

8

Collaborative Family Law

9

Participation Agreement

Process Guidelines

- We will not:
  - use the threat to withdraw from the collaborative process or to go to court as a means of achieving a desired outcome or forcing a settlement, or
  - take advantage of mathematical or factual errors and will instead identify them and seek to have them corrected.

10

- Mandatory Termination By Lawyer
  - A lawyer must withdraw from the collaborative process if his or her client has withheld or misrepresented important information and continues to do so, refuses to honour this or other agreements, delays without reason, or otherwise acts contrary to the principles of the collaborative process referred to in this agreement.
  - A lawyer withdrawing under this section will only advise the other collaborative professionals that he or she is withdrawing from the collaborative process.

11

Legal Services Under a Limited Scope Retainer

3.2-1A Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.

3.2-1A.1 When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

12

- Communications with a Represented Person
- 7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner
- (a) approach or communicate or deal with the person on the matter; or
- (b) attempt to negotiate or compromise the matter directly with the person.
- 7.2-6A Subject to rule 7.2-7, if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

13

"Unfair or poorly drafted agreements are fodder for conflict. Conflict may lead to litigation. Litigation will likely lead to loss of time and money, and perhaps other things, even when a party prevails after trial.": *Mantella v. Mantella*, 2006 CanLII 10526 (ON SC), at para 44.

14

- **FAILURE TO USE CLEAR AND CONCISE LANGUAGE.** AN AMBIGUOUS AGREEMENT ON ITS FACE MAY LEAD TO LITIGATION
- INCLUDE THE ASSUMPTIONS, THE GIVES AND TRADES SO THERE IS CLARITY RATHER A WEAVING TOGETHER OF VARIOUS INFORMATION
- THE CASE OF *RIDEOUT V. RIDEOUT*, 2021 ONSC 1107 (CANLII), AT PARAS 130-131 IS AN EXAMPLE OF A CREATIVE RESOLUTION AND RESULTANT DIFFERENT UNDERSTANDINGS OF THE AGREEMENT. THE COURT WAS LEFT PIECING TOGETHER THE INTENTIONS OF THE PARTIES THROUGH DIFFERENT AREAS OF THEIR AGREEMENT.

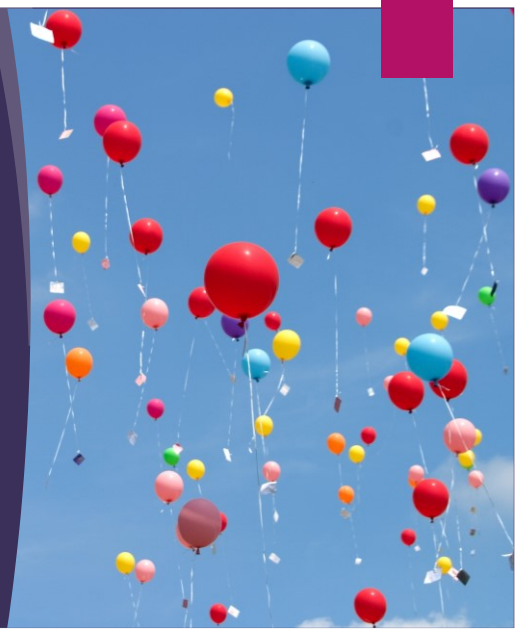
15

- **Failure to set out agreement on key terms.** To reach a binding agreement, the terms of an agreement must be "clear enough to give effect to the reasonable expectations of the parties". When one of the terms of the separation agreement included that "the parties will negotiate the exchange of personal property", there was no agreement on all essential terms: *Aberback v. Bellin*, 2019 ONSC 3866 (CanLII), at para 23.

16

- **Failure to set out all relevant financial information.** Set out how much is payable, for what, by whom, to whom, what the terminating date or conditions are, and what the underlying assumptions are, such as each party's incomes: see, e.g., *Hesson v. Shaker,* 2020 ONSC 1319 (CanLII), at para 26; *Francisco v. Francisco*, 2017 ONCJ 323 (CanLII), at para 116.

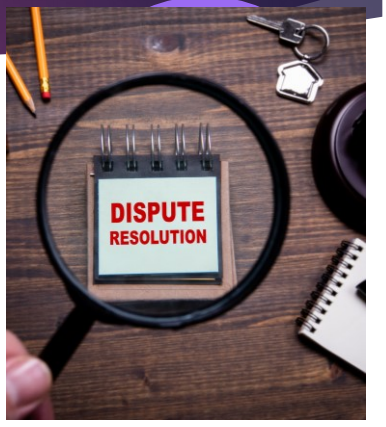
17



- **Failure to set out any and all releases.** Where a separation agreement sets out that "each of the parties is financially independent and does not require financial assistance from the other after divorce", this is not the same as a release of spousal support claims: *Zheng v. Xu*, 2019 ONSC 865 (CanLII), at paras 35-36.
- **Failure to include a Miglin release.** Often as lawyers are quickly drafting to lock it down they don t carefully consider whether a Miglin release is needed and appropriate. Pay attention to the facts of your case and whether a simple release or a Miglin style release is necessary.

18

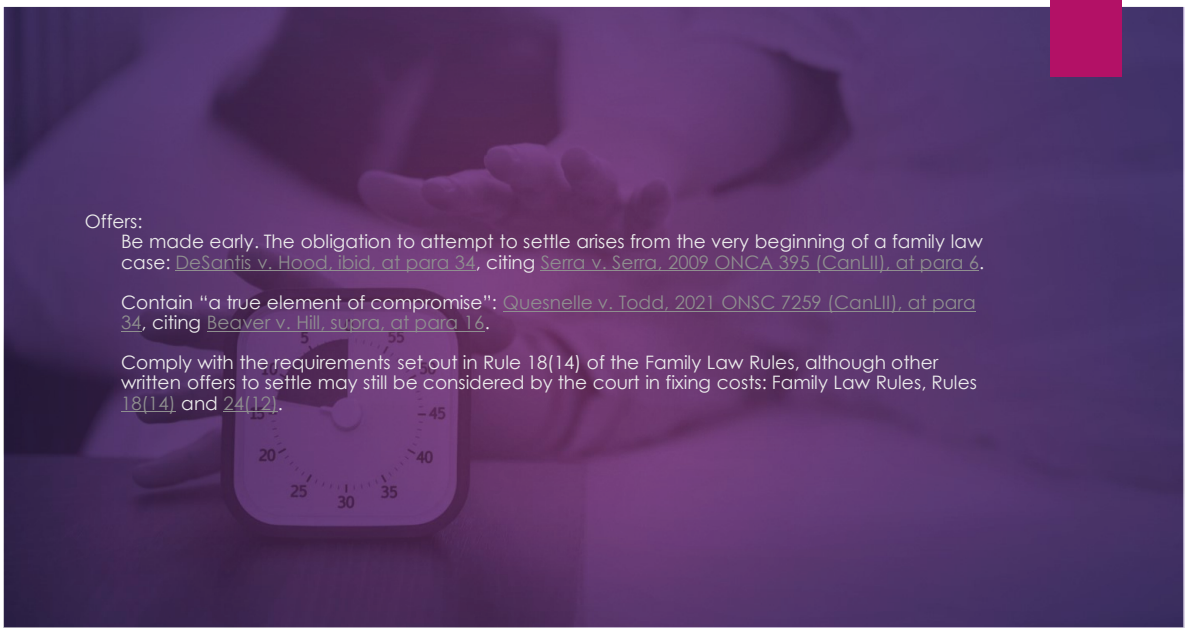
- **Failure to properly execute the dispute resolution clause:** Case law suggests that a dispute resolution clause in a separation agreement is ***not*** a valid and binding family arbitration agreement if it does not contain the formal requirements for secondary arbitration agreements as set out in the *Family Arbitration Regulation*: *Horowitz v Nightingale*, 2017 ONSC 2168 (CanLII), at para 45; followed in *Magotiaux v. Stanton*, 2020 ONSC 4049 (CanLII), at paras 18-20 & *Shinder v. Shinder*, 2022 ONSC 181 (CanLII), at paras 46-47.
  - *Magotiaux v. Stanton*, 2020 ONSC 4049 (CanLII), at paras 7 & 21-23 & *Giddings v. Giddings*, 2019 ONSC 7203 (CanLII), at paras 41 & 44.
  - *Moncur v. Plante*, 2021 ONSC 5164 (CanLII), at paras. 18-19 & 22; and *Lopatowski v. Lopatowski*, 2018 ONSC 824, at paras 55-61.
  - Ultimately, the best practice is to have parties select their dispute resolution provider and attach the executed contract to their agreement.



19

- Failure to address the RESPs
- Failure to structure shared parenting child support payments: Following Harder v. R., 2016 TCC 197 (CanLII), at paras 7-10,

20



Offers:

- Be made early. The obligation to attempt to settle arises from the very beginning of a family law case: DeSantis v. Hood, ibid, at para 34, citing Serra v. Serra, 2009 ONCA 395 (CanLII), at para 6.
- Contain "a true element of compromise": Quesnelle v. Todd, 2021 ONSC 7259 (CanLII), at para 34, citing Beaver v. Hill, supra, at para 16.
- Comply with the requirements set out in Rule 18(14) of the Family Law Rules, although other written offers to settle may still be considered by the court in fixing costs: Family Law Rules, Rules 18(14) and 24(12).

21

The problem with no offer

- *McLean v. Shannon*, 2020 CanLII 61513 (ON CJ), at para 24, citing *Beaver v. Hill*, 2018 ONCA 840 (CanLII), at paras 15.
- Further, the court may find that not serving an offer to settle is unreasonable behaviour: see, e.g., *Firuz v. Said*, 2022 ONCJ 17 (CanLII), at para 22 & *DeSantis v. Hood*, 2021 ONSC 5496 (CanLII), at para 35

22

Make sure it is Severable

Brar v. Brar, 2017 ONSC 6372 (CanLII) at para 19, citing Paranavitana v. Nanayakkara, 2010 ONSC 2257 (CanLII), at para 14:

[19] Sub-rule 18(14)

23

Some Interesting Cases

A court can help during an arbitration: Nugent v. Nugent, 2022 ONSC 7370 (CanLII)

Reminder to Turn Awards into Court Orders: Hristovski v Hristovski, 2022 ONSC 5972

Memorandum of Understandings or Agreement?: *Butler v. Butler*, 2022 ONSC 4675 (

24

Law Society of Ontario | Barreau de l'Ontario

TAB 5

Family Law Refresher 2024

Case Conferences and Motions

Kristy Maurina
MacDonald & Partners LLP

April 5, 2024

Case Conferences and Motions

Kristy Maurina, MacDonald & Partners LLP[1]

The Topics Addressed in this Paper include:

1. Organization and Preparation for Case Conferences
2. Mode of proceeding
3. Importance of following practice directions and promoting the Primary Objective
4. Practice tips for remote hearings
5. Considerations in bringing motions
6. Tips and best practices when arguing motions
7. Costs at conferences and motions
8. Cross-examinations on Affidavits
9. Managing client expectations

Organization and Preparation for Case Conferences

The purposes of a Case Conference are set out in Rule 17(4) of the *Family Law Rules* and include:[2]

(a) exploring the chances of settling the case;

(b) identifying the issues that are in dispute and those that are not in dispute;

(c) exploring ways to resolve the issues that are in dispute;

(d) ensuring disclosure of the relevant evidence, including the disclosure of financial information required to resolve any support or property issue;

(d.1) identifying any issues relating to any expert evidence or reports on which the parties intend to rely at trial;

(e) noting admissions that may simplify the case;

(f) setting the date for the next step in the case;

(g) setting a specific timetable for the steps to be taken in the case before it comes to trial;

[1] My thanks to Kira Beck, associate at MacDonald & Partners LLP, for assisting with this paper.

[2] O. Reg. 114/99

(h) organizing a settlement conference, or holding one if appropriate;

(i) giving directions with respect to any intended motion, including the preparation of a specific timetable for the exchange of material for the motion and ordering the filing of summaries of argument, if appropriate; and

(j) in the case of a motion to change a final order or agreement under rule 15, determining the most appropriate process for reaching a quick and just conclusion of the motion.

A Case Conference's effectiveness and result will depend on several factors, including what has occurred since the parties' separation in terms of moving the matter forward, such as the amount of negotiation and the extent of disclosure that has taken place, and the nature of the issues in dispute.[3]

Before preparing your Case Conference brief, you should review the file to make sure you are familiar with the facts, identify areas of agreement, issues in dispute and necessary disclosure. When drafting your brief, you should do so with a purpose in mind. Consider the purposes from Rule 17(4) that are important to the case at hand. You should attempt to focus on the relevant issues and potential solutions or compromises to these issues that may be able to be resolved on consent of the parties at the conference. For each issue, identify what is required to move on to the resolution stage of the proceedings and clearly set out what information or documentation is needed with respect to each issue in dispute.[4]

A Case Conference Brief should not simply repeat the party's pleadings with sections copied and pasted from an Application or Answer. Lengthy briefs containing material irrelevant to the Case Conference issues, confrontational, inflammatory and unprofessional language and baseless accusations could result in an Order for costs being made against your client. Consider the temporary/procedural issues that can and should be addressed at a Case Conference, such as disclosure, questioning, timetabling next steps, as well as the immediate issues that need to be discussed, such as child support and parenting time issues. Come equipped knowing exactly what disclosure order is needed from the other side and what disclosure your client still needs to provide.

A Case Conference brief has its name for a reason, it is meant to be brief. The brief should focus on the important issues that can reasonably be canvassed at the conference. Counsel should ensure they check the notices to the profession, as well as the practice directions of the jurisdiction where the conference will be heard to ensure all page limits and drafting restrictions are adhered

[3] Alfred Mamo, "Getting a Family Case to Trial" (2006), 25 CFLQ 17, s. 6b
[4] Mamo, *supra*, s. 6c

to. If the page limit is an issue, you might consider skipping a "Background" section when addressing the issues and important facts, as this information is already included on the first page and does not need to be repeated here if you are looking to save space.

Ni v. Yan[5] is an interesting case about Conferences decided by the Honourable Justice Jarvis. In this case, the parties had collectively filed Settlement Conference briefs totaling 236 pages with 20 tabbed attachments. Each party claimed there was still relevant disclosure needed from the other. The Court stated that neither of the parties had fully complied with the *Family Law Rules* governing settlement conference proceedings, such as providing an updated financial statement and net family property statement and neither party estimated their trial time in the prescribed form. Justice Jarvis held:

> Too often, serial settlement conference events are permitted in circumstances where there are continuing complaints about inadequate or refused disclosure impacting a party's ability to make an informed settlement decision. That practice must end…..The parties are entitled to one settlement conference unless otherwise ordered. Either they comply with their disclosure obligations, bring a disclosure motion if they are dissatisfied with the other's disclosure and comply with the Family Law Rules or their day in court will not happen any time in the near future. A settlement conference can serve many purpose. Serialized mediation is not one of them"[6]

This decision has highlighted the importance of making use of the Conference you have, as Conferences are not unlimited. By engaging in repeated conferences where complaints remain about the sufficiency of disclosure, the parties are wasting valuable judicial resources. Where there are disclosure issues with numerous items in dispute, these issues should be resolved on a motion.

Lastly, make use of Rule 17(8)(b.1), which provides the judge with the authority to make a variety of orders to facilitate the preservation of the rights of the parties provided notice has been served including, but not limited to, an order preserving assets, an order for an accounting of funds, an order preserving medical coverage for one of the parties or children, and an order continuing the payment of periodic amounts to preserve an asset or benefit one of the parties or children.

Mode of Proceeding

On February 1, 2024, "Guidelines to Determine Mode of Proceeding in Family", were released and speak to the presumptive mode of hearing for court attendances in the Superior Court

[5] 2020 ONSC 5941
[6] *Ni v. Yan*, 2020 ONSC 5941, paras. 10 & 12

of Justice. The guidelines can be found here: Guidelines to Determine Mode of Proceeding in Family | Superior Court of Justice (ontariocourts.ca).

Pursuant to these guidelines, the default mode of hearing is summarized below for family law matters:

(i) **First appearances:** each Unified Family Court location will decide whether the attendance is virtual or in person;

(ii) **Early or urgent case conferences and triage courts (where available):** by videoconference unless the Court specifies a different method of attendance;

(iii) **Urgent motions:** by videoconference unless the Court specifies a different method of attendance when the event is scheduled. A party who takes the position that the urgent motion should be heard in person should include in their motion materials the reasons why the motion should not be heard by videoconference;

(iv) **Case conferences, settlement conferences and trial management conferences:** all conferences with a settlement focus will be held in person unless a different method of attendance is approved by the Court in advance;

(v) **Trial scheduling conferences, other trial management conferences and assignment court attendances (where required):** all conferences where the focus is on preparation for trial and assignment court attendances (where required) are by videoconference unless, at a prior conference, the Court has specified a different method of attendance;

(vi) **Motions for procedural relief and motions on consent:** in writing. More complex procedural motions will be conducted by videoconference, unless the Court specifies that an in-person attendance is required;

(vii) **Substantive regular/short motions:** outside of Toronto and Windsor, in locations where regular motions in family cases are heard on mixed civil and family lists, substantive motions of less than an hour will be held by videoconference. In Unified Family Court locations, Toronto and Windsor, regional practice direction or notice to the profession will direct the mode of appearance for these events. All motions for contempt will be held in person;

(viii) **Long motions:** in person unless the Court has agreed to a virtual attendance in advance, which will be decided at the case conference. If contempt is sought or there is a hearing alleging the wrongful removal or retention of a child, the motion will be held in person;

(ix) **Trials:** in person unless all parties consent to a virtual trial and the Court approves. The Court may consider the option of a hybrid proceeding and whether a witness may be permitted to testify virtually by videoconference. Requests for virtual or hybrid trials will be addressed with the completion of the Trial Scheduling Endorsement Form prior to the scheduling of the trial.

Importance of Following Practice Directions and promoting the Primary Objective

Counsel should be accustomed at this point to reviewing the Notices to Profession and Practice Directions for the various regions as relate to their particular court attendance. The practice directions set out information such as the page limits for court materials, the allowable page limits for exhibits / attachments, including which documents count toward those page limits and which do not, as well as spacing and font size requirements, etc.

Various justices of our courts have begun to express their extreme frustration with litigants (and counsel) who are not following the Notices to Profession and Practice Directions. Recent decisions have chastised counsel for failing to follow the practice directions, including regarding the length of affidavits and attachments.

In one recent costs decision, the Honourable Madam Justice Kraft wrote as follows:

> Further, I found that the respondent did not comply with the Practice Direction in terms of the length of her motion material. The respondent argues that she was in compliance with the Practice Direction because her affidavit was not more than 12 pages and that although her exhibits exceeded 10 pages, it was necessary for her to attach additional pages to her affidavit because the exhibits contained relevant evidence. I disagree. The respondent's affidavit and exhibits, sworn on October 24, 2022, amounted to 156 pages, which also contributed to an increase in the applicant's costs. Accordingly, as I indicated in my Endorsement, dated November 15, 2022, the respondent's non-compliance with the Practice Direction and her failure to recognize that this motion needed to be scheduled as a long motion, will impact the amount of costs I order.[7]

It is essential that counsel remain within the confines of the page limits set out in the practice directions. If additional pages for narrative or exhibits are needed, counsel should seek leave of the court to file materials beyond the relevant page limits.

[7] *Hrvic v. Hrvic*, 2023 ONSC 388, para. 23

Similarly, both counsel and the parties have an obligation to promote the Primary Objective under Rule 2 of the *Family Law Rules*[8]. This includes consideration of the appropriate procedure to utilize in a case. A number of recent decisions have also been released regarding the proper (and improper) use of 14B motions. In a recent decision, the Honourable Justice Kaufman commented the following regarding counsel's use of 14B motions:

> The parties and their respective counsels (whether on the record or acting as agent) are hereby put on alert. There are *Family Law Rules* that have been in place since 1999. These rules govern the conduct of family law matters that come before the court. They govern all aspects of a case including 14B motions that these parties use to facilitate their whims from time to time notwithstanding that their usage of Rule 14(10 is not procedural, uncomplicated or unopposed. In fact, their usage of this Rule is an abuse of the court and must cease. They are forewarned that further breaches of this Rule will be met with costs sanctions under Rule 24(9) and they should note that those sanctions apply equally to counsel and agents.[9]

Practice Tips for Remote Hearings

While counsel are likely accustomed to remote hearings at this point, below are some reminder tips for remote attendances:

- Maintain formality
  - Do not forget that even though you may be attending Court from the comfort of your home, it is still a very formal process. Lawyers and clients should dress appropriately. Lawyers must robe for motions in the Superior Court of Justice. Clients and the judiciary are watching.
  - Lawyers should also maintain formality in addressing the Court and in their behaviour during the appearance. This is also something lawyers should ensure their clients understand, regardless of whether it is in a Courtroom or on Zoom.
- Internet Connection
  - Make sure you are in an area with a reliable internet connection.
- Be punctual
  - With the advent of virtual court attendances scheduled throughout the day, it is now more likely than not that your attendance will start on time. Be ready to proceed at your

[8] *Family Law Rules*, *supra*, r. 2; *Modabber v. Kermanshahani*, 2024 ONSC 186
[9] *Naguib v. Ibrahim et al*, 2024 CanLii 25609 (ON SC), para. 26

scheduled time (as you should be with in person attendances as well). Stay close while your video is off and you remain muted.

- No Interruptions
  - Make sure you have a sign on your door, whether at work or at home to make sure you are not interrupted during the Court appearance. Clients should also be told to be in a private place without distractions for the attendance;
- Prepare your client
  - Spend some time explaining the Zoom court procedure to your client. Make sure they are comfortable and know what to expect. While many clients are intimately familiar with virtual programs at this point, if they have never used zoom before, do a 5-minute practice run with them to make sure they can connect and have some understanding of how the technology works.
- **And finally: MUTE your mic when on break or not speaking**
  - This one speaks for itself. We all have heard or know of horror stories at this point. It's very simple. Mute. Your. Mic.

<u>Considerations in Bringing Motions</u>

There are several things to consider when deciding whether or not to bring a motion:

1. Do a cost analysis.
   - Consider the benefit of the motion to your client and determine if the Order that you are seeking could be made at a Conference at a lesser cost to your client.
   - Consider the likelihood of success. Does the motion you are bringing have a likely or possible chance of success?
2. Consider the dates available for motions.
   - Some jurisdictions do not have available motion dates for several months. Book as early as possible expecting that you will often have to wait a few months to be heard.
   - Dates for long motions are often especially difficult to get in a timely manner. If you have a case that can be dealt with by way of a short trial/trial of an issue, it may be more prudent and cost-effective not to bring motions and instead have a short trial to dispose of all the issues on a final basis.
3. Consider the time required for your motion.

- You must adhere to the amount of time you have requested. Remember that the amount of time you have must take into account time for questions from the judge.

4. Motion overload.
    - Some matters seem to be a series of motions after motions, but the purpose of many interim orders is to apply a "band aid" solution until trial. The trial judge will have the authority to adjust many of the interim orders made in their ultimate trial determinations. Accordingly, consider if your client is better served by simply setting the matter for trial.

Tips and Best Practices When Arguing Motions

1. **DO** seek an Order prohibiting further motions if a party tries to delay the case, adds to its cost or in any other way abuses the court's process by making numerous motions without merit.
2. **DO** summarize and introduce what you intend to argue at the beginning of your oral submissions, so the judge knows what to expect and can follow along.
3. **DO NOT** include argument, irrelevant statements or those statements that are only intended to inflame the proceedings, for example to cast the other party in a negative light. *Csak v. Mokos*, 1995 CarswellOnt 1279 (reversed on other grounds, 1996 CarswellOnt 2673). **DO** seek to strike these statements where appropriate.
4. **DO** properly include hearsay evidence where necessary. Hearsay evidence is permitted if certain conditions are met. To include hearsay in an affidavit, the person swearing the affidavit must specifically include the source of the information (using a name) and must state that he or she believes that the hearsay statement is true (Rule 14(19)(a)).
5. **DO NOT** attempt to rely on recordings/videos on interim motions unless the probative value is clear, and the emotional or physical well-being of the children/spouse are at stake.
6. **DO** limit reply evidence to comply with the *Family Law Rules*.
    a. **DO NOT** include new allegations in reply materials.
    b. **DO NOT** repeat argument you already made in your main argument;
    c. **DO NOT** include fresh evidence unless it was unavailable when the initial affidavit was sworn, unless there is good reason.
    d. **DO** question the relevance and probative value of the contents of each affidavit.

7. **DO** use tools whenever possible to backup what you are arguing (Divorcemate Calculations, NFP Statements, Tax calculations)
8. **DO** provide a factum or Statement of Law, even in jurisdictions where it is not required**.**
9. **DO** have access to your consolidated Ontario Family Law Statutes and Regulations.
10. **DO** keep an eye on the judge throughout the motion. Know your audience and go at his or her pace. If the judge is writing while you are speaking, slow down and allow them to finish. The point you are making is important enough for them to be writing it down. Similarly, do not belabour points and move on, especially if the judge tells you to move on.
11. **DO** comply with your time estimates for argument and ensure you reserve time for your reply to leave the judge with your final thoughts in his or her ears.
12. **DO** be prepared to argue costs on the day of the motion. Bring a draft Order, a Bill of Costs (and serve and upload it as required), and copies of any offers to settle made to settle the motion.
13. **DO** serve an offer to settle.
14. **DO NOT** speak over or interrupt the judge or opposing counsel. You will get your chance to speak. **DO** be polite and courteous, including to court staff, at all times.

Costs at Conferences and Motions

Conferences

Costs awarded at Case Conferences are rare. According to Rule 17(18) of the *Family Law Rules*, Costs shall not be awarded at a conference unless a party to the conference was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules, in which case the judge shall, despite rule 24(10),

a) order the party to pay the costs of the conference immediately;
b) decide the amount of costs; and
c) give any directions that are needed.[10]

[10] *Family Law Rules*, *supra*, r. 17(18)

Bourgeois v. Bourgeois, 2011 ONSC 345

Bourgeois v. Bourgeois is one case where costs at a conference were ordered. In this case, there had been three settlement conferences heard in June, August, and October 2010. Due to the father's incomplete disclosure and expert's reports that were outstanding, no meaningful discussion on the financial issues could proceed although certain child related issues were resolved. The wife sought costs of $19,165.63 for the failed settlement conference attendances. The Honourable Madam Justice McGee found the word "shall" in Rule 17(18) to be instructive, speaking to an underlying policy choice to treat conferences as significant judicial events, and not merely a series of assisted courthouse negotiations. Disclosure is a litigant's duty and when a court attendance is a non-starter as a result of a failure under rule 17(18), the rules provide that costs shall be awarded. The Court then held that in determining the quantum of costs under Rule 17(18), a pattern of non-disclosure will attract a greater consequence than a singular episode. The father in this case had significant disclosure outstanding on all of the court appearances. He would claim that disclosure had been given or was forthcoming. Sometimes it came the day of the court attendance and sometimes not, but it was never adequate and always gave rise to more questions.

The wife sought her costs on a full indemnity basis and asked the court to make a finding of bad faith to invoke full recovery pursuant to Rule 24(8). The Court declined to do so, holding that bad faith requires certain findings for which the Court will lack an evidentiary basis within the context of a settlement conference. However, the Court stated that a finding of bad faith is not the only basis upon which a Court can consider a quantum of costs in the full recovery range. In determining the quantum of costs Justice McGee began by subtracting from the mother's Bill of Costs entries from prior court appearances that the mother had included totaling $6,040.50 that were not relevant to the consideration of costs for the three failed settlement conferences. Justice McGee then recognized that the parties did enter into certain consents on each of the conferences such that the attendances were not wholly lost, the father had made substantial monthly payments to the mother, and there would be a remedy at trial if it was shown that the father deliberately made information unavailable or confused information. Taking all of these considerations into account, the Court ordered the father pay the substantial indemnity amount of $8,000 with a further $750 for the preparation of cost submissions.

Hakim v. Hakim, 2020 ONSC 6587

Two other cases where costs were awarded at conferences are *Hakim v. Hakim* and *Caskie v. Caskie*. In *Hakim*, the case management judge had presided over six Case Conferences from May-July 2020. The wife sought an Order that the husband pay her costs for these conferences on a full recovery basis in the all-inclusive amount of $11,410.64. The husband denied that he had acted in bad faith and denied that the wife was entitled to her costs on a full recovery basis. The Court noted that the starting point in addressing cost issues is section 131 of the *Courts of Justice Act*, which provides that subject to the provisions of an Act or rules of Court, costs are within the discretion of the Court. Persistent refusal by a party to make accurate financial disclosure and reveal their true income may rise to the level of bad faith, however Rule 24(8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. The Honourable Justice Nadeau stated "I have been tempted by the submissions of Counsel for the Applicant to make a finding that the Respondent has acted in bad faith during these Case Conferences by requiring this Court to provide six separate appearances in order to finally be in a position to complete my duties as the Case Conferencing Judge. However, I cannot find that the behaviour of the Respondent was so egregious as to warrant the rare finding of bad faith in these circumstances. I fully appreciate the difference between bad faith and unreasonable behaviour, and the latter is most appropriate here."

Although not rising to the level of bad faith, the husband had not complied with the disclosure that was required by Orders arising from previous Court attendances, and the Court was satisfied that the wife had proven that the husband "was not prepared, did not serve the required documents, did not make required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules" (Rule 17(18)). Having considered rules 17, 18 and 24 of the *Family Law Rules*, the Court ordered partial indemnity costs of 3,000.00 payable by the husband to the wife to be collectable as child support.

Caskie v. Caskie, 2020 ONSC 7010

In *Caskie v. Caskie*, the wife's counsel sent a detailed request for disclosure to the Husband's counsel. The husband failed or refused to provide disclosure beyond personal tax returns, some financial statements and corporate tax returns, despite the fact that he was the sole and/or controlling shareholder of multiple corporations, the trustee of a family trust and an indirect beneficiary of the family trust. In place of a business valuation, the husband provided an Excel

spreadsheet in support of his purported value of the business and appraisal of a commercial property. Both values were unrelated to the date of separation and not reliable evidence as to the fair market value of either entity. In the wife's Case Conference Brief, she sought reimbursement for the costs incurred for requesting and receiving piecemeal and incomplete disclosure. The husband produced a business valuation and income report but none of the scope of review documents were provided and when they eventually were produced, the "select" general ledgers in Excel format were locked and could not be expanded to permit a review of the complete information.

The husband submitted that he substantially complied with his disclosure obligations by producing an Estimate Valuation Report. The Honourable Justice Price held that the husband's choice to tender an Estimate Valuation Report did not, in itself, support a conclusion that he has failed to meet his disclosure obligations. However, the Report by reason of its acknowledged limitations, was not a substitute for the full financial disclosure that the husband was required to make and did not relieve him of his obligation to provide the information that the wife's Chartered Business Valuator requested. For 2 years and 5 months following the parties' separation, the husband left the wife to "piece together" his financial circumstances and identify the various issues that required further investigation. The Court ordered the husband to pay the wife $20,000 as reimbursement for the expenses she incurred as a result of his delayed and incomplete disclosure, including the expense of her having to redo her Case Conference Brief following his recent disclosure. The court also ordered the husband to pay the wife $10,000 for the costs of the Case Conference.

Motions

Costs at motions are governed by Rule 24 of the *Family Law Rules*. Rule 24(1) of the *Rules* states that there is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.[11] Cost rules are designed to foster three fundamental purposes (a) to indemnify successful litigants for the cost of litigation; (b) to encourage settlements, and (c) to discourage and sanction inappropriate behaviour by litigants.[12]

As noted by the Ontario Court of Appeal in *Beaver v. Hill*, two touchstone considerations must be applied to costs decisions: 1) proportionality, and 2) reasonableness.[13]

[11] *Family Law Rules*, *supra*, r. 24(10)
[12] *Serra v. Serra*, 2009 ONCA 395, para. 8
[13] *Beaver v. Hill*, 2018 ONCA 840, paras. 4, 12 & 19

Rule 18 of the *Family Law Rules* concerns Offers to Settle. Pursuant to rule 18(14), a party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date if the following conditions are met:

1. If the offer relates to a motion, it is made at least one day before the motion date.
2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
3. The offer does not expire and is not withdrawn before the hearing starts.
4. The offer is not accepted.
5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.[14]

Additionally, pursuant to subrule 16, when the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply.[15] Costs are discretionary and no rule requires the Court to make any costs award.[16] A successful party who has behaved unreasonably during a case may be deprived of their costs or ordered to pay all or part of the unsuccessful party's costs.[17]

There are two areas in relation to costs that will be briefly discussed. The first relates to costs of a self-represented party. The Ontario Court of Appeal has held that the purposes justifying cost rules are to indemnify successful litigants, encourage settlement, and discourage inappropriate behaviour of parties apply to self-represented litigants.[18] However, self-represented litigants are not entitled to costs calculated on the same basis as those of the litigant who retains counsel.[19]

In *Jordan v. Stewart*, the Honourable Justice Czutrin reviewed the law with respect to costs for self-represented litigants where the unsuccessful party was represented by counsel and the self-represented party was successful.[20] "If a self-represented litigant, in performing the tasks that would normally have been performed by a lawyer, lost the opportunity to earn income elsewhere, this may be a relevant factor. But costs for self-represented parties are not the same as damages for lost income. Remunerative loss is not a "condition precedent" to an award of costs. To require proof of lost income would disqualify litigants who are homemakers, retirees, students,

[14] *Family Law Rules*, *supra*, r. 18(14)
[15] *Family Law Rules, supra*, r. 18(16)
[16] *Green v. Cook*, 2012 ONSC 3731, para. 8
[17] *Family Law Rules*, *supra*, Rule 24(4)
[18] *Fong v. Chan*, 1999 CarswellOnt 3955 (C.A.)
[19] *Ibid,* para. 26
[20] *Jordan v. Stewart*, 2013 ONSC 5037

unemployed, unemployable, and disabled; and deprive courts of a tool required for the administration of justice."[21]

The case law is divided, and there are cases, such as *Noble v. Lyle*[22] and *Gibson v. Duncan*[23] that maintain that a self-represented litigant is not entitled to compensatory costs in the absence of evidence showing that he or she has foregone the opportunity to earn income during the preparation involved for the litigation. These cases interpret the Ontario Court of Appeal decision of *Fong v. Chan* narrowly. However, the more prevalent trend in recent years has been to allow costs to self-represented parties regardless of whether they have foregone remunerative activity to work on their case, as long as the costs claimed relate to tasks that would typically be carried out by legal counsel.[24] Clients should be made aware that they may be ordered to pay costs even though the other party is self-represented.

The second area is with respect to a legally aided client. The applicable billing rate for the lawyer is his or her usual rate, not the rate under the Legal Aid Tariff, so that the costs recovered and turned over to the legal aid plan may exceed the actual fees received by the lawyer. Section 46 of *the Legal Aid Services Act* provides "The costs awarded in any order made in favour of an individual who has received legal aid services are recoverable in the same manner and to the same extent as though awarded to an individual who has not received legal aid services"[25] The Court in *R. (S.) V. R. (M.)* noted "There is nothing unfair about this interpretation. There is no punitive aspect in such an award of costs; the party paying the costs simply pays the same amount as they would if the client were not legally aided. In fact, to hold otherwise would grant an inadvertent windfall to the party fortunate enough to only have to pay costs to an opposing party on Legal Aid, since the rates would be accordingly reduced."[26] The Ontario Court of Appeal has also held that the availability of costs in favour of pro bono counsel is a tool to potentially reduce the necessary financial sacrifice associated with taking on pro bono work and to therefore increase the number of counsel who may be willing and able to accept pro bono cases, which will facilitate access to justice.[27]

---

[21] *Ibid*, para. 40
[22] 2016 ONSC 5616
[23] 2013 ONSC 6245
[24] *Rappazzo v. Venturelli*, 2018 ONSC 4760, para. 33
[25] *Legal Aid Services Act*, S.O. 1998, c 26, s. 46
[26] *R.(S.) V. R.(M.),* 2002 ONSC 53246 (S.C.J.), para. 25
[27] 1465778 Ontario Inc. v. 1122077 Ontario Ltd., 2006 CarswellOnt 6582 (C.A.), para. 35

Cross-examination on affidavits

Rule 20 of the *Family Law Rules* addresses questioning and disclosure, including questioning on an affidavit, and which questioning includes the right to cross-examine.[28]

The case of *Ontario v. Rothmans Inc.*,[29] lists a number of principles and rules that apply to cross-examinations of a deponent for a motion. These rules are narrower than for a questioning.

- **The scope of a cross-examination of a deponent for an application or motion is narrower than an examination for discovery:** BOT Construction (Ontario) Ltd. v. Dumoulin, [2007] O.J. No. 4435 (S.C.J.) at para. 6.
- **A cross-examination is not a substitute for examinations for discovery or for the production of documents available under the Rules of Civil Procedure**: BOT Construction (Ontario) Ltd. v. Dumoulin, supra at para. 7; Westminer Canada Holdings Ltd. v. Coughlan, [1989] O.J. No. 252 (Master), aff'd [1989] O.J. No. 3038 (H.C.J.).
- **The examining party may not ask questions on issues that go beyond the scope of the cross-examination for the application or motion**: Thomson v. Thomson, [1948] O.W.N. 137 (H.C.J.); Toronto Board of Education Staff Credit Union Ltd. v. Skinner, [1984] O.J. No. 478 (H.C.J.) at para. 12; Westminer Canada Holdings Ltd. v. Coughlan, [1989] O.J. No. 3038 (H.C.J.).
- **The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence**: Superior Discount Limited v. N. Perlmutter & Company; Superior Finance Company v. N. Perlmutter & Company, [1951] O.W.N. 897 (Master) at p. 898; Re Lubotta and Lubotta [1959] 0.W.N. 322 (Master); Wojick v. Wojick, [1971] 2 O.R. 687 (H.C.J.); Toronto Board of Education Staff Credit Union Ltd. v. Skinner, [1984] O.J. No. 478 (H.C.J.) at para. 11; BASF Canada Inc. v. Max Auto Supply (1986) Inc., [1998] O.J. No. 3676 (Master) at paras. 6, 10-11; Caputo v. Imperial Tobacco Ltd., [2002] O.J. No. 3767 (Master) at paras. 14-15; BOT Construction (Ontario) Ltd. v. Dumoulin, [2007] O.J. No. 4435 (S.C.J.) at para. 4; Shannon v. BGC Partners LP, 2011 ONSC 1415 (Master) at para. 8.

[28] *Family Law Rules, supra*, r. 20
[29] 2011 ONSC 2504

- **If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court**: Wojick v. Wojick and Donger, [1971] 2 O.R. 687 (H.C.J.), at p. 688; Ferring Inc. v. Richmond Pharmaceuticals Inc. [1996] O.J. No. 621 (Div. Ct.) at paras. 14 and 15; Logan v. Canada (Minister of Health), [2001] O.J. No. 6289 (Master); Guestlogix Inc. v. Hayter, 2010 ONSC 5570 at para. 16.
- **The proper scope of the cross-examination of a deponent for an application or motion will vary depending upon the nature of the application or motion**: Blum v. Sweet Ripe Drink Inc. (1991), 47 C.P.C. (2d) 263 (Ont. Master); Moyle v. Palmerston Police Services Board (1995), 25 O.R. (3d) 127 (Div. Ct.).
- **A question asked on a cross-examination for an application or motion must be a fair question**: Superior Discount Ltd. v. N. Perlmutter & Co., [1951] O.W.N. 897 (Master) at p. 898; Canadian Bank of Commerce (CIBC) v. Molony, [1983] O.J. No. 221 (H.C.J.) at para. 3; Seaway Trust Co. v. Markle, [1988] O.J. No. 164 (Master); BASF Canada Inc. v. Max Auto Supply (1986) Inc., [1998] O.J. No. 3676 (Master) at para. 6. (See discussion below.)
- **The test for relevancy is whether the question has a semblance of relevancy:** Re Lubotta and Lubotta [1959] O.W.N. 322 (Master); Rodriques v. Madill, [1985] O.J. No. 1666 (Master).
- **The scope of cross-examination in respect to credibility does not extend to a cross-examination to impeach the character of the deponent:** Moyle v. Palmerston Police Services Board (1995), 25 O.R. (3d) 127 (Div. Ct.).
- **The deponent for an application or motion may be asked relevant questions that involve an undertaking to obtain information, and the court will compel the question to be answered if the information is readily available or it is not unduly onerous to obtain the information**: Bank of Montreal v. Carrick (1974), 1 O.R. (2d) 574 (Master), aff'd ibid p. 574n (H.C.J.); Mutual Life Assurance Co. of Canada v. Buffer Investments Inc. (1985), 52 O.R. (2d) 335 (H.C.J.) at paras. 9-13; Caputo v. Imperial Tobacco Ltd., [2002] O.J. No. 3767 (Master) at paras. 42, 56; BOT Construction (Ontario) Ltd. v. Dumoulin, [2007] O.J. No. 4435 (S.C.J.) at para. 8; Hinke v. Thermal Energy International Inc., 2011 ONSC 1018 (Master) at paras. 36-37.

- **The deponent for a motion or application who deposes on information and belief may be compelled to inform himself or herself about the matters deposed**: Rabbiah v. Deak, [1961] O.W.N. 280 (Master); Caputo v. Imperial Tobacco Ltd., [2002] O.J. No. 3767 (Master) at paras. 42, 46.

Managing Client Expectations

Finally, as counsel deal with all steps and aspects of a case, managing client expectations is important. It is important to identify, as early as possible, what your client's expectations are in retaining a lawyer to deal with their matrimonial issue. Have a discussion early on with your client about what your lawyer-client relationship will look like including your typical response time for emails and phone calls, your hourly rate as well as your expectations of them in return, in order for you to be able to effectively assist them in obtaining the best result possible.

There are four general categories of unrealistic client expectations: expectations about service, expectations about time to conclude, expectations about result, and expectations about cost.[30] It is common for clients to have high service expectations (both reasonable and unreasonable). For example, they may expect calls and emails returned within an hour. Lawyers should be clear with their clients from the outset that that kind of service will not be possible. Clients who have high service expectations should be billed regularly so they can see the cost of these expectations.[31]

Clients are most often surprised at the amount of time it takes for their case to be settled or resolved. Lawyers should warn their clients at the outset that the process is not quick. The earlier clients are aware of this the better, so they are not continuously disappointed. In terms of result, clients who expect and are insistent in achieving their desired result should be informed as early as possible if this is not possible or realistic, even if this means losing the client. Similarly, unnecessarily combative clients who are not willing to compromise should be warned that in family law, this approach is not always going to end up serving their best interests. Finally, regarding costs, again, regular billing that includes as much detail as possible is optimal.

There is a line between blindly advocating for your client's interests and desires and advocating effectively for those interests in a way that is realistic and beneficial to your client in achieving their desired outcome. When clients' desires are so unreasonable that advocating for

[30] Carole Curtis, "Dealing with the Difficult Client", 25 CFLQ 291, s. 3v
[31] *Ibid*

those desires will negatively affect the client and others, it is our duty as lawyers to take a firm position even though that may be contrary to what the client wants to hear. Lawyers should not simply rubber stamp what it is that their client wants. At the end of the day, this will not help them. This is especially important regarding children's issues. A client who does not wish to pay child support for example must be reasoned with and told that it is the right of the child, no matter how much they dislike their spouse. Not only is it the right of the child, but a client who is refusing to pay child support or is in significant arrears will not be looked at favourably by the court, who may ultimately decide the issues. Clients can be in a state of "tunnel vision" and may not be aware that in fighting on certain issues, they are hurting, not helping themselves. It is our job as lawyers to try to get them out, even if they do not like us for it.

Finally, if a client is so unreasonable and the trust between you has been lost such that you are no longer able to effectively represent your client, you must consider ending your solicitor-client relationship. Rule 2.09(2) of the Rules of Professional Conduct states that where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.[32] This may include being deceived by the client, or where the client has refused to accept and act upon the lawyer's advice on a significant point.

At the end of the day it is important not only for your client, but for yourself as counsel, that client expectations are managed as effectively as possible.

[32] Rules of Professional Conduct, Law Society of Ontario, Rule 2.09(2)

Law Society of Ontario | Barreau de l'Ontario

TAB 6

Family Law Refresher 2024

Preparing for Trial

Fareen Jamal
Jamal Family Law Professional Corporation

Kathleen Broschuk
Jamal Family Law Professional Corporation

April 5, 2024

cpd

Family Law Refresher 2024

Law Society of Ontario

Preparing For Trial

Fareen L. Jamal and Kathleen Broschuk
Jamal Family Law Professional Corporation

Index

Organization and Preparation: The Trial Binder

The Trial Binder helps focus the organization and preparation for Trial. The “binder” can be virtual (consider using OneNote).

The Trial Binder has the following. If anything is on CaseLines, note the numbers:

1) Trial Preparation Chart – refer back to this often to keep yourself on track
2) Theory of the Case
3) Opening Statement
    a. What questions need to be resolved at Trial
    b. Outline the Legal Issues
    c. Basic undisputed facts
    d. Who witnesses will be
    e. Outline of evidence you expect to call
    f. Chronology
    g. Prior Legal Proceedings
    h. Any other demonstrative aids
4) Draft Order
    a. (reserve opportunity to provide refined version with Closing Statement)
    b. Check the pleadings – Judge cannot make an order for relief not claimed in pleading
5) Statement of Agreed Facts (marked up copy for your notes, otherwise just note the CL number)
6) Index of Joint Document Brief – or CaseLines Index
7) Exhibits List – blank until Trial
8) Proof of Facts Chart
9) Witness: Beyonce – Examination in Chief Outline
10) Witness: Michael Buble – Examination in Chief
11) Witness: Jay-Z – Cross-examination
12) Witness: Farrah Hudani – Expert
    a. Expert Report

    *(Separate Tab for every witness)
13) Evidentiary Issues
14) Voir Dire Preparation
15) Closing Statement
    a. Application of the evidence – factual matrix
    b. Credibility issues – demeanour, impressions as matter unfolded
    c. Burden of proof – which party onus to prove rests, whether onus met
    d. Legal issues – legislation, caselaw and application to facts
    e. Net Family Property Statement
    f. Divorcemate Calculations
    g. Order being sought (Final)

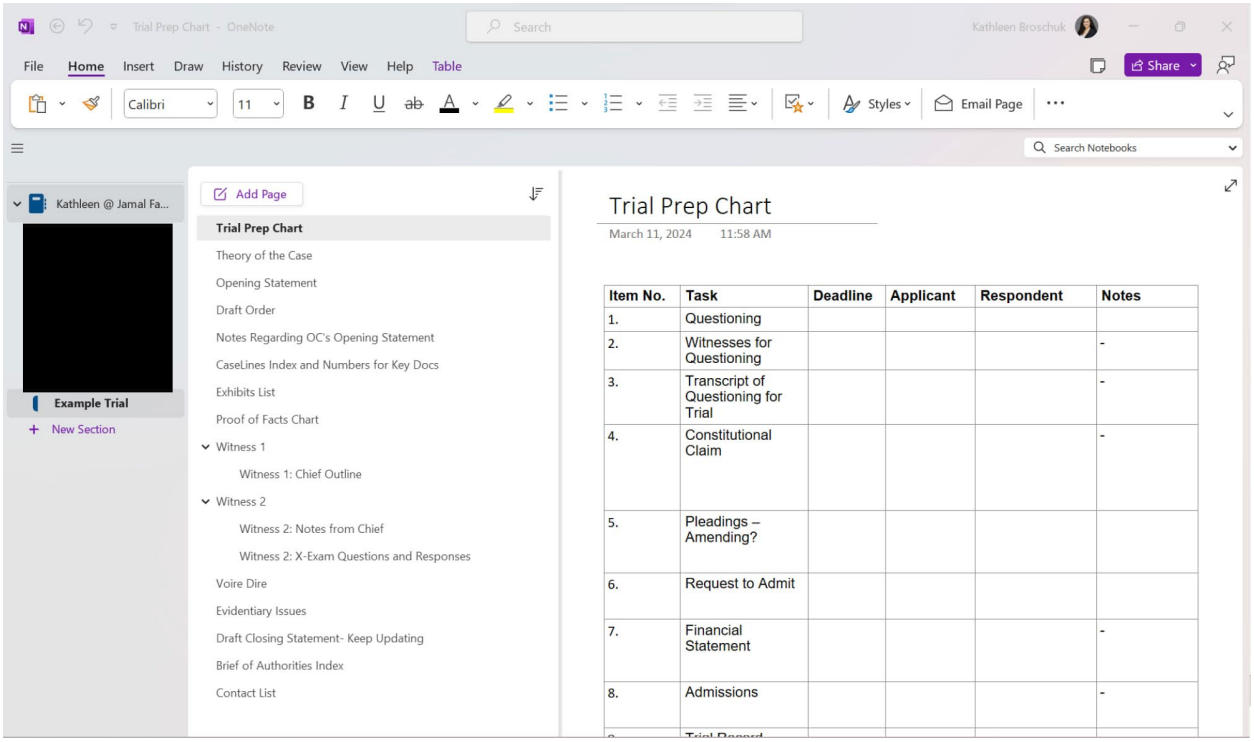
Fareen L. Jamal and Kathleen Broschuk | fjamal@jamalfamilylaw.com

h. Update this throughout trial after each day—it will save you work at the end

16) Brief of Authorities – index with all cases hyperlinked
17) Contact list with names and phone numbers of everyone involved in the trial (including witnesses, opposing counsel and registrar)

OneNote is a good resource for making a virtual trial binder.

- Example of Virtual Trial Binder in OneNote:



- Note, you can add your co-counsel and clerk to the notebook to work collaboratively on the same documents
- You probably already have this program as a subscriber to the Microsoft Office Suite

Have on hand during Trial:

- A text consolidating Family Law Rules, Divorce Act, Family Law Act, Children's Law Reform Act (Ontario Family Law Practise or Annotated Acts)
- Rules of Civil Procedure and Courts of Justice Act
- Evidence Text (e.g. Sopinka and Lederman on Evidence)
- A Courtroom Procedure Text (e.g. Ontario Courtroom Procedure by Michelle Fuerst and Mary Anne Anderson)
- Access to DivorceMate
- Access to legal research databases

Fareen L. Jamal and Kathleen Broschuk | fjamal@jamalfamilylaw.com

Leading up to Trial

1) Theory of the Case
2) Research
    a. What facts are relevant?
    b. Whose onus to prove?
    c. What needs to be proved? Proof of Facts Chart
    d. What standard?
3) Conferences
    a. Rule 1(8) can be used at a conference for non-compliant opposing party. Consider: striking pleadings, invitation for adverse inferences, etc.
    b. Can also use Rule 1(8) at trial
    c. Also note Rule 20.2; exert reports due 6 days before Settlement Conference
4) Practice Direction
    a. Check your practice direction in the region of your trial for deadlines and virtual/in person rules
5) Witnesses
    a. How will your evidence in chief go in? Consider affidavits with exhibits attached to shorten trial time
    b. Expectation is “in person”; need permission for remote witnesses
6) Questioning – Rule 20 – collect information, collect lies (impeachment tool)
    a. What you need to work on with your client
    b. Undertakings and follow up
7) Documentary Disclosure – Rule 13 and 19
    a. Affidavit of Documents – Rule 19
    b. Financial Statements – Rule 13
        i. Thoroughly review with client before Trial (including budget section)
    c. Net Family Property Statement – Rule 12
        i. Settle anything you can. Highlight anything in dispute.
        ii. Use Comparative NFP to highlight differences
8) Request to Admit – Rule 22
    a. Narrows issues and shortens trial; helpful when considering costs later
9) Expert Reports – Rule 23
    a. 90/60/30 days
    b. Duty of Expert
10) Offers to Settle – Rule 18
    a. Severable. More than 7 days before Trial. Capture your Trial prep.
11) Budget and Realistic Outcomes
    a. Cost/benefit analysis with client while doing Offer to Settle
12) Exhibits
    a. Joint Document Brief
    b. Consider: How will witnesses view the exhibits at trial? Bring a paper copy with the CaseLines numbers as a back up

Fareen L. Jamal and Kathleen Broschuk | fjamal@jamalfamilylaw.com

c. Documents used solely for impeachment need not be disclosed, *Rules of Civil Procedure* R. 30.09; *Landolfi v. Fargione*, 2006 CanLII 9692 (ONCA)

13) Business Records – CEA s. 23; EA s. 35
    a. Evidence Act Notices
14) Trial Record – Rule 23

Proof of Facts Chart Example

Claim	Element	Facts	Witnesses	Documents
Sole custody	Cannot coparent	Disrespectful Abusive Ongoing communication problems Different views of parenting Cannot make joint decisions historically CONFLICT	Beyonce Jay-Z Child Psych.	XX Affidavit, paras. XX Answer Letter dated , Tab 13 Email Tab 27, pp. XX
	Beyonce Primary Parent		Beyonce Jeff cross re: schedule, activities, travel denial	Calendars Tab 45 Photos Tab 6
Child Support	Jay-Z's Income	Underemployed Cash income Travel perks	Beyonce Aria Jay-Z	Travel log Tab 29 Income Tax Returns Tab 72 Financial Statements Tab 2

Fareen L. Jamal and Kathleen Broschuk | fjamal@jamalfamilylaw.com

Challenging an Expert

Potential avenues of challenge to consider:

1. Expert's qualifications
2. Expert's past testimony
    a. Other court cases (Canlii)
    b. Expert CV – what included and excluded
3. Expert's impartiality
4. Scope of expert testimony
    a. Was the right question asked?
5. Areas of disagreement between opposing experts
    a. Narrow the issues in dispute
6. Underlying factual assumptions experts relied upon
    a. Were they proved?
    b. Impact on opinion if underlying facts not proved
    c. Hypotheticals – detailed fact pattern
7. Documents expert saw
    a. Were relevant documents ignored?
8. Documents expert did not see
    a. Was expert provided with right or complete information?
9. Expert's actual opinion
    a. Can you challenge the theory, approach, science or scholarship relied on?
    b. How can you discredit opinion?

Sample Directives and Virtual Trial

While the presumptive mode of trial is in person, everything is still on CaseLines.

We have a Trial Preparation Chart that we have adapted to virtual trials incorporating recommendations from the bench. It is attached herein. Before you use it, go through your local practice direction to make sure all of the issues you need are addressed.

Justice Paul Perrell created an Evidence Cheat Sheet which is attached.

If you are physically in person:

1. Consider hybrid options for witnesses when appropriate (and with the Court's consent). For example, in one trial we participated in, the expert witness came down with a terrible cold the week before trial. The Court allowed her to appear virtually in the courtroom to avoid spreading the virus. Remember to address these types of issues as "housekeeping" matters on the first day of trial (or as soon as possible) so Court staff can set up the necessary technology.

2. Consider printing a backup copy of any affidavits or exhibits you intend to rely on with the CaseLines page numbers. You never know when the wi-fi at the Courthouse will stop working or the witness will not have access to CaseLines. This is especially important if the opposing party is a self-represented litigant – they may not have options for their witness to see their own evidence.

CaseLines

*Note, CaseLines will soon be updated to "CaseCentre".

CaseLines is a document sharing platform that the SCJ is using for online and in person appearances. **The Court's expectation is that lawyers are proficient with CaseLines: the Court is done with paper.**

> [37] In this region, we have been using CaseLines for some time. It is expected that counsel and their staff are trained in how to properly upload and hyperlink their material. Counsel must become familiar in using CaseLines during their submissions. Material must also be uploaded to the proper bundle.
>
> [38] The ineffective use of CaseLines cannot continue. All counsel have a responsibility and duty to their clients and the court to properly use CaseLines and electronic documents. The days of paper are over.

Anthony v. Oqunbiyi, 2023 ONSC 861 (CanLII), at para 37

CaseLines is **not a filing platform**: you file through Justice Submissions Online (the "portal" or "JSO" which you can learn about by clicking **this**. You need to register for a One-Key ID in order to use the portal: click **One-Key**). You must **file first** then upload to CaseLines.

In advance of an event (like a Conference, motion or trial) you will receive an invitation to load the documents you filed for an event on to CaseLines. It allows the Judge and counsel all to be viewing the same documents.

There is a great CaseLines **tutorial** on the SCJ website, and one-hour CaseLines tutorial video which you can watch on Vimeo by clicking **this**. **You should watch both videos before appearing in Court using CaseLines.**

Download the CaseLines bundle to your desktop the morning of Court as an emergency provision if you truly cannot get internet in Court.

As a general note: when adding new documents to CaseLines, add them to the bottom.

Do not reorder the documents otherwise you will change the page numbers (this is very annoying for colleagues and judges who may have written down a page number to which to refer). Considering asking for an endorsement to this effect at the settlement conference or TMC.

Consider re-naming your exhibits in CaseLines as a form of advocacy.

Here are some CaseLines tips and tricks that we have picked up so far:

Invite Your Assistant/Clerk/Junior/Co-Counsel to CaseLines

1. Log into CaseLines
2. View your Case List
3. Select the case you want to add your assistant or law clerk to
4. From the main page of the case, click on PEOPLE
5. Click on Invite a New Participant
6. Put in your assistant's info and give them the bundle access that you want
7. Click INVITE and that will send the invite out

Sending a Client the Zoom Link from CaseLines

1. Login to CaseLines
2. In the main screen you will see a View Hearings menu along the top. Click to select.
3. Right click on the Video Conference Link button in the case on CaseLines.
4. Copy the link address.

5. Paste into a calendar appointment or email to the client.

Hyperlinking in CaseLines (if your bookmarks have gone missing)

All documents must be hyperlinked and bookmarked correctly. The Judge **will** be annoyed with you if you do not do this. The ONSC has a detailed explanation of how to upload with hyperlinks and bookmarks at items 4, 5 and 6 of their CaseLines Hearings – Tips for Counsel and Self-represented Parties.

1. If you followed the tutorial and your hyperlinks have gone missing, click on VIEW beside the document name and you will see a HYPERLINK button. Click it. Go to the location where you want to hyperlink. You will get a pop up asking if you want to add a hyperlink. Click OK. You will then get a pop up and you can hyperlink to the cloud or to another document on CaseLines. Click SAVE as you do each one.

Direct Other's to Page Feature

Use this to send the judge, opposing counsel, and others to the page you are referring to in CaseLines.

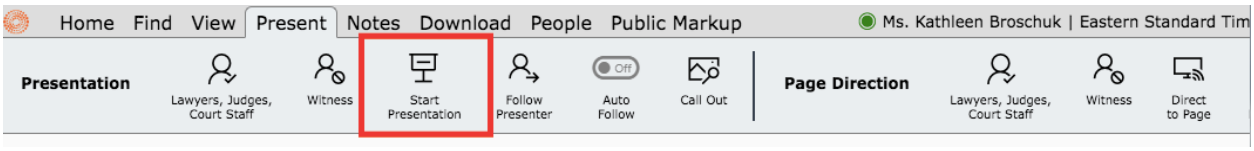
1. Go to CASE LIST
2. From your list of cases, click REVIEW EVIDENCE
3. From the top menu, click FIND
4. Make sure you are on the page you are trying direct others to (if not, use the FIND PAGE feature in the same menu)
5. Press DIRECT OTHERS TO PAGE
6. Click OK when the pop up appears asking if you would like to direct others
7. All others will get a prompt to go to the page you've directed them to
8. If you don't want page directions from others, toggle the PAGE DIRECTION slider to OFF. If you automatically want to be taken to pages, slide the AUTO DIRECTION slider to ON

Fareen L. Jamal and Kathleen Broschuk | fjamal@jamalfamilylaw.com

Presentation Mode

Use this during your hearing to show others your presentation. This is useful when you're walking the judicial officer through your evidence.

1. Go to CASE LIST
2. From your list of cases, click REVIEW EVIDENCE
3. From the top menu, click PRESENT
4. Click START PRESENTATION (this makes you the presenter)- a red boarder will appear around the review pain
5. Others should then click FOLLOW PRESENTER (located beside the START PRESENTATION button) and choose your name



Lessons Learned from a Post-COVID Trial[1]

Here are some of the tricks and tips that we have learned from virtual, hybrid and in person trials since 2020.

1. **Screens/KeyBoards/ Mice**
    a. Use more than one screen even if it's an in person trial (you'll have CaseLines on one screen and you're notes on the other)
    b. Bring your keyboard and mouse with you (consider a mousepad).
2. **Taking Notes**
    a. Use OneNote (or another organizing app) if you're a typer.
    b. Use a digital notebook (like a Remarkable or an iPad) if you like to write by hand.
        i. Note for Remarkable users: you can buy (cheaper) replacement pens from Amazon which are often better quality than the pen which comes with the Remarkable. The Kindle Scribe Premium Pen

[1] These are based on the Virtual Trial Resource Binder by Lorna Yates and myself, for the HCLA in February 2021, with updates from the last three years of experience.

is half the price and the tip doesn't break as easily. Grab a couple back ups for your pencil case.

3. **Virtual Witnesses**

    a. You need to practice Zooming with anyone appearing by Zoom before trial (especially your client). Do not assume they are tech savvy. You need to ensure they understand the impact of lighting and sound. If they need a headset or if they have a quiet room. How they present on screen - is lounging on a couch the look you want or is sitting in a chair the look you want? Do they know how to log in and log out? Do they know how to mute and unmute? Do they know how to make eye contact and where to look on the device that they are using? Practise back up internet and bandwith options.

    b. How will they communicate with you during trial – email, text message, Whatsapp, other? We find it's easier to have our client in the office with us (even for a virtual trial)—it's harder to quickly communicate virtually (or proverbially kick someone under the table).

    c. Even if some witnesses don't want to speak with you prior to trial about their evidence (someone like a teacher, for example, because of Board policy) they need to hop on to test they know how to position the camera and ensure the sound is ok, mute and unmute.

    d. Remind your witnesses to hang out in the Zoom waiting rooms and not to be late – make sure you can contact them and set expectations for when they may be called.

    e. Create a contact list with names and phone numbers that is easily accessible during Trial. Put it in your trial binder. Do this for every trial- not just Zoom trials.

    f. Remind your witnesses and your client they cannot just unmute and jump in when they feel like it. It is a courtroom. They get to speak when asked a question. No question, no speaking. Unless they are testifying ask them to stay on mute and to press the spacebar to speak only when spoken to.

    g. Your client should not be turning the video on and off. It is distracting and, again, we are in court. Set rules for this and seek permission if anyone is going to be off camera.

    h. You really need to remind clients and witnesses they cannot use notes (the exception is of course for professional witnesses once you go through the formalities of asking for leave to refresh memory). It is tempting in the virtual world. But a huge no no. It bears reminding and repeating.

i. Don't let your client use the Chat function in Zoom (the risk is they would send the comment to everyone, not just you; there are also privacy concerns with what the Court can see on the back end). You can set up a WhatsApp group instead if you don't want to use email or text. If you have co-counsel, consider assigning someone to monitor the client's virtual "notepad".

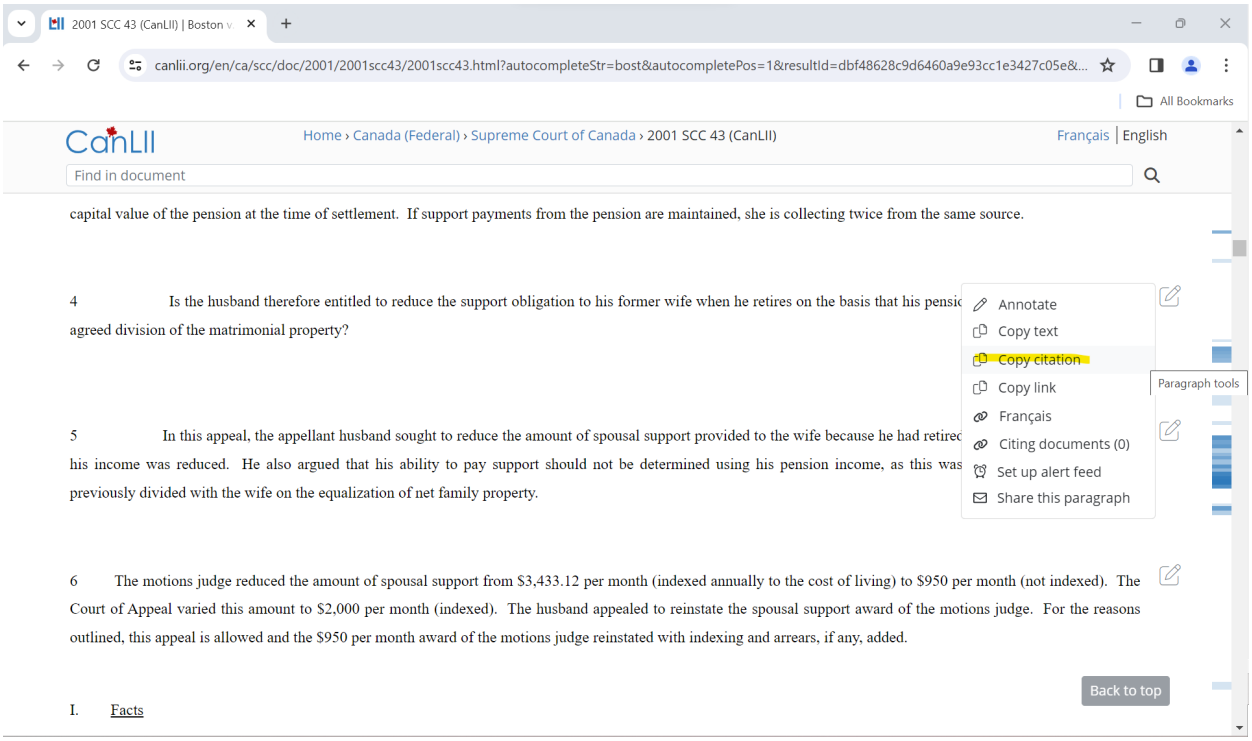
4. **Logistics with Zoom and the Court**

   a. At breaks and lunch, keep the Zoom connection open and just mute yourself and turn off video. Remember witness cautions during cross-examination.

   b. Don't use Zoom screen sharing for CaseLines—the Court will see your "Notes" in CaseLines. Use the DIRECT TO PAGE function or PRESENTER mode.

Tech Tips[2]

Citations and HyperLinking from Canlii



To copy a citation and hyperlink from Canlii, click the pencil button beside your paragraph and select “copy citation”—the citation along with the link will copy and you can paste it into your factum.

Do this as you go along to save yourself hyperlinking time.

Use Styles to Format

Do this as you go along to save yourself hyperlinking time.

For factums, we like to set up a “Style” for main text, headings and citations to save time formatting; once the “Style” is set up, we just have to select the relevant text in the Word document and apply the style we need (no more re-formatting pesky citations).

Learn more about styles here: https://support.microsoft.com/en-gb/office/customize-or-create-new-styles-d38d6e47-f6fc-48eb-a607-1eb120dec563

[2] With deep gratitude to Lorna Yates, the tech guru, with whom I presented at the Halton County Law Association in February 2021 and prepared the Virtual Trial Resource Book. A lot of the Virtual Trial Tips and Tech Tips have been included in this resource.

Law Society of Ontario | Barreau de l'Ontario

TAB 7

Family Law Refresher 2024

Law Society of Ontario (LSO)
Family Law Rights of Appearance Pilot Project
Fact Sheet

April 5, 2024

Fact sheet
Family Law Rights of Appearance Pilot Project

Law Society of Ontario | Barreau de l'Ontario

Issued: September 2023

What is the Family Law Rights of Appearance Pilot Project?

- The Family Law Rights of Appearance Pilot Project allows eligible lawyer licensing candidates to appear in court on an increased number of matters related to family law cases without first needing advance permission of the court pursuant to Rule 4(1)(c) of the Family Law Rules.
- Rule 4 allows that a party may be represented in court by someone who is not a lawyer, but only if the court gives advance permission.
- In matters where advance permission is not required, candidates must have a lawyer with direct knowledge of the file on stand-by availability.

Why was the Family Law Rights of Appearance Pilot Project created?

- The pilot is a joint initiative of the Law Society of Ontario, the Superior Court of Justice and the Ontario Court of Justice.
- The pilot was launched in 2022 as an access to justice initiative to help increase access to family law services for Ontarians and provide additional learning opportunities for lawyer licensing candidates.

Who is eligible to participate in the pilot?

- Candidates who are eligible to participate in the pilot are referred to as Permitted Candidates. Permitted Candidates include:
    - lawyer licensing candidates
    - LPP/PPD students engaged in work placements and
    - Law students enrolled in an Integrated Practice Curriculum program at Lakehead University or Toronto Metropolitan University and who are engaged in a work placement.

How can candidates participate?

- Articling principals overseeing lawyer licensing placements and supervising lawyers who oversee LPP, PPD and IPC placements are responsible for determining which learning experiences are best suited to a candidate's learning goals and are encouraged to consider participating in the Family Law Rights of Appearance Pilot Project.
- Candidates are encouraged to speak to their articling principals and supervising lawyers to consider if they are eligible and what opportunities may be available.

Matters not requiring advance permission

These matters require candidates to have a lawyer with direct knowledge of the file on stand-by availability:

- First appearances.
- Preparing submissions and attendances to address costs.
- Appearances to settle disputed orders.
- Assignment court/audit court, to confirm a trial is ready to proceed.

- Rule 14B motions for consent orders or other procedural, uncomplicated, or unopposed matters, including requests regarding service and extension of timelines.
- Attending on refraining motions either for the Family Responsibility Office, Ontario Works, or the support payor.
- Case conferences (including conferences before Dispute Resolution Officers) and "to be spoken to" lists.
- Form 15D Consent Motions to Change Child Support.
- Any step in a Motion to Change related solely to child support with a T4 employee support payor – (except for discretionary claims pursuant to sections 3(2), 4, 7, 8, 9, or 10 of the Child Support Guidelines).
- Motions to appoint the Office of the Children's Lawyer, except for appointments under the *Child, Youth and Family Services Act (CYFSA).*
- Motions relating to questioning and undertakings.
- Attendances to speak to matters on consent, including consents to incorporate settlements reached through negotiation, mediation, and minutes of settlement.
- Support enforcement proceedings including steps relating to final disposition.
- Motions relating to financial disclosure.
- Contested adjournments.

What is considered stand-by availability?

- When a candidate speaks to a matter not requiring advance permission, a lawyer with direct responsibility for the file must be available on stand-by to speak to the judge, if required.
- Stand-by means that the lawyer is available to appear in court at the scheduled time, either virtually, by telephone, or in person, if required by the court.

Matters requiring advance permission and candidates be accompanied by a lawyer with direct knowledge of the file

- Any matter involving the *CYFSA*, Hague Convention on the Civil Aspects of International Child Abduction, or other concerns related to child abduction or wrongful retention.
- A settlement conference, trial scheduling conference, or trial management conference.
- Any case where a party on either side is under disability.
- Anything that finally disposes of a matter, including motions for summary judgment, except as otherwise provided above.
- Any case that includes an allegation of family violence.
- Focused hearings or trials.

What additional responsibilities are required of articling principals or supervising lawyers when candidates participate in the pilot?

In addition to following the General Guidelines for all Appearances, articling principals and supervising lawyers must ensure:

- candidates are adequately supervised, with ongoing training and monitoring with respect to their court representation and activities, in respect of both substantive and procedural family law.
- candidates are properly prepared and familiar with the client's file and
- the client has granted permission for the candidate to speak to the issues being addressed in the court appearance, including resolution of those issues on consent. If issues arise outside of those that were expected to be addressed by the court, the lawyer with direct responsibility for the file must be available to speak to the matter.

What additional responsibilities do candidates have when appearing in court under the pilot?

In addition to following the General Guidelines for all Appearances, candidates must:

- indicate to the court that they are appearing under the Family Law Rights of Appearance Pilot Project and are within the rights of appearance and
- confirm to the judge at the start of the proceeding that a lawyer with direct responsibility for the file is available on stand-by in matters where the candidate is speaking to a matter not requiring advance permission.

If the presiding judge decides a matter should not proceed, what steps should be taken by a candidate?

- The presiding judge retains discretion to permit or refuse a candidate's attendance.
- If the presiding judge decides the candidate should not proceed with the matter without a lawyer with direct knowledge of the file present, the candidate should ask that the matter be stood down briefly to enable that lawyer to address the matter.
- A lawyer with direct knowledge of the file should be on stand-by and ready to attend court. Where requested, the candidate shall notify the judge if the lawyer with direct knowledge of the file is not immediately available to attend in person and, if so, of the approximate amount of time it will take for them to be available in person.

The Law Society regulates lawyers and paralegals in Ontario in the public interest. The Law Society has a mandate to protect the public interest, to maintain and to advance the cause of justice and the rule of law, to facilitate access to justice for the people of Ontario and to act in a timely, open and efficient manner.

Media contact: Amy Lewis, Senior Communications Advisor, External Relations and Communications, amlewis@lso.ca. Follow us on LinkedIn, Instagram, Twitter and Facebook.

Law Society of Ontario | Barreau de l'Ontario

TAB 8

Family Law Refresher 2024

How to Best Craft the Pleading and Case Development: Torts, Trusts, Third Parties and Beyond
List of Key Cases

Andrea Gonsalves
Stockwoods LLP

Frances Wood
Wood Gold LLP

April 5, 2024

cpd

Family Law Refresher 2024

How to Best Craft the Pleading and Case Development: Torts, Trusts, Third Parties and Beyond

Andrea Gonsalves, *Stockwoods LLP*
Frances Wood, *Wood Gold LLP*

List of Key Cases

- Elements of **assault & battery**:
    - *Barker v Barker*, 2022 ONCA 567, at para 138
    - *Ahluwalia v Ahluwalia*, 2023 ONCA 476, at paras 61-64, 88
    - *Warman v Grosvenor* (2008), 2008 CanLII 57728 (ON SC), 92 OR (3d) 663 (Sup Ct)

- Elements of **intentional infliction of mental distress**:
    - *Ahluwalia v Ahluwalia*, 2023 ONCA 476, at para 69
    - *Prinzo v Baycrest Centre for Geriatric Care* (2002), 2002 CanLII 45005 (ON CA), 60 OR (3d) 474 (CA)

- **Defamation**:
    - Elements:
        - *Grant v Torstar Corp*, 2009 SCC 61, at para 28
    - Not bare hyperlinks:
        - *Crookes v Newton*, 2011 SCC 47
    - Defences:
        - Justification:
            - *Bent v Platnick*, 2020 SCC 23, at paras 107-108
        - Fair comment:

        - *WIC Radio Ltd v Simpson*, 2008 SCC 40, at para 1
    - Qualified privilege:
        - *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, at paras 143-147
        - *Bent v Platnick*, 2020 SCC 23, at para 121
    - Responsible communication:
        - *Grant v Torstar Corp*, 2009 SCC 61, at paras 98-125

- Elements of **privacy torts**:
    - **Intrusion upon seclusion**:
        - *Jones v Tsige*, 2012 ONCA 32, at paras 70-78
    - **Public disclose of embarrassing private facts**:
        - *Doe 464533 v ND*, 2016 ONSC 541, at paras 41-46
        - *Jane Doe 72511 v NM*, 2018 ONSC 6607, at para 99
    - **Publicly placing in a false light**:
        - *Yenovkian v Gulian*, 2019 ONSC 7279, at paras 170-171

- Elements of **internet harassment**: *Caplan v. Atas*, 2021 ONSC 670, at para 171

- Elements of **civil conspiracy**:
    - Unlawful means conspiracy:
        - *Agribrands Purina Canada Inc v Kasamekas*, 2011 ONCA 460, at para 28
    - Predominant purpose conspiracy:
        - *Harris v Glaxosmithkline Inc*, 2010 ONCA 872, at para 39

- Pleading tort claims in family law proceedings: *Ahluwalia v Ahluwalia*, 2023 ONCA 476

Pleading Tort Claims in Family Law Matters

- *Limitations Act* 2002, SO 2002, c 24– most torts will have a 2 year limitation period
    - BUT, see section 11 – limitation does not run during any period the parties are engaged in a third party resolution process
    - And section 16 – no limitation period for sexual assault or, in the case of plain assault, where parties are in an intimate relationship or one of dependence
- In most cases, claim can and should be pleaded along with the family law matter.
    - *Courts of Justice Act* – Ontario Court of Justice does not have jurisdiction to hear tort claims – consider at the outset whether to bring action in Superior Court
    - Both Superior Court of Justice and Family Court can hear tort matters – see Courts of Justice Act, section 21.9 (UFC) Rules of Civil Procedure, Rule 6 & Family Law Rules, Rule 12(5) re hearing related matters together
    - *Courts of Justice Act*, section 138 – discourages multiplicity of proceedings
    - See *Breukelman* v *Miret*, 2023 ONSC 3287 – civil action and employment action consolidated with family law matter – full review of considerations
    - And, think about interplay between tort damages and other claims – see *Ahulwalia* at paragraphs 137-140 – is this the correct approach?
- In some cases, consolidation is not a good idea
    - Where tort involves third parties – new girlfriend (intrusion upon seclusion), conspiracy (parties' parents or other family members) – consider carefully
    - Parties have a right to be in attendance at conferences, Rule 20 questioning and other appearances
    - Consider trial together rather than consolidation
- Amendments
    - Tort claim can be added after the claim has been commenced – FLR very relaxed on amending pleadings (but don't wait until trial) – amend in the same way you would any other amendment

- Amended claim must be served personally on any third parties, just as if it were an initiating process
- You will need a Case Conference on the new issues

- Identifying Parties
  - For family law lawyers, taking care to name proper parties isn't always top of mind – for third party individuals, be sure to get proper legal name, for corporations, do a corporate search

- Evidence
  - Start to gather evidence from the start – get medical records (if relevant), photos, text messages, etc. as soon as possible
  - Scope of necessary evidence may well be greater than typical family law claims, and evidentiary requirements are likely to be stricter (although not always)

- Do Proper Pleadings
  - Family law is notorious for terrible pleadings – all family law actions should have better pleadings – pleading a tort is a great opportunity to learn to plead the *facts* and not the *evidence*
  - All family lawyers should read Pleadings: There are Rules
  - Seriously consider bringing in a civil litigator

Strategic Considerations

- Financial Viability
  - In tort claims, the ability of the tortfeasor to pay is not a proper formal consideration (despite some blurring of the lines in some of the cases…) BUT, if there is no ability to pay, is it worth the legal and emotional cost?
  - Consider damages – are the potential damages worth the additional legal and emotional costs?

- Never as Retaliation
  - It is never proper to commence a tort claim as retaliation for other perceived (or real) wrongdoing – this almost always goes badly and can negatively impact other important family law claims

- Effective way to bridge gaps in legislation or other family law concepts
    - See *Leitch* v *Novak*, 2020 ONCA 257 – Court of Appeal allowed tort of conspiracy to proceed against husband's family and corporations, accused of conspiring to hide his assets and divert income/assets – instead of having to rely only on notions of imputing income or adverse findings on equalization, the family business was brought in actively to answer to its dealings
    - Think creatively
- Evidence (Again)
    - In family law we often plead first, think about evidence second, but in civil litigation it's essential to consider your evidence first