Law Society of Ontario | Barreau de l'Ontario

17th Family Law Summit

CO-CHAIRS

Kelly D. Jordan, C.S.
Kelly D. Jordan Family Law Firm

Shawn Richard, TEP
A. Shawn Richard Family and Estate Law

March 28, 2023
March 29, 2023

Law Society of Ontario | Barreau de l'Ontario

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www.lso.ca

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17th Family Law Summit

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cpd

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CO-CHAIRS: **Kelly D. Jordan, C.S.,** *Kelly D. Jordan Family Law Firm*

Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*

March 28, 2023
March 29, 2023
9:00 a.m. to 4:00 p.m.
Total CPD Hours = 9 h Substantive + 2 h Professionalism
+ 1h EDI Professionalism

Law Society of Ontario
130 Queen Street West

SKU CLE23-00304

Agenda

DAY 1: Tuesday, March 28

9:00 a.m. – 9:05 a.m. **Welcome**

Kelly D. Jordan, C.S., *Kelly D. Jordan Family Law Firm*

Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*

9:05 a.m. – 9:55 a.m.	**Is Artificial Intelligence the Future? Opportunities and Challenges** (40m P) Michael McGinn, Manager, Innovation *Fasken Martineau DuMoulin LLP* Susan Wortzman*, McCarthy Tétrault LLP*
9:55 a.m. – 10:40 a.m.	**Update on Case Law** Aaron Franks, *Epstein Cole LLP*
10:40 a.m. – 10:50 a.m.	**Question and Answer Session**
10:50 a.m. – 11:05 a.m.	**Break**
11:05 a.m. – 11:35 a.m.	**How Family Law Intersects with Business, Criminal, Immigration and Real Estate Law** Jennifer Allen, *Allen McDonald Swartz LLP* Jody Berkes, C.S., *Berkes Law* Shalini Konanur, Executive Director *South Asian Legal Clinic of Ontario* (SALCO) Tannis Waugh, C.S., *Waugh & Co.*
11:35 a.m. – 12:20 p.m.	**Torts and Family Law** Mary-Jo Maur, Assistant Professor Faculty of Law, *Queens University*
12:20 p.m. – 12:30 p.m.	**Question and Answer Session**

12:30 p.m. – 1:30 p.m.	**Lunch**
1:30 p.m. – 2:00 p.m.	**Billing 101** (20m P) Lisa Bernstein, Director, External Relations Strategy & Public Affairs, *Legal Aid Ontario* Shuchanna Swaby, *Shuchanna Swaby Barrister & Solicitor*
2:00 p.m. – 2:30 p.m.	**Enforcing Support Orders** Georgette Makhoul, *Hogarth Hermiston Severs LLP* Kelly Spear, Deputy Director Legal Services Branch *FRO*
2:30 p.m. – 2:33 p.m.	**Polling Questions**
2:33 p.m. – 2:40 p.m.	**Question and Answer Session**
2:40 p.m. – 2:55 p.m.	**Break**
2:55 p.m. – 3:50 p.m.	**Judicial Panel- Oral and Written Advocacy** (10m e) The Honourable Justice Heather McGee *Superior Court of Justice* The Honourable Justice Renu Mandhane *Superior Court of Justice* The Honourable Justice Wiriranai Kapurura *Ontario Court of Justice*
3:50 p.m. – 4:00 p.m.	**Question and Answer Session**

4:00 p.m.	**End of Day 1**
4:00 p.m. – 6:00 p.m.	**Cocktail Reception**
	Registrants attending in-person are invited to join us for a reception immediately following Day One.

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Law Society of Ontario

SKU CLE23-00304

Agenda

DAY 2: Wednesday, March 29

9:00 a.m. – 9:05 a.m. **Welcome**

Kelly D. Jordan, C.S., *Kelly D. Jordan Family Law Firm*

Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*

9:05 a.m. – 10:05 a.m.	**Keynote Address: Mental Health, Resilience, Reducing Stress and Having a Long Career** (45m e) The Honourable George R. Strathy, Former Chief Justice of Ontario Stephen Grant, LSM, Cert. F. Arb., Counsel *McCarthy Hansen & Company LLP* Valarie Matthews, *McCarthy Hansen & Company LLP* Jonathan Richardson, *Richardson Hall LLP*
10:05 a.m. – 10:35 a.m.	**Hot Topics in Child Protection** (5m e) Tammy Law, *Tammy Law Barrister & Solicitor* Mélanie Verdone, Legal Counsel *The Children's Aid Society of S.D.&G.*
10:35 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:00 a.m.	**Break**
11:00 a.m. – 11:45 a.m.	**Best Practices in Dealing with Property Issues** (20m P) Vivian Alterman, MBA, CPA, CA, CBV, *ap Valuations Limited* Kavita Bhagat, C.S., *Kavita V. Bhagat Professional Corporation* David Frenkel, *Frenkel Tobin LLP* Bhuvana Rai, *Mors & Tribute Tax Law Professional Corp*oration

11:45 a.m. – 12:20 p.m.	**Contracts and the Family Law Client: Negotiating, Drafting and More** (25m P) Robert Halpern, C.S., *Halpern Law Group* Shelly Kalra, *Kalra Family Law Professional Corporation*
12:20 p.m. – 12:30 p.m.	**Question and Answer Session**
12:30 p.m. – 1:30 p.m.	**Lunch**
1:30 p.m. – 2:05 p.m.	**Estates and Family Law** (15m P) Marni Pernica, *Aird & Berlis LLP* Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*
2:05 p.m. – 2:40 p.m.	**The Reform of Relocation Law in Ontario: The First Two Years** Professor Nicholas Bala, LSM, Faculty of Law *Queen's University*
2:40 p.m. – 2:50 p.m.	**Question and Answer Session**
2:50 p.m. – 3:00 p.m.	**Break**
3:00 p.m. – 3:50 p.m.	**Spousal Support and Retirement** Professor D.A. Rollie Thompson, K.C, Schulich School of Law, *Dalhousie University*

3:50 p.m. – 4:00 p.m.	**Question and Answer Session**
4:00 p.m.	**Program Ends**

Information from Humane Canada

Perpetrators of family and intimate partner violence use animal abuse to manipulate, control, and intimidate partners or ex-partners, children, or elder family members to silence them about their abuse, prevent them from leaving, and/or force them to return.

In order to better understand the current level of knowledge about this link between animal abuse and interpersonal violence currently held by family justice system professionals, Humane Canada will be conducting a two-part research project in the first three months of 2023 as part of a government-funded study.

National in scope, the goal of this project is to reach family justice system professionals in all regions of the country.
The project involves an initial survey, with a sample of respondents chosen to expand on their experiences and insights. Survey participants will also be given the opportunity to include their name and practice information in a national family law database.

This project, Violence Link Awareness for Family Justice System Professionals: Stakeholder Research and Consultation, aims to identify knowledge gaps regarding the Violence Link within a family law context and how best to address those gaps and the unique needs of family justice system professionals. These professionals include family law providers, mediators, or court support workers.

Our project end date is March 31, 2023. While we hope to publish our findings in a peer-reviewed journal later in the year with our academic partners, we will be discussing the study and its findings in greater detail at our bi-annual Violence Link Conference which will be held November 8-9, 2023.

Who is Humane Canada?

Humane Canada represents the largest animal welfare community of more than 50 Humane Societies and SPCAs across Canada and brings together organizations that work with and care for animals to end animal cruelty, improve animal protection and promote the humane treatment of all animals. It is also the Lead Agency and founder of the Canadian Violence Link Coalition (CVLC).

Established in 2018, the CVLC brings together stakeholders from both human and animal services interested in confronting the human-animal Violence Link and the weaknesses of a system that ignores that bond, especially in the intimate partner and family violence context. The CVLC works across sectors to raise awareness of the Violence Link and promote proactive practices that reduce harm in our communities.

https://humanecanada.swoogo.com/cjsr/1253225

Federation of Law Societies of Canada
2024 National Family Law Program

Call for Papers

2024 National Family Law Program
Halifax, Nova Scotia
Monday, July 22 – Thursday, July 25, 2024
(Opening Reception Sunday, July 21st)

Academics, members of the judiciary and practitioners from the public, private, and non-profit sectors are invited to submit proposals for papers to present at the National Family Law Program. We welcome both theoretical and practical contributions in either or both of Canada's official languages that will be of interest to our audience of lawyers and judges from across Canada.

To apply, please provide us with

1. a brief summary of the topic
2. format of presentation (note sessions are either 60 or 75 minutes long)
3. presenter name(s) and curriculum vitae for each

If your submission is accepted, you must agree to provide the following material by May 20, 2024:

- an original written paper on the topic(s)
- a session description (250 words maximum)
- a bio (250 words maximum) and photo for each presenter

Please submit your proposal to:
nflpcoordinator@flsc.ca; Subject: "2024 Proposal"

Deadline: May 31, 2023
Successful applicants will be notified in September 2023

This program qualifies for the 2024 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, 2022 and September 15, 2023, you will be entitled to a $50 premium reduction on your **2024 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 2024 invoice, you must complete the online Declaration Form.

STEP 1:	STEP 2:
• Attend an approved program in person or online; and/or • Self-study a past approved program • Completing a Homewood Health e-course*	Complete the online Declaration form at lawpro.ca/RMdec by Sept. 15, 2023. The credit will automatically appear on your 2024 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

17th Family Law Summit

March 29, 2023

SKU CLE23-00304

Table of Contents

Law Society of Ontario | Barreau de l'Ontario

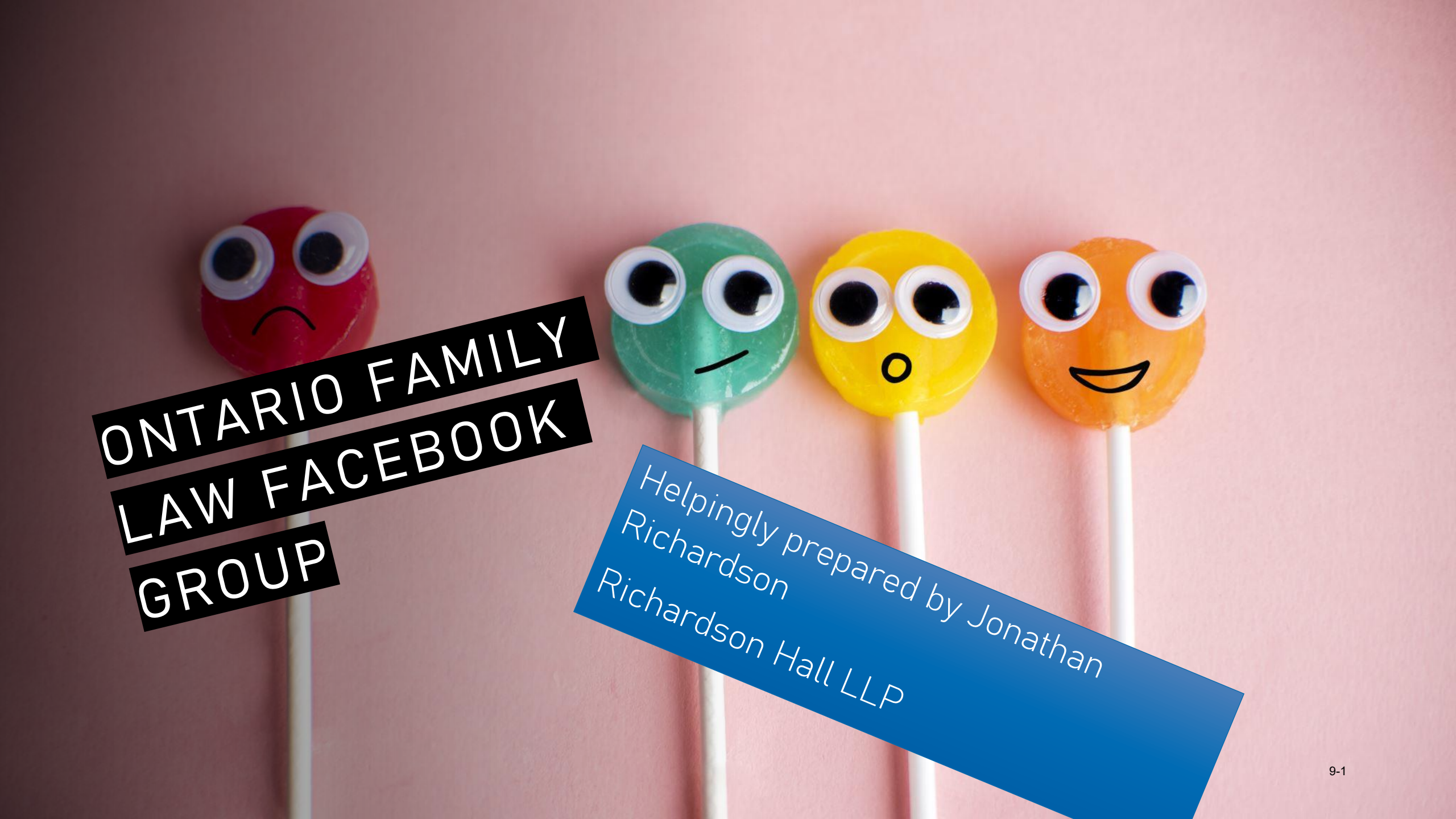
TAB 9

17th Family Law Summit

Ontario Family Law Facebook Group (PowerPoint)

Jonathan Richardson
Richardson Hall LLP

March 29, 2023



ONTARIO FAMILY LAW FACEBOOK GROUP

Helpingly prepared by Jonathan Richardson

Richardson Hall LLP


[redacted]
1h ·
Divorcemate finally added pronouns to matter information for the parties and kids, including a they/them option! Woohoo!
View insights
129 post reach
[redacted] and 17 others
Like
Comment
Send
Write a comment...
GIF


[redacted]
14h ·
For everyone that has pensions for your employees. How much did you match at the beginning? I'm trying to see what the going rate is!
View insights
201 post reach
Like
Comment
Send
Write a comment...
GIF

[redacted]

Does anyone have contact for a tax lawyer who might be able to speak with a family client about some planning items that are beyond the scope of my practice. GTHA.

View insights

244 post reach

7 comments

Like Comment Send

View more answers

[redacted]

[redacted] Bhuvana Rai https://www.morstribute.ca/about-1

MORSTRIBUTE.CA

Mors & Tribute | Lawyers

Like Reply 20h

[redacted] Author

Thank you !!!

Like Reply 20h

Write an answer...

[redacted]

Again, on the topic of fees, do you charge a flat fee for divorce applications? If so, what do you charge. I'm in Ottawa and we have been charging $1,600, all-in.

View insights 438 post reach >

5 26 comments

Like Comment Send

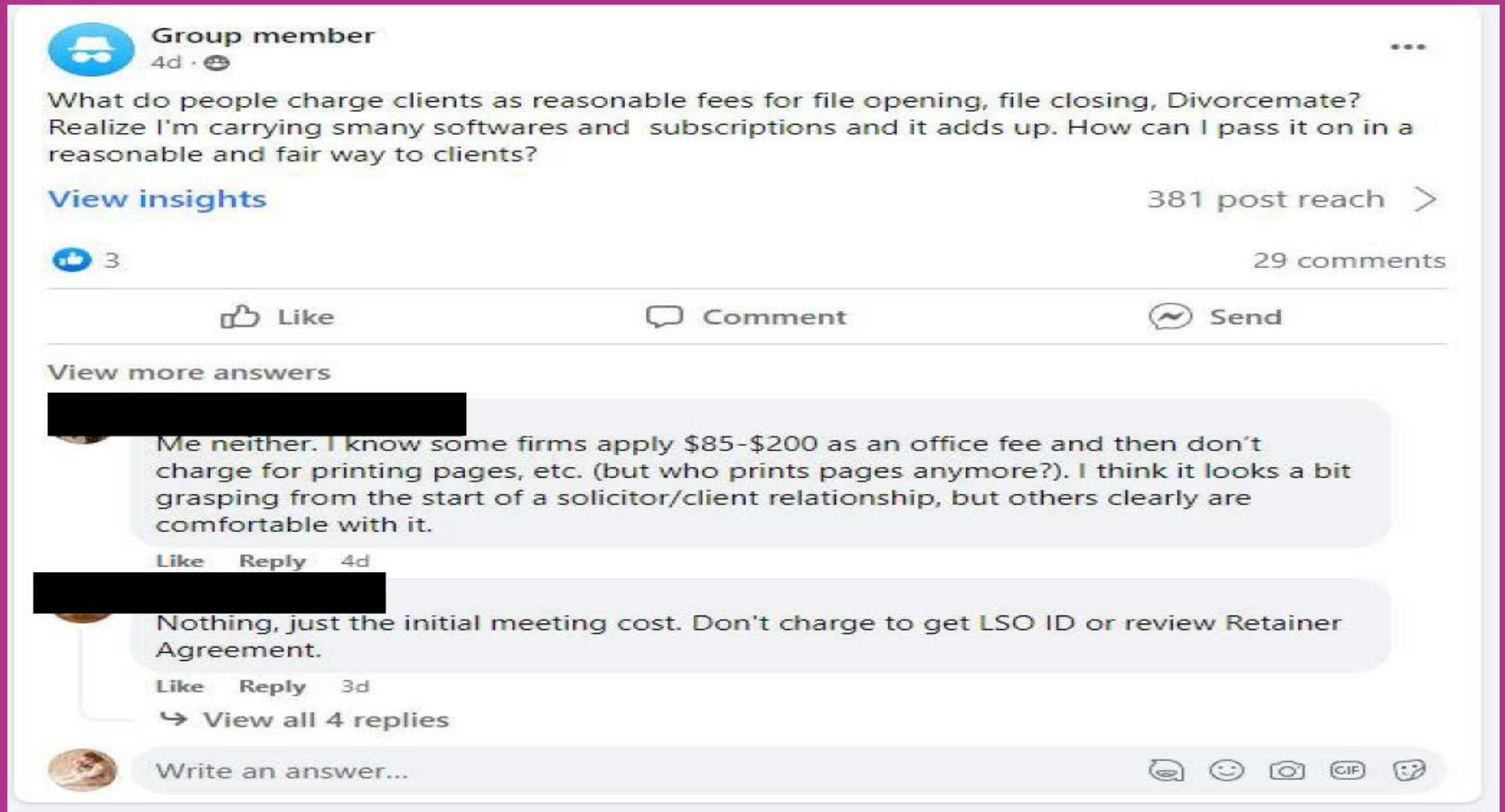
View more answers

[redacted]

Yikes I've been doing $1975 all in, you're all undercutting me!

Like Reply 3d

Write an answer...


Group member
4d ·
What do people charge clients as reasonable fees for file opening, file closing, Divorcemate? Realize I'm carrying smany softwares and subscriptions and it adds up. How can I pass it on in a reasonable and fair way to clients?
View insights
381 post reach
3
29 comments
Like
Comment
Send
View more answers
[redacted]
Me neither. I know some firms apply $85-$200 as an office fee and then don't charge for printing pages, etc. (but who prints pages anymore?). I think it looks a bit grasping from the start of a solicitor/client relationship, but others clearly are comfortable with it.
Like Reply 4d
[redacted]
Nothing, just the initial meeting cost. Don't charge to get LSO ID or review Retainer Agreement.
Like Reply 3d
View all 4 replies
Write an answer...

[redacted]

Anyone know a lawyer in Goderich that can notarize something. Thanks

View insights

236 post reach

7 comments

Like Comment Send

View more answers

[redacted]

the ross firm

Like Reply 3d

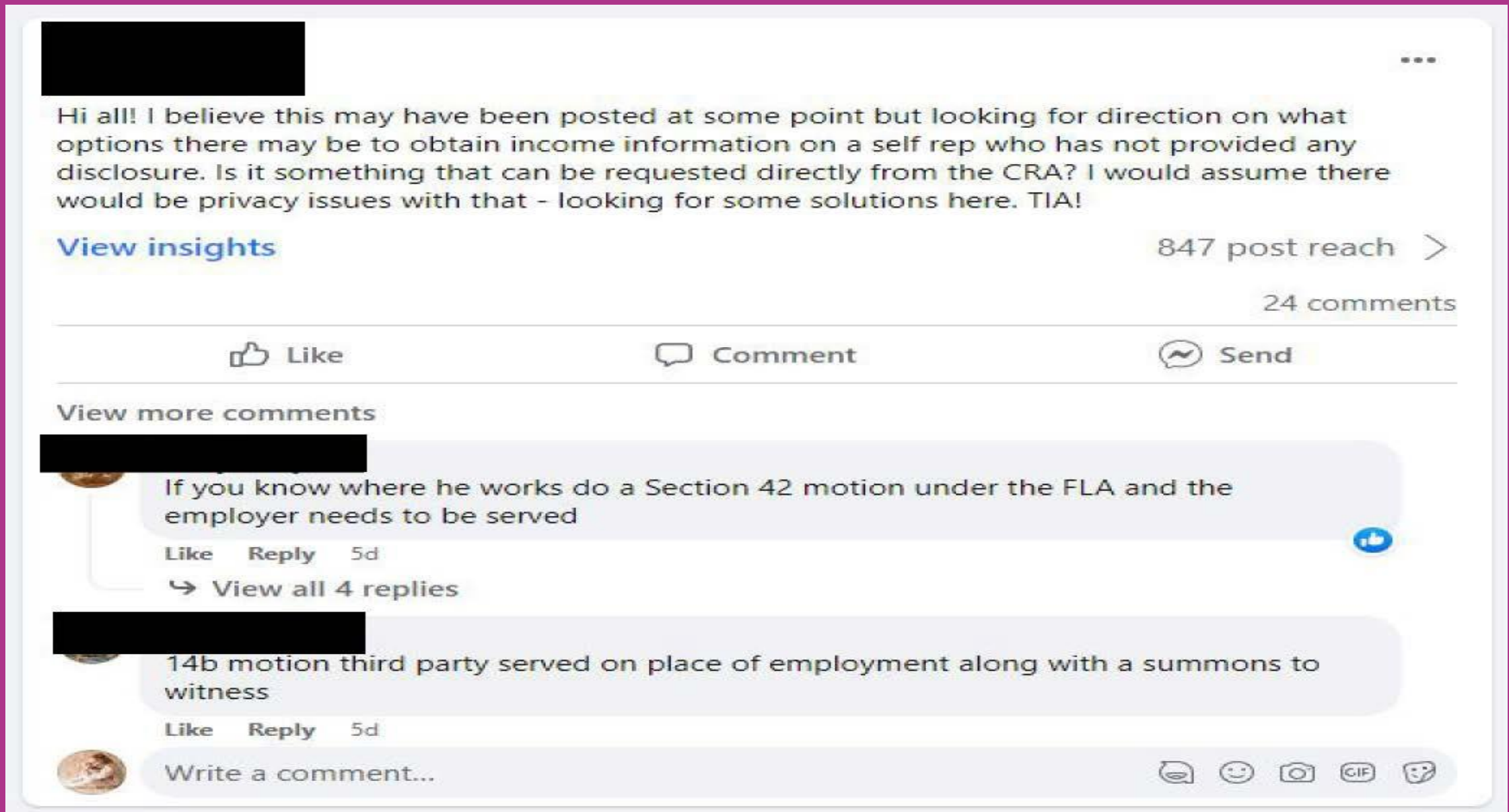
View 1 reply

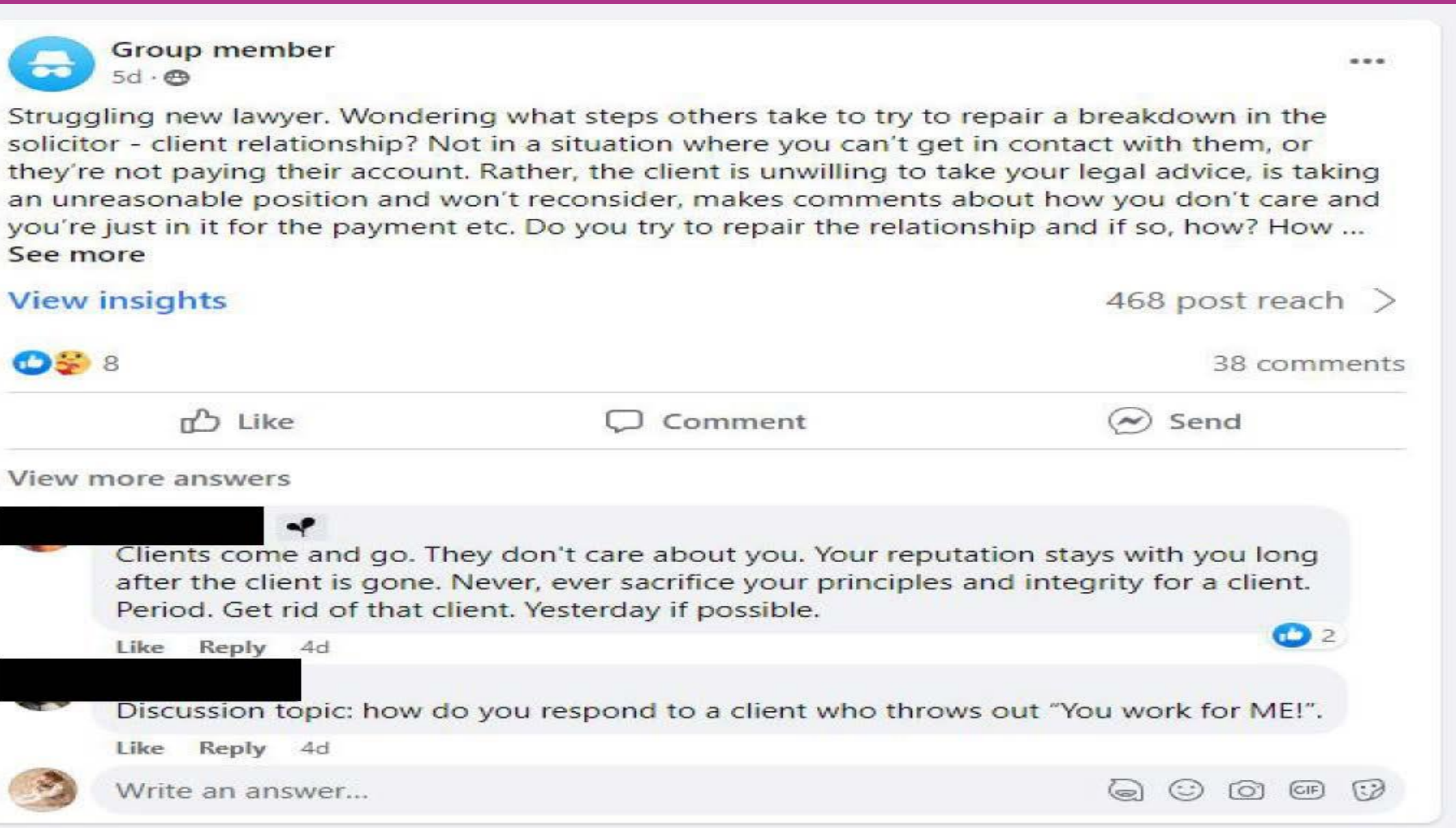
[redacted]

Donnelly Murphy, Norman pickell, and troyan and fincher on top of the two mentioned

Like Reply 3d

Write an answer...


[redacted]
Hi all! I believe this may have been posted at some point but looking for direction on what options there may be to obtain income information on a self rep who has not provided any disclosure. Is it something that can be requested directly from the CRA? I would assume there would be privacy issues with that - looking for some solutions here. TIA!
View insights
847 post reach
24 comments
Like
Comment
Send
View more comments
[redacted]
If you know where he works do a Section 42 motion under the FLA and the employer needs to be served
Like Reply 5d
View all 4 replies
[redacted]
14b motion third party served on place of employment along with a summons to witness
Like Reply 5d
Write a comment...


Group member
5d ·
Struggling new lawyer. Wondering what steps others take to try to repair a breakdown in the solicitor - client relationship? Not in a situation where you can't get in contact with them, or they're not paying their account. Rather, the client is unwilling to take your legal advice, is taking an unreasonable position and won't reconsider, makes comments about how you don't care and you're just in it for the payment etc. Do you try to repair the relationship and if so, how? How ...
See more
View insights
468 post reach
8
38 comments
Like
Comment
Send
View more answers
[redacted]
Clients come and go. They don't care about you. Your reputation stays with you long after the client is gone. Never, ever sacrifice your principles and integrity for a client. Period. Get rid of that client. Yesterday if possible.
Like Reply 4d
2
[redacted]
Discussion topic: how do you respond to a client who throws out "You work for ME!".
Like Reply 4d
Write an answer...


Group member
5d ·
Good morning friends and colleagues:
I am in a bit of an awkward position - I have a simple matter seeking the sale of a matrimonial home (no children) - I scheduled the Motion, but they consented to the sale right after service of materials, but now there are long delays in responses on Realtors etc. (its been 42 days since we consented and still the home is not listed). I threatened another Motion if the delay continues and the response I got from OC was difficult to deal... See more
View insights
213 post reach
2 comments
Like
Comment
Send
[redacted]
ask for terms on the sale of the home:
1. which realtor to use;
2. listing price;... See more
Like Reply 5d
4
[redacted]
Everything that [redacted] said.
When people say that I'm wrong about law, I put it back on them to prove their case. "Can you provide caselaw to support your position, because this case says X"
Like Reply 4d
2
Write an answer...


Group member
February 15 at 12:09 PM ·
I am a new call and I'm not 100% confident in firing clients. I feel bad etc.
I have a recently retained client (1.5 months and didn't receive her full file until 2 weeks ago) that advised me that I've had "3 months" to do so and so and demanded why it's not done etc etc. This client has had 4 previous counsel.
There is a trial scheduled in the summer. No TMC yet. ... See more
View insights
444 post reach
3
28 comments
Like
Comment
Send
View more answers
[redacted]
I find I can tolerate a lot of BS with a big retainer, which also changes the dynamic and power in the relationship. Get your money upfront and do the best you can. No money, no dice. If you need to get off the record, it's a simple aff "I'm the 5th la... See more
Like Reply 1w
[redacted]
You don't have to "fire" them in a dramatic way. Just tell them that you don't think you can help and maybe they should find someone else who's a better fit. Sometimes they need to hear reality from a judge and there is nothing wrong with setting out... See more
Like Reply 4d
Write an answer...

[redacted]

Question - can an Endorsement (reasons and orders) that is not on Canlii be relied upon on a different motion and a different file dealing with the same issue?

View insights 383 post reach >

17 comments

Like Comment Send

View more answers

[redacted]

The law is the law, whether it is reported or not. I have an unreported decision in which my hourly rate was found to be reasonable that I use in all of my costs submissions, for example. McGill Guide has the citation format.

Like Reply 5d 3

[redacted]

Just curious whether the new Rule 1.3 of the Rules might have some sort of implication to the "Public record" aspect of a case. Does this new Rule change that presumption in any way, since now, it seems that you must give notice to see an "open record"... See more

ONTARIO.C
e-Laws

Like Reply 5d Edited

View 1 reply

Write an answer...

[redacted]

Does anyone have experience with capital gains clauses in a separation agreement where one party is buying out an investment property?

I might be overthinking.

View insights 299 post reach >

7 comments

Like Comment Send

View more answers

[redacted]

...you may be overthinking, but I may be oversimplifying...

Property transfers between spouses can* be effected on a capital gains tax-deferred basis. The original ACB remains for the new owner/transferee.... See more

Like Reply 5d Edited

↪ View all 2 replies

[redacted]

I suppose my original question should be, does the transferring spouse pay any capital gains by virtue of the transfer?. My client is not calculating buy out based on any tax advice. Just 50% and wants a term saying he pays any of his share of the taxe... See more

Like Reply 5d Edited

Write an answer...

Jon Richardson

Admin · February 14 at 8:26 AM ·

Valentine, I love you so much, I'd be satisfied with insufficient financial disclosure from you.

Happy Valentine's Day! May all our family ventures be joint!

Be my valentine. I'll keep you as the beneficiary of my health care plan beyond the one-year of separation.

Valentine, on this most romantic of days, I would pay spousal support at the mid-high range of the SSAGs.

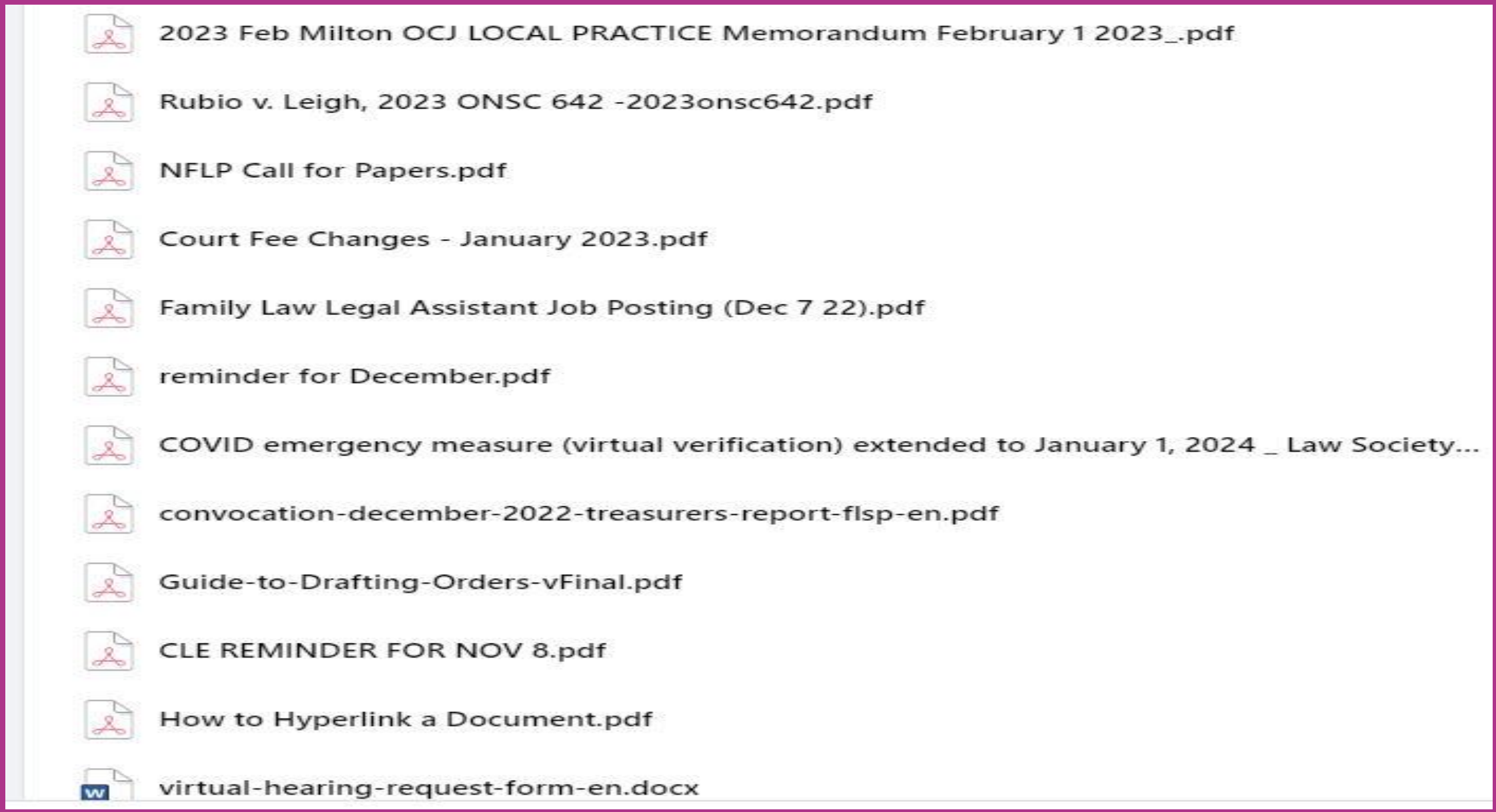
View insights

1K post reach

Amanda Hall, Tugba K and 87 others

9 comments


SETTLE ON REASONABLE TERMS AT AN EARLY STAGE
SCORCHED EARTH HELLFIRE
imgflip.com
JAKE-CLARK.TUMBLR


2023 Feb Milton OCJ LOCAL PRACTICE Memorandum February 1 2023_.pdf
Rubio v. Leigh, 2023 ONSC 642 -2023onsc642.pdf
NFLP Call for Papers.pdf
Court Fee Changes - January 2023.pdf
Family Law Legal Assistant Job Posting (Dec 7 22).pdf
reminder for December.pdf
COVID emergency measure (virtual verification) extended to January 1, 2024 _ Law Society...
convocation-december-2022-treasurers-report-flsp-en.pdf
Guide-to-Drafting-Orders-vFinal.pdf
CLE REMINDER FOR NOV 8.pdf
How to Hyperlink a Document.pdf
virtual-hearing-request-form-en.docx

Lorna M. Yates

February 14 at 12:44 PM ·

CaseLines Tip no. 5: Hyperlinking Within CaseLines

This came up today on a motion and got me thinking....

Hyperlinking within CaseLines is great for linking documents to your Factum once it is uploaded, and for other cross referencing. But you can't hyperlink to a specific page on CaseLines, just a document. My motions judge this morning shared with us that she prefers that exhibits to an affidavit be uploaded separately - so after the affidavit, upload each exhibit as a se... See more

View insights

781 post reach

COME JOIN US!

- Need a Facebook Account
- Doesn't need to be under your own name (eg/ Anna Banana)
- Search in Groups for Ontario Family Lawyers – Private
- Request to Join
- 3 questions to be answered including LSO Number
- Post, Lurk, Learn!

Law Society of Ontario | Barreau de l'Ontario

TAB 10A

17th Family Law Summit

Child Protection: Hot Topics (PowerPoint)

Tammy Law
Tammy Law Barrister & Solicitor

Mélanie Verdone, Legal Counsel
The Children's Aid Society of S.D.&G.

March 29, 2023

cpd

Child Protection Hot Topics

17th Family Law Summit LSO

Tammy Law
Melanie Verdone

Hot Topics

- The Child, Youth and Family Services Act turns 5!!!
- An Act respecting First Nations, Inuit and Métis children, youth and families (2019)
- Who is a service recipient and why does it matter? (IPC v. CFSRB)
- Who is a party?
- What about a Customary Care Agreement?

An Act respecting First Nations, Inuit and Métis children, youth and families

- 18(1) The inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982 includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under the legislative authority.
- 20(1) If an Indigenous group, community or people intends to exercise its legislative authority in relation to child and family services, an Indigenous governing body acting on behalf of that Indigenous group, community or people may give notice of that intention to the Minister and the government of each province in which the Indigenous group, community or people is located.

Definition of Service – Battle between the IPC and CFSRB

- s. 2 of the CYFSA sets out that “service” includes:
  - (a) a service for a child with a developmental of physical disability or the child’s family,
  - (b) a mental health service for a child or the child’s family,
  - (c) a service related to residential care for a child,
  - (d) a service for a child who is or may be in need of protection or the child’s family,
  - (e) a service related to adoption for a child, the child’s family or others,
  - (f) counselling for a child or the child’s family
  - (g) a service for a child or the child’s family that is in the nature of support or prevention and that is provided in the community,
  - (h) a services or program for or on behalf of a young person for the purposes of the Youth Criminal Justice Act (Canada) or the Provincial Offences Act, or;
  - (i) a prescribed service.
- “prescribed” means prescribed by regulations.

Statutory pathway to consider (CFSRB)

- s. 35 (1) - The functions of a children's aid society are to,
  - (a) investigate allegations or evidence that children may be in need of protection
- s. 35 (2) – A society shall,
  - (a) provide the prescribed standard of services in its performance of its functions; and
  - (b) follow the prescribed procedures and practices.
- s. 15(2) Services providers shall ensure that children and young persons and their parents have an opportunity to be heard and represented when decision affecting their interests are made and to be heard when they have concerns about the services they are receiving.
- Ontario Regulation 156/18 ("O.Reg 156/18) sets out the prescribed standard of services procedures and practices related to child protection investigations. (s.31-32)
- Appendix A to the Child Protection Standards then sets out the requirements for "specialized" investigations related to community caregivers (ie. schools, daycares, etc.)
- s. 120 – Complaint to a Board

Statutory Pathway - IPC

- Part X of the CYFSA – Personal Information
- 281 – Definitions
  - “service” means a service or program that is provided or funded under this Act of provided under the authority of a licence.
- 312 – Individual’s Right of Access – (1) An individual has a right of access to a record of personal information about the individual that is in a service provider’s custody or control and that relates to the provision of a service to the individual, unless […]

Service

CA22-0084 S.D. and Children's Aid Society of Toronto (CFSRB) – Feb. 2023

- Confirmed jurisprudence that "a person (in this case, a teacher) who has been investigated by the children's aid society has been in receipt of a service" within the meaning of section 2(1)(i) of the Act.

CYFSA Decision 1 – Nov. 2021

CYFSA Decision 3 – Feb. 2022

- Part X applies to personal information that is in the custody or control of a service provider and that relates to the provision of a service.
- Access to records denied because the records at issue do not relate to the provision of a service to him (a teacher) and, therefore, he has no right of access to them under 312(1)

Children's Aid Society of London and Middlesex v. T.E., 2023 ONCA 149

Who is a party?

- Child, Youth and Family Services Act
  - s. 79(1) The following are parties to the proceeding under this part
    - […] 3. The child s parent
  - s. 74(1) of the CYFSA defines "parent" as follows:
    - […] 5. An individual who has lawful custody of the child
    - […] 7. An individual who, under a written agreement or a court order, is required to provide for the child, has custody of the child or has a right of access to the child.
- Act respecting First Nations, Inuit and Métis children, youth and families
  - 13. In the context of a civil proceeding in respect of the provision of child and family services in relation to an Indigenous child,
    - (a) the child s parent and the care provider have the right to make representations and to have party status; […]
  - 1. Care provider means a person who has primary responsibility for providing the day to day care of an Indigenous child, other than the child's parent, including in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs

As for the suggestion that status as a “parent” can only be determined at the start of the application or on status review, nothing in the statute suggests a time restriction of any kind. (para. 46)

Children's Aid Society of London and Middlesex v. T.E., 2023 ONCA 149 – Things to consider next

- Will a motion be required?
  - Paragraph 49 : The CYFSA does not call for retrospective consideration to include persons who are no longer providing care. Individuals entitled to party status have custody and/or access at the time of the motion to be added as a party. Consequently, no "floodgate" issue arises.
- What happens if the child moves from the kin home?
  - Will the previous caregiver, who was previously added as a party, maintain party status?
- What does this mean for kin?
  - File disclosure (both of birth parents and likely of kin caregiver)
  - Potential cost exposure
  - Legal representation (already shortage of counsel in child welfare)
  - Should children be placed with kin without ILA?

- s. 79(3) RIGHT TO PARTICIPATE – Any person, including a foster parent, who has cared for the child continuously during the six months immediately before the hearing,
  - (a) is entitled to the same notice of the proceeding as a party;
  - (b) may be present at the hearing;
  - (c) may be represented by a lawyer; and
  - (d) may make submissios to the court,

  But shall take no further part in the hearing without leave of the court.

Children's Aid Society of London and Middlesex v. T.E., 2023 ONCA 149

Customary Care

- Child, Youth and Family Services Act
  - s. 80. CUSTOMARY CARE A society shall make all reasonable efforts to pursue a plan for customary care for a First Nations, Inuk or Métis child if the child,
    - (a) is in need of protection;
    - (b) cannot 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 or, where there is an order for the child s custody that is enforceable in Ontario, of the person entittled to custody under the order; and
    - (c) is a member of or identifies with a band, or is a member of or identifies with a First Nations, Inuit or Métis community
  - s. 2(1) of the CYFSA defines "customary care" as follows:
    - Means the care and supervision of a First Nations, Inuk or Métis child by a person who is not the child s parent, according to the custom of the child s band or First Nation, Inuit or Métis community

Customary care agreements are the agreements that implement the plan for customary care. They are agreements between the parties, a representative of the First Nation, and the Society that set out a plan for the child's care, in accordance with the objectives of the legislation, rather than through the usual child protection proceedings. Customary care agreements represent a cooperative and community-based approach to the wellbeing of First Nations, Inuit and Métis children in care (para. 62)

Best Interest

- A focus on the best interests of the child applies to every hearing before the court in a child protection proceeding. When all parties to a proceeding participate and agree to a plan for customary care, absent evidence to the contrary, the court is entitled to presume that the customary care agreement reflects the child's best interests. But all parties must agree.
- Reminder –
  - Section 10 of An Act Respecting First Nations, Inuit and Métis children, youth and families defines best interest of a First Nation, Inuit and/or Métis child or youth
  - Section 74(2) of the CYFSA also defines best interest and applies, so long as it does not conflict with or it not inconsistent with the Act Respecting First Nations, Inuit and Métis children, youth and families

Law Society of Ontario | Barreau de l'Ontario

TAB 10B

17th Family Law Summit

Resource – New Child Protection Flowcharts

March 29, 2023

Hot Topics in Child Protection

https://www.cleo.on.ca/en/whats-new/new-child-protection-flowcharts

Law Society of Ontario | Barreau de l'Ontario

TAB 11A

17th Family Law Summit

Best Practices in Dealing with Property Issues (PowerPoint)

Vivian Alterman, MBA, CPA, CA, CBV
ap Valuations Limited

March 29, 2023

cpd

BEST PRACTICES IN DEALING WITH PROPERTY ISSUES

FAMILY LAW SUMMIT
MARCH 29, 2023

Vivian Alterman (ap Valuations Limited)

CONSIDERATIONS WHEN WORKING WITH CBV

- Is there a business that needs to be valued?
- Are there other assets that require a valuation (stock options, RSUs, etc.)?
- Are there liabilities that need to be calculated (notional disposition costs on business assets, stock compensation, interim personal tax liabilities, RRSPs, etc.)?
- Can valuator assist with financial information gathering (liaison with client representatives; corporate/personal accountant, CFO, bookkeeper, etc.)?
- Can valuator assist clients/counsel with preparation of NFP and supporting document brief?
- Can valuator assist with structuring a settlement and identifying alternative options (settlement team: CBV – expertise in financial aspects of family law matters, corporate lawyer, tax expert, bank etc.)?
- Can valuator assist in settlement discussions (financial neutral, mediation attendance, co-mediator)?

PREPARE A WORKPLAN

- Joint retainer or sole retainer?
- If there are two experts, it does not make sense for both experts to be working on reports at the same time. More cost effective for the expert that acts on behalf of the party with access to disclosure to go first and the other expert to review.
- Consider if draft report can be circulated to other expert for review and comment before it is finalized.
- Consider working relationship of experts. Allow for communication between experts early in the process.
- Expert hired to review other expert's report should not provide their own calculations without comments, or preferably a spreadsheet identifying and quantifying differences and the basis thereof.
- Consider joint reporting letter, or report, to be prepared by experts identifying legal and non-legal issues and quantum thereof.
- Consider preparing workplan for use of CBV(s) with opposing counsel. Identify and limit differences (process, valuation date, etc.).

CONSIDER VALUATION DATE

- If a valuation report is required, what is the valuation date?
- If parties are equal shareholders, there is no equalization payment (EP) and Date of Separation (DOS) is not relevant. Relevant date is current date.
- If parties are unequal shareholders, then there is an EP issue and DOS value is relevant *but* so is current date value.

JOINT RETAINER CONSIDERATIONS

- Do clients and counsel agree on process, scope of work, etc.?
- Consider terms of engagement letter (i.e., what happens if one party does not want to finalize the draft report, or one party fires the joint valuator?)
- Misconception that joint retainers always translate to lower professional fees.
- Try to be proactive in terms of 'hot' issues on file and how they will be addressed (for example, i) unreported cash; will and can it be quantified, costs vs. benefit or ii) discretionary expenses; scope of work).

GET EXPERTS INVOLVED EARLY

- Assist in identifying deliverables and financial issues.
- Assist in identifying valuation date considerations.
- Assist with information gathering.
- Ensure deadlines are met.
- Eliminate or reduce cost of preliminary/scope limited reports prepared to meet deadlines.
- Consider cost vs. benefits.

UNDERSTAND CBV STANDARDS

- Types of reports (valuation, advisory, expert, limited critique reports).
- Calculation vs. Estimate vs. Comprehensive valuation report.
- Type of report is distinguished by scope of review, amount of disclosure provided, and level of assurance being provided in conclusion (Theoretically, estimate report provides more assurance than calculation report).
- Limited critique reports do not include conclusions (very limited purpose).
- Calculations without an accompanying report are not allowed.
- Draft reports are subject to material change and distributed to obtain comments and not to be used for any other purpose.
- Valuators preparing reports for settlement purposes only (acceptable to opposing counsel?)
- Cost vs. benefit.
- www. cbvinstitute.com

REVIEW OF EXPERT REPORT

- Understand type of report and limitations.
- Restricted use (draft, for settlement purposes only, etc.).
- Review key areas to identify potential deficiencies (any scope limitations, are key assumptions, reasonable, etc.).
- Review your own expert's report as if you were acting for the other party.
  - Identify areas of concern and ask your expert to address them. Be proactive.
  - Cost vs. benefit.

MINIMIZE DISCLOSURE ISSUES

- Review request for disclosure as if you were acting for the other party to assess reasonableness.
- Contact CBV to review request if you are concerned about reasonableness.
- Understand basic disclosure required by CBVs (for example, financial statements with general ledgers (excel format), adjusting entries, trial balances, or access to business owner and accountants, etc.).
- Allow access to spouse and their representatives as it can reduce fees (for example, allowing an expert to speak with the business owner directly rather than through written correspondence only). Sometimes a quick call will efficiently remove a lot of back and forth related to information gathering, which can be expensive and time consuming.
- Final expert reports must be distributed with a link to the scope of review documents.

CONSISTENCY IN TAX CALCULATION ASSUMPTIONS

- Tax calculations are estimates based on assumptions regarding various factors including:
  - The probable timing of the disposition of the asset.
  - The probable tax and other costs of disposition (i.e. commissions or legal expenses) that will be incurred on the disposition.
  - The risk or likelihood that these costs will be incurred which can impact the discount rate to be applied.
- In this regard, there is "no right answer" as the assumptions made relate to future events.

CONSISTENCY IN TAX CALCULATION ASSUMPTIONS

- Some of the common errors in calculating notional disposition costs include:
  - No present value (i.e., discount for timing) considerations (legal issue but in context of family law should be considered).
  - Using tax rates at the valuation date without consideration of future income tax rates.
  - Incorrect assumptions as to how the asset will be disposed.
  - No consideration of reasonable tax planning (e.g. Dividend strip, LCGE).
  - No consideration of reasonable professional costs (e.g. real estate commission).
  - No consideration of tax balances (e.g. capital losses).
  - No consideration of impact on tax rates of different sources of income. For example, each asset is considered in isolation. A 25% tax rate may be used for the RRSP by counsel and an actuary may use a 30% tax rate for the pension based on different assumptions regarding sources of income at retirement.

THANK- YOU

Vivian Alterman (ap Valuations Limited)

Law Society of Ontario | Barreau de l'Ontario

TAB 11B

17th Family Law Summit

Best Practices in Dealing with Property Issues Pensions – Summary Checklist (PowerPoint)

Best Practices in Dealing with Property Issues Pensions – Summary Checklist

Kavita Bhagat, C.S.
Kavita V. Bhagat Professional Corporation

March 29, 2023

cpd

Best Practices in Dealing with Property Issues

Pensions – Summary Checklist

A. Determine if either party has / had a pension.

1. Review the pay stub
2. Review the employment contract
3. Web search the employer
4. Search on the Federal and Provincial database (below)
5. Ask your client
6. Ask an actuary

B. Determine if the plan is federal agency, federally regulated, provincial, or unregulated

- Obtain a Pension Statement
- Call the administrator (number on statement) and ask.
- Locate the plan registration # and enter into web-based plan lists.
- Federally Regulated (Not Federal agency) at:
  - www.osfi-bsif.gc.ca/Eng/wt-ow/Pages/swwr-rer.aspx
- Provincially Regulated at:
  - http://planinfoaccess.fsco.gov.on.ca/planaccess.aspx

C. Obtain a valuation of the pension.

1. Provincially Regulated Plans

- Pension administrator will provide the valuation.
- The plan administrator may charge a fee. The maximum fee that the administrator can charge is:
  - $200.00 for a pension plan that provides a defined contribution benefit or a variable benefit.
  - $600.00 for a pension plan that provides a defined benefit.
  - $800.00 for a pension plan that provides a separate defined benefit and a defined contribution benefit.
  - The applicant is responsible for paying the fee. You can opt to share the fee. If you request two Family Law Values, the plan administrator may charge two separate fees.
  - Some plans don't seek a payment.
- Access the forms at:
  - Divorcemate – Application Family Law Value FL1
  - https://www.fsrao.ca/family-law-form-fl-1-application-family-law-value

2. Federally Regulated Plans:

- Federal government employees need to have their pension valued by an independent actuary in accordance with the Ontario *Family Law Act* to determine the Ontario family law value.
- Cost varies.
- Find an actuary: https://www.cia-ica.ca/about-us/actuaries/find-an-actuary

D. Information required to complete the form:

- Up to date contact information for your client and the opposing party. The administrator must provide a copy of the valuation to both parties at the same time.
- A document that verifies when your spousal relationship began.
  - Marriage certificate
  - Court Order/ Arbitral Award
  - Joint Declaration of Period of Spousal Relationship

- A document that confirms your separation date.
- Separation agreement, family arbitration award or court order
- Joint Declaration of Period of Spousal Relationship.
- If there is no agreement with respect to the separation date, you can request two family law values by signing Request for Two Family Law Values.
- Some plans require notarized copies of Proof of date of Birth, Marriage Certificate

* Most actuaries seek similar information.

* If the plan member was retired on the date of separation, you will need to obtain the value of the survivor benefit.

What now:

- Send the completed form and required documents to the pension administrator.
    - *Not all plans accept electronic documents and/ or electronic signature.
- Send the required fee to the pension administrator.
- The pension administrator has 60 days to complete the valuation.
- Federal Pension, timelines depend on the actuary.

E.Financial Statement:

- The value of the pension has to be included in the Form 13.1 Financial Statement.
- Include the before tax value of the pension on the Financial Statement under Part 7(c): Bank Accounts, Savings, Securities and Pensions.
- List the future tax liability for the pension as a debt in Part 8 of the Financial Statement.
    - The Pension administrator does not provide the notional cost of disposition. You should look to retain an independent actuary to calculate the future tax rate. When obtaining a valuation of a federal pension you can include this in the scope of the actuaries work.

F. What to consider when drafting a Separation Agreement/ Court Order/ Arbitral Award:

- If an equalization payment is owed, parties can agree to divide the pension to satisfy all or part of that debt.
- A pension cannot be divided if it has not been valued.
- Ensure the date of birth, separation date, marriage date, cohabitation date as stated are the same as stated in the Family Law Valuation/ Actuarial Report.
- Name the pension plan.

1. Separation before retirement:

- State the amount the plan will pay to the spouse as a lump sum dollar amount or as a percentage of the value. It cannot be both.
- Make sure the payment amount is not more than 50% of the Family Law Value.
- Interest is payable on the lumpsum from the date of separation.
- The lump sum will not be cash. The pension valuation form lists options available to the spouse.
- Depending on the option, the spouse must set up a receiving account such as a locked-in retirement account (LIRA) or a life income fund (LIF). They can also receive it in their existing Pension Plan (conditions apply).

2.Separation after retirement:

- The payment cannot be a lump sum dollar amount.
- State the amount of each pension payment that is payable as a specified dollar or as a percentage of each pension payment. Make sure that this amount is not more than 50% of each pension instalment.
- State the payment start and end dates. If time has passed between your separation date and the first pension division payment, there may be arrears.
- Payments will cease when the plan member dies. Spouse will receive a survivor benefit for the rest of their life normally 60% of the retired member's pension.
- Clearly state what happens if the spouse dies before the retired member. Will the pension payments continue to the spouse's estate or revert to the retired member.

What now:

- The spouse must complete either:
  - Spouse's Application to Divide a Retired Member's Pension; or
  - Spouse's Application to Divide a Retired Member's Pension – Special (Combined Option).
- The pension division application should include a copy of the document that authorized the payment. This could be a:
  - separation agreement;
  - family arbitration award; or
  - Send court order.
- to the plan administrator.
    - *Federal pension the process differs.

Preconstruction Property – Summary Checklist

<u>Determine if either party has invested in a pre-construction property:</u>

1. Ask the client.
2. Was primary residence refinanced – trace the funds.
3. Review bank account statements – trace the funds.

Review Agreement of Purchase and Sale to determine:

1. Title
2. Installment payment terms / payments made.
3. Assignment sale permissible.
4. Cost of assignment.
5. Is there a penalty payable to the builder for not closing.
6. Any payments for future upgrades.
7. Occupancy date.
8. Occupancy cost.
9. Closing date.
10. Closing costs.
11. Penalty for inability to close.

Determination of value of property:

1. Date of purchase value of the property.
2. Date of separation value of property .
3. Determine payments made thus far.
4. Real estate commission
5. Assignment fee
6. HST
7. Capital Gains
8. Other charges

*depends on the stage the property is being assigned.

Challenges:

1. Can the parties meet the financial obligations necessary to close the APS.
2. Ability to qualify for mortgage solely or jointly.
3. Decrease in value of property post COVID and resultant ability to secure mortgage.
4. Is there a requirement for an additional down payment over and above the installment payments made.
5. Impact of ability to secure a mortgage due to obligation to pay child or spousal support payments.
6. Property will no longer be a primary residence.
7. Will the parties be forced to forfeit the initial deposit due to their inability to close.
8. Legal consequences of inability to close.

Thank you:

Kavita V. Bhagat

Lawyer I Mediator I Arbitrator

www. BramptonFamilyLawyers.ca

Best Practices in Dealing with Property Issues

Pensions – Summary Checklist

Family Law Summit March 29, 2023

Kavita V. Bhagat
FAMILY LAW SOLUTIONS

A. Determine if either party has / had a pension.

- Review the pay stub.
- Review the employment contract.
- Web search the employer.
- Search on the Federal and Provincial database (below).
- Ask your client.
- Ask an actuary.

B. Determine if the plan is federal agency, federally regulated, provincial, or unregulated.

Obtain a Pension Statement

- Call the administrator (number on statement) and ask.
- Locate the plan registration # and enter into web-based plan lists.
  - Federally Regulated (Not Federal agency) at:
    - www.osfi-bsif.gc.ca/Eng/wt-ow/Pages/swwr-rer.aspx
  - Provincially Regulated at:
    - http://planinfoaccess.fsco.gov.on.ca/planaccess.aspx

C. Obtain a valuation of the pension.

1. Provincially Regulated Plans
   - Pension administrator will provide the valuation.
   - The plan administrator may charge a fee. The maximum fee that the administrator can charge is:
     - $200.00 for a pension plan that provides a defined contribution benefit or a variable benefit.
     - $600.00 for a pension plan that provides a defined benefit.
     - $800.00 for a pension plan that provides a separate defined benefit and a defined contribution benefit.
     - The applicant is responsible for paying the fee. You can opt to share the fee. If you request two Family Law Values, the plan administrator may charge two separate fees.
     - Some plans don't seek a payment.

- Access the forms at:
  Divorcemate – Application Family Law Value FL1
  https://www.fsrao.ca/family-law-form-fl-1-application-family-law-value

2. Federally Regulated Plans:
   - Federal government employees need to have their pension valued by an independent actuary in accordance with the Ontario *Family Law Act* to determine the Ontario family law value.
   - Cost varies.
   - Find an actuary: https://www.cia-ica.ca/about-us/actuaries/find-an-actuary

D. Information required to complete the form:

- Up to date contact information for your client and the opposing party. The administrator must provide a copy of the valuation to both parties at the same time.
- A document that verifies when your spousal relationship began.
  - Marriage certificate
  - Court Order/ Arbitral Award
  - Joint Declaration of Period of Spousal Relationship
- A document that confirms your separation date.
  - Separation agreement, family arbitration award or court order
  - Joint Declaration of Period of Spousal Relationship.
  - If there is no agreement with respect to the separation date, you can request two family law values by signing Request for Two Family Law Values.
  - Some plans require notarized copies of Proof of date of Birth, Marriage Certificate
- Most actuaries seek similar information.
- If the plan member was retired on the date of separation, you will need to obtain the value of the survivor benefit.

What now:

- Send the completed form and required documents to the pension administrator.
  *Not all plans accept electronic documents and/ or electronic signature.
- Send the required fee to the pension administrator.
- The pension administrator has 60 days to complete the valuation.
- Federal Pension, timelines depend on the actuary.

E. Financial Statement:

- The value of the pension has to be included in the Form 13.1 Financial Statement.
- Include the before tax value of the pension on the Financial Statement under Part 7(c): Bank Accounts, Savings, Securities and Pensions.
- List the future tax liability for the pension as a debt in Part 8 of the Financial Statement. The Pension administrator does not provide the notional cost of disposition. You should look to retain an independent actuary to calculate the future tax rate. When obtaining a valuation of a federal pension you can include this in the scope of the actuaries work.

F. What to consider when drafting a Separation Agreement/ Court Order/ Arbitral Award:

- If an equalization payment is owed, parties can agree to divide the pension to satisfy all or part of that debt.
- A pension cannot be divided if it has not been valued.
- Ensure the date of birth, separation date, marriage date, cohabitation date as stated are the same as stated in the Family Law Valuation/ Actuarial Report.
- Name the pension plan.

  1. <u>Separation before retirement:</u>
     - State the amount the plan will pay to the spouse as a lump sum dollar amount or as a percentage of the value. <u>It cannot be both.</u>
     - Make sure the payment amount is not more than 50% of the Family Law Value.
     - Interest is payable on the lumpsum from the date of separation.
     - The lump sum will not be cash. The pension valuation form lists options available to the spouse.
     - Depending on the option, the spouse must set up a receiving account such as a locked-in retirement account (LIRA) or a life income fund (LIF). They can also receive it in their existing Pension Plan (conditions apply).

  2. <u>Separation after Retirement:</u>
     - The payment cannot be a lump sum dollar amount.
     - State the amount of each pension payment that is payable as a specified dollar or as a percentage of each pension payment. Make sure that this amount is not more than 50% of each pension instalment.
     - State the payment start and end dates. If time has passed between your separation date and the first pension division payment, there may be arrears.

- Payments will cease when the plan member dies. Spouse will receive a survivor benefit for the rest of their life normally 60% of the retired member's pension.
- Clearly state what happens if the spouse dies before the retired member. Will the pension payments continue to the spouse's estate or revert to the retired member.

What now:

- The spouse must complete either:
  - Spouse's Application to Divide a Retired Member's Pension; or
  - Spouse's Application to Divide a Retired Member's Pension – Special (Combined Option).
- The pension division application should include a copy of the document that authorized the payment. This could be a:
  - separation agreement;
  - family arbitration award; or
  - court order.
- Send to the plan administrator.
  *Federal pension the process differs.

Law Society of Ontario | Barreau de l'Ontario

TAB 11C

17th Family Law Summit

Separation Date Assessment Guide

David Frenkel
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Yunjae Kim
Birenbaum Steinberg Landau Savin & Colraine LLP

March 29, 2023

cpd

Separation Date Assessment Guide

David Frenkel, Yunjae Kim[*] [1]

The following Separation Date Assessment Guide (the "Guide") is a combination of the legal principles applied by courts in Ontario jurisprudence over the last thirty years when determining a date of separation.

The unique feature of the Guide is that it is a collection of the legal principles from all the relevant cases in Ontario dealing with separation date issues. The legal principles have also been organized into six sections that we think represent a collection of foundational elements of a couple's relationship pertaining to a separation date. The first section is "Relationship, Communication and Intimacy", followed by "Household and Family", "Financial Affairs", "Activities with the Public", "Separate Residences" and ending with "Additional Factors".

The first purpose of the Guide is to be used as a tool to obtain a preliminary assessment of the separation date issue. In doing so, the user will be applying the necessary principles distilled from the jurisprudence without having to separately find and review all the relevant case law. This will hopefully be useful to counsel by saving them time when looking for key principles in a quick and efficient manner.

We also found that when the elements in each section were reviewed within their respective sections, it became easier to apply those elements in a unified way and with a more organized focus.

A second purpose of the Guide is to have a starting point when digging a little deeper into the separation date issue. Perhaps the client does not know the answers to some of the questions. Or the client's answers are elusive and questionable, which may provide counsel a reason to pause before accepting the information at face value.

The information derived from the Guide can also be used to ask opposing counsel about certain details of the relationship that may not have been otherwise addressed. Perhaps looking into certain events of the relationship may result in information that would assist both parties to narrow in on a mutually-agreeable date and reduce unnecessary litigation on that issue.

One point of caution is that we have found, through experience, the Guide is best used when counsel interviews the client rather than providing the Guide to the client and asking them to complete it on their own. Clients are typically not equipped to answer a series of legally loaded questions especially ones that could affect the fate of their case. Some clients may answer with bias, some with ulterior motives and others may not adequately understand the question itself without further advice.

Instead, we recommend reviewing the Guide with your client by way of a probing inquiry. This should increase the chances that the answers are tested and credible. Otherwise, you may be left with unhelpful information that will not assist you in moving the case forward towards resolution.

Keep in mind that ultimately your goal is to determine an accurate separation date that can be supported by the evidence.

A. — Relationship, Communication, and Intimacy

When did the spouses stop:

1) having sexual relations[2]

2) sharing a bedroom together[3]

3) going on dates with each other[4]

4) celebrating anniversaries (e.g. wedding)[5]

5) exchanging tokens of affection[6]

6) exchanging gifts with each other[7]

7) celebrating holidays together[8] (e.g. Christmas, Thanksgiving, Easter[9])

8) being faithful to each other (i.e. fidelity)[10]

9) making attempts to reconcile with one another[11]

10) attending couples and/or marriage counselling[12]

B. — Household and Family

When did the spouses stop:

1) discussing family issues and problems[13]

2) performing household chores[14] (e.g.: grocery shopping,[15] laundry,[16] preparing and eating meals,[17] washing/mending clothes,[18] cleaning[19])

3) having expectations regarding accountability to each other for daily activities[20]

4) caring for each other for health reasons (e.g.: during an illness[21], after an injury,[22] after surgery,[23] during hospitalizations[24])

5) informing each other of their illness and/or health procedures[25]

6) helping each other during difficult times (e.g.: personal issues,[26] problems,[27] grieving during the death of a spouse's loved one[28])

7) having joint family vacations,[29] outings or gatherings with the children[30]

8) having the existence of a relationship between the spouses and members of their respective families[31] (e.g.: socializing with the other spouse's family,[32] spending holidays with extended family,[33] arriving separately when socializing with friends[34])

C. — Financial Affairs

When did the spouses stop:

1) combining their finances[35] (e.g. having joint bank accounts,[36] having access to family funds,[37] contributing towards RRSPs of each other,[38] having a joint safety deposit box[39])

2) contributing towards the expenses of the home[40]

3) acquiring and owning property together[41]

4) participating in the operations of the other spouse's business[42]

5) being beneficiaries of the other's life insurance policy or a will[43]

6) showing marital status on income tax returns filings[44]

7) showing marital status information on other official documents (examples: loan applications, citizenship applications,[45] property registrations[46])

D. — Activities with the Public

When did the spouses stop:

1) presenting themselves as a couple at neighbourhood, work or family social functions[47]

2) attending joint social activities together[48] (e.g. theatre,[49] church[50])

3) attending special events together (weddings,[51] funerals,[52] graduations[53])

4) vacationing together[54]

E. — Separate Residences

If the spouses began living in separate residences:

1) when did they stop:
   a. making efforts to resume cohabitation[55]

   b. having personal items of one spouse at the other's residence[56]

   c. returning to the home at the other spouse's request[57]

2) When did any of the following occur?
   a. a spouse purchasing furniture for the new residence[58]

   b. the spouse still living at the primary residence changing the locks[59]

   c. The public being aware that the spouses are living separately[60]

F. — Additional Factors

When did either of the spouses do any of the following?

1) consult a family law lawyer[61]

2) tell the other spouse that the "relationship was over"[62]

3) tell the children of couple's decision to separate[63]

4) inform third parties that the couple is no longer in a relationship[64]

5) take significant legal steps (examples: purchasing a separation agreement template,[65] exchanging draft separation agreements,[66] having a lawyer send a letter indicating separation,[67] issuing a Divorce Application[68]).

Footnotes

[*] Originally published in the Canadian Family Law Quarterly. For the full and unabridged version of the Guide and article, see 40 CFLQ 335, 2022 written by David Frenkel, B.A., L.L.B., partner at Frenkel Tobin LLP, Toronto, Ontario and Yunjae Kim, B.A., J.D., partner at Birenbaum Steinberg Landau Savin & Colraine LLP, Toronto, Ontario.

[1] The *Guide* was built upon the foundational decisions to date that have addressed the separation date issue including but not limited to *Oswell v. Oswell*, 1992 CarswellOnt 306, [1992] 43 R.F.L. (3d) 180 (Ont. C.A.), *Newton v. Newton*, 1995 CarswellOnt 84, [1995] W.D.F.L. 707 (Ont. U.F.C.), *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.), *Greaves v. Greaves*, 2004 CarswellOnt 2408, [2004] O.J. No. 2522 (Ont. S.C.J.), *Strobele v. Strobele* (2005), *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) and *Rosset v. Rosseter*, 2013 CarswellOnt 17606 (Ont. S.C.J.). With respect to the more recent decision, the following decisions were most helpful: *Tokaji v. Tokaji*, 2016 CarswellOnt 20010, 2016 ONSC 7993 (Ont. S.C.J.), *Ramoutar v. Ramoutar*, 2019 CarswellOnt 6677, 2019 ONSC 2448 (Ont. S.C.J.), *Warren v. Warren*, 2019 CarswellOnt 4106, 2019 ONSC 1751 (Ont. S.C.J.) and *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.).

[2] *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 15. See also *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.) at para. 7. See also *Button v. Button*, 2000 CarswellOnt 1228, [2000] W.D.F.L. 539 (Ont. S.C.J.) at para. 79: "Third, when it comes right down to it, the husband's view of the end of the marriage is the point when he says that they stopped sleeping together and their sexual relationship ended. The sexual relationship between spouses is peculiar to that couple. One must assess the significance of the end of sexual intimacy in the context of the frequency and importance of sexual intimacy in that relationship. Even by his account, the sexual relationship had been infrequent for some years before the events of December, 1992. The spouses agree that the sexual relationship ended. The wife says it was as early as 1987. The husband says it was as late as 1992. Whatever the date was, there is no evidence upon which the court could conclude that the sexual relationship was of such importance to this marital relationship that its demise was fundamental and indicative of irretrievable marriage breakdown. To the contrary, I find on the evidence of both of them that the intimate sexual relationship was not a significant feature of the marriage. Even accepting for the moment his evidence that the sexual relationship ended as a result of the events in December, 1992, I find that that is not determinative of "separation with no reasonable prospect of the resumption of cohabitation." Furthermore, applying the other factors to which reference is made in *Miceli*, *supra* and *Oswell*, *supra*, *nothing in the relationship changed materially until the fall of 1997."*

[3] *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 13. See also *Kimpton v. Kimpton*, 2003 CarswellOnt 2552, [2003] W.D.F.L. 365 (Ont. S.C.J.) at para. 18 "The fact that the husband lived separately in the basement of the matrimonial home until he could withdraw from it also supports a conclusion of separation." See also *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(3): "By the same token, the fact that the spouses have two residences and spend significant periods apart in the two homes is not determinative of whether they are living separate and apart. As the Ontario Court of Appeal stated in *Lachman v. Lachman*, 1970 CarswellOnt 122 (Ont. C.A.), at para. 12, spouses in these circumstances will only be considered to be living separate and apart if at least one of them intends to end the marital relationship. Where the parties live primarily in separate residences, the court must examine all of the other circumstances surrounding their relationship to determine whether they were, in fact, living separate and apart. The reasons for maintaining separate residences will be one important consideration (*Rosseter v. Rosseter*, 2013 CarswellOnt 17606 (Ont. S.C.J.), at para. 14)." See also *Chee-A-Tow v. Chee-A-Tow*, 2021 CarswellOnt 4316, 2021 ONSC 2080 (Ont. S.C.J.) at para. 77. See also *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) at para. 10. "Pamela Klimm began to keep a calendar of Michael Klimm's visits to the matrimonial home in the fall of 2003. His visits or overnight stays became less frequent during the months of 2004. Mr. Klimm's evidence was he merely attended at the matrimonial home to pick up clothes or perhaps stay overnight and that there were no sexual relations." See also *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 16: "In this case, Mrs. Rosseter moved out because of Mr. Rosseter's alcoholism. Initially, she rented on a month-to-month basis, even though there was enough time between her departure from the matrimonial home and the time at which she began to rent an apartment for her to find accommodation on a yearly lease basis. This supports her evidence that she was hopeful that the physical separation would be temporary, at least initially."

[4] *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 124.

[5] *Anderson v. Anderson*, 1994 CarswellOnt 438, [1994] W.D.F.L. 1501 (Ont. Ct. J. (Gen. Div.)) at para. 51.

[6] *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052, 2020 ONSC 2492 (Ont. S.C.J.) at para. 32. See also *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 18: "Whether they have purchased gifts or exchanged other tokens of affection with each other (Oswell, at para. 29; Rosseter, at para. 29; Neufeld, at para. 75)." In *Bouffard v. Bouffard*, 2020 CarswellOnt 7066 (Ont. S.C.J) at para. 80), "The parties' daughter, Aimy, gave evidence that there was not much of a relationship

between her parents. She remembered them fighting. She did not remember them being affectionate, using terms of endearment or showing physical affection towards each other."

7 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at paras. 29, 34. *Morin v. Morin*, 2011 CarswellOnt 1848, 2011 ONSC 1727 (Ont. S.C.J.) at para. 32.

8 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 27.

9 *Warren v. Warren*, 2019 CarswellOnt 4106, 2019 ONSC 1751 (Ont. S.C.J.) at paras. 38-42 & 76.

10 *Morin v. Morin*, 2011 CarswellOnt 1848, 2011 ONSC 1727 (Ont. S.C.J.) at para. 32. "There was no evidence of infidelity of either one during the disputed period." See also *Whalen-Byrne v. Byrne*, 2017 ONCA 729, at para. 12. See also *Launchbury v. Launchbury*, 2001 CarswellOnt 1384, [2001] W.D.F.L. 426 (Ont. S.C.J.) at para. 2 where a party refused to give up an extramarital relationship. See also *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) at para. 10. "Michael Klimm presented himself as separated when he moved in with his new girlfriend Linda Wedor in August of 2003. Her evidence at trial confirmed that he told her he was separated. In addition Paul Monroe, a friend of Michael Klimm, also gave evidence that he was aware of the separation and that Michael Klimm was living with another woman in the fall of 2003." See also *Anderson v. Anderson*, 1994 CarswellOnt 438, [1994] W.D.F.L. 1501 (Ont. Ct. J. (Gen. Div.) at paras. 47 & 49: "It is abundantly clear from the evidence before me that the petitioner led a double life — one for himself, and one for his family. On the one hand, he was the merry blade who flitted from one extra-marital affair to another — until he settled down with Thelma. On the other hand, for over thirty-five years he assumed the role of the husband in a traditional marriage. Although he lived at home sporadically, he nevertheless, throughout all those years, set the pattern and created the atmosphere and lifestyle of what married life was to him. For better or for worse, the respondent accepted this lifestyle as the way married life was to him and she became compliant and dependent on him. This lifestyle was also known to his daughters but they accepted it as part of "life with father." Although they were aware of his other activities, they never did consider their parents as being "separated." They lived under the same roof. They had assumed traditional roles. They socialized with and visited their children's families as a married couple. They shared the same sleeping quarters together."

11 *Plimmer v. Burke*, 2016 CarswellOnt 21055, 2016 ONSC 7963 (Ont. S.C.J.) at paras. 5 & 11.

12 *Taylor v. Taylor*, 1999 CarswellOnt 4653, [1999] O.J. No. 5310 (Ont. S.C.J.) at para. 43 "Mrs. Taylor's exploring the possibility of counselling, whether it be in the self-help form or otherwise, is indicative of the fact she had not given up on the prospect of reconciliation or resuming co-habitation." See also *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 37. They engaged in counselling not for the purpose of adjusting to separation but for the purpose of trying to communicate better; See also *Garnick v. Garnick*, 1987 CarswellOnt 1728, [1988] W.D.F.L. 150 (Ont. Sup. Ct. (High Court of Justice)) at para. 12: "The evidence satisfies me that the plaintiff consulted Dr. Bartoletti for the sole purpose of obtaining his assistance in reaching an agreement with the defendant with respect to their financial affairs on separation and not for the purpose of marriage counselling or repairing the marriage as the plaintiff testified. I accept the evidence of the defendant that he informed Dr. Bartoletti that he wished their affairs to be determined through the judicial system. The correspondence filed commencing with the letter from the plaintiff's counsel dated August 12, 1983, to the defendant and referred to above as well as the conduct of the parties conclusively supports those findings." (emphasis added). See also *O'Brien v. O'Brien*, 2013 CarswellOnt 12747, 2013 ONSC 5750 (Ont. S.C.J.) at para. 61. See also *Rosset v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 58 where "Both parties testified that they discussed counselling for their marital problems, although their evidence about it differed. According to Mrs. Rosseter, only one conversation took place, during which they each refused the other's request to attend counselling. According to Mr. Rosseter, there were two discussions. The first took place while he was still drinking. In that conversation, he refused Mrs. Rosseter's plea that they get help. He testified he later made the same suggestion, perhaps just before meeting with the lawyer in 2006, and Mrs. Rosseter refused. On either version, both parties demonstrated a willingness to attend counselling by making the request, and the presence of a stubborn streak by refusing it." See also *Greaves v. Greaves*, 2004 CarswellOnt 2408, [2004] O.J. No. 2522 (Ont. S.C.J.) at para. 35 where counselling was not successful. *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(11): "Whether the parties have continued to discuss family issues and problems and communicate about daily issues (Greaves, at para. 34; *Cooper v. Cooper* (1972), 10 R.F.L. 184 (Ont. H.C.) at para. 12; Oswell, at para. 16)."

13 *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(11): "Whether the parties have continued to discuss family issues and problems and communicate about daily issues (Greaves, at para. 34; *Cooper v. Cooper* (1972), 10 R.F.L. 184 (Ont. H.C.) at para. 12; Oswell, at para. 16)."

14 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 17; *Lamantia v. Solarino*, 2010 ONSC 2927, 2010 CarswellOnt 3412 (Ont. S.C.J.) at para. 11.

15 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 33.

16 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 33.

17 *Newton v. Newton*, 1995 CarswellOnt 84, [1995] W.D.F.L. 707 (Ont. U.F.C.) at paras. 6 & 67. See also *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 20: "Whether the parties prepared meals for one another or ate together are two circumstances often considered in the jurisprudence: see also *Newton v. Newton* (1995), 11 R.F.L. (4th) 251, [1995] O.J. No. 519 (Ont. U.F.C.); *Hazlewood v. Kent*, [2000] O.J. No. 5263 (Ont. S.C.J.). Mr. Rosseter admitted that the parties ate together"a couple"of times each week. These meals were usually eaten at Mrs. Rosseter's place of residence, but also occasionally at restaurants. According to Mr. Rosseter, although Mrs. Rosseter did cook some meals, he often picked up take-out food to bring over to her residence."

18 *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.) at para. 7.

19 *Rosset v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 22. See also *Dai v. Ding*, 2019 CarswellOnt 3401, 2019 ONSC 6118 (Ont. S.C.J.) at para. 213: "According to the applicant, she cooked and cleaned for the respondent. According to the respondent, the applicant performed no domestic duties. The truth is likely somewhere between these two polarized positions. There is no doubt, however, that after March 2013, the applicant cooked and cleaned only for herself and her daughter."

20 *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(12).

21 *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.) at para. 7.

22 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 33: "In July of 2008, Mr. Rosseter severely injured his eye while at home. Rather than calling 911, he called Mrs. Rosseter. As he explained, he was concerned that the ambulance attendants might not be able to get into his home. Regardless of the reason, not only did Mrs. Rosseter attend and take him to the hospital, but she also then drove him down to the Eye Institute in Ottawa, for surgery. On their return to North Bay, Mr. Rosseter stayed one or two nights with Mrs. Rosseter at her place of residence. Since then, Mr. Rosseter concedes that Mrs. Rosseter may have driven him to Ottawa for a further seven visits relating to his eyes. While in Ottawa, the parties' visited with their two sons."

23 *Sydor v. Sydor*, 2001 CarswellOnt 3675, [2001] O.J. No. 4057 (Ont. S.C.J.) at para. 18. [decision reversed, but not as to the date of separation or indicia of separation].

24 *Morin v. Morin*, 2011 CarswellOnt 1848, 2011 ONSC 1727 (Ont. S.C.J.) at para. 31. "Mr. Morin cared for Mrs. Morin during her health crises and stayed with her during her hospitalizations."

25 *O'Brien v. O'Brien*, 2013 CarswellOnt 12747, 2013 ONSC 5750 (Ont. S.C.J.) at para. 62. "And when Mr. O'Brien fell ill and required surgery, he did not advise his wife of his very serious medical condition prior to her return to Canada in August, 2011 and instead turned to his sisters for assistance."

26 *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(19): "Whether they have supported each other with respect to extended family obligations, through difficult times and with each other's personal issues (Rosseter, at para. 31; *Henderson v. Casson*, 2014 ONSC 720 (Ont. S.C.J.))."

27 *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.) at para. 7.

28 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at paras. 31-32. "The parties did not just share happy times together after 2003. Mrs. Rosseter's father died in 2008. Mr. Rosseter was with her throughout that period. According to Mrs. Rosseter, he stayed with her at her place of residence for approximately five nights. According to Mr. Rosseter, it may have been only one. In 2008, the parties lost two other family members, namely Mr. Rosseter's mother and Mrs. Rosseter's uncle. They attended those funerals and grieved those losses together, as well."

29 *Neufeld v. Neufeld*, 2019 CarswellOnt 3406, 2019 ONSC 1277 (Ont. S.C.J.) at para. 75.

30 *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 106.

31 *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.) at para. 7.

32 *Mathers v. Crowley*, 2019 CarswellOnt 14052, 2019 ONSC 5088 (Ont. S.C.J.) at para. 45.

33 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 24.

34 *Mathers v. Crowley*, 2019 CarswellOnt 14052, 2019 ONSC 5088 (Ont. S.C.J.) at para. 45. "The parties' socializing with old friends was done with each arriving separately. Their friends had to be aware of the fact. That is far from a representation that they were still together, although it is not proof of separation either."

35 *Whalen-Byrne v. Byrne*, 2017 CarswellOnt 14484, 2017 ONCA 729, at para. 12. "Mr. Byrne continued to support Ms. Whalen-Byrne, including allowing her to use a credit card in his name" See also *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 92. The court accepted the husband's "evidence that as of July 2014, he began to make fairly regular cheque payments to the Applicant in the nature of support payments. The financial dealings between the parties after March 7, 2014 were in my view reflective of a separated couple." In contrast, see *O'Brien v. O'Brien*, 2013 CarswellOnt 12747, 2013 ONSC 5750 (Ont. S.C.J.) at para. 58: "There were, however, several things that did change after May 20, 2008. Mr. O'Brien began providing monthly cheques to Ms. O'Brien in June, 2008. Ms. O'Brien arranged for a transfer of her condominium to herself and her daughter within months of the separation discussions."

36 *Bouffard v. Bouffard*, 2020 CarswellOnt 7066, 2020 ONSC 3079 (Ont. S.C.J.) at para. 130. See also *McBennett v. Danis*, 2021 CarswellOnt 7411, 2021 ONSC 3610 (Ont. S.C.J.) at para. 55(16). *Zheng v. Xu*, 2019 CarswellOnt 3294, 2019 ONSC 865 (Ont. S.C.J.) at para. 8. See also *Chan v. Chan*, 2013 CarswellOnt 17399, 2013 ONSC 7465 (Ont. S.C.J.) at para. 37. See also *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) at para. 10 where a spouse opens up their own bank account. See also *Kimpton v. Kimpton*, 2003 CarswellOnt 2552, [2003] W.D.F.L. 365 (Ont. S.C.J.) at para. 18 "The wife's conduct in withdrawing substantial sums of money from the joint line of credit early in January that year indicates of her belief the marriage was over." See also *Iankilevitch v. Iankilevitch*, 2004 CarswellOnt 2381, [2004] O.J. No. 2472 (Ont. S.C.J.) at para. 7, where the Husband stripped money out of his U.S. account to reduce his assets as of the date of separation. The court found that the husband had a financial reason for wanting the separation date to be after the withdrawal. The court held that the separation date was the date when the husband made the withdrawal. See also *Mathers v. Crowley*, 2019 CarswellOnt 14052, 2019 ONSC 5088 (Ont. S.C.J.) at para. 45: "Mr. Crowley withdrew $35,000 from the joint HELOC to make a down payment on his new and solely owned home in Ancaster. He did so without telling Ms. Mathers, who was jointly liable for the HELOC. This is an indication that he was planning and had already taken steps toward a separate financial and physical life."

37 *Gibson v. Gibson*, 2011 CarswellOnt 6951, 2011 ONSC 4406 (Ont. S.C.J.) at para. 280. "I accept Melanie's evidence that once she found she had no access to any funds, the marriage was over. I accept that she suffered a loss of trust and that this was the last straw for their marriage."

38 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 42.

39 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 42.

40 *Lamantia v. Solarino*, 2010 CarswellOnt 3412, 2010 ONSC 2927 (Ont. S.C.J.) at para. 20. "The wife also paid the expenses related to the matrimonial home until May 31, 2003. Those expenses included Bell Telephone, taxes, home insurance, Rogers, the water bill, gas and Toronto Hydro. The wife discontinued paying those expenses after May 31, 2003 which is more consistent with her evidence that May 31, 2003 is the date of separation." See also *Cramer v. Cramer*, 2013 CarswellOnt 8197, 2013 ONSC 4182 (Ont. S.C.J.) at para. 42. "Nor is the fact that none of the transfers outlined in the separation occurred, and the parties kept their finances intermingled. I find that the latter facts are more practical matters of convenience; there was no need for the transfers to occur while Mrs. Cramer remained in the home, the parties had always paid their bills from a from a joint account, and there was no need for a change in that situation while they were sharing the same expenses." See also *Morin v. Morin*, 2011 CarswellOnt 1848, 2011 ONSC 1727 (Ont. S.C.J.) at para. 32. "There was very little evidence of their financial relationship but for some furniture, appliance and car purchases that Mrs. Morin said were made together."

41 *F. v. V.*, [2002] O.J. No. 3900, 2002 CarswellOnt 4265 (Ont. S.C.J.) at para. 7. See also *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 60 where the parties stopped looking to purchase a matrimonial home together. See also *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 19. In contrast, see *Ramoutar v. Ramoutar*, 2019 CarswellOnt 6677, 2019 ONSC 2448 (Ont. S.C.J.) at para. 24 where the husband "provided significant contemporaneous documentary evidence and affidavit evidence that the parties' date of separation was September 1, 2005 as originally asserted by the Applicant in her Application. The parties unwound their financial affairs and sold the matrimonial home."

42 *Tokaji v. Tokaji*, 2016 CarswellOnt 20010, 2016 ONSC 7993 (Ont. S.C.J.) at para. 24: "The Wife continued to participate in the operation of the Husband's business "That Water Place". She put the business logo on her car in May, 2013, and purchased radio advertising on November 29, 2013. The Facebook page for the business, posted sometime after April 2013, contains a description

of the business authored by the Husband. He describes the business as "locally owned and family operated! My wife (Virginia) and myself (Rick) have lived and worked in and around the Tillsonburg area for most of our lives. We continue to live in the area where we raised our 3 daughters and now we have an opportunity to serve our community!""

43 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 42. See also *Riha v. Riha*, 2001 CarswellOnt 1024, at para. 26 where the parties had joint wills prepared by their lawyer and neither advised their lawyer that they were separated. The parties also designated each other as the sole beneficiaries of their respective estates.

44 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 18. See also *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(21): "Documentary evidence respecting their relationship status is also relevant. For example, the manner in which the parties described their status in important documents, including Income Tax Returns, and whether they have claimed any benefits that are conditional on their relationship status are important considerations (*Czepa v. Czepa* (1988), 16 R.F.L. (3d) 191 (Ont. H.C.), at para. 13; *Oswell*, at para. 18; *Greaves*, at para. 34; *Joanis v. Bourque*, 2016 ONSC 6505 (Ont. S.C.J.), at para 25; *Rosseter*, at para. 47; *Henderson*, at para. 35; *Tokaji*, at para. 25). Once again, however, these considerations are not determinative, and the court should consider any explanations which either party may proffer before determining the weight, if any, to accord to them (*Morin v. Morin*, 2011 ONSC 1727 (Ont. S.C.J.), at para. 27; *Anthony*, at para. 42)."

45 *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at paras. 51 & 69. "In addition, the Applicant completed her citizenship application on August 4, 2014 and emailed it to the Respondent for him to submit on her behalf on August 26, 2014. On this extremely important document, she noted that she was legally separated."

46 *Ramoutar v. Ramoutar*, 2019 CarswellOnt 6677, 2019 ONSC 2448 (Ont. S.C.J.) at para. 24: "The husband has provided significant contemporaneous documentary evidence and affidavit evidence that the parties' date of separation was September 1, 2005 as originally asserted by the Applicant in her Application. The parties unwound their financial affairs and sold the matrimonial home. Ms. Ramoutar lived with a different partner from 2005-2010; she declared herself to be separated on all the property registrations. Mr. Ramoutar has been in a permanent relationship with a different partner since 2010. There is no other evidence of steps taken by both of them that would indicate a reasonable prospect of resuming cohabitation." (emphasis added)

47 *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) at para. 10. "There was no evidence that Michael and Pamela Klimm presented themselves as a couple at any other social or family functions in 2004." See also *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 27 (employment social function).

48 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 13. See also *Tokaji v. Tokaji*, 2016 CarswellOnt 20010, 2016 ONSC 7993 (Ont. S.C.J.) at para. 23: "They also appeared to engage in very few social activities, save for dinners with their children and extended families. Photographs were filed by the Wife from Christmas Day, 2013, and March 2, 2014, showing the two of them with their daughters, looking objectively like a happy family. Indeed, in the photo from March 2, 2014, the Wife is sitting beside the Husband with her arm around his neck and her head resting on his shoulder, while he holds their infant grandchild. That image is not consistent with what one would expect from a couple that have permanently separated." See also *Steinberg v. Fields*, 2005 CarswellOnt 9983, [2007] W.D.F.L. 2146 (Ont. S.C.J.) at para. 11: Ms. Field's evidence is that their socializing between December 2003 and January 2005 consisted of six occasions: two funerals, a Bat Mitzvah, two unveilings and one baby naming. These are all functions to which both would have been invited whether they were a couple or not because they involved mutual friends or family. On only one occasion — the Bat Mitzvah — did Mr. Steinberg drive Ms. Field to the function and back and, only on that occasion, did they sit together. They did not otherwise eat meals, go out to restaurants or the movies or take vacations together. They did not exchange birthday cards or presents.

49 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 27.

50 *Greaves v. Greaves*, 2004 CarswellOnt 2408, [2004] O.J. No. 2522 (Ont. S.C.J.) at para. 36.

51 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 27.

52 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 30.

53 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 31.

54 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 26. See also *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 35-37: "Mr. and Mrs. Rosseter travelled together to Florida on four occasions between 2003 and 2009. On two of these occasions, they spent about ten days together. On a third, they spent approximately four weeks together. On all of them, they slept in the same room. In addition to these longer vacations, the parties

stayed together while visiting friends in the Muskokas on two occasions, and in Toronto on one. They took their last vacation together in February 2009. It was not their best. They separated shorty after their return."

55 *Newton v. Newton*, 1995 CarswellOnt 84, [1995] W.D.F.L. 707 (Ont. U.F.C.) at para. 48. See also *Cox v. Cox*, 1997 CarswellOnt 3558, 32 R.F.L. (4th) 70 (Ont. S.C.J.) at para. 14: All of the criteria "suggested in *Newton v. Newton*, *supra*, were present: different residences, steps were taken to financially separate their affairs *and there were no further efforts to resume cohabitation in a meaningful way by either party* after January 1996. Accordingly, this court finds that the date of separation of the parties with no reasonable prospect of reconciliation was the departure of the wife from the matrimonial home in January of 1996." (emphasis added)

56 *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 25: " . . . Mrs. Rosseter purchased pyjamas and underwear for Mr. Rosseter's use while at her residence."

57 *Greaves v. Greaves*, 2004 CarswellOnt 2408, [2004] O.J. No. 2522 (Ont. S.C.J.) at para. 36. "This is confirmed by Mr. Greaves' evidence that he pleaded with his wife to return home, but she refused. This continued refusal must constitute an intention not to truly reconcile the relationship."

58 *Lamantia v. Solarino*, 2010 CarswellOnt 3412, 2010 ONSC 2927 (Ont. S.C.J.) at para. 21. " . . . the wife purchased bunk beds for her children to be assembled in Mr. DiFlorio's home. Those bunk beds were purchased from Leon's in June 2003. Again, this is with the wife vacating the matrimonial home.

59 *Klimm v. Klimm*, 2010 CarswellOnt 1419, 2010 ONSC 1479 (Ont. S.C.J.) at para. 10.

60 *Newton v. Newton*, 1995 CarswellOnt 84, [1995] W.D.F.L. 707 (Ont. U.F.C.) at para. 78: "In all of the circumstances and facts of this case, I choose June 30, 1986, as the valuation date. This was a date sometime after the husband moved into his mother's home and stopped attending at the matrimonial home. It is also consistent with the time when he took some steps with respect to the transfer of the property at 110 Wilson Street, Ancaster. It is a date referred to by the wife in her own application. It is a date after both agreed they hoped to put their marriage back together, although briefly, in the 1980's. By June 30, 1986, the parties had in fact been physically living separate and apart for a period and the reasonable prospect of resuming cohabitation would likely end. It was a date by which the husband, except for his indication on tax returns, was prepared to have the public know he was no longer residing with his wife."

61 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 23, 35.

62 *Strobele v. Strobele*, 2005 CarswellOnt 9201, [2005] O.J. No. 6312 (Ont. S.C.J.) at paras. 27 & 35. See also *Chateauvert v. Chateauvert*, 2019 CarswellOnt 681, 2019 ONSC 81 (Ont. S.C.J.) at para. 13: "While there is no agreement on the exact date of separation, it appears that the parties separated on or about May 15, 2018. On that date, the wife told the husband by long-distance telephone call that she wanted to end their relationship." See also *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 14 discussing the term "withdrawing from matrimonial obligation with intent of destroying matrimonial consortium or of repudiating marital relationship". The term "consortium" refers broadly to the companionship, love, affection, comfort, mutual services and support, and sexual relations typically involved in the martial relationship. See also *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(4).

63 *Mathers v. Crowley*, 2019 CarswellOnt 14052, 2019 ONSC 5088 (Ont. S.C.J.) at para. 45.

64 *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(20): "How the parties referred to each other and held out their relationship to third parties (*Anthony*, at para. 42; *R. (T.) v. K. (A.)*, at para. 46)." *Rosseter v. Rosseter*, 2013 CarswellOnt 17606, 2013 ONSC 7779 (Ont. S.C.J.) at para. 44: "Most of the cases consider how the couple was viewed by third parties. Strictly speaking, this is opinion evidence and it is not admissible. What is important is the behaviour of the parties towards one another that lead to the opinion." See also *Al-Sajee v. Tawfic*, 2019 CarswellOnt 10060, 2019 ONSC 3857 (Ont. S.C.J.) at para. 26(25).

65 *Cramer v. Cramer*, 2013 CarswellOnt 8197, 2013 ONSC 4182 (Ont. S.C.J.) at para. 42. "In this case I have determined that the date of separation was February 28, 2006, because there was no true and reasonable prospect of reconciliation from that date forward. Mr. Cramer was aware of this fact, and even took steps to purchase the separation agreement template in order to prepare a formal separation agreement, although, as I accept his evidence, he wanted the marriage to continue."

66 *Oswell v. Oswell*, 1990 CarswellOnt 278, 1990 CanLII 6747 (Ont. S.C.J.) at para. 23. See also *Mathers v. Crowley*, 2019 CarswellOnt 14052, 2019 ONSC 5088 (Ont. S.C.J.) at para. 45: "Starting in 2013, the parties negotiated the terms of a separation agreement. Mr. Crowley even prepared numerous drafts of potential separation agreements. This illustrates an understanding that

they were leading separate lives, the only question being under what terms."

67 *O'Brien v. O'Brien*, 2013 CarswellOnt 12747, 2013 ONSC 5750 (Ont. S.C.J.) at paras. 52, 59 & 64.

68 *Taylor v. Taylor*, 1999 CarswellOnt 4653, [1999] O.J. No. 5310 (Ont. S.C.J.) at para. 15 "There are some acts which can be characterized as clear and unequivocal. As Mr. Justice Killeen observed in *Czepa v. Czepa* the clear and unequivocal act of issuing a Petition for Divorce ended "all prospects of reconciliation"; and at para. 45 "But whatever mutuality existed was destroyed by Mrs. Taylor initiating divorce proceedings on November 15th, 1995. That step was truly, as Mr. Justice Killeen described in *Czepa v. Czepa*, a clear and unequivocal act that ended all prospects of reconciliation." See also *Verma v. Bhooi*, 2019 CarswellOnt 18755, 2019 ONSC 6251 (Ont. S.C.J.) at para. 103-104. See also *Ramoutar v. Ramoutar*, 2019 CarswellOnt 6677, 2019 ONSC 2448 (Ont. S.C.J.) at para. 6: "In *Forget v. Forget*, [2001] O.J. No. 3691 (Ont. S.C.J.), para. 7, Justice Rogers determined that the statement of a date of separation is an admission of fact. I agree. Ms. Ramoutar is seeking to withdraw an admission that a fact is true."

Law Society of Ontario | Barreau de l'Ontario

TAB 11D

17th Family Law Summit

Topics Covered During Consultation

LawPRO

March 29, 2023

Topics Covered During Consultation

DATE:_____

NAME OF CLIENT:_____

1. Confidentiality

- ☐ Our privacy policy
- ☐ Solicitor Client Privilege
- ☐ Bringing someone with you to this meet and other meetings

2. Process Options

- ☐ Negotiation
- ☐ Mediation
- ☐ Collaborative Law
- ☐ Arbitration
- ☐ Litigation
- ☐ Parenting Co-ordination

This document can be found on LAWPRO's Limited Scope Representation Resources page at practicepro.ca/LimitedScope. It was adapted from materials by the Jamal Family Law Professional Corporation.

3. Separation Agreements

- ☐ Full and frank financial disclosure
- ☐ Independent legal counsel and legal advice
- ☐ No duress or coercion

4. Property Division Issues

- ☐ The identification of and valuation for (equalization purposes) of property
- ☐ Calculation of the net family property of each of you and your spouse
- ☐ The possible equalization payment owing
- ☐ Applicable limitation periods
- ☐ Preservation and non-depletion orders (freezing):
  - ☐ when you need these kind of orders
  - ☐ warning signs to watch for
- ☐ Trust ownership issues
- ☐ Common law couple property issues including joint ventures
- ☐ Use of experts – how to handle difficult assets whose value may need to be ascertained:
  - ☐ pensions
  - ☐ businesses
  - ☐ unusual assets such as stock options
  - ☐ contents
  - ☐ land, home, and other dwellings

5. Disclosure in a Family Law Matter

- ☐ Financial statements
- ☐ Back-up documents for income, assets, liabilities
- ☐ No intrusion upon seclusion

6. Matrimonial Home Contents

- ☐ What you can and can't remove
- ☐ How to get someone removed from the home
  - ☐ No right without an order
  - ☐ Changing the locks
  - ☐ Exclusive possession
  - ☐ Restraining orders
  - ☐ Bail conditions and peace bonds
- ☐ partition and sale of the matrimonial home
- ☐ buyout of a party's interest
- ☐ severing the joint tenancy
- ☐ title searches
- ☐ lines of credit, mortgages and other expenses secured against or related to the property

7. Custody and Access

- ☐ The rights and obligations that arise for a parent in a variety of custody and access arrangements (joint, sole custody, parallel parenting, Parenting Coordinators and hybrid orders)

- □ Factors that a court will consider in determining the best interests of children, maximum contact and minimal disruption
- □ Parenting time / access
  - □ What is age appropriate?
  - □ The social science data on age-appropriate access and its impact on the court's determination of appropriate access
  - □ Impact of agreed-upon arrangements on future chances of success regarding variation of such agreements, such as in the event that a parent wishes to relocate
- □ How such things as the child's views and preferences impact on a court and a court's determination of custody / parenting issues
- □ The interplay between parenting (custody and access) and the parents' ability to parent in situations where there is domestic violence, recreational drug use, mental health issues, sexual abuse or other factors that affect one's ability to parent
- □ Factors that affect limiting access by imposing supervised access or other restrictive conditions – what a court will or will not consider or do
- □ The kind of third party evidence that can be put forward to support a position:
  - □ The Office of the Children's Lawyer
  - □ Psychological assessments
  - □ Section 30 custody and access assessments

- ☐ Parenting courses
- ☐ Anger management courses
- ☐ Therapists, teachers, physicians and other professionals who may be involved

☐ The role that the Office of the Children's Lawyer and private assessors may play and the impact their recommendations may have on the outcome of an access dispute;

☐ Risk and prevention of abduction; non-removal orders, and when they are available

8. Spousal Support

☐ Factors affecting entitlement, duration and quantum;

☐ SSAG

☐ Amounts and possible duration

☐ Extended health care plans
- ☐ Do you need to be on your spouse’s plan?
- ☐ How most expire on divorce

☐ Tax implications

☐ Ways to pay (lump sum, periodic)

☐ Family Responsibility Office and other enforcement mechanisms

9. Child Support

☐ Guideline Table amount

- ☐ Circumstances under which a court may award an amount which is different than that prescribed under the Child Support Guidelines:
  - ☐ children over the age of majority
  - ☐ 40% rule – shared custody
  - ☐ split custody
  - ☐ income over $150,000
  - ☐ undue hardship
- ☐ S7 (special and extraordinary) expenses: what they are, how and when they are shared and effect of tax credits and deductions etc.

10. Estate and Beneficiary Matters

- ☐ Elections under the *Succession Law Reform Act*, *Family Law Act*
- ☐ The impact of separation on various beneficiary designations that may have been made by either spouse
- ☐ The need for a new Will and Powers of Attorney

11. Divorce

- ☐ Obtaining a divorce in Ontario
- ☐ Grounds for divorce
- ☐ Child support and its interplay with the court's willingness to grant a divorce

12. Social Media and Electronic Communications with Others

- ☐ The dangers of posting things – treasure trove of evidence
- ☐ Ways to protect your online image and electronic data

13. Next Steps / Plan / Strategy

- ☐ A variety of strategies that might be appropriate for your case
- ☐ The next steps you may wish to take in this matter (the use of experts, the negotiation of a separation agreement, mediation, arbitration and litigation)

14. Financing the Case

- ☐ Family members
- ☐ Bank loans and lines of credit
- ☐ Funds in joint accounts
- ☐ Orders for interim disbursements

15. Full Service vs. Limited Scope or Unbundled Services

- ☐ The difference
- ☐ Types of Unbundled Services (make two side by side lists)
- ☐ Providing basic legal advice
- ☐ Drafting pleadings, briefs, declarations or orders
- ☐ Document review

- ☐ Conducting legal research
- ☐ Negotiating
- ☐ Making limited appearances in court, at mediations etc.
- ☐ Coaching on strategy or role playing
- ☐ Advising on court procedures and courtroom behavior
- ☐ Preparing exhibits
- ☐ Organizing documentary disclosure,
- ☐ Drafting contracts and agreements
- ☐ Ghostwriting
- ☐ Providing direction to resources such as community resources, rules of court, legislation

16. Our Fees and Retaining Us

- ☐ Our fees
- ☐ Retainer and Replenishment
- ☐ Retainer agreement

17. Our Paperless Office - Electronic Communications

- ☐ E-mail and texting staff and the lawyers in this firm
- ☐ Benefits
- ☐ Risks
- ☐ Precautions

18. Material Given Prior to Consult

- ☐ Confidential questionnaire
- ☐ Billing information for new clients
- ☐ Admin information for new clients

19. Resources Referred to

- ☐ Referral to:
  - ☐ Resources on web site
  - ☐ Therapists
  - ☐ Coaches
  - ☐ Marriage counsellors
  - ☐ Other

20. Law Clerk Follow Up

- ☐ Consult only letter
- ☐ Retained us consult letter
- ☐ Include limitation period references in letter:
  - ☐ Yes
  - ☐ No
- ☐ Include Estate and Beneficiary designation clauses in letter:
  - ☐ Yes
  - ☐ No

21. Length of Consultation:

- ☐ The client agreed to extend the consultation beyond the allotted hour at an additional charge based on the lawyer's hourly rate:
  - ☐ Yes
  - ☐ No
- ☐ Length of the consultation (please record in 6 minute increments): _____

This document can be found on LAWPRO's Limited Scope Representation Resources page at practicepro.ca/LimitedScope. It was adapted from materials by the Jamal Family Law Professional Corporation.

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TAB 12

17th Family Law Summit

Select Domestic Contract Issues for Panel Discussion

Shelly Kalra
Kalra Family Law Professional Corporation

Robert Halpern, C.S.
Halpern Law Group

***Special thanks to Sanaz Golestani**
****Additional special thanks to Michael Weisbrot**

March 29, 2023

cpd

Family Law Summit March 29, 2023: Select Domestic Contract Issues for Panel Discussion

Shelly Kalra, Kalra Family Law* and Robert M. Halpern , Halpern Law Group**

*Special thanks to Sanaz Golestani for her assistance with this paper

** Additional special thanks to Michael Weisbrot for his assistance with this paper

1. ***Managing client expectations when a client says they want to enter into a domestic contract***

In Ontario, the relevant provisions governing domestic contracts are found under Part IV of the *Family Law Act*. Under Part IV, domestic contract mean a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement. [1]

These domestic contracts are broken down in the legislation as follows:

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. R.S.O. 1990, c. F.3, s. 52 (1); 2005, c. 5, s. 27 (25); 2020, c. 25, Sched. 1, s. 28 (6).

(2) A provision in a marriage contract purporting to limit a spouse's rights under Part II (Matrimonial Home) is unenforceable. R.S.O. 1990, c. F.3, s. 52 (2).

Cohabitation agreements

53 (1) Two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,

(a) ownership in or division of property;

(b) support obligations;

[1] Section 51, Family Law Act

(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. R.S.O. 1990, c. F.3, s. 53 (1); 1999, c. 6, s. 25 (23); 2005, c. 5, s. 27 (26); 2020, c. 25, Sched. 1, s. 28 (7).

(2) If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract. R.S.O. 1990, c. F.3, s. 53 (2).

Separation agreements

54 Two persons who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children;

(d) the right to decision-making responsibility or parenting time with respect to their children; and

(e) any other matter in the settlement of their affairs. R.S.O. 1990, c. F.3, s. 54; 1999, c. 6, s. 25 (24); 2005, c. 5, s. 27 (27); 2020, c. 25, Sched. 1, s. 28 (8).

Family Arbitration Agreement

Finally, under the Section 51 Definitions, “family arbitration” means an arbitration that,

(a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under this Part, and

(b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; (“arbitrage familial”)

Other Part IV Provisions

55 (1) A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed. R.S.O. 1990, c. F.3, s. 55 (1).

(2) A minor has capacity to enter into a domestic contract, subject to the approval of the court, which may be given before or after the minor enters into the contract. R.S.O. 1990, c. F.3, s. 55 (2).

(3) If a mentally incapable person has a guardian of property or an attorney under a continuing power of attorney for property, and the guardian or attorney is not his or her spouse, the guardian or attorney may enter into a domestic contract or give any waiver or consent under this Act on the person's behalf, subject to the court's prior approval. 2009, c. 33, Sched. 2, s. 34 (4).

(4) In all other cases of mental incapacity, the Public Guardian and Trustee has power to act on the person's behalf in accordance with subsection (3). 1992, c. 32, s. 12.

56 (1) In the determination of a matter respecting the education, moral training or decision-making responsibility or parenting time with respect to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child. R.S.O. 1990, c. F.3, s. 56 (1); 1997, c. 20, s. 10 (1); 2020, c. 25, Sched. 1, s. 28 (9).

(1.1) In the determination of a matter respecting the support of a child, the court may disregard any provision of a domestic contract pertaining to the matter where the provision is unreasonable having regard to the child support guidelines, as well as to any other provision relating to support of the child in the contract. 1997, c. 20, s. 10 (2); 2006, c. 1, s. 5 (8).

(2) A provision in a domestic contract to take effect on separation whereby any right of a party is dependent upon remaining chaste is unenforceable, but this subsection shall not be construed to affect a contingency upon marriage or cohabitation with another. R.S.O. 1990, c. F.3, s. 56 (2).

(3) A provision in a domestic contract made before the 1st day of March, 1986 whereby any right of a party is dependent upon remaining chaste shall be given effect as a contingency upon marriage or cohabitation with another. R.S.O. 1990, c. F.3, s. 56 (3).

(4) A court may, on application, set aside a domestic contract or a provision in it,

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract. R.S.O. 1990, c. F.3, s. 56 (4).

(5) The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement. R.S.O. 1990, c. F.3, s. 56 (5).

(6) Subsection (5) also applies to consent orders, releases, notices of discontinuance and abandonment and other written or oral arrangements. R.S.O. 1990, c. F.3, s. 56 (6).

(7) Subsections (4), (5) and (6) apply despite any agreement to the contrary. R.S.O. 1990, c. F.3, s. 56 (7).

Managing a client's expectations for a domestic contract involves clear communication, setting realistic goals, and addressing any concerns and questions they may have.

Below are some steps counsel may take to manage their client's expectations for a domestic contract:

1. **Understand the client's needs and goals**: Before drafting the domestic contract, make sure you understand what the client wants to achieve. This will help you tailor the agreement to meet their specific needs.
2. **Explain the law:** Be clear with the client from the onset about the purpose of the contract. Explain the relevant laws to your client, so that the client has a realistic understand of what the law allows and the legal limitations.
3. **Keep the client informed:** Throughout the process, keep the client informed of any progress or changes. This will help build trust and ensure that the client is satisfied with the final outcome.

4. **Discuss the negotiation process:** Domestic contracts are typically negotiated between partners. Discuss the negotiation process with the client, so they understand that the process can take time and that it involves compromises.[2]
5. **Manage expectations around enforceability**: While domestic contracts are legally binding, there are some circumstances in which a court may set aside or invalidate a contract. Manage the client's expectations around the enforceability of the contract and explain the circumstances in which a contract may be invalidated.
6. **Encourage open communication:** Effective communication between partners is key to the success of any domestic contract. Encourage the client to have open and honest conversations with their partner about the contract, and to be prepared to negotiate in good faith.

By taking these steps, you will help the client understand the domestic contract process and manage the client's expectations for what the domestic contract can achieve.

Overall, domestic contracts can be a useful tool for couples to clarify their rights and responsibilities during a relationship. However, it is important to ensure that the requirements for a valid contract are met and when preparing separation agreements, any provisions related to children are in their best interests.

[2] Rules of Professional Conduct, Rule 3.2-4 "Encouraging compromise or Settlement"

2. Setting Aside Separation Agreement

Please see the attached relevant legislation and cases:

Legislation

1. *Family Law Act*, RSO 1990, c F.3, s 33(4)
2. *Family Law Act*, RSO 1990, c F.3, s 55(1)
3. *Family Law Act*, RSO 1990, c F.3, s 56(1)
4. *Family Law Act*, RSO 1990, c F.3, s 56(1.1)
5. *Family Law Act*, RSO 1990, c F.3, s 56(4)

Cases

6. *Bruni v Bruni*, 2010 ONSC 6568 at paras 98-114
7. *Chee-A-Tow v Chee-A-Tow*, 2021 ONSC 2080 at paras 92, 93, 94, 95, 101, 115, 116, 11, 123, 125, 126, 127 and 170
8. *Connell v Connell*, 2011 ONSC 4868 at paras 38-39
9. *Cramer v Cramer*, 2013 ONSC 4182
10. *Currey v Currey*, 2002 CarswellOnt 878 (Ont. S.C.J.) at paras 16-18 [hyperlinked here and reproduced below]
11. *Danylkiw v Danylkiw*, 2004 CarswellOnt 4401 (Ont. C.A.) [hyperlinked here and reproduced below]
12. *Faiello v Faiello*, 2019 ONCA 710 at paras 25, 26, 27, 28, 29 and 54
13. *Golton v Golton*, 2018 ONSC 6245 at paras 205, 206, 210, 212 and 213
14. *Gregory v Brown*, 2005 ONCJ 284
15. *Hartshorne v Hartshorne*, 2004 SCC 22
16. *Harnett v Harnett*, 2014 ONSC 359 at paras 87-94

17. *J.L.S. v D.B.S.*, 2016 ONSC 1704

18. *Laderoute v Heffernan*, 2020 ONSC 1157

19. *LeVan v LeVan*, 2008 ONCA 388

20. *Miglin v Miglin*, 2003 SCC 24

21. *Milne v Milne*, 2019 ONSC 459

22. *Patrick v Patrick*, 2002 CarswellOnt 593 (Ont. S.C.J.) [hyperlinked here and reproduced below]

23. *Rempel v Smith*, 2010 ONSC 6740

24. *Rick v Brandsema*, 2009 SCC 10 at paras 40-50

25. *Rolland v Tevendale*, 2015 ONSC 3226

26. *Smith v Smith*, 2000 CarswellOnt 5054 (Ont. S.C.J.) at paras 19-45 [hyperlinked here and reproduced below]

27. *Turk v Turk*, 2018 ONCA 993 at paras 5, 6, 7, 11 and 12

28. *Virc v Blair*, 2014 ONCA 392

29. *Virc v Blair*, 2017 ONCA 394

3. ***Considerations when advising a client who wishes to enter into a marriage contract after the wedding has occurred***

(i) For Summit Panel Discussion: Consider the Following Fact Situation:

You have a consultation booked. You review the intake form which sets out the following details:

> *I do not want to separate from my husband. Andy and I have been married for six (6) years, and we have a 4-year-old daughter, Gigi.*
>
> *I recently learned that Andy has about $90,000 in debt. I want to help him pay off his debt but I'm worried that this may happen again. If we separate in the future, I want to make sure Andy will pay me back. I also want to protect my assets from Andy. I have a condo which I owned before I ever met Andy. I refinanced my condo, and we used the money towards the downpayment of our current home, which we jointly own. I feel trapped, please help, I don't want us to separate*.
>
> What do you advise?

(ii) One type of Marriage Contract: the Post-Nuptial Agreement

A marriage contract entered into after the wedding (hereinafter a "postnuptial agreement")can be a useful tool for couples who want to protect their assets and ensure that their wishes are carried out in the event of a divorce or separation.

A postnuptial agreement can cover various issues, such as property division, spousal support, and debt assumption. Since the postnuptial agreement is signed *after* marriage, the parties have legal rights and obligations pursuant to the *Family Law Act* and the *Divorce Act.* Therefore, the circumstances in which a postnuptial agreement was

negotiated and executed is particularly important when a Court is determining itsvalidity, given that it may affect parties' existing rights and obligations based on a variation of existing entitlements ,as opposed to anticipated entitlements.

(a) Fact situations which may prompt a post-nuptial agreement:

1. **Change in financial circumstances**: If one spouse receives a significant inheritance or a large windfall, they may want to protect those assets in the event of a divorce. A postnuptial agreement can be used to ensure that those assets are kept separate.
2. **Change in family circumstances:** If a couple has children, they may want to use a postnuptial agreement to ensure that certain assets are designated for the benefit of the children, regardless of the outcome of a divorce.
3. **Reconciliation**: If a couple has separated or filed for divorce, but then decides to reconcile, they may use a postnuptial agreement to establish the terms of their reconciliation and to address any issues that led to the separation in the first place.
4. **Marital problems**: If a couple is experiencing problems in their marriage and wants to work through them, a postnuptial agreement can be used to address financial issues that may be contributing to the marital problems.
5. **Estate planning**: If a couple wants to ensure that their estate is distributed in accordance with their wishes, they may use a postnuptial agreement to establish how their assets will be distributed in the event of their death.

(b) Legal Considerations when addressing a post-nuptial agreement

No obligation to disclose extramarital affair

In D'Andrade v. Schrage, 2011 ONSC 1174 (CanLII), one of the issues before the court was whether the parties' postnuptial agreement should be set aside because, unbeknownst to the husband, on the day that the wife signed the contract, she was having an affair, and was contemplating separation. The husband found out about the wife's

affair two months after she had signed the contract, and he immediately began divorce proceedings. The husband claimed the wife lacked good faith and therefore the agreement is invalid and should be set aside.

The court rejected the husband's request to set aside the postnuptial agreement by relying on the following factors:

(a) There is no duty on spouses to disclose their thoughts of separation or their involvement in extra-marital relationship before executing a marriage contract. If the law imposed such a duty on spouses, it would essentially reintroduce "conduct" as a factor to consider when assessing the validity of a marriage contract, and this will have negative public policy implications.

(b) The purpose of marriage contracts is to address financial obligations between couples. Marriage contracts are not for the purpose of enforcing personal obligations such as the duty to remain faithful or the commitment to remain in the relationship.

(c) When negotiating a domestic contract, couples have an absolute duty to disclose anything that would be relevant to their financial positions. This obligation does not extend to disclosing the existence of an extramarital affair or the intention to separate.

Unconscionability - Postnuptial Agreement Set Aside

In *Stevens v. Stevens*, 2012 ONSC 706 (CanLII), the court found the postnuptial agreement was unconscionable and set the contract aside. While the husband's infidelity during the negotiation process was deemed reprehensible by the judge, the Court held that the husband's conduct was not a factor that can be relied on to invalidate the contract.

In determining that the postnuptial agreement was unconscionable, Justice Harper found that the wife gave away everything and received nothing in return. In this case, the Court found that the husband took advantage of the wife by not clarifying a major inconsistency

in the postnuptial agreement, and that the husband also took advantage of his wife while she was vulnerable state as she was suffering from a condition known as hypomania.

Lack of financial disclosure and section 52(2) of the Family Law Act

In Franklin v. ten Berge, 2016 ONSC 4036, the postnuptial agreement was set aside because neither party made the appropriate financial disclosure to the other as required by the *Family Law Act* before the postnuptial agreement was signed, and the postnuptial agreement conflicted with section 52(2) of the *Family Law Act*. Section 52(2) prohibits provisions in marriage contracts from limiting a married spouse's right to equal possession of a matrimonial home.

(iii) Helping Clients to navigate the introduction of a post-nuptial agreement

If your client is considering asking their partner to sign a postnuptial agreement, its important to have them approach the conversation with sensitivity and respect.

Here are some steps to help the client navigate the discussion:

1. **Choose the right time and place**: Choose the right time and place when they are relaxed and have time to discuss the issue(s). Suggest that they avoid having the conversation during an argument or major life event.

2. **Keep the conversation respectful:** Don't make demands or ultimatums. Instead, keep the conversation respectful and try to find common ground.

3. **Express your intentions:** Start by explaining why you want to have a marriage contract. You may want to express your desire for financial security, protection of assets, or simply a clear understanding of the expectations and responsibilities of each partner in the relationship.

4. **Be clear and transparent:** Discuss any terms or conditions that you would like to include and why they are important to you. Be honest about your concerns and fears and listen to your partner's concerns as well.

5. **Be open to compromise:** Your partner may have concerns or objections to some of the terms of the contract. Be prepared to listen to their concerns and be willing to negotiate and compromise to find a mutually acceptable agreement.

6. **Emphasize the positive:** Emphasize that signing a marriage contract is not a reflection of your love or commitment to your partner. It is simply a way to ensure that both partners are protected and have a clear understanding of their responsibilities and rights within the relationship.

(iv)Lawpro: Malpractice Claims and Domestic Contracts: According to Law Pro, family law is one of the most complex practice areas of law. Failure to know/apply the law is twice as likely in family law matters than other area of law.[3]

The annual cost of Law Pro malpractice claims related to domestic contracts is close to $4.2 million per year.[4]

COMMON MALPRACTICE ERRORS LAWYERS SHOULD AVOID:

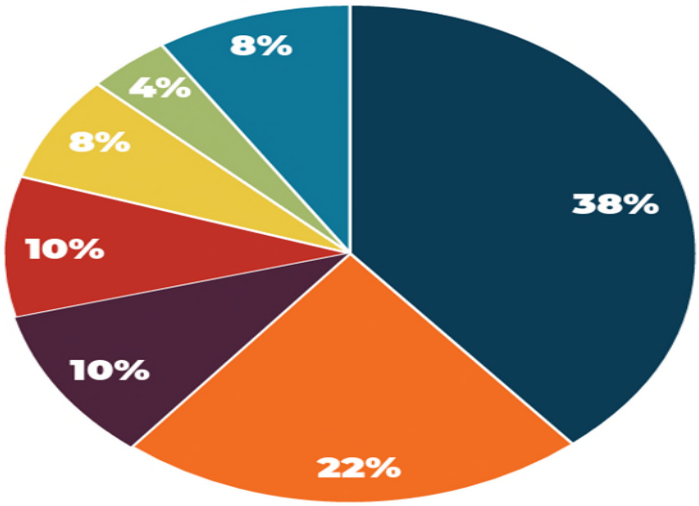
1. **Communication (38%):** Failing to ensure the client understands the implications and consequences of a domestic contract, comprise 38% of malpractice claims. For marriage contracts, lawyer's fail to explain the consequences of excluding certain property from an equalization calculation. When it comes to separation agreements, the settlement terms are not adequately explained to the client, or the client is not informed that the settlement terms are final.

2. **Errors of law (22%):** Errors as to entitlement, amount or duration of spousal support, and not complying with the *Federal Child Support Guidelines* and unanticipated and unintended tax obligations comprise 22% of law pro claims against family lawyers**.**

[3] LawPro: Family Law Claims Factsheet
[4] LawPro: Family Law Claims Factsheet

3. **Time Management (10%):** Time limitations, missing deadlines for equalization, and delays in spousal support claims which in turn leaves an amount of support lost because the Court will not make a retroactive order.

4. **Inadequate investigation (10%): F**ailing to identify all assets and liabilities in the financial statement and net family property statement comprise 10% of malpractice claims.



LAW PRO – RISK MANAGEMENT

When preparing a domestic contract for a client, minimize your risk of a potential malpractice claims, by considering the following risk management tips:

1. **Manage expectations of the client:** Family law clients can be emotional and difficult with unrealistic explanations. Managing the client's expectations from the beginning of the retainer avoids disappointment.

2. **Explain the terms of the domestic contract to the client:** Take the time to explain each term of a domestic contract to the client by using simple terms. Try to avoid using legalese. Take detailed notes and ask the client to explain the provisions of the agreement in their own words to make sure they understand.

5. **Be aware of the limitation of your legal knowledge:** Know when you are out of your league. No lawyer will be an expert in all aspects of the law. It is important for lawyers to recognize their own limitations and ask for assistance from a more seasoned lawyer or a third-party expert (i.e. accountant, real estate lawyers etc), if required.[5]

6. **Use Checklists and Reporting letters**: Lawyers should use the checklists to ensure nothing is missed. Checklists can also be relied on to evidence the work that was completed, and the communication that took place at the initial intake meeting and at the time of the review and signing of the domestic contract. Checklists can do wonders for a lawyer if a client later tries to sue for malpractice.[6]

7. **Use Clear and Concise Language:** Failure to use clear and concise language leaves room for ambiguity which in turn may result in litigation years later. Use simple, clear and standard language when drafting. Include examples to assist in clarify the intention of a provision and avoiding confusion.

[5] Rules of Professional Conduct, Rule 3.1-2, "Competence"
[6] Toolkit: Domestic Contract

4. ***Entering into a Mediation Agreement, Arbitration Agreement or a Mediation-Arbitration Agreement***

Below please find the legislation, Rules of Professional conduct, case law and secondary/online sources pertaining to this area of discussion:

Legislation

1. *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 7.3
2. *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 7.7(2)(a)
3. *Family Law Rules*, O Reg 114/99, rr 2(2)-(5)

LSO Rules of Professional Conduct

4. LSO Rules of Professional Conduct – Rule 3.1-1: Chapter 3 | Law Society of Ontario (lso.ca)
5. LSO Rules of Professional Conduct – Rule 3.2-4 [Commentary]: Chapter 3 | Law Society of Ontario (lso.ca)

Cases

6. *AP v PP*, 2021 ONSC 7424 at paras 28, 29, 35 and 38

Secondary Sources and Online Resources

7. James C. MacDonald, Lee K. Ferrier, *Canadian Divorce Law and Practice*, 2nd Edition § 3:6. Family Dispute Resolution Process [hyperlinked here and reproduced below]
8. Alternative dispute resolution (ADR) - Family Court & Beyond (familycourtandbeyond.ca)
9. Alternative dispute resolution (ADR) | Family Law Flowcharts (cleo.on.ca)
10. Family Dispute Resolution in Family Law - FLEW / FODF — Family Law Education for Women / Femmes ontariennes et droit de la famille (onefamilylaw.ca)

11. Fact Sheet - Family dispute resolution: resolving family law issues out of court (justice.gc.ca)

12. Family mediation | ontario.ca

2002 CarswellOnt 878
Ontario Superior Court of Justice

Currey v. Currey

2002 CarswellOnt 878, [2002] W.D.F.L. 213, [2002] O.J. No. 5943, 26 R.F.L. (5th) 28

Michael Currey, Applicant and Candace Currey, Respondent

Cunningham J.

Heard: February 4, 2002
Judgment: February 5, 2002
Docket: 97-FP-24185

Counsel: *Derek Nicholson*, for Applicant
Joseph Hamon, for Respondent

Subject: Family

Related Abridgment Classifications

Family law
VII Division of property
VII.12 Miscellaneous
Statutes
III Retroactive and retrospective operation
III.6 Miscellaneous

Headnote

Family law --- Family property on marriage breakdown — Transitional provisions and retroactivity in property legislation
Husband and wife were married in 1980 — Marriage was marked by number of separations and reconciliations — After reconciliation in 1985, husband and wife decided to regularize relationship through domestic agreement — Wife brought motion to set aside agreement on basis of husband's failure to disclose previous paternity agreement under which he was committed to pay support for child with other woman — Motion dismissed — Under s. 56(4) of Family Law Act, which was proclaimed in 1986, domestic contract could be set aside if party failed to disclose significant debts or other liabilities existing when contract was made — Non-disclosure provision of Act was not retroactive — Family Law Act, R.S.O. 1990, c. F.3, s. 56(4).
Statutes --- Retroactivity and retrospectivity — General
Husband and wife were married in 1980 — Marriage was marked by number of separations and reconciliations — After reconciliation in 1985, husband and wife decided to regularize relationship through domestic agreement — Wife brought motion to set aside agreement on basis of husband's failure to disclose previous paternity agreement under which he was committed to pay support for child with other woman — Motion dismissed — Under s. 56(4) of Family Law Act, which was proclaimed in 1986, domestic contract could be set aside if party failed to disclose significant debts or other liabilities existing when contract was made — Non-disclosure provision of Act was not retroactive — Family Law Act, R.S.O. 1990, c. F.3, s. 56(4).

Table of Authorities

Cases considered by *Cunningham J.*:

Demchuk v. Demchuk, 1 R.F.L. (3d) 176, 1986 CarswellOnt 251 (Ont. H.C.) — considered
Gregoric v. Gregoric, 28 R.F.L. (3d) 419, 39 E.T.R. 63, 4 O.R. (3d) 588, 1990 CarswellOnt 296 (Ont. Gen. Div.) — followed
Klinger v. Klinger, 1993 CarswellOnt 1667 (Ont. Gen. Div.) — considered
Montreuil v. Montreuil, 1999 CarswellOnt 3853 (Ont. S.C.J.) — considered

Statutes considered:

Family Law Act, 1986, S.O. 1986, c. 4
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
Generally — referred to

s. 56(4) — considered

s. 56(7) — referred to

s. 60 — referred to

MOTION by wife to set aside domestic agreement.

Cunningham J. **(orally):**

1 Because it is important to have this issue dealt with expeditiously, I do not intend to be expansive in these reasons, Of course, I reserve the right to edit these oral reasons and expand upon them if necessary.

2 Mr. and Mrs. Currey were married in New York State April 12, 1980. Putting it mildly, this was a rather tumultuous relationship marked by a number of separations and reconciliations.

3 In 1985, after again reconciling, Mr. and Mrs. Currey decided that it would be in both of their interests to regularize their relationship and, accordingly, decided that a domestic agreement would be the best avenue.

4 Lloyd Brennan (now Mr. Justice Brennan), then a senior lawyer practicing in Ottawa, was consulted and eventually a Domestic Agreement dated December 16, 1985 was entered into.

5 Although Mrs. Currey had previously retained Jennifer Lynch, then a lawyer practicing primarily in the area of Family Law, by the time the agreement was signed, Ms. Lynch had been discharged and Mrs. Currey received her independent legal advice from Dalton McGuinty, then an Ottawa lawyer.

6 The issue before me at this stage is to determine whether Mr. Currey's failure to disclose a previous paternity agreement between himself and one Sandra Tracey and under which Mr. Currey committed to pay the sum of $300.00 per month to Ms. Tracey until the birth of the child and thereafter the sum of $400.00, constitutes a material non-disclosure such that the subsequent domestic contract ought to be set aside.

7 It is the position of the moving party, Mrs. Currey, that this agreement was made wholly in contemplation of the new *Family Law Act* which, by December 1985, had received two readings and which, for the purposes of the sections involved, was identical to the ultimate statute proclaimed in 1986.

8 Specifically, it is the position of the moving party that section 56(4) of the now *Family Law Act* is applicable, that it is retroactive and that it, in the circumstances of this non-disclosure, provides the statutory framework by which the Domestic Agreement ought to be set aside.

9 Counsel for the moving party points to several portions of the Domestic Agreement which, in his submission, illustrate that the proposed *Family Law Act* was to be incorporated into this Agreement.

10 Section 56(4) states that a court may, on application, set aside a domestic contract or a provision in it, (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made. Counsel for Mrs. Currey further submits that 56(7) makes it clear that parties may not contract out of the provisions of Section 56(4). So in essence it is the position of the moving party that if this Domestic Agreement was made in full contemplation of the *Family Law Act*, then one must take all of it, the good and the bad.

11 In argument, counsel for the moving party has referred me to current bar admission material and as well a paper written by Ruth Mesbur (now Madam Justice Mesbur) in January 1986 dealing with domestic contracts and, more particularly, the issue

of retroactivity. Both Gerald Sadvari and Ruth Mesbur seem to agree that Section 56(4) is to be applied retroactively. At page 5 of her article Ruth Mesbur states:

> What is also of critical importance in terms of section 56(4) is the operation of section 60(1) which provides that the Act applies to domestic contracts validly made prior to the Act. These contracts are deemed to be domestic contracts for the purposes of the Act, and by implication therefore, section 56(4) would appear to extent its influence to all existing domestic contracts. The consequences of this act of retroactivity are indeed awesome for there would appear to be no time limitation upon the application of section 60(1), nor would an intervening divorce appear to have any limiting effect either.

12 In his dissertation on the subject, Gerald Sadvari, for the Bar Admission Course, writes:

> What of agreements which pre-date the FLA? According to section 60(1), the provisions of the FLA apply to contracts "validly made" prior to the passage of the FLA. They are deemed to be domestic contracts for the purposes of the FLA, and therefore section 56(4) applies to them retroactively.

13 In support of his position, counsel for the moving party has referred me to *Demchuk v. Demchuk*, [1986] O.J. No. 1500 (Ont. H.C.), a decision of Clarke J. In this case the wife sought to set aside a separation agreement on the ground that, amongst other things, her husband failed to disclose a significant asset. While Clarke J. declined to give Mrs. Demchuk the relief she sought on the ground that she knew what she was signing and that she ought to have taken better steps to inform herself and that the agreement was neither unconscionable nor entered into under duress, he did, in passing, find Section 56(4) to be retroactive, relying upon Section 60. This was, as I have said, clearly obiter and was not germane to the issue which Clarke J. ultimately had to decide. Counsel for the moving party has also referred me to *Montreuil v. Montreuil*, [1999] O.J. No. 4450 (Ont. S.C.J.). In that case Aitken J. found that the husband knowingly misrepresented to his wife the value of his RRSP and the value of his interest in another significant asset when they were negotiating the agreement. In her reasons at paragraph 114, Madam Justice Aitken stated:

> The wife relied on the information provided to her by the husband in regard to assets, as well as his opinion regarding the value of the marina property. I find that the wife would not have signed the separation agreement in its current form had she realized the true value of the Registered Retirement Savings Plans and Mikes Marine at the time. These facts justify the separation agreement being set aside, both under section 56(4)(a) of the FLA and pursuant to the Common Law Doctrine of Material Misrepresentation which continues to be relevant under section 56(4)(c).

In her reasons at paragraph 101, Madam Justice Aitken agreed with he reasoning of Clarke J. in *Demchuk* (*supra*) and by implication that section 56(4) is retroactive.

14 In my view, neither of these cases have specifically pronounced, other than inferentially or in obiter, that the provisions of section 56(4) ought to be applied retroactively in circumstances such as those in the case at Bar.

15 It is the position of the moving party that this Paternity Agreement entered into just months before the Domestic Contract is a significant debt and/or liability which had it been disclosed, would have caused Mrs. Currey not to sign the Domestic Contract. In making this submission they rely upon the evidence of Lloyd Brennan who testified earlier in this trial that the disclosure of this information would have caused irreparable strain on an already fragile relationship and that in all likelihood, Mrs. Currey would not have signed the agreement. What I take from the evidence of Mr. Brennan is that the disclosure of Mr. Currey having fathered a child during a time when he and Mrs. Currey were separated, would have been troubling for Mrs. Currey to the point where the whole object of the exercise in late 1995 — reconciliation — would have been defeated. I do not take from the evidence of Mr. Brennan that the disclosure of this "liability" alone, without the emotional overtone, would have had the same effect.

16 Needless to say, in the exercise of my discretion, I have to determine whether this non-disclosure was significant such that its financial effect would have caused Mrs. Currey to rethink her position.

17 Counsel for the responding party argues that section 56(4) is not retroactive and that the law, so far as it goes, is quite clear in this regard. Let me for a moment deal with the term "significant" as set out within that section. In my view, the term significant must refer and be measured in the context of the entire relationship between the parties. At the time, Mr. Currey was earning between $75,000.00 and $100,000.00 a year. In strictly financial terms, a $400.00 monthly obligation was not significant and was rather minor relative to his income. Furthermore, this obligation was never used to reduce whatever benefits were to flow to Mrs. Currey in the event of separation. The test, therefore, ought to be first did the obligation in any way effect or reduce what the beneficiary was to receive. In other words, is there any connection between the $400.00 monthly obligation and what Mr. Currey agreed to provide in the event of their separation.

18 Secondly, did this obligation in any way impact on Mr. Currey's ability to fulfill his contractual obligation.

19 I answer both of those questions in the negative.

20 Counsel for the responding party referred me to *Klinger v. Klinger*, a decision of Scott J. [1993] O.J. No. 170 (Ont. Gen. Div.), in which the late Madam Justice Scott wrestled with this whole notion of retroactivity. Relying upon a decision of Granger J. in *Gregoric v. Gregoric* (1990), 4 O.R. (3d) 588 (Ont. Gen. Div.), Scott J. concluded that this section of the Family Law Act was not to be applied retroactively. In *Gregoric*, Granger J. at page 598 after referring to *Demchuk* stated:

> With great respect to Clarke L.J.S.C., I disagree that section 56(4) is to be applied retroactively. Subsection 60(1) and (2) are validating and continuing sections and do not appear to overcome the presumption that substantive legislative changes are presumed to be prospective only unless there is a clear indication to the contrary. When the legislature wanted the FLA to apply retroactively, it was clearly stated (see section 70). Accordingly, if the legislature had wanted section 56(4) to be applied retroactively, it would have also been clearly stated.

Madam Justice Scott also referred to the annotation of Professor James McLeod following the *Demchuk* decision in which he stated:

> It seems unduly harsh, given the general law of contract, to let spouses negotiate a contract and then to subsequently invalidate the contract. The courts have been slow to give effect to retroactive provisions in respect of property and contract law and even slower where the effect is to invalidate *bona fide* agreements. The better view is that the non-disclosure provision is not retroactive but prospective only.

21 I agree entirely with the reasoning of Granger J. and Professor McLeod and indeed the decision of the late Madam Justice Scott.

22 Even if I am wrong in that conclusion, in a full exercise of my discretion, I would not rescind this Domestic Agreement on the basis that Mr. Currey failed to disclose this obligation to the mother of his illegitimate child. This obligation, considered objectively, was not a significant liability (or debt) in the greater scheme of things and in my view, taken only for its monetary component, would not have caused Mrs. Currey not to sign the Domestic Agreement.

23 Support for this is found in the fact that in 1989 after Mr. and Mrs. Currey again separated, Mrs. Currey retained very competent matrimonial counsel in Ottawa. It was during that time that she learned of the Paternity Agreement. There is also a suggestion made by counsel for Mrs. Currey that correspondence leading up to the signing of the Domestic Agreement makes it clear she was to receive something in the order of $50,000.00 to set up her own business, an asset which she wanted to keep completely separate and away from Mr. Currey. While this may have been the subject of discussion between Mr. and Mrs. Currey, there never was a business established by her and consequently, there never was a request (or demand) for this $50,000.00 start up cost. I fail to see how this could have been an inducement for Mrs. Currey to sign this agreement but I expect I will hear further from her counsel on that subject. In any event, following the disclosure of the Paternity Agreement in 1989 Mrs. Currey did not move to set aside the agreement but rather reconciled for the next 7 years with Mr. Currey taking the full benefit of this marriage relationship. In my view, having taken no steps at that time, Mrs. Currey has effectively waived any rights to have this contract rescinded.

24 Accordingly, the motion to set aside this agreement on the strength of this non-disclosure is dismissed.

Motion dismissed.

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Sonia v. Ratan | 2022 ONSC 6340, 2022 CarswellOnt 17387 | (Ont. S.C.J., Dec 2, 2022)

2004 CarswellOnt 4401
Ontario Court of Appeal

Danylkiw v. Danylkiw

2004 CarswellOnt 4401, [2004] W.D.F.L. 612, [2004] O.J. No. 4411, 134 A.C.W.S. (3d) 843, 9 R.F.L. (6th) 93

JOSEPHINE DANYLKIW (Plaintiff / Appellant) and GEORGE DANYLKIW (Defendant / Respondent)

Moldaver, Sharpe JJ.A., Killeen J. (ad hoc)

Heard: October 18, 2004
Judgment: November 2, 2004
Docket: CA C39705, C40440

Proceedings: affirming *Danylkiw v. Danylkiw* (2003), 2003 CarswellOnt 457, 37 R.F.L. (5th) 43 (Ont. S.C.J.); additional reasons at *Danylkiw v. Danylkiw* (2003), 42 R.F.L. (5th) 40, 2003 CarswellOnt 3066 (Ont. S.C.J.); and affirming *Danylkiw v. Danylkiw* (2003), 42 R.F.L. (5th) 40, 2003 CarswellOnt 3066 (Ont. S.C.J.)

Counsel: Daphne Johnston for Appellant
D. Smith for Respondent

Subject: Family; Contracts; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles
Family law
VI Domestic contracts and settlements
VI.1 Validity
VI.1.d Lack of disclosure
Family law
XVII Practice and procedure
XVII.12 Miscellaneous
Headnote
Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — Lack of disclosure
Plaintiff wife brought action in 1993 — Parties entered into settlement agreement in 1996 — Wife brought action to set aside settlement — Action was dismissed — Wife appealed — Appeal dismissed — It would be very difficult to restore parties to position they were in prior to 1996 agreement — This constituted legally recognized reason for refusing rescission — Wife would have to repay certain payments made by husband and any order of rescission would have to take into account fact that wife had made substantial recovery from her former solicitors on account of same claims she wished to reassert against husband — It was within trial judge's discretion to conclude that difficulty of unravelling those issues was reason to refuse rescission.
Family law --- Support — Child support — Practice and procedure — General principles

Plaintiff wife brought action in 1993 — Parties entered into settlement agreement in 1996 — Wife brought action to set aside settlement — Action was dismissed — Wife appealed — Appeal dismissed — Principles of res judicata and issue estoppel provided legitimate juristic reason to justify refusal of equitable remedy of rescission — If wife wished to litigate additional issues, it was incumbent upon her to bring them forward so that all of her claims against husband could be dealt with at once — Wife's strategy of asserting succession of claims in series of actions or proceedings was not permitted in law — In view of protracted nature of proceedings, application of legal principle of cause of action estoppel was particularly significant — Wife sought rescission in order to achieve procedural tactic simply not permitted in law — It was within trial judge's discretion to refuse order on that ground and there was no reason to interfere with exercise of that discretion.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Plaintiff wife brought action in 1993 — Parties entered into settlement agreement in 1996 — Wife brought action to set aside settlement — Action was dismissed — Wife appealed — Appeal dismissed — Principles of res judicata and issue estoppel provided legitimate juristic reason to justify refusal of equitable remedy of rescission — If wife wished to litigate additional issues, it was incumbent upon her to bring them forward so that all of her claims against husband could be dealt with at once — Wife's strategy of asserting succession of claims in series of actions or proceedings was not permitted in law — In view of protracted nature of proceedings, application of legal principle of cause of action estoppel was particularly significant — Wife sought rescission in order to achieve procedural tactic simply not permitted in law — It was within trial judge's discretion to refuse order on that ground and there was no reason to interfere with exercise of that discretion.

APPEAL by plaintiff from judgments reported at *Danylkiw v. Danylkiw* (2003), 2003 CarswellOnt 457, 37 R.F.L. (5th) 43 (Ont. S.C.J.) and *Danylkiw v. Danylkiw* (2003), 42 R.F.L. (5th) 40, 2003 CarswellOnt 3066 (Ont. S.C.J.).

***Per curiam*:**

1 The central issue before us is whether, having made a finding of fraud, the trial judge erred in refusing to set aside the 1996 settlement. The appellant seeks to set aside the 1996 settlement in order to enable her to litigate the claims in her 1993 action and for spousal support and equalization. The appellant submits that there was no legal or equitable basis to justify the trial judge's refusal to grant rescission. We are unable to accept the appellant's submission.

2 In her reasons for judgment, reported at (2003) 37 R.F.L. (5th) 43, with supplementary reasons reported at (2003) 42 R.F.L. (5th) 40, the trial judge did not elaborate on why she was refusing to set aside the agreement, apart from the fact that there would be no purpose in doing so, given that the appellant had failed to establish any loss arising from the respondent's fraud. The trial judge gave full reasons to justify her decision in response to the appellant's subsequent motion for further relief. We see no error in those reasons.

3 First, as the trial judge observed, it would be very difficult, in view of all that has transpired, to restore the parties to the position they were in, prior to the 1996 agreement. That constitutes a legally recognized reason for refusing rescission. The appellant would have to repay certain payments made by the respondent and any order of rescission would have to take into account the fact that the appellant made a substantial recovery from her former solicitors on account of the same claims she wishes to reassert against the respondent. It was within the trial judge's discretion to conclude that the difficulty of unravelling all of these issues was a reason to refuse rescission.

4 Second, we agree with the trial judge that the principles of *res judicata* and issue estoppel provide a legitimate juristic reason to justify the refusal of the equitable remedy of rescission in the circumstances of this case. If the appellant wished to litigate additional issues, it was incumbent upon her to bring them forward so that all of her claims against the respondent could be dealt with at once. We recognize that the appellant's claim for additional child support arose in response to the respondent's motion to have child support reduced. However, the issues were complex and Rivard J. directed the trial of an issue. That trial certainly could have been expanded to embrace all of the appellant's claims. The appellant's strategy of asserting a succession of claims in a series of actions or proceedings is simply not permitted in law. As the trial judge correctly stated at paragraph 9 of her supplementary reasons, "cause of action estoppel extends to bar litigation of any claim a plaintiff could have or should have raised against the defendant arising from events that were the subject of an earlier claim". In view of the protracted nature of the proceedings between these parties, application of this legal principle is particularly significant in the circumstances of this case.

In effect, the appellant sought rescission in order to achieve a procedural tactic that is not simply permitted in law. It was within the trial judge's discretion to refuse the order on that ground and we see no reason to interfere with the exercise of that discretion.

5 We did not call upon the respondent to answer the appellant's submissions relating to the quantification of child support, interest or costs as, in our view, those grounds of appeal are without merit. We are not persuaded that there is any basis upon which we could interfere with the trial judge's costs award and we dismiss the application for leave to appeal costs.

6 Accordingly, the appeal is dismissed. The respondent is entitled to costs of the appeal. However, as the respondent's factum was not delivered until the morning of the appeal, we limit those costs to $7500, inclusive of GST and disbursements.

Appeal dismissed.

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2002 CarswellOnt 593
Ontario Superior Court of Justice

Patrick v. Patrick

2002 CarswellOnt 593, [2002] O.J. No. 639, [2002] O.T.C. 131, 112 A.C.W.S. (3d) 302

David Patrick, Plaintiff, (Husband) and Elena Patrick, Defendant, (Wife)

Mesbur J.

Heard: January 14-25, 2002
Judgment: February 20, 2002
Docket: 00-FA-9521

Counsel: *Gerald P. Sadvari*, *Kori Levitt*, for Plaintiff/Husband
Jodi Feldman, for Defendant/Wife

Subject: Family; Contracts

Related Abridgment Classifications

Family law
VI Domestic contracts and settlements
VI.1 Validity
VI.1.b Non est factum and lack of understanding
Family law
VI Domestic contracts and settlements
VI.1 Validity
VI.1.d Lack of disclosure
Family law
VIII Support
VIII.3 Spousal support
VIII.3.c Time-limited award/duty to become self-sufficient
Family law
X Custody and access
X.1 Best interests of child generally
X.1.i Miscellaneous

Headnote

Family law --- Custody and access — Factors to be considered in custody award — Miscellaneous factors
Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — Lack of disclosure
Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — Non est factum and lack of understanding
Family law --- Support — Spousal support under Divorce Act and provincial statutes — Time-limited award — Spouse to become self-sufficient

Table of Authorities

Cases considered by *Mesbur, J.*:

Ablaka v. Ablaka, 32 R.F.L. (3d) 369, 1991 CarswellOnt 268 (Ont. U.F.C.) — considered
Ablaka v. Ablaka, 1994 CarswellOnt 399, 4 R.F.L. (4th) 167, 1998 CarswellQue 480 (Ont. C.A.) — referred to
Pruss v. Pruss, 2000 CarswellOnt 3548, 12 R.F.L. (5th) 188 (Ont. S.C.J.) — considered
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Statutes considered:

Children's Law Reform Act, R.S.O. 1990, c. C.12

Generally — considered

s. 24(2)(d) — referred to

s. 24(2)(e) — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — considered

s. 5(6) — considered

s. 5(6)(g) — considered

s. 33 — considered

s. 33(8) — considered

s. 33(9) — considered

s. 33(9)(a) — considered

s. 33(9)(b) — considered

s. 33(9)(c) — considered

s. 33(9)(d) — considered

s. 33(9)(f) — considered

s. 56 — considered

s. 56(4) — considered

s. 56(4)(a) — considered

s. 56(7) — considered

ACTION by husband for divorce and corollary relief.

***Mesbur, J.*:**

Introduction:

1 David and Elena Patrick were married in 1993 and separated in 1999. They are the parents of a five-year old son, Jason. Although they recognize that Jason's best interests determine who will have custody of him, sadly, they disagree on what his best interests are. The court must therefore determine the appropriate custodial arrangement for Jason. The related issues of child support and spousal support, which the court must also decide, flow from the issue of Jason's custody. Finally, although the parties executed a marriage contract just prior to their marriage, Mrs. Patrick disputes its validity. The court must therefore also determine whether the contract binds the parties. If it does not, the parties are agreed in large part on the equalization payment Mr. Patrick must pay his wife. If the agreement is binding, there is no payment owing. These are the major issues that consumed ten days of trial.

Factual Background:

2 David Patrick is a 54 year-old businessman. His wife, Elena Patrick, is from Russia and is now 40. For ease of reference, I will refer to them, as they referred to one another, as "David" and "Elena". David and Elena met in a bank line at Christmas time in 1992 when Elena was in Canada visiting a friend. David extended holiday greetings to Elena and, although Elena spoke only Russian, David invited her and her friend to join him for dinner at a nearby Yorkville restaurant. During dinner, they were able to communicate with the assistance of translation from Elena's friend. After this dinner, they went out several times with the friend continuing to help with translating. Soon they were going out alone and by March, they had decided to live together in David's apartment in the Manulife Centre in Toronto.

3 David was thrilled to have a young, attractive woman interested in him. He was in his forties and had never been married. Elena had been married and divorced in Russia, and had a young son, Kirill, who was still living in Russia. Although there is some dispute about what David was led to believe about Elena's background, it is clear to me that she has a high school education from Russia, and did not work outside the home in Russia, having married young, and immediately became pregnant. After her divorce, she did not work outside the home, although she traveled with a boyfriend who was investigating business opportunities in Italy. When she and David met, she was here visiting a friend who had recently had a baby. Soon after they began their relationship, David introduced Elena to his family, who found her shy and sweet. By July of 1993, the couple was quite serious. They went on a holiday to western Canada. Elena described it as an advance honeymoon while David said he viewed it more as a test of their relationship. Whatever the purpose, they had a lovely time and on their return were married at City Hall on August 20, 1993.

4 The parties appeared to be under the impression that Elena's visitor's visa was expiring that day, which appears to have precipitated their plan to marry immediately at City Hall. However, it is now apparent from Exhibit 20 that the visa did not expire until late September. At the time of the parties' marriage, David was managing some retirement homes and had accumulated some significant assets, including a summer cottage in Muskoka, investment properties, and retirement savings. He testified that because of the disparity in their ages and the limited time he had known Elena, he wished to have a marriage contract. He said they discussed it some weeks prior to their marriage and he explained to her that such contracts were common in Canada with couples like them who had a large age difference.

5 Elena testified that the notion of a marriage contract was unknown to her, and unknown in Russia. She denied any discussion of the contract in any detail but said that David had told her such contracts were routine in Canada. She said they had no discussion about his assets and she assumed he did not have much since he lived in a small, sparsely furnished apartment and did not dress particularly well. She said, and I believe her, that at the time she had no knowledge of what RRSP's were and had no independent knowledge of David's wealth apart from visiting his Muskoka cottage. They lived comfortably and David was generous with her but did not explain the extent of his holdings to her. As well, it is clear that at this time, Elena had only limited facility with English and David spoke no Russian at all.

6 David wanted to protect all his premarital assets, particularly his cottage and RRSP's, and did not want to share in the growth of his net worth until it had reached a certain level. He found a solicitor, Mr. Marshall, whom he retained on August 16, 1993 to prepare a contract for him. On August 16, just four days before the wedding, he faxed Mr. Marshall a statement of his net worth. He met with Mr. Marshall and outlined his wishes. They discussed his wishes in the context of the operation of the *Family Law Act*[1] and Mr. Marshall immediately prepared a draft contract. On August 17, David faxed Mr. Marshall some changes, comments, and questions concerning this first draft. Mr. Marshall made the requested changes and then sent this revised draft to a Mr. Naimul Lodi, whom he had been led to believe would be acting for Elena. The next day, he sent a revised agreement to Mr. Lodi and later that day, sent a further revision. Mr. Marshall's changes to the agreement came from David's instructions to him. He had no idea whether David and Elena had discussed these changes or not.

7 Mr. Lodi was not a lawyer. He was employed in some capacity by a law firm called Rosenblatt Associates, a firm engaged in immigration matters. Neither Mr. Marshall nor David had any involvement in Elena's seeing Mr. Lodi. Mr. Harvey Wengle, Q.C. actually advised Elena concerning the contract. Mr. Wengle shared office space with the Rosenblatt firm at this time. He has been in continuous practice since 1955. Family law has made up about 10 to 15% of his practice. He has negotiated and drafted more than a dozen marriage contracts. Mr. Wengle testified that he has no current recollection of the circumstances

surrounding Elena's signing the contract. He did not recall if he had opened a file but stated that if he had, it would be long gone. Mr. Wengle relied on his invariable practice and his solicitor's affidavit appended to the contract to outline what he must have done in advising Elena about the contract.

8 First, the solicitor's affidavit states that he met with Elena twice, on the 17th and 19th of August. The affidavit goes on to say: "It was clear to me that Elena could not understand the English language and that her native language is Russian." He deposes as well that Mr. Lodi attended with Elena on both occasions and that Mr. Lodi "took oath before me that he speaks both the English and Russian languages fluently and that he would correctly interpret to Elena, in the Russian language, all advice given to her by me." In the affidavit Mr. Wengle swears: "I then proceeded to advise Elena as to the contents, nature, and effect of the annexed Agreement, all of which was interpreted into Russian by the said Naimul Lodi. I believe that Elena is fully aware of the contents and nature of the annexed Agreement and its effect on, and in light of, her present and future circumstances, and that she is signing it voluntarily."

9 Although Mr. Wengle did not recall these events, he testified that if he swore to them, that is what happened. He takes these affidavits seriously and would not swear one unless he had read it over and its contents were true. He denied that he viewed his role in advising on marriage contracts as simply "rubber stamping" them. Although he did not actually recall doing it, he said his invariable practice would have been to explain that the contract was excluding assets from sharing, and would have also outlined Elena's rights under the *Family Law Act* if there had been no contract. Again, Mr. Wengle did not remember the actual time he spend with Elena but confirmed the statement of account which detailed a total of 1.5 hours of meeting time with Mr. Wengle and Mr. Rosenblatt, as well as a further fee of $190 at $125 per hour for the second meeting when the agreement was executed, as being accurate. It would appear from the account that Mr. Wengle spent roughly 3 hours in reviewing the agreement and meeting with Elena.

10 Mr. Wengle commented that, having recently reviewed the agreement, it struck him as not generous, and he is sure that he would have advised Elena of his opinion. Elena confirmed this to some extent when she said she had the impression that Mr. Wengle didn't like her fiancé very much.

11 Mr. Wengle testified that he knew he was advising Elena and he knew she was signing the agreement the day before the wedding as was apparent from the contract itself. He confirmed that it would be better to have more time if possible. When asked what he would have advised Elena if she refused to sign, he responded that he understood the contract was necessary for her to get married and it would have been up to her if she wanted to sign or not.

12 I found Mr. Wengle to be entirely credible and find both his solicitor's affidavit and the account to be an accurate representation of both the time he spent and what occurred when he reviewed the agreement with Elena. Since both documents were prepared at the time the events occurred, I find they are likely more accurate than Elena's hazy recollection that she spend only five minutes with Mr. Wengle and that Mr. Lodi did not really speak Russian all that well. As a result, I must conclude that from the objective point of view of her solicitor, Elena had the agreement explained to her and signed it voluntarily. That, however, is not the end of the matter.

13 David's disclosure of his assets and liabilities, appended to the contract, is significantly deficient. He did not disclose either the existence of his RRSP's at the time, nor their value. At the time of the agreement, David had about $230,000 in RRSP's which represented about half the value of his disclosed assets. The contract had two main features. First, David's cottage, his RRSP's (present and future) and CPP contributions were to be exempt from any sharing with Elena at all. In addition, the parties were to share only increases in their respective "net worths" after the date of marriage once that increase had exceeded $250,000, and then only according to a "stepped" formula with sharing increasing over time. Neither the cottage nor RRSP's were to be included in calculating net worth. Although David did not disclose either the existence or the value of his RRSP's, he did disclose both the value of the cottage and the value of the outstanding encumbrances against it. Even his lawyer, Mr. Marshall, had no idea of the extent of David's RRSP's or even if he had any. Similarly, although from her solicitor's point of view, Elena understood the agreement and signed it voluntarily, I must also address whether she indeed understood the impact of the agreement. As well, I must consider whether Mr. Wengle could advise Elena adequately in the absence of complete financial disclosure. I will discuss the impact, if any, of these issues on the validity of the contract later in these reasons.

14 After their civil marriage at City Hall, David and Elena had a more formal celebration of their marriage at the National Club. They had a religious ceremony performed by Catholic clergy followed by a dinner for about forty guests.

15 From David's point of view, the marriage was happy until Jason was born. He thought that he and Elena were both happy in the marriage. Similarly, Elena found early married life comfortable, seeing her few friends and keeping house for David. Elena did not work outside the home, and David did not really expect her to, although they had some discussions about the possibility of her selling a line of home products, or perhaps opening a clothing store. Nothing came of these plans. Although he did not give Elena any control over any money of her own, David was generous financially. For example, he purchased a $2,500 Chanel handbag for Elena and she was able to shop at expensive and exclusive stores for clothes, indulging her love of beautiful clothing.

16 In October of 1994, David sponsored Elena's son Kirill to come to Canada as a landed immigrant. Kirill was then about 11 years old and had not seen his mother for about two years. The parties decided to change Kirill's surname to "Patrick" and took the legal steps to do so. David got Kirill enrolled in a local school and the parties rented a home in north Toronto near schools, parks, and skating rinks. David arranged for English as a second language (ESL) classes for Kirill, sent him to a summer camp, and got him involved in hockey and soccer. Although Elena made many allegations of David's being abusive to Kirill and suggested that she had much evidence to support her claims, she called none. I have no doubt that David tried to be a father to Kirill. I also have no doubt that David may have been impatient and demanding with Kirill as well. Dr. Awad, the child custody assessor, had the opportunity to meet with Kirill. Kirill described David to Dr. Awad as "very strict", getting "mad at small things", and "impatient". Kirill also complained about David yelling at him. David is an intelligent and highly controlling individual. I am sure he was demanding of Kirill while Elena was more "*laissez faire*" as a parent. Currently, Kirill is not in school, having dropped out several times. He is not working. On occasion, he has left home and lived briefly on his own. Kirill has had some difficulties with the police as well. Although Elena's claims originally included a claim for support for Kirill, she is not pursuing that claim now.

17 Jason's birth was planned. Elena testified that she and David had never consummated their marriage, that David was effectively impotent, and that Jason's conception was the first time they had intercourse. David stated that they had had sex prior to this. The true facts of their sexual relationship are immaterial to the issues before me, although they consumed considerable time with the assessor, and some court time as well. Whatever their sexual relationship, Elena approached David about the possibility of having a child together. She stated that she thought having his own child might make David a better father to Kirill. They discussed having a baby. They agreed Elena would have a nanny for the baby at least three days a week in order to give her a break. In addition, Elena was concerned about the marriage contract and wanted it cancelled. As she put it, she told David she didn't like signing things she didn't understand and wanted him to cancel the contract to prove he wanted to be with her and be a family. Although David denies he ever agreed to cancel the contract, he did consult a new lawyer to prepare a revised contract which rescinded the original contract, made specific reference to the existence and value of David's RRSP's at the date of marriage, excluded only RRSP's and their growth from any sharing on marriage breakdown, but otherwise preserved the parties' rights under the *Family Law Act*. David signed this new agreement and presented it to Elena just a few days before Jason was born in July of 1996. She did not sign it. The contract, and its cancellation, were to become major issues between the parties.

18 David now says that becoming pregnant was part of Elena's overall plan to entrap him in some way. Whatever their actual motivations, they agreed that David would stop drinking for several weeks before they attempted to conceive a child. He did this. Elena became pregnant at once and the parties were thrilled at the pregnancy. Elena described her pregnancy as difficult, with the baby moving a great deal, and her having trouble sleeping. She complained that David's snoring made it even harder for her and she was forced to move out of the marital bed in order to get some rest. After Jason's birth, the parties did not sleep in the same bed again. The parties' relationship deteriorated after Jason's birth as did David's relationship with Kirill. David stated that his and Elena's focus on the new baby no doubt had an impact on Kirill. His behavior became more uncontrolled, with truancy, late nights, and brushes with the police. The situation in the home became more and more strained.

19 The contract remained a focus of Elena's concerns. She says she gave David an ultimatum sometime in the fall of 1998 to cancel the contract within six months. Prior to her six-month deadline, David had a business meeting in the Caribbean island of

Nevus. He wanted Elena to accompany him. He told her to do some shopping for herself for the trip. He claims he gave her a budget; she denies it. She spent a great deal of money on new clothes for the trip. This upset David. After they returned home, there was still no cancelation of the contract. Elena consulted Mr. Wengle about a separation. Mr. Wengle was the only lawyer she knew. On her instructions, he wrote to David, in April 1999, advising that the marriage was over.

20 David was shocked and upset to receive the letter although he, himself, had been thinking about separating and said that he considered that Elena had "beaten him to the punch". After receiving the letter, David consulted counsel and made some financial disclosure to Elena's new counsel whom she had retained after Mr. Wengle. Even though they had both retained counsel, David and Elena continued to live together under the same roof. To a large degree, their lives remained unchanged. David continued to pay the household bills and would give Elena some grocery money on a weekly basis. However, over May and June of 1999, Elena used David's credit cards, without his permission, to purchase some $20,000 in clothing for herself. David was able to obtain a refund of $5,000 from one of the credit card companies, citing unauthorized use of his card. He has paid for the balance of the unauthorized purchases. He was distraught and upset when he discovered the charges.

21 By the summer of 1999, David became suspicious about where Elena was spending her days. He began to track her movements and eventually hired private investigators to follow her. They discovered she was working as an exotic dancer at two strip clubs in the Brampton area. She continues to do so, although she claims she would quit if she received sufficient spousal support. Elena claims that she has no other skills and working in this fashion allows her to work only those hours that suit her, thus giving more flexibility than either a regular full-time or part-time job in a more traditional occupation.

22 Much was made of Elena's work as a stripper. The parties disputed whether she abides by the rules of the establishment that prohibit physical contact with patrons. However, this is immaterial to the issues I must decide. The only relevance that her occupation has is to the issues of its impact, if any, on Jason's best interests, and on her ability to earn income.

23 Dr. George Awad, an experienced and well-respected child psychiatrist and custody assessor, was retained jointly by the parties to conduct a custody assessment concerning Jason. Dr. Awad expressed concern regarding the impact Elena's occupation might have on Jason's self esteem in the future if he learns what his mother does for a living. I share this concern. However, at present, Jason has no knowledge of his mother's occupation. Given her present age of over forty, I accept Elena's evidence that it is unlikely she can continue in this business for long. This was confirmed by Mr. Parish, one of the private investigators, who testified that he observed that Elena was substantially older than the other dancers working in the club.

24 As to Elena's income, it is virtually impossible to discern what her real income is from stripping. Andrew Rayne, a retired RCMP officer who now works as a private investigator, testified that Elena told him she was earning between $3,000 to $3,500 per week. This was in response to his telling her he would like to hire her to work for him and would match her current earnings. Elena testified that, of course she was exaggerating her earnings to him, and in any case, it is routine to lie to customers about such things. She denied ever earning that much. Mr. Rayne also testified that Elena told him she danced to pay her legal fees, and to pay for her shopping habit. On cross-examination, Elena was unable to give any meaningful idea of how many days or hours she works per week, or how much she generally earns. Her most recent financial statement shows earnings of only $50 per week, contrasted with the investigators' evidence that in one day, each observed Elena performing well in excess of 20 dances for which she was paid $20 per dance. She must pay a fee of $25 per shift from her earnings. Notwithstanding the investigators' evidence, Elena testified that on a busy day she would be at the club for about four hours and do perhaps five dances. Even at that rate, or slightly more, which is substantially less than the investigators' observations, and assuming working only part time, Elena is still likely to be able to earn in the range of at least $300 to $400 per week. This income is not out of the range of what she might earn at another entry level type of job. She may earn significantly more; however, the evidence is far from compelling. On the balance of probabilities, I find Elena's current income and income earning capacity to be in the range of at least $15,000 to $20,000 per year.

25 By sometime in 1999 Elena had met a man, Jeffrey Nourse, with whom she developed a relationship. Elena stated that she did not begin to date him until some time in 2000. However, by either April or July 1999 (the date is unclear), Elena was using Mr. Nourse's credit card to purchase appliances for his home. This flies in the face of her assertion that their relationship did not commence until 2000. During her relationship with Mr. Nourse, Elena took Jason to Mr. Nourse's home in Newmarket

to spend weekends there. This would be of little or no concern, except for Mr. Nourse's abusive behavior toward Elena. In early February 2001, Elena complained to her family doctor about being attacked and sexually assaulted by Mr. Nourse. Her doctor's notes indicate that she was in severe emotional distress, with bruises all over her body, breasts, neck face and extremities, and with a few scratches on the neck. After this attack, she had an abortion in March 2001. The hospital records show Elena also had abortions in November 2000, and in January 2001. She attributed one of these pregnancies to Mr. Nourse, and the other to her husband, as a result of an alleged rape, which she reported to Dr. Awad. David denies any rape. Prior to the custody assessment, Elena had not complained of any sexual assault by her husband. In fact, in April 1999, she was reporting to her family doctor that she was a married, 38 year-old housewife, wanting to have a third child. She did not see her family doctor concerning the two terminated pregnancies in either November 2000 or January 2001, and there is no other medical evidence concerning the circumstances surrounding these pregnancies, other than the hospital records of the abortions themselves. The hospital records make no mention of rape.

26 By July 13, 2001, Elena was complaining to her family doctor about her legal problems, that she was separating from her husband, that she was not working and had no profession, and had no support from anyone. This was not entirely true. David was continuing to pay all the household bills and buy the groceries. Elena was working as a stripper. A few days after this appointment, she obtained an order for spousal support of $2,000 per month. I mention all of this as an indication that Elena's evidence has been less than reliable.

27 From the time of the letter announcing the separation in April 1999, until early August 2001, David and Elena continued to live under the same roof in their jointly owned matrimonial home. During this joint occupation, the police had been consulted in various capacities. In November 1999, Elena contacted the police complaining about "an outburst by her husband in which he was verbally abusive to her and her son (3yrs)". Elena stated her husband was a severe alcoholic and that she was attempting to get a divorce but her husband was uncooperative. She also advised the police that her husband had never been physically abusive toward her or the children. The police never contacted David about this complaint. Although Elena complained about David's excessive drinking and belligerence when drunk, she called no independent evidence to corroborate it. Both David and his sisters deny that he has any problems with alcohol abuse.

28 On December 12, 2000, Elena reported a burglary at the matrimonial home. The police report indicates they determined that "this is an ongoing domestic involving custody of a 4 year old child". The report also stated that during their break and enter investigation, Elena "wished to report an assault that occurred on December 11 th by the suspect [David]. She stated she was beaten and received bruises to her throat, chest and hands." No medical evidence corroborates this. The police report goes on to say that Elena reported that when she threatened to call the police, her husband left with the four year old son and she had not seen him since. The police report notes that "there were no visible signs of injuries on the victim".

29 The police followed up with further investigation of the break and enter. Their investigation is reported in their occurrence report dated December 19, 2000. In that report, Elena told the police that she and David were in the midst of an ugly divorce and that David had moved out of the house with their son. She added that she had been seeing another man for about two years and her son Kirill had broken into this man's house in Newmarket the previous June. As to the break-in at the matrimonial home, the police found no evidence of forced entry to either the front or back doors but a basement window was broken and two bedrooms were the target of the instruction. Elena accused David of being responsible for the break-in. She reported that expensive clothes, cash, and jewellery had been taken. This included $100,000 in cash, divided into two plastic bags, each containing $50,000, from under her mattress, a mink coat, a Cartier watch, a 1 carat diamond solitaire ring, which she valued at $20,000, a tennis bracelet, which she also valued at $20,000, and numerous other items of valuable jewellery. None of these items of jewellery or clothing appeared on the financial statement that Elena had sworn in June of 1999. In fact, David testified that he had never seen any of these items. On cross-examination, Elena admitted that she had "made up" the figure of $100,000 in cash "out of panic". She said she had just made up the story because she was very upset. She said she only had cash of about $20,000 which she had borrowed from friends to pay her lawyer. She refused to disclose the names of any of the friends from whom she had borrowed any money. None of them testified. Again, the police reports and Elena's testimony at trial are an indication of the general unreliability of Elena's evidence.

30 On the events of mid-December 2000, I believe David's version of what happened. He stated that in November 2000, Elena had broken up with Mr. Nourse. The breakup was violent and ugly. Mr. Nourse was threatening to kill Elena. He was leaving threatening messages on the Patrick's voicemail at their home. Elena even warned David not to answer the door if a strange man came to the door. She described this man as someone who wanted to marry her, but whom she did not want to marry. Notwithstanding Nourse's threats, Elena took Jason away for the weekend of December 8 and 9, and refused to tell David where she was going. She took Jason again on the 13 th of December. David became increasingly concerned about Jason's safety and decided to start legal proceedings for custody of Jason.

31 The parties had been alternating weekends with Jason. The weekend of December 16 and 17 was David's weekend. David simply kept Jason after the weekend, and started these proceedings urgently. While he was with Jason, David called Elena to let her know Jason was all right. David and Jason initially stayed in a hotel, but then moved to David's sister Peni's the night of December 20. David had Jason call his mother from Peni's. Jason told Elena they were at Auntie Peni's. At about 4 o'clock the following morning, someone threw a rock through Peni's living room window and someone also vandalized David's car. David, of course, blames Elena for this vandalism. She denies it. Later that same day, the parties were in court and Lissaman J., made an order granting the parties interim-interim joint custody of Jason. The order required Jason to remain in the matrimonial home and directed the parties to conduct themselves in a "live and let live manner". This arrangement continued until August 2001.

32 In early August 2001, Elena complained to the police that David had assaulted her. She described a quarrel about Jason's lunch for daycamp that escalated into a heated argument. At trial, she testified that she ran up the stairs, David grabbed her leg, and then punched her. She complained to the police who then arrested David on a charge of assault. David denies any assault. However, as a result of the charges David's bail terms do not permit him to enter the matrimonial home or to communicate either directly or indirectly with Elena. These criminal charges are still outstanding.

33 After David's arrest, two weeks went by without his seeing Jason. In part this was as a result of Elena's lawyer being away on holidays and Elena not wishing to agree to any access without her lawyer's advice. On August 14, David obtained an order from Backhouse J. granting him weekly access to Jason from Thursday to Monday. That is the current *status quo*. Jason now spends every week from Monday to Thursday with his mother, and every weekend from Thursday evening to Monday morning with his father. This is the arrangement Elena would like to continue, although her position in the custody assessment was that she should have custody. David now seeks sole custody of Jason, with primary residence with him, even though his initial position with Dr. Awad was that he was seeking 50/50 time with Jason. Each party's position at trial has been influenced by Dr. Awad's recommendations. Dr. Awad has recommended that David have sole custody of Jason and that Elena have access on alternate weekends from Friday to Monday morning, and Wednesdays overnight. He also recommends that the parties share all holiday time equally.

34 Dr. Awad is an experienced and respected custody assessor. Elena takes significant issue with the assessment, suggesting that Dr. Awad exhibited both bias toward her because of her occupation and nationality, and a misogynistic attitude that permeated his assessment. There is no question Dr. Awad found Elena quite unreliable in the things she reported to him. I share his view, although for the different reasons I have already articulated. Elena's counsel attacked Dr. Awad, suggesting he was influenced against Elena because of her occupation. I accept Dr. Awad's evidence that being a stripper is not a measure of parenting ability. His concern about Elena's stripping has more to do with its impact on Jason's self esteem. He stated that his recommendations are based on Elena's personality style, and not on her career. He does not suggest Elena is not a good mother. There is no question she loves Jason and he loves her. However, as Dr. Awad puts it, he has to look at the total situation. He does not doubt Elena's love for Jason; he simply states that love is not enough. A child needs more, and he views David as able to provide more for Jason than Elena can.

Jason's best interests:

35 In looking at Jason's best interests, I begin with determination of Jason's needs, and the parties' abilities to meet those needs, in the context of the criteria under the *Children's Law Reform Act* [2] . Jason is a five year-old boy who needs love, nuturing, and stability. He needs to be provided with guidance and education, and the necessaries of life. To date, Jason has not evidenced

any special needs that require particular emphasis. Jason lives in a city where he has aunts, uncles, and cousins. They are part of his extended family, and his continued relationship with them forms part of his overall needs. Jason also has a half-brother Kirill, who is part of his extended family. Even though he is only five, Jason's wishes are of some importance as well. In order to address Jason's needs and circumstances I must consider the parties themselves and what each has to offer Jason. I must also consider Dr. Awad's assessment. However, while Dr. Awad's assessment is an important piece of evidence, the court cannot simply accept his recommendations without making its own independent determination of Jason's best interests.

36 Looking first at the parties themselves, David presented at trial as a highly competent, controlled, and controlling individual. The psychological test report that Dr. Awad obtained concerning David describes him as "an emotional man who is usually well able to maintain control over the experience and expression of his feelings". The test profiles showed him to have "a fragile sense of self-esteem, which is strongly defended." He needs to be seen as competent and well adjusted. However, "when he feels insecure, he is likely to resort to rationalization and to criticizing and blaming others for the difficulties at hand. He will minimize and avoid acknowledging his own weaknesses or contribution to the difficulty, which will be exasperating to others." These personality traits came through clearly in both David's testimony at trial and in Dr. Awad's clinical impression of him. I have no doubt that David is particularly controlling about money and that this was a major source of conflict within the marriage.

37 Elena presented at trial as often unable to focus on the issues confronting her and re-focusing only on the matters she wished to discuss. While some of this may result from her lack of facility with English, particularly as she became more fatigued during her testimony, to a large degree her lack of responsiveness and rigidity in her testimony are reflective of the personality traits outlined in the psychological report about her and Dr. Awad's clinical observations of her. The psychological report describes Elena as portraying herself in an unrealistic manner, with strong defensiveness, a lack of insight, and an unwillingness to acknowledge personal weaknesses. It goes on to say that she is "prone to feel quickly overwhelmed by external demands". When she is, "she is likely to react in oppositional ways and withdraw from the demands placed on her". Although the psychological report describes Elena as an ambitious woman, it goes on to say "she is prone to set herself goals which are unrealistically high. When she encounters difficulties in reaching them, oppositional behaviors, anger, and depressive states are likely to occur." The comments on her test scores indicate "an increased likelihood of impulsive behaviors, family conflict and difficulties with delay of gratification." Test results also show her to be "quite insecure and fearful of being left alone to take care of herself without the support of others."

38 Dr. Awad's clinical observations of the parties confirmed, in large part, the results of the psychological testing. He describes David as a naïve individual who still could not understand why his relationship with his wife was over. He found Elena to be emotionally rigid having an expectation she should have custody simply because she is the mother. He also observed that she is mistrustful of others and avoids intimate relationships. He expressed concern over her relationship with Mr. Nourse and whether it was truly over. In addition, as a result of her three abortions in a short period of time, he was concerned that she was using abortion as a birth control method and, as a result, viewed her as still living in Russia emotionally, psychologically and mentally. He considered her use of abortion as an indication that she is a "rigid, cognitively and emotionally limited woman, who has not grown up emotionally and has not adapted to Canadian society". Dr. Saunders, the psychologist who administered the psychological testing, expressed some concern over the validity of the results given some of Elena's limitations with English. Dr. Awad discussed this issue directly with Dr. Saunders and his interpretation of her results accords with his own clinical observations of Elena. My impression coincides to a large degree with theirs.

39 Elena's evidence was often filled with asides and *non sequiturs*, such as sudden references to David's purchasing health insurance for her mother, or her complete inability to respond to her counsel's question about the effect of her continued stripping on Jason's self esteem. Her response focused entirely on her view that Dr. Awad is biased against Russian women. She could not focus on Jason and the impact her profession might have on his self esteem. When asked how she felt about Dr. Awad's recommendations, Elena responded that the situation between her and David was all about money. David was mad that she left him and he doesn't want to pay her support. She went on to add that if Jason is with her, David will have to pay support. When asked whether she has any weaknesses as a mother, Elena responded that she could be a better mother when she has a "private normal life" and "when she gets a divorce". These kinds of responses confirm to me Dr. Awad's general conclusions about Elena's personality type, namely that she is rigid, with significant oppositional tendencies, and little insight.

40 Dr. Awad's observations of the parties with Jason led him to conclude that David has a comfortable and emotional tie with Jason. They interacted well together. Jason seemed comfortable and communicative with his father. Similarly, Dr. Awad noted that there is a strong emotional tie between Jason and Elena. Jason feels very comfortable with her, both emotionally and physically, and was happy to be with her. Dr. Awad's conclusions were borne out by the warm and loving way each of the parents described their relationship with their son. David spoke of playing sports with Jason, skating and skiing together, and teaching him to play chess. He described his involvement in Jason's early care, feeding and changing him. David described his early involvement as being equal to Elena's. In my view, he has exaggerated his time with Jason, given the demands of his work schedule. That is not to say he was uninvolved; rather, during Jason's infancy, Elena spent more time with him.

41 Elena spoke warmly of teaching Jason to pray, or "talk to the angels", as she put it. She described cutting up fruits and vegetables for him for snack, or getting up early in the morning to fry chicken wings for his lunch. He likes to hear her tell stories of her girlhood, and other stories, and he tells her stories of his own. They do many activities together, such as going to movies, museums, and the like. Both parents have much to offer Jason.

42 Dr. Awad recognized that Jason has a strong emotional tie with both his parents. He loves them both and they love him. However, as Dr. Awad opined, love is not enough. He is of the view that while Elena has important things to offer Jason, David has more. In Dr. Awad's view, both David's and Jason's ongoing relationship with David's extended family is a critical factor in Jason's future care and upbringing. Both of David's sisters live in Toronto. His sister Alison is a nurse, with a masters in nursing. She has worked as a nursing unit administrator of emergency departments for the last ten years. She and her husband have three sons, Matthew, 18, Andrew, 11, and Conor, 7. Conor and Jason are particularly close, and enjoy playing together. Each asks about the other, and when they can play again. Alison described her relationship with David as close and loving. It has become more so since David and Elena separated. Alison and her family have been an important support to David while providing the additional benefits of a warm and loving extended family to Jason.

43 Alison described Elena's attitude to the family as being disdainful, contemptuous and detached. Dr. Awad also noted this attitude and expressed concern that Elena would isolate Jason not only from his father, but also from his extended family who could be a source of socialization and support for Jason. Elena seems extremely isolated. She called no witnesses to support her case, not a friend, not a neighbour, not a parent of a friend of Jason's — no one who could give any independent evidence of her relationship with her son and her parenting ability. Even though witnesses like that are generally partisan to a degree, their complete absence gives credence to Dr. Awad's concerns about Elena's isolation. She herself talked about having no friends or family here, only her children. I am concerned about the impact of Elena's personal isolation and animosity to David's family on Jason.

44 David's sister Peni also testified. She teaches pre-service education, to primary teachers, at York University in the faculty of education. She also described a warm familial relationship with her brother. Although she and her husband did not socialize routinely with David and Elena, they saw one another regularly for holidays and special occasions. Her children, aged 17 and 11, also have a close relationship with their young cousin Jason. Despite the differences in their ages, they ski together, play soccer, basketball and games together, and watch movies. Peni has kept toys from when her children were younger and Jason enjoys playing with them in her basement. She described Kirill's arrival in Canada, and David's attempts to forge bonds between him and "the cousins", taking them for boat rides at the cottage, taking them to play baseball. Kirill called her "Auntie Peni", and she viewed him as her nephew. She described David with Jason, building Lego together, reading before bed, patiently teaching Jason to ski. She expressed concern about what she called Elena's vindictiveness, and fear that she and her family may be cut off from contact with their nephew.

45 Dr. Awad placed a great deal of weight on the love and support David's extended family offers Jason, and the importance of this ongoing relationship to him. As Dr. Awad put it in cross-examination, his concern is that Elena's personality would put down David and his family and exclude Jason from them, leading Jason to lead an isolated life. I share these concerns.

46 When I consider all the relevant factors under the *Children's Law Reform Act*, I conclude that each of the parents has strong bonds of love, affection and emotional ties with Jason. Dr. Awad stated that Jason expressed a preference for being with

his mother; however, during the assessment, he attributed it in large part to Elena's imposing fewer limits and giving Jason more toys while the assessment process was going on. In her testimony, Elena described a conversation with Jason that occurred during the course of the trial. She reported that Jason started to cry after saying his prayers one night, saying he wanted mommy and daddy to live together. I suspect this is far closer to Jason's true wishes; unfortunately, it is not a wish this court can fulfil.

47 The *Children's Law Reform Act* also requires the court to consider the time the child has lived in a stable home environment. Jason was living in what Justice Lissaman J. described as a "live and let live" environment until the assault charges last summer. Since then he has spent weekdays with his mother and every weekend with his father. This is the situation Elena would like to continue, even though it would mean Jason's time with her would be reduced once he starts being in school for full days starting in September. I do not view the current arrangement as being stable; at best, it has been a temporary stop-gap, which neither of the parties initially wished to see continue.

48 Each of the parties is single and thus provides some stability of family unit for Jason. However, I am concerned about the stability of Elena's relationship with Kirill and whether he will continue to reside with her. I have no doubt that Kirill is an important feature in Jason's life. Since Kirill has left home before, I am concerned about the stability and permanence of the family unit Elena proposes when Kirill may come and go, causing disruption and loss to Jason.

49 Critical factors in determining Jason's best interests are those set out in paragraphs (d) and (e) of subsection 24(2) of the *Children's Law Reform Act*. It is here that the balance tips in favour of David. Elena's plans for the future of Jason and herself are somewhat formless. She states that she simply wishes to live in the house and have the financial ability to take her children to Disneyland, to give them nice soft love, as she put it. David, for his part, has a clear plan. He proposes to take a short leave of absence from work to settle Jason into whatever new routine the court imposes. He recognizes that Jason could use some additional socialization in the afternoons, since he is only in a half day programme at school. He has investigated some additional half day placements for Jason. He is investigating potential schools for Jason for the fall, when he will be starting grade one. He is active and involved in Jason's school, as confirmed by Jason's teacher and school principal. Most importantly, David has the love and support of his extended family, who provide stability, warmth, love and family life for Jason. Jason needs to stay connected with his aunts, uncles, and cousins. David's plans are focused on Jason's needs.

50 Elena has a fairly hands-off relationship with Jason's school, attending school functions, but not having much contact with his teachers other than to exchange pleasantries. David is more involved with the school and Elena concedes that schooling, sports, and extracurricular activities are areas where David should have the responsibility of making decisions. Dr. Awad was of the view that Jason should spend more time with David during the school year because of David's better ability to deal with the school and issues surrounding Jason's education. Dr. Awad conceded that having Jason spend an extra day per week with his mother would not adversely affect him. I am concerned that Dr. Awad's recommendation would have Jason go a whole week without seeing his mother. At present, he does not go more than four days without seeing each parent. At his age and stage of development, a change of the magnitude suggested by Dr. Awad would be upsetting and difficult for him. It would not be in his best interests. I agree however, that given the parties' respective strengths and weaknesses and their inability to consult with one another, it is most appropriate for David to have custody of Jason. Jason will make his primary residence with his father. Jason will reside with his mother on alternate weekends from Friday after school until Monday morning at school, and on Tuesdays and Thursdays, overnight. All vacation time will be shared equally as Dr. Awad recommends. David will consult with Elena concerning Jason's school and extracurricular activities prior to making any decision about these matters. David will not book any additional programmes for Jason on either Tuesday or Thursday afternoons. If the parties are unable to agree on these issues, then David will have the responsibility of making the final decision.

The validity of the marriage contract and property issues:

51 Elena attacks the validity of the marriage contract on a number of bases. She suggests that she signed it under duress, and without appropriate independent legal advice. I am satisfied, on the basis of Mr. Wengle's evidence and his affidavit attached to the contract, that Elena was not under duress and had independent legal advice prior to signing the agreement. Elena also complains about David's failure to disclose either the existence or the value of his RRSP's. Lack of proper financial disclosure

is a potential vitiating element under s. 56(4)(a) of the *Family Law Act*, which provides that the court may set aside a domestic contract:

> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made; ...

52 Here, there is no question David failed to disclose a significant asset. He suggests his failure to disclose is immaterial, since his RRSP's were not to be shared at any time, whatever their value. The difficulty with this position is that it ignores an essential element of marriage contracts. Marriage contracts are a device by which parties can opt out of most or part of the *Family Law Act*, its property provisions, its support provisions, or both. Fundamental to a choice to opt out of the legislative scheme is a clear understanding of what one's rights and obligations might be if there were no marriage contract. It is in this context that financial disclosure is critical. What is the effect of David's failure to disclose? He may be right that the disclosure was "immaterial" because the RRSP's were to be exempt from sharing regardless of their value. Subsection 56(4) does not apply only to "material" non-disclosure. The court has a discretion to set aside an agreement for failure to disclose, *simpliciter*. Here, the effect of David's failure to disclose was two-fold. First, it deprived Mr. Wengle of an opportunity to advise Elena in a meaningful way of what her likely rights might be under the *Family Law Act*. Knowing David had an RRSP of $230,000 going into the marriage would create an expectation of reasonable growth in that asset and a share in that growth. Adding an additional $230,000 of premarital asset value on David's side of the ledger would have been material to any lawyer adequately advising a client about rights under the *Family Law Act*. Giving up a share in the growth in a $230,000 asset is materially different than giving up a share in the growth of an asset that you are led to believe does not exist at the date of marriage and in fact may never come into existence.

53 It is important to analyse s. 56(4) in the context of both the common law and the statute itself. At common law, a contract can be set aside for a material misrepresentation if there has been a deliberate misrepresentation concerning a material fact, and the opposing party relied on the misrepresentation as an inducement to enter the contract. Subsection 56(4) provides that a domestic contract can be set aside in accordance with the law of contract, as well as for the non-disclosure contemplated by s. 56(4)(a). Paragraph (a) contains no requirement that the failure to disclose be either material, deliberate, or relied upon. The legislation places a positive duty on every spouse to make complete, fair and frank financial disclosure before the contract is entered into, whether or not the other party requests it. I conclude that a request for information, and a refusal to provide it, is not necessary to engage the operation of s. 56(4) since, by virtue of s. 56(7), s. 56(4) will apply despite any agreement to the contrary. Parties are, therefore, not even permitted to contract out of the obligation to disclose. On a plain reading of section 56 as a whole, I conclude that a simple failure to disclose significant assets existing at the date the contract was made is sufficient for the court to exercise its discretion and set aside the agreement.

54 David relies on *Ablaka v. Ablaka*, [3] to support his view that the lack of formal financial disclosure is not fatal to the enforceability of a domestic contract where the other party had knowledge of the assets by other means. *Ablaka* upheld a separation agreement in circumstances where each party was aware of the other's assets and liabilities, even though there was no formal financial disclosure. Here, however, I am satisfied that Elena had no knowledge of David's RRSP's by other means. She had no knowledge of what an RRSP was, let alone what David's holdings were. David also relies on *Pruss v. Pruss* [4] to support his view that his lack of disclosure should not affect the validity of the agreement. In *Pruss*, a wife failed to have a separation agreement set aside on the basis of lack of financial disclosure. There, the court held that there was no evidence the wife only discovered the existence of the undisclosed asset after the agreement was signed. *Pruss* , of course, again deals with a separation agreement, rather than a marriage contract. Similarly, in *Rosen v. Rosen*, [5] the Court of Appeal reversed the trial judge's decision to set aside a separation agreement because the wife had a somewhat accurate idea of the value of her husband's assets and had consulted with several matrimonial lawyers prior to signing the agreement. A fundamental difference, however, between these cases and the current situation is that here, the domestic contract is a marriage contract. Unlike separation agreements, marriage contracts are contracts *uberrimae fidei*, contracts requiring the utmost fidelity and good faith between the parties. A greater duty of dealing in good faith is owed in marriage contracts. Because of the special relationship between the parties as intended spouses, they are not entirely at arm's length and thus owe one another duties of good faith and fair dealing.

55 Another concern about the contract is the extent of Elena's actual understanding of it. She could not speak English and although Mr. Wengle arranged for the agreement and his advice to be translated to her, there is no evidence of the adequacy of the translation or of Elena's actual understanding of what was being translated. Neither party called Mr. Lodi as a witness. I assume had David called him, his evidence would have supported the adequacy of the translation and Elena's understanding of both the agreement and Mr. Wengle's advice. Conversely, had Elena called him, no doubt his evidence would have supported the opposite conclusion. Since he did not testify, I can draw no conclusion other than to be concerned about the true extent of Elena's understanding of what she signed, given my own observations of her, and her current facility with both spoken and written English. Although Elena understands English reasonably well, and can speak it well enough to make herself reasonably understood, even now she cannot read English well enough to read a newspaper. At the time she signed the agreement, Elena could not even speak English. Elena expressed concern that the contract had not been translated into Russian, so she could read it herself. No doubt that would have aided somewhat in her comprehension. Here, she was not even able to read the document itself, but was limited to whatever explanation Mr. Lodi gave of it. She stated that she found Mr. Lodi's Russian to be quite poor. All of this leads me to conclude that Elena likely had very limited understanding of the agreement prior to signing it.

56 All these factors combined with the urgency in signing the agreement the day before the wedding lead me to exercise my discretion under paragraph 56(4)(a) and set aside the marriage contract. Having based my decision on the provisions of section 56, I need not deal with the issues of unconscionability, undue influence, or *non est factum*.

57 Because the marriage contract is set aside, the court must consider the issue of equalization of net family property. The parties are agreed on all but four items in calculating their respective net family properties. These are: a condominium David co-owned at the date of marriage, Elena's sable jacket, Elena's diamond ring, and the cash Elena reported as stolen to the police.

58 David and a friend co-owned a condominium on Lakeshore Boulevard at the date of the marriage. The parties agree on the value of the condominium at that date but not on the value of the outstanding encumbrances on it. There were two mortgages registered on title at date of marriage. David testified that the second mortgage of $50,000 was placed on the property at the request of the co-owner who was to be financially responsible for it and indemnify David from liability on it. I am satisfied that David and his friend had this agreement in place at the date of marriage and therefore David could have reasonably expected to be indemnified from liability on the mortgage. The fact that the friend ran into financial difficulty after that date and David had to make payments on the mortgage are events that could not have been predicted with any degree of probability at the date of marriage. In valuing assets, the court must look at the circumstances at the date the assets are to be valued. The court is not to use hindsight in coming to a valuation. I therefore accept David's valuation of the condominium at the date of marriage, net of liabilities, at $4,000.

59 Elena owned a sable jacket at valuation day. Elena alleged that she had owned the jacket prior to the marriage and that her mother had brought it from Russia on one of her trips. David testified that he recalled paying $6,000 for the jacket and that he was led to believe it was worth significantly more than what he paid. I believe David's evidence. Tab 41 of Exhibit 5 contains a letter dated October 31, 1995 from Hi-Fashion Furs Limited to Elena, certifying that the value of the sable jacket was $30,000. David has insured the jacket at this value since then. He takes the position that for equalization purposes, the jacket should be valued at half its appraised value. In my view, this is a reasonable and realistic approach, which takes into account the potential depreciation on the garment since that date. The jacket will be included as a valuation day asset for Elena at a value of $15,000.

60 Elena listed a diamond solitaire ring as one of the items stolen in the December 2000 break-in. She testified at trial that it was gift David gave her when Jason was born. I believe her. Thus, she would have owned it on valuation day. She did not list it (nor any other jewellery) on any of her financial statements. In her report to the police, she valued the ring at $20,000. I accept this value and include the ring, at $20,000, as one of Elena's valuation day assets.

61 David takes the position that Elena's valuation day assets should also include the $20,000 in cash she now says was stolen from under her mattress. There is no credible evidence to persuade me that Elena had this money at the date of separation, nor that she was the beneficial owner of it, if it indeed existed. The fact that Elena sold some of the parties' lawn furniture to obtain a $1,000 retainer for her lawyer at the time of separation suggests to me that Elena did not have this cash at valuation day.

62 Taking these figures into account, David owes Elena an equalization payment of $104,341.01. However, David invites the court to exercise its discretion under s.5(6)(g) of the *Family Law Act* and award Elena a share that is less than half the difference between the parties' net family properties. He suggests that equalization would be unconscionable having regard to "a written agreement between the spouses that is not a domestic contract." In this regard, he argues that the marriage contract, which I have set aside, is nevertheless an "agreement other than a domestic contract" for the court to consider. I disagree. Having set the agreement aside, I cannot see that it retains any vitality as an "agreement" to come within the operation of s. 5(6)(g). In any event, under s. 5(6) I would have to find equalization unconscionable to vary the share. I do not find equalization unconscionable. I therefore decline to exercise my discretion under s. 5(6). The equalization payment remains at $104,341.01. There are, however, some adjustments that must be made to the equalization payment.

63 The parties agreed to share Dr. Awad's fee for the assessment equally. David has paid the fee and Elena has not yet reimbursed him for her share. Her share of $8,500 should be deducted from the equalization payment. After separation Elena used David's credit cards without his permission. She purchased some $20,000 in clothes. Although David was reimbursed $5,000 by one of the credit card companies, he was obliged to pay the balance of $15,000. This is a post-separation event which must be accounted for. Elena must repay that amount which will also be deducted from the equalization payment.

64 Similarly, Elena sold lawn furniture for $1,000 to pay legal fees. David is entitled to credit for one half of this amount since the contents of the matrimonial home are owned equally. After taking these adjustments into account, David owes Elena a balance of $80,341.01. As to furniture, if the parties cannot agree on the division of the household contents, the contents will be sold and the proceeds equally divided. Jason's furniture and personal effects will not be sold but will be divided equitably between the parties so that each can provide familiar surroundings for Jason.

Support issues:

65 Although David initially sought child support from Elena, at trial he said he is not seeking financial contribution from her now for Jason's care. David's counsel suggested that Elena should be deprived of her half interest in the matrimonial home as a lump sum contribution to child support. However, I accept David's evidence that he does not wish financial contribution from Elena. There will therefore be no order for child support at this time.

66 Elena seeks spousal support of $8,000 per month. David concedes that an award of spousal support is appropriate but suggests the quantum should diminish over time and should be time-limited in duration. He proposes to pay $4,000 a month for three years, $3,000 a month for three years, and $2,000 a month for 3 years, after which support would terminate. Elena would then be 50. He also proposes that he would contribute up to $5,000 a year for three years towards the cost of a "reputable educational program" for Elena. He suggests that any spousal support order should terminate if Elena either cohabits with another man or is found to be working as a stripper. David's position on spousal support is a clear indication of his wish to continue to control Elena through money. That is not the purpose of support. Under s. 33(8) of the *Family Law Act*, an order for spousal support should:

> (a) recognize the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
>
> (b) share the economic burden of child support equitably;
>
> (c) make fair provision to assist the spouse to become able to contribute to his or her own support; and
>
> (d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

67 First I must consider these factors in section 33(8) of the *Act*. Elena's contributions to the relationship were in the area of her role as primary homemaker, taking on the bulk of the chores of running the household, preparing meals, and caring for Jason and Kirill. Economically, Elena suffered no specific economic disadvantage from the marriage, other than finding herself in a foreign country, with no facility with the language, and no training. These latter matters she could have resolved, had she

chosen to do so. She did not work in Russia, did not work through the marriage, and apart from her work as a stripper, has not worked since.

68 I have already commented that David is taking on the entire economic burden of child support, and to apportion it equitably, I must consider that a factor in determining spousal support.

69 In light of the significant equalization payment Elena will receive, there is no financial hardship for a support order to relieve.

70 This leaves the objective of assisting Elena in contributing to her own support. Elena is 40 years old, and is in good physical and mental health. She was sufficiently motivated to find work, albeit as a stripper, when she felt she needed independent income. This suggests to me that if she wants to, Elena can find work. No doubt she could continue as a stripper, but realistically she could not do so for much longer, and all agree that this is the least desirable route for her to follow in the future. Elena testified she had dreams of becoming a fashion designer. She clearly has fashion flare, and has a keen sense of fashion. She knows fine clothing well. I have no doubt that Elena would be well suited to some occupation in the fashion industry. To succeed, however, she will first have to enhance her English literacy skills, and then begin to look for training of some sort.

71 Jason will not be with Elena as much as he was during the week. In any case, in September, he will be in school full time. Elena will have both the time and opportunity to upgrade both her spoken and written English, and begin to retain in order to enter the work force. I would expect that she could make significant strides in that regard in the next two or three years. For that reason, it is my view that any support order should be reviewed in three years in order to determine whether Elena has fulfilled these expectations, or made a reasonable and concerted effort to do so.

72 The *Family Law Act* goes on to provide in s. 33 (9) that, in determining the amount of support, the court shall consider all the circumstances of the parties including:

> (a) the dependant's and respondent's current assets and means;
>
> (b) the assets and means that the dependant and respondent are likely to have in the future;
>
> (c) the dependant's capacity to contribute to his or her own support;
>
> (d) the respondent's capacity to provide support;
>
> (e) the dependant's and respondent's age and physical and mental health;
>
> (f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;
>
> (g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;
>
> (h) any legal obligation of the respondent or dependant to provide support for another person;
>
> (i) the desirability of the dependant or respondent remaining at home to care for a child
>
> (j) the contribution by the dependant to the realization of the respondent's career potential;
>
> (k) [repealed 1997, c.20, s 3(3).]
>
> (l) if the dependant is a spouse,
>
> (i) the length of time the dependant and respondent cohabited,

(ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,

(vi) the effect on the spouse's earnings and career development of the responsibility of caring for a child; and

(m) any other legal right of the dependant to support, other than out of public money.

73 For the purposes of determining support in this case, I consider the factors under ss. 33(9)(a), (b), (c), (d) and (f) to carry the most weight. Looking at the parties' current assets and means, after the equalization payment, the parties will be in comparable financial positions, net of their liabilities. However, as part of his current assets, David also has various stock options from his employer which may become quite valuable in the future. He has exercised various options in the past. This has had the effect of nearly doubling his income in some years. Given the history of his employment, he also is likely to be granted further options in the future. Their exercise is likely to create more capital for him, although not until some future date. David also has significantly greater earning power than Elena. He is currently paid a base salary of $200,000 per year, with a potential annual bonus of between $0 to $100,000. In 2000, he earned a bonus of $15,000. At trial, his 2001 bonus had not yet been declared. In the recent past, the bonus has been as much as $90,000. Given that his employer did not grant any stock options to him in 2001, and given the size of the bonus in 2000, I find David's current income to be in the range of at least $215,000 with the potential to increase. David also receives a taxable benefit of a vehicle. I have not included its value in his remuneration, since he does not include any vehicle expenses in his monthly expenses. Given his company's option plan, and his level of earnings, I find it far more likely that David will acquire assets in the future than will Elena.

74 With current earning potential in the range of only $15,000 to $20,000 Elena has limited capacity to contribute to her own support and David has the ability to pay support based on the significant disparity between their incomes. Elena was economically dependent on David throughout their relationship and their marriage. The parties did not view it as important for Elena to work outside the home during their marriage. She is now 40 and her employment opportunities in the future may be limited to some degree by her age and her inability to read English with any degree of fluency. While David blames Elena for not pursuing ESL studies, the fact remains that the parties acquiesced in the roles each assumed during their relationship. As a result, Elena currently has limited ability to support herself. However, one of the objectives of spousal support under the *Family Law Act* is to assist a spouse to be able to contribute to his or her own support. That objective is one that any support order for Elena must also meet.

75 Elena suggests that she requires $8,000 per month in spousal support to meet her needs. Although the parties lived comfortably when they were together, they did not live lavishly or luxuriously. Elena's "proposed budget" in her financial statement shows proposed expenses of over $10,000 per month. Elena has included in her proposed budget items like $1,200 per month for groceries, $400 a month for restaurant meals, $18,000 a year for clothing for herself, $3,000 a year for children's clothing, $15,000 a year for vacations, and $12,000 a year for babysitting. Given that Jason will be living primarily with his father, Elena's grocery and restaurant figures are excessive. Similarly, she will not have these budgeted expenses for Jason for clothing or babysitting. Her own clothing budget is certainly not commensurate with either her own ability to earn income, or that of her husband. Similarly, $15,000 for vacations is completely out of the realm of reasonableness. Elena's stated proposed budget of over $10,000 per month is completely unrealistic. She is entitled, however, to maintain a reasonable standard of living so that she can provide an appropriate home environment for herself and Jason during the considerable time he will spend with her.

76 In my view, spousal support of $5,500 per month balances all the factors in s. 33 of the *Family Law Act* including those I have particularly highlighted. As indicated, support will be reviewed in three years, namely at the end of June, 2005. I have chosen the end of June, since it will likely coincide with the end of any school term for training Elena may have undertaken.

Disposition:

77 David will have custody of Jason. Jason will make his primary residence with his father. Jason will reside with his mother on alternate weekends from Friday after school, until Monday morning at school, and on Tuesdays and Thursdays, overnight. All vacation time will be shared equally as Dr. Awad recommends in Exhibit 2. David will consult with Elena concerning Jason's school and extracurricular activities prior to making any decision about these matters. David will not book any additional programmes for Jason on either Tuesday or Thursday afternoons. If the parties are unable to agree on these issues, then David will have the responsibility of making the final decision.

78 David will pay Elena an equalization payment of $80,341.01. If the parties agree, David may satisfy a portion of the equalization payment by transferring his interest in the matrimonial home to her. If the parties do not agree, then the matrimonial home will be sold immediately, with a closing date no earlier than June 30, 2002, the end of Jason's current school year. The net proceeds of sale will be divided equally between the parties on sale.

79 Commencing February 1, 2002, David will pay Elena spousal support of $5,500 per month. Support payments will bind David's estate. David will maintain one half of his existing life insurance with his estate as the beneficiary, in order to provide a fund out which support may be paid. The support payments will not be limited to this fund. David will receive credit for all payments he has made since February 1, 2002 on account of spousal support and the mortgage, maintenance and taxes on the matrimonial home, on account of this support obligation.

80 As indicated, I expect that Elena will take reasonable steps to attempt to retrain and obtain employment of some kind. For Jason's sake, it would be preferable if it were not as an exotic dancer. There is no basis upon which the court can conclude that there is any foreseeable time frame within which Elena might become self-supporting. Therefore, the support order will not be time limited. Similarly, there is no basis upon which the court can automatically terminate Elena's support if she continues to work as a stripper. To do so would be punitive. However, if her income warrants it, or if there are other changes in circumstances, the quantum of support can always be varied on the basis of a material change in circumstances. In addition to the potential of variation, this is a situation where there must also be a positive onus on Elena to contribute to her own support. She will have to take active steps to train and enter the work force. The marriage was only six years, a medium length marriage. Elena has already been supported for nearly three years post-separation. Her day to day responsibilities for Jason will be reduced as a result of the custody order, as well as by the fact that Jason will be in school full-time in September of 2002. Support will therefore be reviewed on June 30, 2005. At that time, Elena will have to show the particulars of her retraining and her efforts to find employment. The issue of continuing support will be determined then, on the basis of her efforts, and the financial circumstances of the parties at that time.

81 If I have made any mathematical errors in these reasons, I would be grateful if the parties would bring them to my attention, so they can be corrected. If the parties cannot agree on the issue of costs, they may make arrangements through the trial coordinator for an appointment of no more than one hour to argue the issue. Prior to the hearing, each party will provide the court with an outline of his or her position on costs, copies of all relevant offers, and a bill of costs.

Order accordingly.

Footnotes

1 R.S.O. 1990, c. F-3

2 R.S.O. 1990 c. C-12

3 (1991), 32 R.F.L. (3d) 369 (Ont. U.F.C.), aff'd (1994), 4 R.F.L. (4th) 167 (Ont. C.A.)

4 (2000), 12 R.F.L. (5th) 188 (Ont. S.C.J.)

5 [1992] O.J. No. 2608 (Ont. Gen. Div.), rev'd (1994), 3 R.F.L. (4th) 267 (Ont. C.A.)

2000 CarswellOnt 5054
Ontario Superior Court of Justice

Smith v. Smith

2000 CarswellOnt 5054, [2000] O.T.C. 927, [2001] W.D.F.L. 311, 101 A.C.W.S. (3d) 1135

Theresa Denise Smith, Petitioner (Wife) and Benjamin Arthur Smith, Respondent (Husband)

Heeney J.

Heard: October 3-4, 2000
Judgment: November 14, 2000
Docket: Woodstock 6081/98

Counsel: *Robert B. Stewart*, for Petitioner
Andrea K. Stillwell, for Respondent

Subject: Family; Contracts; Property
Related Abridgment Classifications
Contracts
III Formation of contract
III.8 Miscellaneous
Contracts
VIII Rectification or reformation
VIII.2 Prerequisites
VIII.2.b Mistake
VIII.2.b.i Mutual
Family law
VI Domestic contracts and settlements
VI.1 Validity
VI.1.h Miscellaneous
Family law
VIII Support
VIII.1 Issues common to child and spousal support
VIII.1.a Determination of income
VIII.1.a.ii Imputed income
VIII.1.a.ii.C Diverted or hidden income
Torts
VIII Fraud, deceit, and misrepresentation
VIII.3 Negligent misrepresentation [Hedley Byrne principle]
VIII.3.b Detrimental reliance
Headnote
Family law --- Domestic contracts and settlements — Attacking validity of contract — General
Parties separated in 1997 after just over six years of marriage during which they had two children — Parties entered into separation agreement in which wife agreed to accept equalization payment of $7,000 — Parties made "kitchen table agreement" dividing property using values supplied by husband whose lawyer drew up formal agreement — Husband claimed his business was worth about $20,000 and wife said she did not want any part of it so it was not included in agreement — Wife had independent legal advice before signing agreement although neither party made any financial disclosure — Wife applied for order setting aside agreement on basis of failure to disclose significant assets pursuant to s. 56(4) of Family Law Act, those

assets being value of business and balance of two loans, — Section 56(4) not applicable in circumstances — In fact business was worth negative $1,000 at date of separation and husband's calculations of amounts owing on loans was understated by about $3,000 — Regarding business, for such misrepresentation to be relevant to setting aside agreement pursuant to s. 56(4) husband would have had to understate value, not overstate it as he did — As for loans, figures given by husband underestimated debt by about 4% which was not significant error entitling wife to set agreement aside under s. 56(4) — Wife had got exactly property settlement she bargained for and which she had entered into with legal advice and voluntarily — It is not court's function to set aside bad deals so long as one party has not been preyed upon by other — Family Law Act, R.S.O. 1990, c. F.3, s. 56(4).

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Detrimental reliance

Parties separated in 1997 after just over six years of marriage during which they had two children — Parties entered into separation agreement in which wife agreed to accept equalization payment of $7,000 — Parties made "kitchen table agreement" dividing property using values supplied by husband whose lawyer drew up formal agreement — Husband claimed his business was worth about $20,000 and wife said she did not want any part of it so it was not included in agreement — Wife had independent legal advice before signing agreement although neither party made any financial disclosure — Wife applied for order setting aside agreement on basis of negligent misrepresentation by husband as to balances of two loans — Wife entitled to judgment in amount of $4,876 — Husband's calculations of amounts owing on loans underestimated amount owing by about 4% — Wife relied to her detriment on bank indebtedness figures supplied by husband since she paid $1,876 too much when her half of debts was deducted from her equity in matrimonial home when calculating equalization payment — Husband was negligent in providing those figures and special relationship of trust existed between parties as married persons — Accordingly, all elements of negligent misrepresentation had been made out and wife was entitled to judgment for damages in amount of $1,876 — Also, wife was entitled to judgment for additional $3,000 due to mathematical error made by parties in calculations which was mutual mistake which could be corrected through equitable remedy of rectification.

Contracts --- Rectification or reformation — Prerequisites — Mistake — Mutual

Parties separated in 1997 after just over six years of marriage during which they had two children — Parties entered into separation agreement in which wife agreed to accept equalization payment of $7,000 — Parties made "kitchen table agreement" dividing property using values supplied by husband whose lawyer drew up formal agreement — Husband claimed his business was worth about $20,000 and wife said she did not want any part of it so it was not included in agreement — Wife had independent legal advice before signing agreement although neither party made any financial disclosure — Wife applied for order setting aside agreement on basis of negligent misrepresentation by husband as to balances of two loans — Wife entitled to judgment in amount of $4,876 — Husband's calculations of amounts owing on loans underestimated amount owing by about 4% — Wife relied to her detriment on bank indebtedness figures supplied by husband since she paid $1,876 too much when her half of debts was deducted from her equity in matrimonial home when calculating equalization payment — Husband was negligent in providing those figures and special relationship of trust existed between parties as married persons — Accordingly, all elements of negligent misrepresentation had been made out and wife was entitled to judgment for damages in amount of $1,876 — Also, wife was entitled to judgment for additional $3,000 due to mathematical error made by parties in calculations which was mutual mistake which could be corrected through equitable remedy of rectification.

Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual income — Imputed income

Parties separated in 1997 after just over six years of marriage during which they had two children — Children, now aged five and seven, were in primary care of wife — Parties entered into separation agreement in which husband was to pay child support of $250 per month per child — Wife now applied for child support order in accordance with Guidelines and based on income she claimed should be attributed to husband — Income of $45,060 attributed to husband and husband to pay child support of $636 per month — Since no special provisions were made in separation agreement regarding child support that would make application of Guidelines inequitable, agreement was essentially irrelevant — Evidence indicated that husband received as much as 40% of receipts from customers in form of cash — Husband had been able to reduce debts by about $53,600 in three years during which time he claimed to have income of only $52,142 — Bulk of husband's abiltiy to pay down debt must have come from undisclosed sources of income — Sum of $15,000 per year to be attributed to husband as additional income bringing total income for support purposes to $45,060 — Child Support Guidelines, SOR-97/175.

Table of Authorities

Cases considered by *Heeney J.*:

Caron v. Caron, [1987] 1 S.C.R. 892, 38 D.L.R. (4th) 735, 75 N.R. 36, [1987] 4 W.W.R. 522, 14 B.C.L.R. (2d) 186, 2 Y.R. 246, 7 R.F.L. (3d) 274 (S.C.C.) — considered
Dochuk v. Dochuk (1999), 89 O.T.C. 41, 44 R.F.L. (4th) 97 (Ont. Gen. Div.) — considered
Farquar v. Farquar (1983), 43 O.R. (2d) 423, 35 R.F.L. (2d) 287, 1 D.L.R. (4th) 244 (Ont. C.A.) — considered
Krueger v. Krueger (1997), 154 Sask. R. 131, [1998] 2 W.W.R. 488, 30 R.F.L. (4th) 398 (Sask. Q.B.) — considered
Mundinger v. Mundinger (1968), [1969] 1 O.R. 606, 3 D.L.R. (3d) 338 (Ont. C.A.) — applied
Mundinger v. Mundinger (1970), 14 D.L.R. (3d) 256n (S.C.C.) — considered
Pelech v. Pelech, [1987] 1 S.C.R. 801, [1987] 4 W.W.R. 481, 38 D.L.R. (4th) 641, 76 N.R. 81, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 7 R.F.L. (3d) 225 (S.C.C.) — considered
Pruss v. Pruss (2000), 12 R.F.L. (5th) 188 (Ont. S.C.J.) — applied
Queen v. Cognos Inc., 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — applied
Richardson v. Richardson, 17 C.P.C. (2d) 104, [1987] 1 S.C.R. 857, 38 D.L.R. (4th) 699, 77 N.R. 1, 22 O.A.C. 1, 7 R.F.L. (3d) 304 (S.C.C.) — considered

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — considered

s. 15.1(3) [en. 1997, c. 1, s. 2] — referred to

s. 15.1(5) [en. 1997, c. 1, s. 2] — considered

Family Law Act, R.S.O. 1990, c. F.3

Generally — considered

s. 56(4) — considered

s. 56(4)(a) — considered

s. 56(4)(c) — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally

s. 17(1)

PETITION by wife for divorce and for orders setting aside property settlement in separation agreement and increased child support.

***Heeney J.*:**

1 The parties in this case separated on November 1, 1997, after slightly more than six years of marriage. Within two weeks following their separation, on November 13 to be specific, they executed a separation agreement. Both parties had retained counsel, who provided independent legal advice to their respective clients before they executed the agreement. The Wife now seeks to set aside the property settlement embodied in that agreement, and claims entitlement to an equalization payment of $31,401, which is more than quadruple the figure of $7,000 she agreed to accept in the agreement. She also seeks a variation of the child support figure of $500 per month that was agreed to in the separation agreement, to bring it up to the appropriate *Guideline* amount based on income that, she argues, should be attributed to the Husband. The Wife is also seeking a divorce.

The Equalization Issue:

1. Background:

2 The Wife announced her intention to move out of the matrimonial home approximately six weeks before the actual date of separation. On either the first or second Wednesday before the date of separation of November 1, 1997, the parties met at their kitchen table to arrange a division of their property.

3 This meeting produced what has come to be known as the "kitchen table agreement", marked in this proceeding as Exhibit #3. This agreement lists certain property that each party was to receive. It also contains a calculation whereby a payment of $8,000 was arrived at, to be payable by the Husband to the Wife, to complete the division of their assets.

4 The Wife testified that the calculation began with a figure of $29,292, representing her one-half of the equity in the matrimonial home. This represented her initial entitlement, since the Husband was to receive the matrimonial home as part of the settlement. The parties then began to make a series of deductions from that figure, representing her half of the outstanding debts that the Husband was assuming. The Husband supplied the numbers and the Wife wrote them down. After all deductions were made, the result was that the Husband owed a payment to the Wife of $8,000. That figure was later changed to $7,000 when the separation agreement was drafted, because an appraisal showed that they had overestimated the value of the matrimonial home by $2,000, which necessitated a corresponding reduction of $1,000 in the Wife's half share.

5 The Husband's testimony generally agreed with that of the Wife as to the making of the kitchen table agreement. He told the Wife that he had obtained the current balances of their bank indebtedness, and the figures he supplied were used in their calculations. The only significant difference in their testimony was that the Husband indicated that the value of the assets that each party received was added into the calculation, although he did not explain how. An examination of Exhibit #3, however, supports the evidence of the Wife that they simply began with her half of the equity in the matrimonial home, and began making deductions representing one-half of the various debts that were outstanding. The only assets that were factored into the calculation were the riding lawnmower, the Husband's Jeep, and a quantity of food.

6 The Husband had, since before the marriage, operated a milk and ice-cream delivery business as a sole proprietorship, known as B.A. Smith Distributing. For purposes of their settlement discussions, he testified that he "ballparked" the value of his business at $20,000.

7 Although the Husband's figure of $20,000 for the business was written down on the kitchen table agreement, it does not feature in the calculation of the payment due to the Wife of $8,000. It is listed to the right of that calculation, along with the following other assets: Jeep $4,000; house $30,000; accounts $2,368.02; and RRSP $7,101.36. Of those listed assets, only two figures were considered in the calculation to the left that determined the payment due to the Wife: the house, since the calculation began with the roughly equivalent figure of $29,292 representing her half of the equity; and the Jeep, through an entry that reads "owes me $^{1}/_{2}$ for jeep - $2,000".

8 Despite the fact that the Husband ballparked the value of the business at $20,000 for purposes of their settlement discussions, he also testified that the Wife said she did not want any part of the business, because he had had it before they were married. Significantly, the evidence of the Wife is to the same effect. She testified that the Husband asked her about his business, and whether she was going to do anything about it. She then asked what it was worth. He said $20,000, and the Wife said "don't worry about it".

9 Both counsel argued this case on the assumption that the parties were attempting to divide up all of their assets and liabilities as they stood on the date of separation, using an estimated value for the business of $20,000. This assumed approach does not accord with the evidence I just referred to, nor does it accord with the calculation reflected on the kitchen table agreement. As already noted, the assets of the parties, save for the house, the lawnmower, the Jeep and some food, do not enter into the calculation. The Husband's business and other significant assets are listed, with values beside them, but those figures are not brought into the calculation.

10 The evidence of the parties is that the household contents were divided equally. The only other significant asset that the Wife received was a 1995 Pontiac Grand Prix. The parties now agree that the car was worth $16,500 as at the date of separation,

but it was not listed on the kitchen table agreement. The evidence of both parties is that the reference there to " $^{1}/_{2}$ of car" referred to the car loan, not to a vehicle. The Grand Prix is not mentioned in paragraph 18 of the separation agreement, subtitled "Automobiles". The only vehicle dealt with there is the Husband's Jeep. The Grand Prix is also not mentioned in the Wife's list of assets in Schedule "B" to the agreement. This omission was not raised in evidence, so there is no explanation for it. In any event, it is clear that the Wife did receive that asset as part of her share, and the car loan that related to its purchase was assumed by the Husband.

11 I have attempted to reconstruct the calculations that would have been performed if the parties were indeed attempting to divide up their assets and debts, including the business, as at the date of separation. I have used the matrimonial home equity figure from the kitchen table agreement, although it has been doubled because the Husband received that asset in the settlement. Values for the other assets have been taken from the Net Family Property Statements filed by counsel, but the debt figures have been extracted from the kitchen table agreement so that the result from the reconstruction can be compared with the figure arrived at by the parties. I have ignored the entry relating to food, both because counsel did not include it in their NFP Statements, and because it is both added in and subtracted out in the kitchen table calculation, so the net effect of that entry is neutral. The following is the result:

	HUSBAND	WIFE
ASSETS		
Matrimonial home equity	$58,584	
Household contents	$4,775	$4,775
Motor vehicles	$4,000	$16,500
Business	$20,000	
Accounts receivable	$2,600	
Accounts	$2,368	
RRSP	$7,230	
Tools	$800	$1,000
Riding lawnmower	$3,000	
TOTAL ASSETS:	$103,357	$22,275
DEBTS		
Car loan	$23,000	
Septic & air loan	$16,000	
Personal loan	$1,400	
Royal Visa	$5,584	
Sears account		$2,400
TOTAL DEBTS:	$45,984	$2,400
NET PROPERTY:	$57,373	$19,875

12 The difference between the net asset positions of each party is $37,498. This would require a payment by the Husband to the Wife of $18,749 to equally divide their assets and liabilities, including the business, as at the date of separation. This figure is more than double the figure that they actually agreed upon.

13 By contrast, if one performs the same calculation, leaving out the $20,000 value of the business, the payment owing to the Wife amounts to $8,749. That figure is very close to the $8,000 settlement figure that the parties arrived at.

14 I do not place a great deal of reliance on this attempted reconstruction of the parties' calculations, since it is clear that they did not do their calculations in quite the same way. It does, however, provide a useful tool for examining the settlement figure and determining how it was arrived at, and supports the conclusion that they did not factor in the value of the business when they divided their assets and debts. This provides some reassurance that my understanding of the evidence of the parties is correct.

15 Based on the testimony of the parties, and on a careful examination of the kitchen table agreement, I conclude that the Wife agreed that she would not claim any share of the Husband's business. I conclude that the parties divided up the bulk of their other assets in some fashion that was not fully explained in evidence, but which was roughly equal and was mutually

agreeable to them, and agreed on lists of what each was to receive. Having divided everything else up to their satisfaction, the only matter remaining to be done was to calculate the buyout owing to the Wife for her share of the matrimonial home, after deducting her share of the debts. The parties proceeded to do exactly that, while in the process also making adjustments (for reasons unexplained in the evidence) for the value of the Jeep, the lawnmower and some food, and finally adding back in $1,200 as the Husband's contribution to the Wife's Sear's account. This resulted in a figure of $8,000 owing by the Husband to the Wife, which, as noted earlier, was ultimately reduced by mutual consent to $7,000.

16 The Husband arranged for his lawyer to draw up a separation agreement, which incorporated the property settlement that they had arrived at between themselves. It also listed, in attached schedules, the various items of household contents that each party was to get, which was agreed to be an equal division of those contents. The agreement provided that the Wife specifically released any claim that she may have against the Husband's dairy delivery business, and contained full and final mutual releases of all property claims.

17 On November 12, 1997, the draft agreement was executed by the Husband in the presence of his lawyer, and sent to counsel for the Wife, along with an equalization cheque for $7,000 and the first support cheque of $500. The Wife reviewed the agreement with her lawyer and signed it on November 13. No financial disclosure from the Husband was requested nor received by the Wife's lawyer, nor did she supply any financial disclosure to the Husband's lawyer. No documents were exchanged to verify the various amounts that featured in their kitchen table agreement, except perhaps the appraisal of the matrimonial home. Despite this, paragraph 37 of the agreement stated that each party had given complete financial disclosure to the other, and verified that the parties were satisfied with the information received as to the assets and liabilities of the other party.

18 The Wife received independent legal advice, although it is difficult to grasp how a lawyer can give meaningful legal advice without having received the financial disclosure necessary to complete a net family property calculation. Paragraph 31 of the agreement acknowledged receipt of that independent legal advice, and confirmed that the parties understood their respective rights and obligations under the agreement and were signing it voluntarily. The Wife received her cheques after she executed the agreement.

2. Analysis:

19 Mr. Stewart, on behalf of the Wife, now argues that the property settlement portion of the agreement should be set aside, based on s. 56(4) of the *Family Law Act*, or alternatively based on negligent misrepresentation on the part of the Husband. He submits that the value attributed to the business was wrong, as were the balances of two of the loans, and since all of those figures were supplied by the Husband, and relied upon by the Wife to her detriment, she should be entitled to rescind the property settlement.

20 The business has now been valued by a business valuator, as at the date of marriage and as at the date of separation, and the appraisal filed in evidence by counsel for the Wife is acknowledged to be accurate. The appraisal reveals that the business was worth negative $37,000 on the date of marriage, June 29, 1991, and was worth negative $1,000 on the date of separation. In other words, the business was, in reality, a substantial liability that the Husband brought into the marriage. This has a dramatic impact on the equalization calculation, since deducting a liability outstanding on the date of marriage results in an increase in the Husband's net family property.

21 I agree with Mr. Stewart that the "ballpark" figure of $20,000 attributed to the business by the Husband was wrong. However, it *overstated* the value of the business by $21,000 as at the date of separation. If I have misapprehended the evidence, and the parties really did intend to divide up the value of the business, then such an error could only work to the Wife's advantage, since she would receive more money than she otherwise would have had the true value of the business been known. On the facts as I have found them, this error is equally non-consequential. The Wife told the Husband to "forget about" the business after he told her it was worth $20,000. Obviously, if he had told her that it was really worth negative $1,000, she would have been even more inclined to waive any claim against the business. For such a misrepresentation to be relevant, the Husband would have had to *understate* the value of the business. For example, if the Wife waived any claim to it, believing it to be worth

only $20,000, and it actually turned out to be worth $100,000, she could legitimately claim that she had relied on the Husband's erroneous estimate to her detriment.

22 I would not, therefore, exercise my discretion under s. 56(4) of the *Act* to set aside the property settlement portion of the separation agreement, based on the Husband's erroneous disclosure as to the date of separation value of his business.

23 The thrust of Mr. Stewart's argument did not focus on the inaccurate value attributed to the business as at the date of separation. Rather, he argues that the Husband failed to disclose that he brought a $37,000 liability into the marriage. Mr. Stewart submits that this failure to disclose a significant liability entitles the Wife to rescind the property settlement, pursuant to s. 56(4)(a) of the *Act*.

24 I do not agree. S. 56(4)(a) gives the court discretion to set aside all or part of an agreement where a party fails to disclose significant assets or debts "existing when the domestic contract was made". The $37,000 liability existed on the date of marriage, but no longer existed when the domestic contract was made. Non-disclosure of that liability cannot, therefore, constitute grounds to set aside the agreement under this section.

25 The alternative argument is based on negligent misrepresentation. In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), the necessary ingredients for establishing negligent misrepresentation are set out, as follows:

1. There must be a duty of care based on a "special relationship";

2. There must be a representation which is untrue, inaccurate or misleading;

3. The person making the representation must have acted negligently in making it;

4. The person to whom the representation was made must have relied, in a reasonable manner, on the negligent misrepresentation; and

5. The reliance must have been detrimental to the representee in the sense that damages resulted.

26 Looking first at the representation that the business had a v-day value of $20,000, the Wife, as already noted, is unable to satisfy the requirement of detrimental reliance. Since the value of the business was overstated by $21,000, this misrepresentation cannot have operated to her detriment.

27 Looking next at the fact that the business had a date of marriage value of negative $37,000, the fundamental flaw in the Wife's argument is that no representation was made by the Husband at all as to the date of marriage value of his business. It was simply not discussed. The parties at no time turned their minds to their assets and liabilities on the date of marriage, because they were not applying the equalization formula in the *Family Law Act*. They were content to divide assets and liabilities according to their own methodology, as of the date of separation alone.

28 It is obvious that if the Husband made no representation about the date of marriage value of his business, he cannot be said to have made a *mis*representation about the same matter, negligent or otherwise.

29 Accordingly, I conclude that the Wife is not entitled to set the agreement aside based on the Husband's erroneous representations as to the value of his business.

30 The other errors in the Husband's figures related to debts outstanding on the date of separation. He advised the Wife that a loan, labeled on the kitchen table agreement as the "septic & air" loan, had a balance of $16,000. In fact, the balance was $13,989. He also stated that the balance of the car loan was $23,000, when in fact it was $21,258.83. The Wife was charged with paying half of both of those loans in the calculation that the parties performed. Since the debts were overstated by $3,753, she "paid" $1,876 too much.

31 The law is well established that non-disclosure under s. 56(4)(a) of the *Act* is not restricted to a failure to disclose the existence of an asset or debt, but also encompasses a failure to disclose the extent and value of an asset or debt: see *Dochuk v. Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.), where Lack J. provides an excellent review of the law in this regard.

32 Do the errors described above amount to a failure to disclose "significant debts"? The total amount of the debts, including the mortgage, that were dealt with in the kitchen table agreement, and toward which the Wife had to contribute half, was $97,399, on the figures supplied by the Husband. The true amount of those debts was actually $93,646. In my view, this is not a "significant" error. The figures as given by the Husband were within 4% of the true balances, and that is an acceptable margin of error.

33 The errors relating to the outstanding debts do not, therefore, entitle the Wife to set aside the property settlement portion of the separation agreement under s. 56(4)(a) of the *Act*.

34 Mr. Stewart also argued that the agreement should be set aside on the basis of economic duress. Duress is a ground for rescission pursuant to s. 56(4)(c) of the *Act*, which entitles a court to set aside an agreement "otherwise in accordance with the law of contract". The evidence of the Wife was that she was unable to get either her child support cheque or her equalization payment unless and until she signed the agreement, so that she executed the agreement under duress.

35 I find no merit to this argument. The fact that the Wife was made to wait less than two weeks to get her money cannot amount to economic duress. Given the shortness of the delay, it can hardly be said that the Husband was starving her out to force her to sign the agreement. Indeed, the Husband began to pay support more rapidly than many or perhaps most payors following a separation, and his payment of the property settlement was remarkably prompt. It must also be remembered that the Wife was represented by counsel, and could have brought a speedy motion for interim support if she was feeling any financial pressure. Furthermore, her allegation that she signed under duress runs contrary to paragraph 31 of the agreement, which verifies that she signed the agreement voluntarily, and is contradicted by the certificate executed by her solicitor, which verifies the same thing.

36 I am led to the conclusion that the Wife got exactly the property settlement that she bargained for and intended to get, according to methodology that she and the Husband worked out between themselves. She discussed the settlement with her lawyer and was, I must presume, advised as to her equalization and disclosure rights under the *Act* in the course of receiving independent legal advice. She signed the agreement voluntarily, knowing that it was a final and binding agreement, and released all claims to the Husband's property. She now seeks to set aside the agreement because it is apparent that, had she gotten proper disclosure including an appraisal of the Husband's business, and had she done a proper equalization calculation that considered assets and liabilities on the date of marriage as well as on the date of separation, she would have received a substantially higher equalization payment. In other words, she made a bad deal, and wants to get out of that deal.

37 The importance of a written contract in the settlement of the affairs of separating spouses was emphasized by the Supreme Court of Canada in the *Pelech* trilogy: *Pelech v. Pelech* (1987), 7 R.F.L. (3d) 225 (S.C.C.), *Richardson v. Richardson* (1987), 7 R.F.L. (3d) 304 (S.C.C.), and *Caron v. Caron* (1987), 7 R.F.L. (3d) 274 (S.C.C.). The Ontario Court of Appeal expressed similar views in *Farquar v. Farquar* (1983), 43 O.R. (2d) 423 (Ont. C.A.). While the concept that parties should be held to their bargains has been considerably eroded in recent years, insofar as child and spousal support is concerned, there has been no similar erosion where property division is under consideration. Simply put, valid legal contracts are meant to be respected, both-by the parties and by the court.

38 The following passage from *Mundinger v. Mundinger* (1968), [1969] 1 O.R. 606 (Ont. C.A.), affirmed (1970), 14 D.L.R. (3d) 256n (S.C.C.), still reflects the law today (at p. 610):

> If a bargain is fair, the fact that the parties were not equally vigilant of their interest is immaterial. Likewise, if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the contract to show that his conduct throughout was scrupulously considerate of the other's interests.

39 In other words, it is not open to the court to set aside an agreement freely entered into by the Wife, with the benefit of independent legal advice, merely because she would have gotten a much higher equalization payment had she been more vigilant of her interests. It is not the court's function to set aside bad deals, so long as one party has not preyed upon the other. Adult spouses are free to enter into settlement agreements that are not in accordance with their spousal property rights under the *Family Law Act*: *Pruss v. Pruss* (2000), 12 R.F.L. (5th) 188 (Ont. S.C.J.). Having chosen to do so, a spouse cannot later set aside that agreement simply because she would have received more had she followed the equalization formula in the *Act*.

40 It cannot be argued that the parties were operating under a mistake of law as to their equalization rights, as Mr. Stewart suggests, because they both received independent legal advice and were, I must presume, advised as to their legal rights and thereafter knew the law. The Wife did not call her lawyer to give evidence, and she could not recall the specifics of their discussions, other than that they were "short and sweet". She did certify in paragraph 31 of the agreement that she received independent legal advice, and she confirmed in cross-examination having read and understood that paragraph. I infer from that paragraph that she was advised as to her legal rights relating to the matters dealt with in the agreement, including equalization of net family property, custody and support.

41 I am not satisfied that the Wife has established any valid ground for setting aside the property settlement provisions of the separation agreement. Having said that, however, I do not find that the Wife is without a remedy. I have so far considered the errors concerning the bank indebtedness only in connection with the claim for rescission under s. 56(4) of the *Act*. Mr. Stewart also argued that those errors constitute negligent misrepresentation. He stated that negligent misrepresentation entitled the Wife to rescind the contract, but cited no authority for that proposition. I do not believe that to be the law. Negligent misrepresentation is a cause of action in tort, not in contract, and the remedy is damages. Indeed, the authority relied upon by Mr. Stewart, *Krueger v. Krueger* (1997), 30 R.F.L. (4th) 398 (Sask. Q.B.), awarded damages in the amount of $18,888, representing one-half of the amount of cash deposits that were undervalued by the husband.

42 Misrepresentation does give rise to contractual remedies. A fraudulent misrepresentation affords a basis for avoiding a contract, but there is no evidence of fraud here. An innocent misrepresentation, as we have here, can only serve to rescind the contract if the misrepresentation is "operative" i.e. it leads to "a substantial difference between what the victim bargained for and what he obtained, such as to constitute a failure of consideration": Fridman, *The Law of Contract* 4th ed. (Toronto: Carswell, 1999) at 320-1. Here, the misrepresentation is not "operative". It merely resulted in a small difference in the equalization figure that both parties were attempting to calculate. The same essential bargain would have been entered into by the parties had the true debt figures been known, but the amount of the equalization payment would have been adjusted upward by $1,876.

43 Returning to the claim for negligent misrepresentation, I am satisfied that the Wife relied on the bank indebtedness figures supplied by the Husband, and that he was negligent in providing those figures. He told the Wife that he obtained the figures from the bank, but in fact it appears that they were estimates on his part. She relied on those figures to her detriment, since they resulted in her, in effect, "paying" $1,876 too much when her half of the debts was deducted from her equity in the matrimonial home. I am prepared to conclude that a special relationship of trust exists between married persons, although I acknowledge that the law is far from settled on that point. I am, therefore, satisfied that the elements of negligent misrepresentation have been made out. Adopting the approach followed in *Krueger* (supra), Ms. Stillwell having provided me with no authority to say I should not do so, I find that the damages suffered by the Wife as a result of this misrepresentation amount to $1,876, and she is entitled to judgment in that amount.

44 In addition, it is clear on the face of the kitchen table agreement that the parties made a mathematical error. The calculation begins with the Wife's half share of the equity in the matrimonial home, and that figure is steadily reduced by her half of various debts that are taken into account. At one point, her balance of $6,300 is reduced by $1,500 to $4,800, and the entry beside that reduction is "lawn mower". This would make sense if she was to receive the riding lawnmower, and was paying the Husband half of its $3,000 value. However, the Husband actually received the lawnmower, so they should have added $1,500 to her balance instead of subtracting it. This creates a $3,000 error in the bottom line, so that the amount payable should have been $11,000 instead of $8,000.

45 In my view, a mathematical error amounts to a mutual mistake, which can be corrected through the equitable remedy of rectification. Correcting the mistake results in the Husband owing the Wife the additional sum of $3,000, and she is entitled to judgment in that amount as well.

Child Support:

46 The Wife is claiming child support under the *Divorce Act* for the two children in her primary care. Courtney is seven years of age, and Cameron is five. Although the parties agreed, in the separation agreement, that the Husband would pay child support of $250 per month per child, this is not a variation proceeding because there has never been a prior court order for child support.

47 On an application for child support in the first instance, a court "shall" make an order that is in accordance with the *Guidelines*, pursuant to s. 15.1(3) of the *Divorce Act*. However, s. 15.1(5) permits a court to make an order that is different from the *Guideline* amount if two conditions are met:

> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

48 In this case, no "special" provisions have been made in the agreement that directly or indirectly benefit the children. The agreement contains nothing more than a standard clause providing for child support of $250 per month per child, terminating when the child is 18 or no longer in full time attendance at school, with a cap at age 23. The parties also agree to contribute toward the cost of post-secondary education on a pro-rata basis. There are no transfers of property or other special provisions that benefit the children, directly, or indirectly.

49 In such a situation, the separation agreement is essentially irrelevant. Since the pre-conditions in s. 15.1(5) for taking an agreement into account have not been met, I am left with the presumptive obligation to make a child support order in accordance with the *Guidelines*. Thus, the task becomes one of establishing the Husband's income for purposes of determining the appropriate table amount.

50 The Husband's net income from his sole proprietorship, for the past three years, as disclosed by the financial statements attached to his income tax returns, is as follows: 1997 - $40,149; 1998 - $34,052; 1999 - $30,060. In each case, I have ignored a deduction that he is entitled to claim for income tax purposes relating to a share of his home expenses, because he would be required to incur those expenses in any event with or without his business.

51 Mr. Stewart argues that these financial statements do not fairly reflect the Husband's income. The evidence is that the Husband receives as much as 40% of his receipts from his customers in the form of cash, and during the marriage he habitually had large quantities of cash on hand from which he paid family expenses. Certainly, there is a clear opportunity to siphon cash from the business that would not be reflected in the financial statements.

52 He submits that the Husband's budget, according to his various Financial Statements sworn during this proceeding, discloses that he needs about $69,000 per year to meet his expenses. Thus, I am urged to impute income in that amount to the Husband.

53 The obvious weakness in this argument is that it requires the court to accept the Husband's expenses in his Financial Statements as being perfectly accurate and credible, while at the same time finding that the Husband has deliberately understated his income in those same Financial Statements. It seems to me more logical to conclude that if the Husband was inaccurate in one part of his Financial Statement, it is likely that he was inaccurate in the other part as well.

54 A more persuasive argument for attribution emerges from an analysis of the Husband's demonstrated ability to pay down his debts. His Financial Statement sworn February 25, 1999 disclosed that his total indebtedness on the date of separation, November 1, 1997, was $108,966, and that his total indebtedness as at the date of the Statement was $92,169. The Husband's updated Financial Statement, sworn October 1, 2000, disclosed that his total indebtedness had been reduced to $55,357. This represents a total reduction in debt of $53,609 during a period of almost exactly three years.

55 The Husband offered no explanation for his ability to make such a drastic paydown of his debt during that period. He referred in his evidence to a line of credit that he has with his supplier, Beatrice, that fluctuates from $18,000 to $40,000 from time to time, but averages about $24,000. He specifically confirmed in his testimony that the Beatrice debt is not getting bigger, but rather has, on average, remained the same over the years. He admitted that he has not run up the Beatrice debt in order to pay down his other debt.

56 I have set out above his net income, after business expenses, for the years 1997, 1998 and 1999. The Husband's net income has remained relatively constant, or in slight decline, in recent years. Certainly, there is no evidence that his income has gone up in the past ten months. Thus, his income for those three years from January 1997 to December 1999 should provide a fairly reliable indicator as to his maximum ability to earn income for the three year period from the date of separation November 1, 1997, to the present time. For purposes of the analysis below, these three year periods will be assumed to coincide.

57 His total net income after business expenses for the three year period is $104,261. His income tax returns indicate that he paid income tax and CPP premiums in the following amounts in those years: 1997 - $10,561; 1998 - $6,071; 1999 - $6,239. These payments total $22,871, reducing his income, after tax, to $81,390. He also made RRSP contributions during those years, as follows: 1997 - $4,750; 1998 - $2,250; 1999 - $3,000. These contributions total $10,000, further reducing his available income to $71,390.

58 Finally, he paid non-deductible child support of $500 per month for the first 10 months following the separation, and $548 per month for the next 26 months, up to and including the payment made October 1, 2000. These child support payments total $19,248. This further reduces the income available to the Husband to $52,142 for the three year period.

59 It is obviously impossible for the Husband to have paid down his total indebtedness by $53,609 during this same three year period. He only had $52,142 available to him, from which he had to provide for all of his own living expenses, including housing, food and transportation. Given the expenses he claims to incur in his Financial Statement, and even allowing for substantial discounts on many items, I am satisfied that he would require all or most of that $52,142 just to provide for his own needs. The conclusion I am led to is that the bulk of his ability to pay down his indebtedness came from undisclosed sources of income.

60 Allowing for at least some ability to pay down his debt from his available income, I attribute the sum of $15,000 per year in additional income to the Husband. Since the Husband's income has declined, albeit modestly, in each of the past three years, s. 17(1) of the *Guidelines* directs me to use his income from the most recent year for the purpose of calculating child support. I start, therefore, with his 1999 income of $30,060, and add to that the attributed income of $15,000, bringing his total income for support purposes to $45,060.

61 Child support for two children at that income level, according to the table, is $636 per month.

62 Mr. Stewart argues that the commencement date for support should be the date of separation. I do not feel that it is appropriate to so order. While the separation agreement is irrelevant for purposes of determining the quantum of child support to be paid, it does have some relevance when establishing a date for the commencement of retroactive support. The Wife negotiated a settlement of child support at $500 per month, with the benefit of independent legal advice. The Husband performed his obligations under the agreement faithfully and on time, and voluntarily increased support to $548 per month in September, 1998.

63 Having said that, it is clear that the separation agreement was under attack when the Wife commenced these proceedings in September of 1998. It is also clear, from the findings I have made above, that the Husband has been paying less than he should have been paying under the *Guidelines*. Balancing these competing considerations, it is ordered that the Husband shall

pay child support to the Wife in the amount of $636 per month, commencing September 1, 1998. He will, of course, receive credit for the amount of $548 per month that he has been paying since then.

Access:

64 The Wife is also seeking a minor variation in the access that the Husband has been receiving. The separation agreement gives the Husband access including alternate weekends plus ten evenings per month. The status quo that has been in place during the three years since the separation is that those additional ten days of access have been exercised on Tuesdays and Wednesdays of each week. The Husband picks up the children at the Wife's residence on Tuesday after work, and brings them home. They spend Tuesday night at his residence, and he drives them to school the next morning. He needs to have someone watch the children briefly Wednesday morning between 6:15 and 7 a.m. while he loads his truck, but otherwise he is available to care for the children. Cameron only goes to school every other day, so he has been spending the off days with the Husband since school started in September, travelling around with him on his delivery route. The Husband then picks up the child or children at school, has supper with them, and returns them to the Wife Wednesday evening at around 7 p.m.

65 The Wife objects to this arrangement, and wants the children to be returned home Tuesday evening, with a separate visit to follow the next evening. However, she works straight midnights at her job. If her plan were adopted, the children would fall asleep at her residence Tuesday evening, then have to be carried to the babysitters (who lives in the same building) to spend the night there. They would then return to the Wife's residence the following morning when she finishes her shift.

66 It seems to me to be much better for the children to spend an uninterrupted evening, night and morning with their father than to be shuttled back and forth to a babysitter's residence. The Wife has offered no evidence to demonstrate that the status quo is not operating in the best interests of the children. Accordingly, I am not prepared to make any variation in the access arrangements.

Divorce:

67 The Wife also seeks dissolution of the marriage. The grounds for a divorce have been established, and judgment for divorce shall issue, effective thirty-one days from this date.

68 If the parties are unable to agree on costs, I will entertain brief written submissions within the next thirty days. Alternatively, counsel may make arrangements with the Trial Coordinator for the matter to be spoken to at a mutually convenient time.

Order accordingly.

Canadian Divorce Law and Practice, 2nd Edition § 3:6

Canadian Divorce Law and Practice, 2nd Edition
James C. MacDonald, Lee K. Ferrier

Part I. Canadian Divorce Law and Practice, 2nd Edition

Chapter 3. Duties[1]

I. Parties to a Proceeding[1]

§ 3:6. Family Dispute Resolution Process

Amendments to the *Divorce Act*, which came into force on March 1, 2021, reflect the most extensive amendments to the *Act* in decades. The primary focus of the amendments is to ensure that the best interests of the child are the only considerations for parenting decisions under the *Divorce Act*. To achieve this goal, the amendments have made notable changes in terminology. The previous concepts of "custody" and "access" have been replaced with the term "parenting order". Under a parenting order the court can consider and determine "parenting time" and "decision-making responsibility". Parenting time is the time during which someone in the role of a parent is responsible for a child. Included in this time are periods when the child is not physically in the care of that person, such as when the child is at school or in daycare. "Decision-making responsibility" refers to the responsibility to make significant decisions about a child. This may include, but is not limited to, decisions about a child's health and education. A parenting order may be granted, on application, only to either of both spouses or to a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

The amendments also introduced "contact orders" for situations in which, after a relationship breaks down, the relationship between the former spouses and the children's extended family becomes strained. While contact orders may be subject to the same terms and conditions as parenting orders, persons seeking a contact order are not in a parental role. Differences exist between parenting and contact orders. Notably, a person granted a contact order is not automatically entitled to make day-to-day decisions about a child, even during contact.

These changes in terminology are intended to reduce parental conflict by shifting the focus from a scenario in which it could be perceived there are winners and losers to one in which the focus remains on the parents' responsibilities for their children. Under these parenting and contact orders, courts will be able to provide specific directions concerning the care of children. There is no presumption in the amendments that joint custody is in a child's best interests.

In order to help parents, family justice professionals and judges determine the best interests of a child on a case-by-case basis, and to achieve some consistency and clarity, the amendments set out a non-exhaustive list of best interests of the child criteria. The amendments create a "primary consideration", which ensures a child's safety, security and well-being is always at the forefront.

Under **section 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." This provision reflects the fact that many parties are self-represented in family law proceedings. Alternative dispute resolution, whether arbitration, mediation or collaborative law is often a less expensive and less time-consuming way to resolve disputes. There are situations, for example where there are family violence issues, where it may not be in the parties' best interests to engage in an alternative dispute resolution process. As such, **s. 7.3** is not absolute.

A parent's refusal to submit issues to mediation or arbitration by a parenting coordinator should not be considered unreasonable conduct in the context of costs—A.P. v. P.P., 2021 ONSC 7424 (Ont. S.C.J.). The father was successful in opposing the mother's relocation from Mississauga to Ajax. He sought substantial indemnity costs of the motions. The mother submitted the costs

should be reduced because of the father's failure to submit the dispute to mediation or arbitration by a parenting coordinator. The court found that, as alternative dispute resolution is not mandatory; refusal to submit to same is not conduct considered unreasonable sufficient to attract costs sanctions.

Footnotes

1 [Heading added 2019, c. 16, s. 8.]

1 [Heading added 2019, c. 16, s. 8.]

Law Society of Ontario | Barreau de l'Ontario

TAB 13

17th Family Law Summit

Estates and Trusts Family Planning (PowerPoint)

Marni Pernica
Aird & Berlis LLP

March 29, 2023

Estates and Trusts Planning
Family Law Summit 2023

Marni Pernica, Partner, Aird & Berlis LLP

AIRD BERLIS

Table of Contents

AIRD BERLIS

Why do I need a Will in the First Place?

AIRD BERLIS

Why do I need a Will in the first place?

- Objectives:
  - Preserve and protect assets during lifetime
  - Transfer assets to beneficiaries in an orderly and tax-effective manner (during lifetime and on death)
  - Continued preservation of assets in the hands of beneficiaries
  - Potential to reduce/avoid litigation

Why do I need a Will in the first place? Ontario Intestacy Rules

Married, no children	Spouse
Married, with children, > $350,000	Spouse
Married, 1 child, > $350,000	$350,000 to Spouse Balance: ½ to Spouse and ½ to child
Married, 2 or more children, > $350,000	$350,000 to Spouse Balance: 1/3 to spouse and 2/3 equally among children
Single, no children	Parents
Single, no children/parents	Siblings
Single, no children/parents/siblings	Nieces/Nephews
Single, no children/parents/siblings/ nieces/nephews	Next of Kin
Single, no children/parents/siblings/ nieces/nephews, no next of kin	Government

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Do I need to change my will if my marital status changes?

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Do I need to change my will if my marital status changes?

- marriage no longer revokes a will

- separation does not revoke a will
    - recent change to the *Succession Law Reform Act* provides that a separated spouse (as specifically defined in the legislation) will be treated as if they predeceased the testator
    - As of January 1, 2022, the *Succession Law Reform Act* is amended to extend the same treatment to spouses who have separated. The parties must have either:
        1. been living separate and apart as a result of the breakdown of their marriage for a period of at least three years, if the period immediately preceded the death;
        2. entered into a valid separation agreement under the relevant provisions of the *Family Law Act*;
        3. obtained a court order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; or
        4. obtained a family arbitration award with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage.

- does not **apply to beneficiary designations**

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What are the differences between the rights of a common law spouse and a married spouse on the death of a partner?

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Rights on Death – Legislation

- *Family Law Act*:
  - a surviving married spouse has the option of either:
    - receiving the entitlement under the deceased spouse's Will (or under the rules of intestacy where there is no Will); or
    - electing to receive an equalization of net family property under the *Family Law Act*

- *Succession Law Reform Act*
  - excludes common law spouses from inheriting on intestacy
  - entitlement on intestacy does not include a separated spouse at the time of their spouse's death

Potential Claims by Spouse(s) and Other Dependents

- Claim for Dependant Support
  - a person who was receiving, or was entitled to receive, support from the deceased can apply for a court order requiring that some provision be made for them out of the deceased's estate, if the deceased died without adequately providing for such dependent.
  - the "dependant" includes, *inter alia*: married spouses and common law partners

- Claim of Constructive Trust or Resulting Trust

What should I consider when making a beneficiary designation in a life insurance policy?

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Revocable vs. Irrevocable Insurance Beneficiary

	Revocable	Irrevocable
Can the beneficiary be removed as a beneficiary by the policy owner?	Yes	No
Must the beneficiary consent to any policy changes?	No	Yes
Must the beneficiary be told if the policy is cancelled?	No	Yes

Irrevocable Insurance Beneficiary Designations

- Irrevocable designations must be filed with the insurer at its head office or principal office in Canada.
- Irrevocable designations cannot be made in a Will.
- If an irrevocable designation has been made, it cannot be changed without the consent of the beneficiary.
- Where a beneficiary cannot consent due to legal incapacity, one can apply to the court for consent.
- While an irrevocable designation is in place, the contract is protected from creditors of the insured person and is not part of the insured's estate.

Rules Applicable to Insurance Beneficiary Designations

- Revocation:
  - Later designations revoke an earlier designation.
  - If a designation is contained in a Will, revocation of the Will revokes the designation.
- Disclaiming:
  - A beneficiary may disclaim the insurance by filing a notice in writing to the insurer's head office. Once filed, it is irrevocable.
  - A disclaimer operates as if the beneficiary has predeceased the person whose life is insured.

- **Reminder:** Always make appropriate inquiries to accurately state the assets. Do not just rely on what the clients say, always obtain source documents.

Should the Designation be Inside or Outside the Will?

Inside the Will

- Be aware that the financial institution may take the position that the Will must be probated
- Revocation of the Will revokes the designation

Outside the Will

- Independent of the Will, but should be reviewed alongside the Will
- Easily deposited with the financial institution
- Do not necessarily need to involve the lawyer
- Offers ease of creating terms through incorporation by reference of the terms of the Will

Life Insurance Designations

- consequences of doing a beneficiary designation to a minor “in trust”
  - without proper trust provisions beneficiary will receive the proceeds when they turn 18
  - must name a trustee

- consider alternate designations

Overview of Probate Planning

AIRD BERLIS

Why is Probate Necessary (or is it)?

- The Will itself gives the named executor authority to administer the testator's estate:
- But how can the executor deal with assets held by third parties?
- Hence: Apply for a Certificate of Appointment of Estate Trustee (with or without a Will)
- The Certificate of Appointment is proof to 3rd parties that the executor has the legal authority to administer the testator's estate
  - A nice gold seal

What Is Estate Administration Tax?

- Estate Administration Tax is also known as “EAT” or “probate”
- Imposed under Ontario’s *Estate Administration Tax Act*
- EAT is paid by your estate when “probating” your will
- Executors may be required to probate the will

How Is EAT Calculated?

- Calculating EAT:
  - EAT is not payable on the first $50,000 of assets
  - $15 for every $1,000 (or part thereof) of the value of the estate
  - Rule of thumb that EAT is $15,000 for every $1M of assets

- Once a will is being submitted for probate, EAT is payable on **ALL** assets governed by the will

When Is Estate Administration Tax Payable?

When Do You Typically Need to Apply for Probate?

- Ontario resident dies and is the **sole registered** owner of any one of the following assets:
  - real estate in Ontario (subject to certain exemptions);
  - large bank accounts (over $50,000);
  - non-registered investment accounts (over $50,000);
  - registered accounts and life insurance where the estate is named as the beneficiary; and
  - shares of public companies

- Non-residents are also required to apply for probate if they have any of the above listed assets in Ontario

What Type of Assets Can Be Dealt With Without Probate?

- shares of private companies;
- personal property (i.e., furniture, art, handbags, watches, clothing, etc.);
- assets held in bare trust;
- assets held in trust; and
- life insurance and RRSPs/RRIFs with beneficiary designation

BUT if an individual dies owning a combination of these assets and assets that require probate in order to be dealt with, EAT may be payable on the value of the whole estate.

How do I minimize estate administration tax?

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Planning to reduce EAT

- Designating a beneficiary (RRSP, RRIF, Life Insurance)
- Multiple wills
- Joint Assets
- Alter Ego Trust or Joint Partner/Spousal trust

Direct Designations and Registered Plans/Life Insurance

- can be done directly with the financial institution or in client's last Will and Testament
- avoids EAT on the value of the plans
- must consider tax consequences

Direct Designations - Points of Consideration

- Tax consequences
  - Mismatch between tax and beneficiary
  - Without insurance, will there be sufficient liquidity to satisfy the tax liabilities?

- Outdated beneficiary designations
  - Divorce vs. separation
  - Marriage
  - Change in circumstances
  - New will

Primary and Secondary Wills

- Probate planning technique where two wills are executed:

  - **Primary Will:** deals with assets for which a Certificate of Appointment is required (i.e. certain bank/investment accounts and real estate)

  - **Secondary Will**: deals with assets for which a Certificate of Appointment is not required (i.e. personal articles; shares in closely-held private corporations)

- Result: only the Primary Will is submitted to the court, and EAT is only payable on assets that are covered in the Primary Will.

Multiple Wills: Risks

- Probate provides the executors with protection from liability. They can be liable if they deal with the assets of the estate without probate and a subsequent valid will is found
- Dependent claims: the Succession Law Reform Act, R.S.O. 1990
  - ss 61 (1) no application after six months from the grant of Certificate of Appointment. If probate is not obtained, this time period never expires.
- There can be problems with banks and home insurance companies due to transfer of assets to bare trusts
- Banks can cause difficulties with bare trust accounts after testator dies
- Even for assets that *prima facie* do not require probate, it may be necessary to obtain probate in any event. For example, if a private company owned by the estate is to be sold, the purchaser may want the security of probate before dealing with the executors.

Bare Trust Planning Using Corporation

- Incorporate a company (or use a corporation already owned) to act as a bare trustee (agent) for the beneficial owner
- Beneficial owner transfers legal title into the name of the corporation to hold “in trust” for the beneficial owner
- Corporation signs a declaration of trust that it holds legal title as bare trustee and true ownership stays with the original owner
- can be done for real estate and non-registered investment accounts

Bare Trust Planning for Real Estate Using Corporation

- Real estate not recorded as an asset on the books of the corporation
- No tax consequences
  - no land transfer tax
  - does not affect eligibility for principal residence exemption
- Consider whether there is a mortgage registered on the property
- Recommend notifying insurance company of the change
- *Ontario Business Corporations Act* requires any corporation that has an ownership interest in land in Ontario to keep, at its registered office, a register identifying:
  - each property held by the corporation;
  - date of acquisition; and
  - date of disposition

Bare Trust Planning Using Joint Ownership

To properly probate plan with adult children as joint tenants:

- The parent transfers legal title to such assets into names of the parent and adult child, jointly
- The adult child signs a declaration of trust acknowledging that he/she is only holding the jointly held assets "in trust" for the parent
- The parent executes multiple wills – the Secondary Will must include "assets held in trust" by the adult child for the parent
- On the parent's death, the asset will form part of the parent's Secondary Estate
- The beneficial owners must report all of the income personally

Joint Ownership: Do the associated risks outweigh the rewards?

- joint account holders have equal rights to access joint accounts
- joint accounts may be subject to claims from the other party's creditors or divorce proceedings
- loss of control and privacy during lifetime
- income tax consequences
- potential for litigation both during and after the transferor's lifetime
- potential for misuse/abuse

AssetsTransferred to Alter Ego or Joint Partner Trusts

- Assets held in Alter Ego Trust or Joint Partner/Spousal Trust falls outside of the estate

Alter Ego Trust	Joint Partner/Spousal Trust
• settled after 1999; • is an inter vivos trust; • taxpayer is 65 years or older; • taxpayer is entitled to all of the income of the trust during his or her lifetime; • no person other than the settlor is entitled to receive or otherwise obtain the use of any capital of the trust during his or her lifetime; and • is a trust that does not elect out of the provision to be an alter ego trust	• settled after 1999; • is an inter vivos trust; • taxpayer is 65 years or older; • taxpayer or taxpayer's spouse or common-law partner is entitled to all of the income of the trust during their respective lifetimes; and • no person other than the taxpayer or taxpayer's spouse or common-law partner is entitled to receive or otherwise obtain the use of any capital of the trust during their respective lifetimes

Alter-Ego Trusts and Joint Partner Trusts: Advantages

- Maintain control over the use and enjoyment of one's assets during one's lifetime while avoiding or minimizing the payment of EAT
- Maintain confidentiality of document
- Ability to permit funds to be available shortly after the death without the delays occasioned by the probate process
- Ease of administration in dealing with assets in foreign jurisdictions
- Creditor protection
- Ensure orderly transfer of assets
- Alternative to the power of attorney for property

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Questions?

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TAB 14

17th Family Law Summit

The Reform of Relocation Law in Ontario: The First Two Years (PowerPoint)

The Reform of Relocation Law in Ontario: The First Two Years

Professor Nicholas Bala, LSM, Faculty of Law
Queen's University

With thanks to Kyle Thom, Queen's Law J.D. Candidate 2024

March 29, 2023

cpd

The Reform of Relocation Law in Ontario: The First Two Years

Prof. Nicholas Bala
Faculty of Law, Queen's University, Kingston, Ontario

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The Challenge of Relocation Cases

- Court outcomes difficult to predict
- Lack of clear guidance in social science literature about effects of relocation or not
- Difficult to settle
  - often no "middle ground"
  - very significant for parents
- Difficult for courts

  "We recognize that mobility cases are among the most difficult cases a court has to decide."

  Laskin J.A. in *Wolf v Wales* (2001, Ont.C.A.)
- Legislative reform & SCC (*Barendregt*) have resulted in significant changes in relocation cases in last 2 years

Barendregt v Grebliunas, 2022 SCC 22, Karakatsanis J
Upholds trial decision allowing relocation

SCC upheld trial decision (reversing BCCA) to allow mother to relocate with her children 10 hours drive away, in significant measure because she had been victim of violence and abuse during and after the parties' cohabitation.

SCC emphasizes deference to trial judge in parenting cases, **including relocation cases, and limited scope for admission of "fresh evidence" at appeal stage *(Palmer Test).***

Barendregt v Grebliunas (2)
Family Violence & Relocation

Family violence has "**grave implications [and] any form of family violence poses for the positive development of children.**" Judicial **findings of family violence are** a **"critical consideration"** in the best interests analysis.

Being a **perpetrator of domestic violence is relevant to "parenting ability." SCC recognized that harm to children "can result from direct or indirect exposure to domestic conflicts."**

SCC observed that this was more than a case of "friction" but involved violence during relationship and at separation incident that involved police and medical attention, and after separation continued emotional abuse and control (eg affidavit of father including nude selfie of mother)

> "…the parties' acrimonious relationship was far from a relic of the distant past. Again, the acrimony surfaced during the trial itself. And abusive dynamics often do not end with separation — in fact, the opposite is often true: Jaffe, Crooks and Bala (2009)"

Barendregt v Grebliunas (3)
"Maximum Contact" - No More

SCC walks back the "maximum contact" principle that it articulated in *Young v Young* (1993) and *Gordon v Goertz* (1996). Karakatsansis J:

> "what is known as the maximum contact principle is ***only*** significant to the extent that it is in the child's best interests; it must not be used to detract from this inquiry. It is notable that the amended *Divorce Act* recasts the 'maximum contact principle' as '[p]arenting time ***consistent with best interests of child'*** s. 16(6). This shift in language is more neutral and affirms the child-centric nature of the inquiry. Indeed, going forward, the 'maximum contact principle' is better referred to as the **'parenting time factor.'"**

While exact meaning of "parenting time factor" is unclear, SCC is clearly stating no presumption of shared parenting time. *Barendregt* supports allowing relocation even if this results in a substantial reduction in parenting time for the non-relocating parent.

Legislative Scheme: Divorce Act & CLRA Notice: Moves that are relocations

- relocation is "a change in the place of residence of a child… that is likely to have a significant impact on the child's relationship" with the other parent
- Parent who wishes to relocate with child, shall give 60 days' written notice to the other parent. *DA* s. 16.9; *CLRA* s. 39.3(2)
- Written notice must provide:
  - date of proposed relocation
  - new address and contact information
  - proposal for exercise of parenting time, decision-making or contact after relocation
- Other parent has 30 days to object or start court application to relocation
- If only a move that is not a relocation, requires written notice, but not 60 days and no right to object

Relocation vs mere change of residence

- relocation is "a change in the place of residence of a child… that is likely to have a significant impact on the child's relationship" with the other parent. *Divorce Act* s. 2(1); *CLRA* s. 18(1).
- Multifactorial assessment including travel time and parenting schedule (more flexible if only weekends vs school pick-ups)
  - *S.C. v. J.C.*, 2022 ONSC 4146:
    - extra 12 mins (each way) added to 32 minutes for weekends only father is not relocation, even if it results in change in schools
    - parent arguing relocation must introduce evidence about "*significant impact on child's relationship" to that parent.*
    - Dad's evidence about children not wanting to change schools NOT relevant to whether this is relocation.
- Move resulting in extra 30 minutes each way (1 hour in total) is not relocation if only weekends (but might be relocation if midweek school drop-offs)
  - *Apa v. Vagadia*, 2022 ONSC 2095.

Ontario trial decisions
First two years of DA & CLRA amendments

76 Ontario cases March 1, 2021- Feb. 28, 2023:

- 38 allowed the parent to relocate with the child (50%)
- Moms (36/70: 51%)
- Dads (2/6: 33%)

- Mothers were more likely to have lawyers than fathers.
  - both parents were represented in 54 cases
  - only mother had lawyer in 14 cases
  - only father had lawyer in 5 cases
  - both SRL's in 3 cases

Unilateral moves: Effect of No-Notice

- Only 3/10 permitted (often urgent motion to return)

  Paull J in *Schul v Schmidt*: 2023 ONCJ 30:

  > "A parent who engages in self-help tactics despite the best interests of the child will generally raise serious questions about their own parenting skills and judgment. In many cases, courts conclude manipulative, selfish or spiteful parents simply can't be entrusted with custodial authority they would likely abuse."

- Interim order for return does not preclude parent from making a court application, with proper notice, to allow relocation, which may succeed: *S.K. v. P.C.*, 2023 ONSC 734.
- Court most likely to allow:
  - if serious violence allegation, or
  - clearly best temporary living alternative and relatively short distance "relocation."

Effect of *Barendregt* - appeals

Appeals 01/03/21 – 28/02/23

- Very significant deference to TJ:
  - only 2/26 do not uphold TJ
  - change from earlier period when about 1/3 appeals reversed TJ
  - reflects *Barendregt*
  - perhaps recognition that relocation often lack a "correct answer"

- Ontario
  - ONCA:
    - TJ affirmed 4, all allowing moves
    - 1 stay request, denied
  - Ont Div Ct – 1 case reverses SCJ and allows move
- SCC – 3 uphold TJ
- Other appeal courts (including 3 at SCC)
  - 18 affirming TJ, 1 orders new trial
  - 4 stay requests, 1 granted

Relocations – onus DA s. 16.93

- Burden of proof, set out at s. 16.93:
  - If child has "***substantially equal time*** in the care of each party," burden lies on party intending to relocate
  - If child has "***vast majority of their time*** in the care of the party who intends to relocate," burden lies on party objecting to proposed relocation
  - In middle-ground cases, parties each have burden of showing relocation is or is not in best interests of child
- Court may ignore substantially-equal and vast-majority tests if order sought is interim
- Onus may not be very significant:
  - "vast majority" of time with the child: 8/14 = 57%
  - "substantially equal time": 11/21 = 52%
  - hence little litigation about definitions

Interim application

- 16/36 (44%) were successful on an interim application
  - decided based on affidavits
- *Schul v Schmidt*, 2023 ONCJ 30, per Paull J:

a) parent seeking change must to prove **"compelling circumstances"**

b) courts are "generally reluctant to permit relocation on a temporary basis" as .decision will often have a strong influence on the final outcome of the case, particularly if the order permits relocation.

c) Courts will be more cautious about permitting a temporary relocation where there are material facts in dispute

d) Courts will be even more cautious in permitting a temporary relocation when the proposed move involves a long distance. It is unlikely that the move will be permitted unless the court is certain that it will be the final result. …

e) Courts will be more cautious in permitting a temporary relocation in the absence of a custody order...

f) Courts will permit temporary relocation ….where the result would be inevitable after a trial…

g) the court must consider the best interest factors …and any violence and abuse in assessing a parent's ability to act as a parent ....

Best Interests Factors for Relocation

Divorce Act s. 16.92(1); *CLRA* s. 39.4(3)

(a) *the reasons for the relocation*;

(b) the impact of the relocation on the child;

(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;

(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16. 9, provincial family law legislation, an order, arbitral award, or agreement;

(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;

(f) *the reasonableness of the proposal of the person* who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and

(g) *whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied* with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Reasons for Move

- a new relationship for the relocating parent; 5/7 =72%
- economic, employment or educational opportunities for the relocating parent; 14/26 (56%)
- family support for the relocating parent 5/8=62%; and
- escaping family violence (physical 3/4 = 75%).

- lack of clear strong reason(s), or failure to prove valid reason (court considers allegation of physical violence lacking in credibility) results in relocation not being allowed

Distance of Relocation

- 10/21 permitted where move of 100 km or less
- 11/26 permitted where move than 100 km but in Ontario
- 12/19 permitted where move in USA or Canada (outside Ontario)
- 5/10 permitted where international outside North America

- Although recognized that longer moves are more disruptive, cases with longer moves often seemed to involve more planning and stronger reasons

"Double Bind" Question – Not to be Asked

- Legislation now provides that a court dealing with a relocation application is *not* to consider whether the parent seeking to relocate would relocate without the child. *DA* s. 16.92(2); *CLRA* s. 39.4(4)
- Cited by Ont Div in *Kazberov v. Kotlyachkova*, 2021 ONSC 5006, to reverse trial decision and let mother & son to relocate to live with mom's new partner, as TJ stated that Mom would not move without son and status quo preferred
- But in *Bourke v. Davis (*ONCA 2021) ONCA upholds decision to allow Mom to relocate to Washington with 2 children to live with new husband and their child. It was clear mother had "made the very difficult decision to go to Washington with her husband and [their] baby, whether the children could go with her or not." Feldman JA:

  "In these circumstances, the trial judge was not only entitled but was obliged to accept the fact that the respondent would be moving to Washington with or without the children and that the status quo was not an option for the court to consider."

Child's Views & OCL involvement

- About half children under 8 yrs & half 8 years or older (under 20% 12 yrs +)
- 11/76 with OCL clinician & 3 with OCL counsel
- OCL clinician recommendation followed by ct in 4/7 cases
- *A.E. v A.B. (2021, ONSC)*, the mother was allowed to relocate despite the OCL clinician recommending that the children not be allowed to move. Jarvis J. observed that OCL recommendation is "not determinative" of the relocation, but "merely piece of evidence, often very helpful, for the Court's consideration."
- Challenge for children to consider hypothetical move, so views often not known. Views of child known in 23 cases and followed in 18
  Greater weight if older, but not determinative.
- *Kazberov v. Kotlyachkova* (2021, Ont Div Ct) allowed Mom to relocate 4 hours' drive against recommendation of OCL and wishes of 6 yr. old child:

  "It is an error in principle to attach any significant weight to the views and preferences of a six-year-old child, especially in a situation like this one where his expressed preference is to continue with the status quo…"

Family Violence

- *Barendregt v Grebliunas* and legislation recognize the importance of "family violence" for relocation
- If physical violence was a significant reason for relocation and court accepts claim, move allowed (3/4 cases where alleged)
- Cases of unfounded (or unproven) family violence allegations
  - *N.P. v D.H.*, 2022 ONCJ 535.
- Emotional abuse of partner may also justify relocation

N.S. v A.N.S., 2021 ONSC 5283:

> "While the father has spanked the child on occasion, it is his non-physical behaviour that primarily creates "family violence". The father's behaviour consists of uncontrollable anger, denigrating comments, threats and harassment aimed at the mother, child, Society workers, teachers and others. It is behaviour that the child has witnessed on many occasions. The behaviour is relentless…
>
> The father directly exposes the child to this harmful behaviour. He gets angry and yells at the child….
>
> The father has not taken any useful or meaningful steps to prevent the family violence from occurring."

Emotional abuse & controlling behaviour

L.B. v R.H., 2022 ONSC 2268.

Important factor for the court in allowing the relocation was that the mother supported the father's relationship with the child, while:

> "the negative communication and comments by the father toward the mother, which is sometimes, profane, insulting and aggressive, show his true opinion of her…. Even the father's descriptions of the mother in his affidavit show that he is not able to support her development with the child."

- *See also S.K. v P.C.*, 2023 ONSC 734

Family violence may not be significant if:

- isolated incident, not likely to recur, and not coercive control (cases where father raises violence of mother)
- *V.S. v F.F.* the father unilaterally relocated the 4-year-old child from Brampton to Wolfe Island (4 hours' drive) and used as one of his justifications the fact that three years earlier during an argument the mother had attempted to stab him with a knife. Justice Clay:

  "I find that the father is not really concerned about any risk of physical or emotional harm to the child in the mother's care. I find that the father has used the mother's conviction with all professionals who interact with the family to try and position himself as the responsible caring parent and the mother as an irresponsible parent who poses a risk to the safety of the child."
- See also *K.M.L. v G.T.O.,* 2021 ONCJ 498.

Mutual hostility – not determinative

Wu v Yu, 2022 ONSC 3661, per Price J

> "each of these parties has, to some degree, engaged in family violence towards the other. Each of them has also acknowledged that they have engaged in inappropriate behaviour towards the other, including speaking disparagingly, within the hearing of their daughter.
>
> Apart from the allegation of choking for which [the father] will be on [criminal] trial… I find that the family violence in this case, while not excusable, was explicable. Both parents were facing challenges. … I find …that the family violence that afflicted these parties, and in which each participated, does not reflect negatively on their individual abilities to care for their daughter, especially since they are unlikely to reconcile their marriage. I am satisfied that, apart, each is capable of caring for C. without family violence being a factor.

- Court does not give weight to (alleged) physical violence of father against the mother but allows her to relocate for economic reasons.

Conditions & Child Support

- court may impose conditions to support continued involvement of non-relocating parent in life of child, though if relocating parent is not co-operative, court ordered compliance may be difficult
- 2021 legislative reforms provide that the court authorizing the relocation of a child may make an apportionment of costs relating to the exercise of parenting time by the person who is not relocating between and the person who is relocating the child: *Divorce Act*, s. 16.95, *CLRA* s. 39.4(9).
- court considers economic situation of the two parents and costs of travel

Importance of Planning

- Relocating parent should introduce plans for:
  - new residence, schools, opportunities for extra-curricular activities, social supports for the child and the quality of life in the new community.
  - supporting relationship with left behind parent

Importance of Having Been Supportive

- Social science research finds attitude of relocating Mom is critical for maintaining long distance relationship of child with Dad.
- Court enforcement is often impractical or impossible.
- The importance of the history of co-operation by the relocating parent (or lack thereof) was recognized by Jarvis J. in *A.E. v A.B*, 2021 ONSC 7302, per Jarvis J

  "It is, perhaps, counter-intuitive that fostering a healthy relationship with the other parent may enhance the likelihood of a relocation Order being made."
- Litigation advice: for relocating parent - introduce evidence of support for other parent (Dad) & plans for future relationship

Conclusions

- Relocation cases are challenging for judges, parents and lawyers
- While 2021 reforms and SCC in *Barendregt* have resolved some issues, still controversy and unpredictability
- Even for relocation, settlement may be possible (and desirable)
  - extended time or financial "sweeteners" can facilitate resolution
  - avoid unilateral action

Strategy: whether litigation or negotiation

- Measures to facilitate contact to other parent if move/no move
- Planning for move/no move
- History of support for relationship with other parent vs history of controlling or abusive behaviour
- Views and perspectives of child may be important, though often not available to the court (voice of child reports, whether through OCL or parents to pay)

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March 13, 2023

The Reform of Relocation Law in Ontario: The First Two Years

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Abstract: This paper discusses the statutory reforms of relocation law and the Supreme Court decision in *Barendregt v Grebliunas* (2022), and analyzes the reported Ontario case law since March 1, 2021, when the new law came into effect. Relocation was permitted in 38/76 (50%) of Ontario cases, with mothers 36/70 (51%) being significantly more likely than fathers (2/6: 33%) to apply and succeed. Parents who move without proper notice are often ordered to return (7/10). The new statutory onuses have played only a limited role. Where the party seeking to relocate has had the children the "vast majority" of time and s. 16.93(1) of the *Divorce Act* places an onus on the objecting party to establish that it is in a child's best interests not to relocate, relocation has been permitted in 8/14 (57%) cases. When the onus is on the party seeking to relocate because the parties have had the children "substantially equal time" under s. 16.93(2), relocation has been permitted in 11/21 cases (52%). The elimination of the "maximum contact" principle has made courts more willing to allow relocation even if there has been substantially equal parenting time. Evidence from assessors or experts is not commonly available (11/76: 15%), and the recommendations of OCL investigators have limited effect. Although sometimes discounted, consistent with the legislative reforms, evidence of the children's wishes can be significant factors. Consistent with *Barendregt* and the legislative reforms, family violence is significant, if proven and the primary reason for relocation. Post-separation conduct, such as supporting a child's relationship with the other parent or conversely being unsupportive, controlling or emotionally abusive can also be significant. Appeal courts across Canada, are giving very significant deference to trial judges, with only 2/26 appeals not upholding the trial decision, reflecting the fact that there is often no "incorrect" (or correct) decision.

The Reform of Relocation Law in Ontario: The First Two Years

Nicholas Bala & Kyle Thom

Context for Reform

For the quarter century following the 1996 relocation decision of the Supreme Court of Canada judgement in *Gordon v Goertz*, which articulated a vague "best interests" test for relocation,[1] there was concern that the lack of guidance from the Supreme Court and legislatures resulted in unpredictability of results at trial and appeal. It was argued that the uncertainty of outcomes promoted continued litigation in these very challenging cases, and that in the absence of the Supreme Court providing more guidance, there was a need for legislative reform.[2] British Columbia began the process of legislative reform of relocation law in 2013, and as part of broader set of statutory reforms to the *Divorce Act* (Bill C-78), Parliament enacted a regime to govern relocation disputes between divorcing and divorced parents.[3] Ontario essentially adopted the federal parenting law reforms in their entirety by amending the province's *Children's Law Reform Act* (CLRA), with only different section numbers and some slight variations in wording; the provincial statute is usually applied to parents who are not married to one another. Since the provisions are nearly identical, the same relocation law applies to married and unmarried parents in Ontario. These legislative reforms came into effect on March 1, 2021.

While the Supreme Court refused leave to appeal in 25 relocation cases after 1996, leaving its frustratingly vague decision in *Gordon v Goertz* as the leading precedent, in 2020 the Court gave leave in three relocation cases,[4] and in May of 2022

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[1] [1996] 2 SCR 27. Until the 2021 reforms, courts and commentators in Canada often referred to this issue as "mobility." The legislative reforms have resulted in the adoption in Canada of terminology much more widely used internationally, now referring to these as "relocation" cases, though the term mobility still appears in some reported decisions.

[2] For commentaries that critiqued the lack of guidance in *Gordon v Goertz*, documented the unpredictability of trials and appeals, and advocated legislative reform see e.g. Bala & Wheeler (2012), Canadian Relocation Cases: Heading Towards Guidelines, 30 Can Fam L Q 271; and Thompson (2015), Presumptions, Burdens, and Best Interests in Relocation Law, 53 Fam Ct Rev 40-55.

[3] See e.g. Rollie Thompson (2019), Legislating About Relocating Bill C-78, N.S. and B.C., 38 Can Fam L Q 219; and Bala (2020), Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's Divorce Act, 39 Can Fam L Q 45.

[4] *Richardson v Richardson*, 2021 SCC 36, upholding 2019 ONCA 983; appeal dismissed with very brief reasons, upholding trial judge's decision to reject a mid-trial settlement and allow a relocation trial to

the Court rendered an important decision in *Barendregt v Grebliunas*,[5] providing significant guidance for dealing with relocation cases, including under the new legislation.

In this paper we discuss the legislative reforms and the decision in *Barendregt*, and analyze the reported Ontario trial case law and national appellate jurisprudence on relocation decided in the two years since the reforms came into effect (March 1, 2021, to February 28, 2023)[6].

Some central themes emerge from the research. While it was hoped when the legislation was enacted that it might result in less relocation ligation, there has been an increase in the number of reported relocation cases.[7] Although this may be attributed, at least in part, to more reported (i.e. written) decisions concerning new legislation that requires interpretation, it also seems likely that the Pandemic and its accompanying adjustments in employment, housing, social and marital relationships, has resulted in an increase in relocation litigation. The introduction of presumptions for and against relocation in certain situations has had only limited effect on court outcomes. The new procedural rules in the reformed statute, however, have had a significant effect, and a failure to give proper notice of a relocation usually results in an order to return the child to their previous place of residence; unilateral action is clearly discouraged by the courts.

The elimination of the "maximum contact" principle in the 2021 parenting law reforms has been cited by the courts as a factor in making them more willing to allow relocation even if there has been substantially equal parenting time and the relocation will substantially affect a child's relationship with a left-behind-parent. *Barendregt* has increased the weight that courts give to family violence during a relationship and post-

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proceed. *Kreke v Alansari,* 2021 SCC 50, another very brief Supreme Court decision upholding trial decision to allow mother to relocate.

[5] *Barendregt v Grebliunas,* 2022 SCC 22.

[6] For a copy of Excel sheet with the reported Ontario trial cases and codebook, please contact Prof. Bala at bala@queensu.ca

[7] Rollie Thompson, The New "Relo" Laws, National Family Program, Whistler B.C., July 28, 2022 reported a 59% increase the number of cases since the new law came into effect in March 2021. Bala & Wheeler (2012), Canadian Relocation Cases: Heading Towards Guidelines, 30 Can Fam L Q 271, at 288 found an average of 19.3 reported Ontario relocation cases (trial and appeal) year between 2001 and 2010; since the new law came into effect there were almost twice as many cases a year. Two judges who wrote an article on relocation also "anecdotally" report that there has been an increase in relocation requests since the end of the most restrictive pandemic, see Himel & Paulseth, 1-800-ZOOM-ME: A Divorce Act Update on Post-Relocation Parenting Time, Travel Costs and Child Support (2022), 41 Can Fam L Q 195.

separation behaviour. As encouraged by the Supreme Court decision, appellate courts across Canada are giving more deference to trial judges, and very rarely reversing trial decisions in relocation cases.

The case law makes clear that post-separation parental behaviour is important for these cases. A parent who has supported the other parent's relationship to the children is more likely to be allowed to move with a child, while a parent who has been controlling or hostile after separation could find that the victimized parent may be permitted to relocate. A parent who wants to relocate should have a good plan to present to the court for the child's care after a move and supporting the other parent's post-relocation relationship to the child.

Although about half of the children involved in relocation cases are 8 years old or older, reliable evidence of the views and perspectives of children is only available in a minority of cases. While the views of children are sometimes disregarded, when evidence of their views is available, it often holds significant weight. Most relocation cases are decided without representation or a clinical investigation by the Office of the Children's Lawyer (OCL) or other expert evidence, and when recommendations about relocation are provided by an OCL clinician, they are only followed in about half of cases.

Overview of Legislative Reforms

The 2021 amendments to the *Divorce Act* and the *CLRA* establish a detailed procedural and substantive regime to govern relocation cases. A parent who intends to *relocate* with a child must give at least 60 days' written notice to the other parent,[8] with relocation defined as "a change in the place of residence of a child… that is likely to have a significant impact on the child's relationship" with the other parent.[9] A parent is required to give written notice to the other parent of *any change* in residence, though a failure to give notice of a mere change in residence that does not result in relocation of a child does not have legal consequences.[10] Further, while every parent must, in theory,

[8] *Divorce Act* s. 16.9; *CLRA* s. 39.3(2). Although in theory both parents are required to give notice of a planned relocation, in practice this will only be a legal issue if a parent want to "relocate the child." There is no remedy if a parent relocates without a child.

[9] *Divorce Act* s. 2(1); *CLRA* s. 18(1).

[10] *Divorce Act*, s.16.8; *CLRA* s. 39.3(1). See https://www.justice.gc.ca/eng/fl-df/divorce/nrf-fad.html for a form that may be used. It is not essential to use the form, and an email may suffice, but, as observed by Sherr J in *N.P. v D.H.*, 2022 ONCJ 535, at para. 64:

give notice of their intent to relocate, whether or not the child spends significant time with that parent, there are only immediate legal consequences for a failure to give notice if a parent actually relocates with a child, impacting the other parent's relationship with the child. A person intending to "relocate" with a child may make an *ex parte* application to the court to be relieved of the obligation to give notice, in particular, if there is a "risk of family violence."[11]

A parent who receives a notice of intention of the other parent to *relocate* with the child has 30 days to serve a written notice of objection on the parent proposing to relocate or to make an application to the court objecting to the relocation of the child.[12] If a notice of objection is served on the parent seeking to relocate with the child, that person is obliged to seek court approval for the relocation. If no notice of objection is served and no application of objection is filed to commence proceedings about this issue, *and* there is no previous *order* prohibiting relocation, the party intending to relocate with the child may do so. [13]

If an application to decide on relocation is made, the judge shall make a decision based on an assessment of the "best interests" of the child. In addition to the best interests factors that are generally applied in parenting cases,[14] the new legislation provides that in deciding whether to allow a relocation of the child, the court will also consider the following additional "best interests" factors:[15]

> (a) *the reasons for the relocation*;
>
> (b) the impact of the relocation on the child;
>
> (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;

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notice of relocation must be meaningful to be given any effect. It is insufficient to inform the other party that you are relocating without specifying where you are relocating to or when that relocation will take place.

[11] *Divorce Act* s. 16.9(3); *CLRA* s. 39.3(3).

[12] *Divorce Act* s. 16.91; *CLRA* s. 39.3(5).

[13] *Divorce Act* s. 16.9(3)); *CLRA* s. 39.4(2). There are no reported Ontario cases using this provision, but for a case using this provision, see *A.J.K. v. J.P.B.*, 2022 CarswellMan 74, 2022 MBQB 43.

[14] *Divorce Act* s. 16; *CLRA* s. 24.

[15] *Divorce Act* s. 16.92(1); *CLRA* s. 39.4(3). Emphasis added.

(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16. 9, provincial family law legislation, an order, arbitral award, or agreement;

(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;

(f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and

(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

This list generally reflects the jurisprudence before the legislative reforms. It is notable, however, that a provision in the new legislation reverses *Gordon v. Goertz*, in part, to the extent that Supreme Court suggested that the reasons for a proposed relocation will "rarely" be a factor. This was a welcome reform and is consistent with almost all of the previous relocation case law, which effectively ignored the Supreme Court's *obiter* statement in *Gordon v Goertz* to generally not consider the reasons for the move.[16] As discussed below, courts making decisions under the new provisions invariably carefully consider the reasons that a parent proposes to relocate with the child.

Paragraph (e)[17] states that the provision of an order or agreement restricting relocation is now a factor to be considered, reversing previous case law indicating that such provisions should be given little or no weight.[18] Counsel negotiating agreements should advise clients of the potential significance of a clause restricting relocation, as

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[16] In *Barendregt v Grebliunas,* 2022 SCC 22, it is argued that (at para 108) "subject to some notable exceptions" the 2021 reforms "*largely codified* this Court's framework in *Gordon*. Where they depart from *Gordon*, the changes reflect the collective judicial experience of applying the framework for over 25 years."[emphasis added.] While the factors in the *Divorce Act* s. 16.92(1) and *CLRA* s. 39.4(3) largely reflect the post-*Gordon* case law, other parts of the reforms are clearly statutory modifications of the prior regime.

[17] *Divorce Act* s. 16.92(1); *CLRA* s. 39.4(3).

[18] See e.g. *Ligate v. Richardson*, 34 O.R. 3d 423, 1997 CarswellOnt 2185 (Ont. C.A.) which held that such clauses should be given little or no weight.

recent cases seem to give an agreement not to relocate some weight, though it is only one factor in a relocation case.[19]

The new legislation also specifies that a court dealing with a relocation application is *not* to consider whether the parent seeking to relocate would be willing to relocate without the child.[20] This prevents the party resisting relocation from asking the "double bind" question, of whether the parent seeking to relocate would move without the child; this is largely consistent with previous case law in Ontario and several other provinces.[21]

The new legislation establishes new burdens of proof to apply to relocation cases:

- If the parties have "*substantially equal time*" with the child pursuant to an order or agreement, the party seeking to relocate with the child will have the burden of establishing that the relocation of the child is in the best interests of the child. [22]
- If the party seeking to relocate has the child for *"the vast majority of …time"* pursuant to an order or agreement, the onus of establishing that the relocation is not in the best interests of the child will be on the objecting party. [23]
- In any other case, both parties have the burden of proof, and there is no onus or presumption about whether or not relocation should be permitted. [24]

A unilateral relocation of a child without notice, relocation after a notice of objection is filed, or the existence of an order prohibiting relocation, will be held against the relocating parent in court proceedings about contested relocation.[25]

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[19] *J.L. v D.L.*, 2021 ONSC 4997, 2021 CarswellOnt 10385, where Himel J wrote (at para 63):

> the Mother asserts that there is no order in respect of parenting time. Moreover, Father has been aware for years that she hopes to relocate to St. Catherines. The Mother's argument once again must fail. An agreement has been in place since the commencement of the shared parenting schedule (until its suspension). The equal time agreement was re-instituted following a mediation when the parties, the Society and the OCL agreed to the current plan.
>
> Many parents follow schedules that they never put down in writing. That does not, in and of itself, negate the existence of an agreement. Moreover, the Mother's decision to take the children to St. Catherines without notice, and knowing that the Father did not consent, is problematic.

[20] *Divorce Act* s. 16.92(2); *CLRA* s. 39.4(4).

[21] See e.g discussion in FAMLNWS 2016-42, October 24, 2016, *Epstein's This Week in Family Law;* and Rollie Thompson, (2019), Legislating About Relocating Bill C-78, N.S. and B.C., 38 Can Fam L Q 219.

[22] *Divorce Act* s. 16.93(1); *CLRA* s. 39.4(5).

[23] *Divorce Act* s. 16.93(2); *CLRA* s. 39.4(6).

[24] *Divorce Act* s. 16.93(3); *CLRA* s. 39.4(7).

[25] *Divorce Act* s. 16.92(1)(d); *CLRA* s. 39.3(d).

As noted earlier, the legislative reforms of relocation law were part of a larger package of reforms of parenting law,[26] and recent case law, including the Supreme Court in *Barendregt,* has clearly established that some of the more broadly applicable reforms are affecting relocation cases, most notably the increased recognition of the importance of family violence and the elimination of the "maximum contact" principle.

Barengredt v Grebliunas

In its May 2022 decision in *Barendregt v. Grebliunas*,[27] the Supreme Court of Canada reversed the decision of the British Columbia Court of Appeal and upheld the decision of the trial judge to allow a mother to relocate with her children some 10 hours' drive from the father. There was no prior parenting (or custody) order in this case, so the Supreme Court accepted that "without a pre-existing judicial determination, a parent's desire to relocate is simply part of the factual matrix in the assessment of what parenting arrangement is in the best interests of the child."

In significant measure the trial judge, as upheld by the Supreme Court, allowed the mother to relocate because she had been a victim of the father's abuse. Justice Karakatsanis held that "because family violence may be a reason for the relocation and given the grave implications that any form of family violence poses for the positive development of children, this is an important factor in mobility cases."[28] The Court accepted that being a perpetrator of domestic violence is relevant to "parenting ability" and recognized that harm to children "can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it" (at para 143). While *Barendregt* was a relocation case, the approach of the Court is clearly relevant to all parenting cases, with Karakatsanis J. observing that the amendments to the *Divorce Act* recognize that "findings of family violence are a critical consideration in the best interests analysis." She also observed that [29]

> [d]omestic violence allegations are notoriously difficult to prove [as] family violence often takes place behind closed doors and may lack corroborating

[26] Bala, Bill C-78: The 2020 Reforms to the Parenting Provisions of Canada's Divorce Act (2020), 39 Can Fam Law Q 45.
[27] *Barendregt v. Grebliunas,* 2022 SCC 22.
[28] *Barendregt v. Grebliunas,* 2022 SCC 22, at para. 147.
[29] *Barendregt v. Grebliunas,* 2022 SCC 22, at para. 144.

> evidence…Thus, proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support [from the family of the victimized parent].

Barendregt clearly recognizes the importance of a "finding" of family violence, though it is necessary to keep the factual context of the decision in mind. The Supreme Court observed that this was not just a case of post-separation "friction," but one "featuring abusive conduct during the marriage, at separation, and at trial."[30] Despite the father's denials, the trial judge found that he was abusive, and concluded that one of his assaults on the mother resulted in her calling the police, seeking medical attention, obtaining protection from her parents and immediately moving with the children to live with her parents, some 10 hours' drive from the family's home. Further, the trial judge emphasized that the abusive conduct continued after separation and into the trial itself, including "most notably" the father including "a nude 'selfie' of the mother" in an affidavit, which the trial judge found served "no purpose but to humiliate her." Consistent with s. 16(4) of the amended *Divorce Act,* the trial and Supreme Court decisions in *Barendregt* require that judges take a broad approach to the consideration of family violence in parenting cases.

The Supreme Court in *Barendregt v. Grebliunas* also reconsidered the role of the "maximum contact principle" in relocation cases in light of the 2021 amendments. The title (or marginal note) to the former s. 16(10) of the *Divorce Act* was "Maximum Contact," and in the 1990s in *Young v Young*[31] and *Gordon v Goertz,*[32] the Supreme Court used this provision to develop the "maximum contact principle." The British Columbia Court of Appeal, in reversing the trial judge, argued that allowing the relocation in this case was "inconsistent with the object of maximizing contact between the children and both of the parents."[33] In upholding the trial decision in *Barendregt,* the Supreme Court emphasized the importance of family violence as a factor in parenting cases, and went a long way of eliminating the concept of "maximum contact" from Canada's family law lexicon, recognizing that this term no longer appears in 2021 version of parenting statutes. Justice Karakatsanis wrote (emphasis of the Court):[34]

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[30] *Barendregt v. Grebliunas,* 2022 SCC 22, at para. 141.
[31] *Young v. Young,* [1994] 4 SCR 3 (S.C.C.).
[32] *Gordon v Goertz,* [1996] 2 SCR 27.
[33] *Barendregt v. Grebliunas,* 2021 BCCA 11, at para. 87.
[34] *Barendregt v. Grebliunas,* 2022 SCC 22, at para. 133-135. Emphasis of the Supreme Court.

> What is known as the maximum contact principle has traditionally emphasized that children shall have as much contact with each parent as is consistent with their best interests. A corollary to this is sometimes referred to as the "friendly parent rule", which instructs courts to consider the willingness of a parent to foster and support the child's relationship with the other parent, where appropriate…
>
> Although [the Supreme Court in] *Gordon* placed emphasis on the "maximum contact principle", it was clear that the best interests of the child are the sole consideration in relocation cases… some courts have interpreted what is known as the "maximum contact principle" as effectively creating a presumption in favour of shared parenting arrangements, equal parenting time, or regular access…..
>
> These interpretations overreach. It is worth repeating that what is known as the maximum contact principle is ***only*** significant to the extent that it is in the child's best interests; it must not be used to detract from this inquiry. It is notable that the amended *Divorce Act* recasts the "maximum contact principle" as "[p]arenting time ***consistent with best interests of child*"**: s. 16(6). This shift in language is more neutral and affirms the child-centric nature of the inquiry. Indeed, going forward, the "maximum contact principle" is better referred to as the "parenting time factor."

The decision in *Barendregt* and the words of the amended s. 16(6) of the *Divorce Act* still allow for the argument that it is in the best interests of children involved in a specific case to have as much parenting time as possible with each of their parents, which may or may not involve an allocation of roughly equal time for each parent. The statute and decision, however, also make clear that where concerns about family violence are raised, they must be taken seriously. In particular, if family violence is established as a concern, this may well be a basis for justifying relocation.

Another significant issue that the Supreme Court addressed in *Barendregt* is the role of appeal courts in parenting cases. The Court limited the scope for the admission of fresh evidence at an appeal and emphasized the need for deference to the decisions of the trial judge. One important way that the Court limited the scope for appeals in parenting cases, where there are often some changes in the circumstances of this children or parents after the trial decision, was to restrict the scope of introducing "fresh evidence" at the appeal stage. The Supreme Court held that when a party seeks to adduce additional evidence on appeal, regardless of whether the evidence relates to

facts that occurred before or after trial, appellate courts must apply the "*Palmer test,*"[35] to determine whether finality and order in the administration of justice must yield in service of a just outcome. The *Palmer* test requires that the party seeking to adduce fresh evidence at an appeal satisfy four criteria:[36]

> (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial;
> (ii) the evidence is relevant in that it bears upon a …potentially decisive issue;
> (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
> (iv) the evidence is such that, if believed, it could have affected the result at trial.

The Supreme Court emphasized that the first criterion requires litigants to take all reasonable steps to present their best case at trial to ensure finality and order for the parties and the integrity of the judicial system.

The Court also emphasized the narrow scope for admission of evidence of post-trial developments, as finality is particularly important in relocation cases, as children benefit from stability. The Supreme Court observed that in parenting cases, the admission of post-trial evidence on appeal is often not necessary because legislative schemes permit a court of first instance to vary a parenting order where a change of circumstances justifies a new hearing and a fresh consideration of the child's situation, with Karakatsanis J. writing:[37]

> Litigants must not be permitted to game the system in this way: an appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding; nor is it an opportunity to seek a fresh determination, after remedying gaps in a trial strategy with the assistance of the trial judge's "preliminary" reasons. Such a tactical approach in family cases will often be at the expense of the children.

The interest in reaching a timely result on an appeal generally requires that evidence of events subsequent to the appeal should be introduced on a variation application, where evidence can be properly tested, rather than having an expansive appeal process that takes a too liberal approach to the admission of fresh evidence.

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[35] *R. v. Palmer,* [1980] 1 SCR 759.
[36] *Barendregt v. Grebliunas,* 2022 SCC 22, at para. 29.
[37] *Barendregt v. Grebliunas,* 2022 SCC 22, at para. 79.

Ontario Trial Decisions: March 1, 2021 – February 28, 2023

The implementation of the parenting legislative reforms was initially planned for the Spring of 2020 but was delayed due to the Pandemic. Well before March 1, 2021, relocation and other parenting cases were being argued on the basis of the new statutory provisions,[38] so Ontario decisions rendered from March 1, 2021, were decided under the reformed law.

In the two years following the coming into force of the new provisions, there were 76 reported trial decisions in Ontario dealing with relocation, most a result of applications to vary prior orders, but some as original applications for relocation where there was no prior order. Of the 76 Ontario cases, 38 allowed the parent to relocate with the child (50%), and 38 were not permitted to relocate. Mothers (36/70: 51%) were more likely than fathers (2/6: 33%) to apply for relocation and succeed with their requests. Reports of clinical investigators from the Office of the Children's Lawyer was available in only 11/76 cases, and recommendations were often not provided (4/11) or not followed (followed in 4/7 cases where provided).

Mothers were more likely to have lawyers than fathers. In 54 cases, both parents were represented. In 14 cases, only the mother was represented, in 5 cases only the father was represented, and in 3 cases both parties were self-represented.

Temporary (or Interim) Applications

Of the 76 reported decisions on relocation, 36 were on a temporary (or interim) application, of which 16 (44%) were successful, generally decided based solely on affidavit evidence. The case law recognizes that there must be "compelling circumstances" to allow such an application. If a relocation is allowed at this stage, it is unlikely that the matter will proceed to trial, and at the temporary hearing stage there will not be an opportunity to fully test evidence.[39]

In his 2023 decision in *Schul v Schmidt,* Paull J. summarized the law governing temporary relocation applications:[40]

The following are additional principles regarding temporary relocation…

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[38] See e.g *Bourke v. Davis,* 2021 ONCA 97, argued and decided by the Ontario Court of Appeal in February 2021, with the Court making reference to the relocation provisions that technically only came into effect on March 1, 2021.

[39] See *Plumley v. Plumley* (1999), 1999 CarswellOnt 3503 (Ont. S.C.J.).

[40] *Schul v Schmidt,* 2023 ONCJ 30, at para.45. Citations omitted.

> a. The burden is on the parent seeking the change to prove compelling circumstances exist that are sufficient to justify the move…
> b. Courts are generally reluctant to permit relocation on a temporary basis. The decision will often have a strong influence on the final outcome of the case, particularly if the order permits relocation. The reality is that courts do not like to create disruptions in the lives of children by making an order that may have to cause further disruption later if the order has to be reversed….
> c. Courts will be more cautious about permitting a temporary relocation where there are material facts in dispute that would likely impact on the final outcome. …In such cases, the court requires a full testing of the evidence…
> d. Courts will be even more cautious in permitting a temporary relocation when the proposed move involves a long distance. It is unlikely that the move will be permitted unless the court is certain that it will be the final result. …
> e. Courts will be more cautious in permitting a temporary relocation in the absence of a custody order...
> f. Courts will permit temporary relocation where there is no genuine issue for trial …or where the result would be inevitable after a trial…
> g. …the court must consider the best interest factors set out in Children's Law Reform Act s. 24(2) and any violence and abuse in assessing a parent's ability to act as a parent ....

The case law clearly establishes the need for "compelling circumstances" for allowing a relocation on a temporary application. The fact that close to half of these applications succeed supports the inference that counsel are selective in the cases in which they bring these applications. While the success of a temporary application makes a trial unlikely, the failure of such an application does not preclude a trial, and it is not uncommon for a parent seeking relocation to be permitted to do so after trial, even if the temporary application failed.[41]

Appellate Decisions in Canada: March 1, 2021 – February 28, 2023

Appeal courts across Canada have given very significant deference to trial judges since March 1, 2021, with only 2 of 26 appeals not upholding the trial decision about relocation, and only 1 of 5 applications for stay of a trial decision in a relocation decision

[41] See e.g *S.K. v P.C.*, 2023 ONSC 734.

succeeding. This success rate of appeals (7.6%) in Canadian relocation cases in this two-year period was much lower than the 29% of appeal cases in 2001 to 2010 period when relocation appeals reversed trial decisions.[42]

There were three Ontario Court of Appeal decisions,[43] all upholding decisions of trial judges to allow a parent to relocate with the child(ren), two involving relocating mothers and one a relocating father. In one those cases, the Court of Appeal reversed an appeal decision of the Ontario Superior Court and upheld the trial decision in the Ontario Court of Justice.[44] In three cases the Ontario Court of Appeal refused stay applications in appeal of relocation decisions, two of which had allowed relocation[45] and one that had not. [46]

There was one Ontario Divisional Court decision, *Kazberov v Kotlyachkova*, [47] that reversed the ruling of a trial judge that a "primary caregiver" mother should not be permitted to relocate with her son, because the trial judge over-emphasized the "maximum contact" principle and placed weight on the "double bind" question, since the mother had testified that she would not move to live with her new partner if the court did not permit her to relocate her son. The appeal court cited the new legislation as supporting its decision, although it was not in effect at the time of the trial, while also noting that the approach of the trial court to the double bind issue was inconsistent with previous case law.[48]

There were 18 court of appeal decisions from outside of Ontario concerning relocation in the two years starting March 1, 2021, 10 in Alberta, 3 in Saskatchewan, 3 in British Columbia, one each in Nova Scotia and Quebec. The only case in which the trial decision was not upheld was in *Titus v Kynock*.[49] In *Titus,* the Nova Scotia Court of Appeal held that the trial judge had erred by not sufficiently scrutinizing the mother's vague plans for the child after her proposed relocation; the appeal court did not reverse the decision but ordered a new trial. The Nova Scotia Court of Appeal had earlier

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[42] See Bala & Wheeler, Canadian Relocation Cases: Heading Towards Guidelines (2012) 30 Can Fam L Q 271, at 310.

[43] *Reiche v. Reiche,* 2022 ONCA 637; *Moreton v. Inthavixay*, 2021 ONCA 501; *O'Brien v Chuluunbaatar*, 2021 ONCA 555.

[44] *O'Brien v Chuluunbaatar*, 2021 ONCA 555.

[45] *Sidiqi v. Ahmadzai,* 2022 ONCA 604; and *Tovmasyan v Petrosian,* 2022 ONCA 583.

[46]*Ncube v. Hassen,* 2022 ONCA 840 (relocation not permitted by trial judge); *Sidiqi v. Ahmadzai,* 2022 ONCA 604; *Tovmasyan v Petrosian,* 2022 ONCA 583.

[47] *Kazberov v Kotlyachkova*, 2021 ONSC 5006 (Div Ct).

[48] *Kazberov v Kotlyachkova*, 2021 ONSC 5006 (Div Ct) at para 62, 64.

[49] *Titus v Kynock*, 2021 NSCA 35.

ordered a stay of the mother's relocation with the child, the only one of five reported appellate decisions making a stay order.[50]

In the only appellate relocation case involving a same-sex couple, the Saskatchewan Court of Appeal held that the trial judge did not err in allowing the biological mother to relocate with a three year child, as the trial judge had acknowledged the biological link but recognized that there was not a presumption in favour of the biological parent, and allowed the relocation for other reasons, including the controlling behaviour of the non-biological mother.[51]

As noted above, the Supreme Court of Canada denied leave to appeal in 25 relocation cases after *Gordon v Goertz* was decided in 1996, but in 2021 and 2022 it rendered three decisions in relocation cases, all restoring the trial judge's decision.[52] By far the most significant decision was *Barendregt v Grebliunas,* which was discussed above, and the other two were very short decisions without precedential significance for future relocation cases, other than as recognizing that appeal courts should give significant deference to trial decisions about relocation.

The appeal courts routinely noted that in the absence of an overriding and palpable error, they would not interfere with the parenting decisions of trial judges. In some cases the appellate justices specifically observed that their courts are not a forum to relitigate an undesired result and that reweighing evidence is not their job.[53] It was noted in various cases that the presiding judge from the lower court engaged in thorough and thoughtful analyses before coming to a decision.[54] Various procedural challenges, such as that the trial judge resolved the relocation case without hearing oral evidence,[55] or an allegation of bias by the trial judge,[56] were consistently dismissed.

The low rate of successful appeals in the past few years has, at least in part, been a result of the high level of deference shown to trial judges in parenting cases by the Supreme Court in *Barendregt* and other decisions. It may also reflect a recognition that

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[50] 2022 CarswellRP 333611.

[51] *T.K. v C.E.*, 2021 SKCA 138 at para 20. No Ontario relocation cases in the study period involved same-sex partners.

[52] *Richardson v Richardson*, 2021 SCC 36, upholding 2019 ONCA 983; appeal dismissed with very brief reasons, upholding trial judge's decision to reject a mid-trial settlement and allow a relocation trial to proceed; *Kreke v Alansari,* 2021 SCC 50, another very brief Supreme Court decision upholding trial decision; *Barendregt v Grebliunas,* 2022 SCC 22.

[53] *M.B.F. v M.N.H.*, 2022 ABCA 42 at para 45.

[54] *Chapman v Somerville*, 2022 SKCA 88; *R.P. v G.U.*, 2022 BCCA 255 at para 59.

[55] *Werry v. Kish,* 2023 CarswellAlta 465, 2023 ABCA 70.

[56] *Nicol v Tremblay*, 2021 ABCA 298.

many relocation cases involve a balancing of incommensurate, future-oriented factors and do have a clear "correct" (or incorrect) decision, and that children benefit from timely resolution of cases and face instability if there are prolonged appeals.

Change in residence vs relocation

A significant procedural issue is whether a relatively short move is a *relocation*, that requires 60 days written notice and gives rise to the right of the other parent to object and the possibility of a court hearing,[57] or is merely a *change in residence*, that the other parent should be notified about in writing, but with no stipulated prior time period and no right to object.[58] As noted above, the definition of relocation is "a change in the place of residence of a child… that is likely to have a significant impact on the child's relationship" with the other parent.[59]

There are no specific distance or travel time parameters to determine whether a move will have a "significant impact," on the child's relationship with the other parent, which means that "significance" is assessed on a case-by-case basis, including such factors as the travel time and whether the parents have use of cars or must rely on public transportation. An important factor will also be whether both parties have shared parenting time during the week, requiring regular pick-ups and drop-offs during the week, or whether one parent only has parenting time during the weekends and will be less affected by a somewhat longer trip.

In *S.C. v. J.C.*,[60] Jain J. held that a move in rural Ontario by the mother and children that extended the father's driving time (already 32 minutes and 43.7 km) to pick up and drop off the children on Mondays and Fridays for weekend visits by an additional 8.4 km or 12 minutes, each way,[61] was not a relocation, even though it was a change in the children's community of residence, and the mother expected that she would seek a change in the children's schools as a result of their change in residence. The primary caregiving mother wanted to move to a less expensive community with her new partner, where they could afford a larger home. After getting notice of the mother's plan, which she had been discussing with the father for some time, the father

[57] *Divorce Act* s. 16.9; *CLRA* s. 39.3(2).
[58] *Divorce Act* s. 16.8; *CLRA* s. 39.3(1).
[59] *Divorce Act* s. 2(1); *CLRA* s. 18(1).
[60] 2022 ONSC 4146.
[61] Courts in family relocation cases commonly cite Google Maps for time and distance; see e.g. *V.S.v F.F.*, 2021 ONCJ 588.

brought an urgent motion to prevent the move or a change the parenting schedule so that he would have care of the children during the school weekl Justice Jain held that the father had the onus of showing that his relationship with the children would be significantly affected by the move and observed that he did not introduce evidence that dealt directly with this issue. Accordingly, the court held that the mother could move without the father's permission. The father's hearsay evidence that the children did not want to change schools was not relevant to the question of whether this was a relocation, as it did not affect his relationship with the children. In response to disruption that the father caused to the relationship with the mother by seeking to prevent her move by bringing the matter to court on an urgent basis, the court altered the parenting arrangement from one requiring joint decision-making about schools to a regime giving the mother the final say on schools, after consultation with the father.

In *Akyuz v. Sahin*, Doyle J. held that it is not a relocation to have a 30 minute drive when mother and children move out of family home and the father is only expected to see the children on some weekends and during holidays.[62] If parents have a parenting time arrangement with both parents having frequent and regular involvement with school drop offs and extra-curricular activities, an extra 30 minutes of travel time (one way, and hence an hour a day extra of travel) might be a relocation, and without doubt an extra hour each way would be a relocation, requiring proper notice and an opportunity to object.[63]

The Onus in Relocation Cases

As discussed above, the 2021 legislative reforms establish different onuses of proof (or presumptions) in relocation cases. If the parents have "substantially equal time" with a child pursuant to an order or agreement, the party seeking to relocate with the child will have the burden of establishing that the relocation of the child is in the best interests of the child.[64] If both parents have substantially complied with an order or agreement which provides that the children spend the "vast majority of the time" with one parent, the parent opposing the move has the burden of proving that the move is not in the child's best interests.[65] In any other case, both parties have the burden of proof, and there is no onus or presumption about whether or not relocation is in the

[62] *Akyuz v. Sahin* 2023 ONSC 1024, per Doyle J.
[63] See e.g. *Apa v Vagadia*, 2022 ONSC 2095. Move of 75 km, 1 hour's drive was "relocation."
[64] *Divorce Act* s. 16.93(1); *CLRA* s. 39.4(5).
[65] *Divorce Act* s. 16.93(2); *CLRA* s. 39.4(6).

child's best interests and should be permitted.[66] If there is no order or agreement in place concerning parenting time, both parties have an onus of establishing the child's best interests in a relocation cases. [67]

In the reported Ontario relocation cases in the two years from March 1, 2021, 21 involved a presumption against relocation (substantially equal time), 14 involved a presumption for relocation (vast majority of time with one parent), 17 had no presumption for or against, and in 24 it was unclear from the decision how the issue of onus was resolved.

In most cases where there was a presumption for relocation because one parent spent the "vast majority" of time with the child, that parent was almost always the mother. Of these 14 cases, 8 resulted in relocation [8/14 = 57%]. When the onus was on the party seeking to relocate because the parties have the children "substantially equal time," relocation has been permitted in 11/21 cases (52%). There is also a presumption against relocation if the parent seeking to relocate did not comply with an order, or there was a unilateral or improper relocation.[68]

The legislation provides that for an interim application, the court may decide not to apply the onus rules otherwise applicable.[69]

An analysis of the Ontario cases suggests that the onus of proof is only of limited significance to ultimate outcomes. In a number of cases, the court explicitly stated that the outcome was not determined by the onus of proof and would have been the same regardless of which party has the burden of proof.[70] Given the limited significance of the presumptions, it is not surprising that there has not been much judicial commentary on whether a case involves "substantially equal time" or whether one parent has children "the vast majority of the time,"[71] and indeed, at least in the first two years that

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[66] *Divorce Act* s. 16.93(3); *CLRA* s. 39.4(7).

[67] *Poluck v Poluck*, 2022 ONSC 2582 at para 122; *Lawrence v Khan*, 2022 ONCJ 521 at para 57, *Jennings v Cormier*, 2022 ONCJ 338 at para 36; *Wu v Yu*, 2022 ONSC 3661 at para 124.

[68] See e.g.*Hales v Lightfoot*, 2022 ONSC 3517, at para 30; *K.M.L. v G.T.O.*, 2021 ONCJ 498, at para 249.

[69] *Divorce Act* s. 16.94; *CLRA* s. 39.4(8). See e.g *Shaw v Gauthier*, 2021 ONSC 5790 at para 30; *Fawcett v Slyfeld*, 2021 ONCJ 459, at para 26; *P.I. v R.O.*, 2021 ONCJ 463 at para 43; and *Hales v Lightfoot*, 2022 ONSC 3517, at para 30.

[70] *Banks v Beaupre*, 2022 ONSC 5662; *Malinowski v. Malinowski*, 2023 ONSC 134.

[71] The term "substantially equal time," is intentionally somewhat vaguer than 40/60 parenting time threshold for "shared custody" (or shared parenting time) under s.9 of the *Child Support Guidelines,* and may allow for a more contextual analysis. Although the term does not appear in other legislation, it is very similar to the term "substantially equal parenting time" in the relocation scheme in the British Columbia *Family Law Act.* British Columbia judges generally accept that 40% of time satisfies this

the legislation has been in effect, many Ontario cases were resolved without the court explicitly addressing the issue of the onus of proof.

Unilateral Relocation Without Proper Notice

The failure to comply with the notice requirements is a significant factor that is considered under the new legislation,[72] and a parent who has moved unilaterally is likely to be ordered to return with the child after an urgent, interim hearing. The courts invariably express concern about unilateral moves because they are often disruptive to children and tend to increase conflict.

In the recent Ontario cases, in only 3 of 10 cases was a unilateral move permitted. The courts are most likely to allow relocation if there has been unilateral action if there are family violence or safety concerns, and even then, may express displeasure or may sanction a party permitted to relocate party with costs.

In *Apa v Vagadia*, the primary caregiver mother moved the children from Mississauga to Cambridge (75 km) without giving the father proper notice or seeking court approval, although the father received some oral information about the move before it occurred. The parents both agreed that the mother and children should move out of the residence where she and the children lived in Mississauga as it was a high crime area, with shootings and drug issues. The residence in Cambridge was significantly less expensive than similar housing in Mississauga and close to schools. The court allowed the relocation but denied the mother her costs for the relocation portion of the proceedings, despite her success on this issue, because of her unilateral relocation without adequate notice.[73]

In *Schul v. Schmidt*,[74] the mother and father of a young child (under 1 year of age) had moved before the child was born to live with the father's parents in Woodstock, Ontario. The mother claimed that after the child was born the father's mother had

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threshold: see *DAM v EGM,* 2014 BCSC 2019. While some BC decisions have accepted 30% of time as "substantially equal" for this purpose (*CMB v DGB,* 2014 BCSC 780), the courts are likely to want consistency and use 40% as the threshold for the presumption against relocation (see *Hefter v Hefter,* 2016 BCSC 1504).

The term "vast majority of time" is also vague, but given the policy concerns and desire to promote stability, a threshold of at least 80% of time seems appropriate. See Bala & Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines" (2012) 30 Can Fam L Q 271.

[72] *Divorce Act* s. 16.92(1)(d); and *CLRA* s. 39.4(3)(d).

[73] *Apa v Vagadia*, 2022 ONSC 2095 at para 149 [*Apa*].

[74] *Schul v. Schmidt*, 2023 ONCJ 30.

repeatedly subjected her to emotional and physical abuse. The mother left Woodstock with their son, without giving the father notice, and moved to Scarborough where she had lived before the birth of the child and had significant social supports, which were especially important as she had developmental disabilities, and a special agency and accommodation supports were available to her in Scarborough that would not be available in Woodstock. On an interim motion seeking an order for the return of the child to Woodstock, Paull J. expressed concerns about the mother's unilateral action:[75]

> A parent who engages in self-help tactics despite the best interests of the child will generally raise serious questions about their own parenting skills and judgment. In many cases, courts conclude manipulative, selfish or spiteful parents simply can't be entrusted with custodial authority they would likely abuse.

The court did not resolve the validity of the claims about the violence perpetrated by the father's mother, but concluded that in the circumstances of case, in particular that supports that the disabled mother needed were not available to her in Woodstock, she should be permitted to stay in Scarborough with the child, though the court allowed the father to have significant parenting time.

Despite cases allowing a unilateral relocation after it has occurred, in most court cases, a move without proper notice will result in an order that the relocating parent return, in some cases after an urgent temporary motion (i.e. without the usual pre-motion conference). While some parents who unilaterally relocate may not be aware of legislation requiring notice and the opportunity to object, a relocation without notice to the other parent demonstrates a disregard for the importance of the child's relationship with the other parent, and is often viewed as controlling behaviour, which militate against allowing relocation.[76]

A parent who has relocated without proper notice and permission may be ordered to return at an interim urgent motion. That will not preclude that parent from making a court application, with proper notice, to allow relocation, which may succeed.[77]

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[75] *Schul v. Schmidt*, 2023 ONCJ 30, at para. 47.
[76] *V.S. v F.F.*, 2021 ONCJ 588, at para. 203.
[77] *S.K. v. P.C.*, 2023 ONSC 734.

In *Poluck v Poluck*, the mother was permitted to relocate with her son (about 10 years of age) from Sault Ste Marie to Chicago, despite having initially attempted relocation without notice.[78] The relocation process began when the mother left Sault Ste. Marie with her son to visit her parents in Chicago and phoned the father to say that she considered the marriage over and would not be returning to live in Sault Ste. Marie. She returned to Sault Ste. Marie a couple of months later to allow the boy to visit with his father. The father refused to return the boy to her care, and proceedings were commenced in Sault Ste. Marie, with an interim rotating three-month shared parenting time schedule imposed, facilitated by virtual schooling due to the Pandemic. A four-day trial was held about a year after the mother's initial unilateral relocation. The judge accepted that it was "a failing marriage," and that the mother felt that it was an emotionally abusive relationship, and concluded that the mother was better equipped to meet the emotional and personal needs of the parties' son, and that she had much better income earning opportunities in Chicago.[79] Despite allowing the relocation, Varpio J. noted that the mother ought to have brought an application to relocate before attempting to relocate, and ordered that the father would not be required to pay child support because of the expenses that he would incur to continue to spend time with his son.

Reasons for Relocation

A review of recent cases and literature[80] reveals four primary reasons for relocation, though some cases involved multiple reasons or unique reasons:

- a new relationship for the relocating parent;
- economic, employment or educational opportunities for the relocating parent;
- family support for the relocating parent; and
- escaping family violence.

In this study, more than a third (26/76) of the cases involved a relocation primarily for economic reasons, with 14 (54%) being allowed. There were relatively few cases where a desire to move away from an abusive partner was the primary reason for

[78] *Poluck v Poluck*, 2022 ONSC 2582.
[79] *Poluck v Poluck*, 2022 ONSC 2582, at paras 123, 137.
[80] See e.g Parkinson & Cashmore (2015), Reforming Relocation Law: An Evidence-based Approach, 53 Family Court Review 23 -39; and Saini, Allan-Ebron & Barnes (2015), A Critical Review of Relocation Research Specific to Separation and Divorce, 56 J Divorce & Remarriage 388-408.

relocation; in with 3 of these 4 cases the relocation was allowed (75%), and in the case where relocation was not permitted, it was because the court did not accept the validity of the claims of family violence.

There were other cases where relocation was permitted due to verbal and emotional abuse, which are also within the definition of "family violence" in the reformed legislation.[81]

There were 7 cases where the parent applied to move primarily due to a new relationship, of which 5 were successful (72%). In cases where the relocation was primarily for parents to obtain familial support, 5 of 8 (62%) were allowed. There were 14 cases that involved multiple reasons, such as a new relationship along with economic reasons, or economic plus familial support, of which 8 were successful.

In 17 cases, there was a unique reason, or the parent applying for relocation struggled to articulate a clear reason for the move;[82] only 4 of these cases (24%) were successful. The lack of a clear and pressing need for relocation often resulted in a relocation application being unsuccessful. For example, in *Harry v Moore* involved the mother did not have immigration status in Canada and faced the prospect of possible deportation. She had lived in Canada for more than a decade and continued to work here, and there were no deportation proceedings underway. The court did not allow her to relocate with the two-year old child, but did determine that if a deportation order were to be made, it would be a material change in circumstances and the basis for a variation application.[83]

The "Double Bind" Question Not to Be Asked

The legislation now provides that a court dealing with a relocation application is *not* to consider whether the parent seeking to relocate would relocate without the child.[84] This prevents the party resisting relocation from asking the double bind question of the party seeking to relocate, of whether that parent would move without the child; this is largely consistent with previous caselaw in Ontario and several other provinces.[85]

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[81] *Divorce Act*, s. 2; *CLRA* s. 18(2).

[82] For a case where the mother sought to relocate for multiple reasons but no single strong reason, see e.g. *Malinowski v. Malinowski,* 2023 ONSC 134.

[83] 2021 ONCJ 341 at para 95.

[84] *Divorce Act* s. 16.92(2); *CLRA* s. 39.4(4).

[85] See e.g. discussion in FAMLNWS 2016-42, October 24, 2016, *Epstein's This Week in Family Law;* and Rollie Thompson, (2019), Legislating About Relocating Bill C-78, N.S. and B.C., 38 Can Fam L Q 219.

The intent for the enactment of this provision was explained by the Ontario Court of Appeal in *Bourke v. Davis*, by Feldman J.A.:[86]

> Parliament's …[decision to enact the *Divorce Act*] s. 16.92(2) reflects the "classic double bind" that has been recognized in the jurisprudence for many years. When the parent who wants to move with the children is asked whether they will stay in their current location should the mobility order not be made, the parent is immediately placed in a "lose-lose" situation. If they answer that they would stay with the children, it allows the court to fall back on the status quo and force the parent to remain when that result may not be in the best interests of the child. By contrast, if the parent says that they would go regardless, it allows the court to draw an adverse inference about that parent's dedication to the children. The problematic double bind has led the courts to repeatedly discourage judges from relying on a parent's representations about whether they will or will not move without the children…

In *Kazberov v Kotlyachkova,*[87] the primary caregiver mother of an 8-year-old boy wanted to relocate from Waterloo, where the father also lived with his wife, to Ann Arbor Michigan (4 hours' drive), to live with her fiancé. In rejecting the mother's application, the trial judge placed significant weight on the mother's answer to the "classic double bind" question. The mother indicated that she would not move without the child, and the trial judge placed significant weight on this, reasoning that not permitting the relocation would allow the boy to continue his relationship with both parents. The Ontario Divisional Court held that this was an error of law, and reversed the trial decision, allowing the mother to relocate with the child.

While the legislation clearly precludes the parent opposed to relocating from asking the "double bind" question, there may be cases where the relocating parent wants to introduce this evidence and it may be highly relevant for the court. This occurred in *Bourke v. Davis* where the parents had two children together.[88] The mother was the primary caregiver and remarried a man who lived and worked in Washington state. For a period of time the new partner was able to spend significant time working remotely and living in Ontario, and they had a child together. When the new husband's visa expired in Canada, he was required to return to work in Washington, and the

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[86] 2021 ONCA 97.

[87] *Kazberov v. Kotlyachkova*, 2021 ONSC 5006.

[88] 2021 ONCA 97.

mother applied to relocate the two children, aged 6 and 4 years, from her prior marriage.

In the course of the trial the mother "was clear with the court that she had made the very difficult decision to go to Washington with her husband and [their] baby, whether the children could go with her or not." She explained that from a financial point of view it was not feasible for her to remain in Ontario if her new husband moved to Washington, and his employment and immigration status required this. The trial judge recognized that the "status quo" of both parents living close to one another in Ontario was "not an option" and allowed the mother to relocate. In upholding the trial judgement allowing the relocation, the Court of Appeal took a purposive interpretation of the application of the new legislation and held that the court could take account of the mother's decision, with Feldman J.A. writing:[89]

> In these circumstances, the trial judge was not only entitled but was obliged to accept the fact that the respondent would be moving to Washington with or without the children and that the status quo was not an option for the court to consider.

This decision recognizes that the legislation precludes the parent opposed to relocating from asking the "double bind" question, but the parent seeking to relocate may nevertheless introduce this evidence. This approach allows courts to make decisions that reflect the reality of the options that are available.

Children Views & OCL Involvement

The Office of the Children's Lawyer provided representation for the children in 3 of the 76 reported Ontario relocation cases in this study, and a clinical investigation was undertaken in 11 cases.

About half of the relocation cases involved younger children (under the age of 8 years old), whose views about relocation were generally not known or considered. In the 76 Ontario cases, there were 116 total children involved: 27 of the children were between the ages of 0 and 4 years; 27 of the children were between the ages of 5 and 7; 32 of the children were between the ages of 8 and 11 years, and 22 were 12 years old or older. There were 8 children whose age was not reported.

There were 18 cases where the children's views were known and the decision was consistent with those views, with 10 resulting in relocation. There were 5 cases

[89] 2021 ONCA 97, at para. 50.

where the children's views were known but not followed. Even in cases where children's views were known and the decision was consistent with those views, the courts usually emphasized that those views were not determinative but just one factor.

In the 11 cases where there was a clinician from the Office of the Children's Lawyer. There were 4 cases where the clinician's recommendations were followed; in 3 the recommendations were not followed, and in 4 cases there were not clear recommendations from the OCL investigator. In cases where the reports of the OCL clinician were followed, the courts tended to cite the reports as significant, though in other cases the recommendations were not followed.[90]

In *A.E. v A.B.*,[91] the mother was allowed to relocate despite the OCL clinician recommending that the children not be allowed to move. The clinical investigator was concerned that the mother might not support the children's relationship with their father if they relocated from Toronto to Cleveland, though recognizing that the children's relationship with mother was closer than their relationship with their father. Further, both clinical investigator and another OCL clinician who prepared a shorter, but more recent Voice of the Child Report (VOCR) emphasized that the two older children wanted to relocate (ages 12 and 14 years; the reports did not canvass the views of the youngest child, aged 6 years). In deciding not to follow the clinician's recommendation and allow the relocation, Jarvis J. observed:[92]

> The OCL report and the VOCR are not determinative of the relocation issue but merely pieces of evidence, often very helpful, for the Court's consideration. The evidence of both clinicians …is clear that the children are closer emotionally and psychologically to their mother than their father…. While the children's views and preferences …are not to be confused with their best interests, it is impossible to unwind the last five and a half years [since separation] and, given the change in family constellations, there is considerable risk to the children's best interests if relocation is refused. That concern outweighs the risk of further compromise to their relationship with their father.

[90] *H.R. v P.R.*, 2021 ONSC 6222 at para 84; *Sidiqi v. Ahmadzai*, 2022 ONCA 604, at para 7.
[91] 2021 ONSC 7302.
[92] *A.E. v A.B.*, 2021 ONSC 7302 at para 150.

In *Rioux v McCutcheon*,[93] a recommendation from the OCL clinician was not followed as the OCL Report was completed more than 2 years before the trial and did not take into account the changes that have occurred since its completion.

In some cases, the court discounted both the recommendation of the OCL investigator and the child's views. In *Kazberov v. Kotlyachkova*, the OCL clinician had recommended against allowing the mother to relocate from Waterloo to Ann Arbor Michigan (4 hours' drive), in part based on the views of the 6-year-old child, and the trial judge refused to allow the relocation. In reversing the decision of the trial judge and allowing the relocation, Sachs J. in the Ontario Divisional Court discounted the significance of the views of such a young child: [94]

> In her conclusion…one of the factors that the Trial Judge highlights in declining to allow the move to Michigan is that A. "does not particularly want to move to Michigan and would rather continue the present schedule." A.'s views and preferences were put before the Trial Judge through the testimony of [the OCL Clinical Investigator] Ms. Glogovic. A. was six years old at the time... It is an error in principle to attach any significant weight to the views and preferences of a six-year-old child, especially in a situation like this one where his expressed preference is to continue with the status quo.

In some cases, the court will discount the wishes of even an older child. In *Banks v Beaupre* the mother wanted to take her daughters with her to Australia for an eight-month stay, where the girls could visit relatives and attend school.[95] Both daughters wanted to go. While Varpio J. recognized that the older girl, aged 17 years should make her own decision, the court did not allow her 15-year-old younger sister to go, noting that the girl was having difficulties in school, and the temporary relocation would disrupt her education. The judge observed: [96]

> She is approximately 16 years old and is not a "virtual adult", unlike her older sister. While her views are an important consideration in the matter, they are not determinative.

When children are older their views are more often given significant weight. *In Moreton v. Inthavixay,* the Ontario Court of Appeal upheld the trial decision to allow

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[93] *Rioux v McCutcheon,* 2022 ONCJ 246 at para 160.
[94] *Kazberov v. Kotlyachkova*, 2021 ONSC 5006, at para 69, per Sachs J.
[95] *Banks v Beaupre,* 2022 ONSC 7170.
[96] *Banks v Beaupre,* 2022 ONSC 7170, at para. 19.

the father to relocate the two children, aged 8 and 12 years, from Toronto to Lindsay, placing significant weight on the views of the children, who were represented by OCL counsel at the Court of Appeal.[97]

> The OCL supported the move to Lindsay …and opposes this appeal. As fresh evidence, the OCL has tendered updated affidavit evidence concerning the children from… the clinician who has been involved in this case since April 2019. We admit the fresh evidence because it is important that we have the most current information bearing directly on the best interests of the children, it is provided by the OCL, and is reasonably capable of belief…By all accounts, the children are settled, happy, and doing well in their new home, school, and community, and are generally content with and do not want a change to their living arrangements.

The Court of Appeal emphasized the value of having current information about the children's views from an independent source for to the appeal but did not allow the appellant mother to introduce fresh evidence at the appeal.

In the four of the 11 cases where an OCL report was prepared, there was no clear recommendation about relocation,[98] perhaps in part reflecting the reality that there is a lack of sound social science research about the effects of post-separation relocation and the factors that there are more or less likely to promote children's well-being in these cases.[99]

In over 50 cases, information on the children's views about relocation was not included in the reported decision, and presumably was not known to the court. While children's views about relocation should not be determinative, it is concerning that in so many cases there was no reliable evidence about the perspectives of the children regarding their possible relocation available to the court.

Distance of the Move

Of the 76 Ontario trial decisions analysed, 21 involved moves within 100 kilometers of the initial place of residence, with 10 of those allowed. A move of 100 kilometers will add at least one hour of driving each way and very likely require a

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[97] *Moreton v. Inthavixay,* 2021 ONCA 501, at para. 13. See also *S.K. v. P.C.,* 2023 ONSC 734 on the importance of the evidence of the views of an 8-year-old child who wanted to relocate with the mother.
[98] See e.g. *Rudichuk v Higgins,* 2021 ONCJ 471.
[99] Saini, Allan-Ebron & Barnes (2015), A Critical Review of Relocation Research Specific to Separation and Divorce, 56 J Divorce & Remarriage 388-408.

change of the child's school and generally make parenting time during the school week practically impossible.

There were 26 proposed relocations of more than 100 kilometres but still in Ontario, with 11 allowed. There were 19 proposed relocations outside of Ontario but within Canada or the United States, of which 12 were allowed. There were 10 cases involving international moves, of which 5 were permitted.

In cases where the distance was greater, courts often noted that the greater distance would have a significant impact on the non-moving parent's relationship with the child, but it seemed that there was often more planning and stronger reasons for moves of longer distances, which resulted in relatively high rates of court's permitting relocation in longer interprovincial and international moves.

There were a couple of cases involving limited-term international moves. While the courts noted that such opportunities to live abroad have value, it was recognized that there are other factors to consider. In *Banks v Beaupre*,[100] a proposed 8 month relocation of the parties' 15 year old daughter to Australia with her mother was not permitted due to concerns about the effect that this would have on the girl's schooling, and she was already having academic difficulties. However, in *Siddiqi v Khan*,[101] the court permitted the primary caregiver mother's request for an 11-month relocation to Dubai with her 11-year-old daughter, a "superb student" in part because it was a "rare opportunity to experience a very different country and culture" and the girl wanted to accompany her mother.

Family Violence and High Conflict

As emphasized by the Supreme Court in its 2022 decision in *Barendregt v Gerbliunas,*[102] violence is an important factor in relocation cases. It is usually mothers who seek to relocate on this ground, both to help ensure the physical safety of themselves and their children, and to promote their own psychological well-being, which will allow them to be more effective parents.

Family violence must be taken seriously and may be a very important reason for allowing relocation. As noted by the Supreme Court in *Barendregt*, family violence often occurs with only the parents present, and may be difficult to prove, even when it has

[100] *Banks v Beaupre,* 2022 ONSC 7170 at para 25.
[101] *Siddiqi v Khan*, 2021 ONSC 5326, at para 37.
[102] 2022 SCC 22.

occurred, but it must also be appreciated that there are cases in which parents may make unfounded allegations to gain tactical advantage.

In three of the four cases where violence was raised by a mother as a significant reason for the relocation, the court found the concerns valid and the move was permitted.[103] In the only case in which relocation was not allowed despite serious family violence allegations, *N.P. v D.H.*[104], the court did not accept the that the mother's allegations were true. Justice Sherr noted that was "no independent evidence to support the mother's allegations against the father — nothing from the [Children's Aid] Society, the police, a therapist or a doctor." Further the mother had a "history of making unsupported allegations against the father to limit his parenting time and relationship with the child." The parents had never cohabited, and since the child's birth, four years earlier, the mother "had a history of being hyper-vigilant and bringing unwarranted motions to curtail the father's parenting time."[105]

While emotional abuse is not always a criminal offence (though it may be if it constitutes harassment or threats of violence), it may be considered "family violence" and be a basis for allowing a relocation application.

In *N.S. v A.N.S.*, the father's verbal abuse of the mother abuse was so extensive that the court accepted that the child's wellbeing was at risk unless the father's parenting time was extensively limited, and the child was allowed to relocate with the mother from Ontario to Israel, and the father's parenting time in Israel was to be very limited and supervised[106] The father had been very verbally abusive of the mother, including in the presence of the child. He had frequent outbursts of anger and used "vulgar and highly derogatory language about the mother and others," including directed at child protection workers who were concerned about the high conflict and emotional abuse. In allowing the relocation, Justice Horkins observed:[107]

> While the father has spanked the child on occasion, it is his non-physical behaviour that primarily creates "family violence". The father's behaviour consists of uncontrollable anger, denigrating comments, threats and harassment

[103] See *N.S. v A.N.S.*, 2021 ONSC 5283; *Schul v Schmidt,* 2023 ONCJ 30; *Wu v Yu,* 2022 ONSC 3661; also *Poluck v Poluck*, 2022 ONSC 2582 (emotional abuse)
[104] 2022 ONCJ 535.
[105] 2022 ONCJ 535, at para 31.
[106] *N.S. v A.N.S.*, 2021 ONSC 5283.
[107] *N.S. v A.N.S.*, 2021 ONSC 5283 at para 414.

> aimed at the mother, child, Society workers, teachers and others. It is behaviour that the child has witnessed on many occasions. The behaviour is relentless…
>
> The father directly exposes the child to this harmful behaviour. He gets angry and yells at the child….
>
> The father has not taken any useful or meaningful steps to prevent the family violence from occurring. He attended some anger management sessions... However, his harmful behaviour has continued with no improvement.

In *S.K. v. P.C.*[108] the court allowed the mother of an 8-year-old child to relocate from Innisfil to Brooklin (118km) so that that the mother could live with her new partner. The relocation was supported by the recommendations of the clinical investigator from the Office of the Children's Lawyer. A significant factor for Jain J. in allowing the relocation was that the father was emotionally abusive and controlling of the mother. The judge noted that were "numerous examples of messages that showed the [father] not only said derogatory and insulting things to the [mother], but he was also very aggressive, distrustful, competitive, controlling, and unreasonable,"[109] which made life emotionally stressful for the mother.

In *L.B. v R.H.*,[110] after separation the mother wanted to relocate with the three-year-old child from Prince Edward County (where the parties lived together) to Burlington (about 3 hours' drive), where she could have a much more remunerative job and her family lived and could provide support. The mother had provided most of the child care since the child's birth, though at time of the relocation hearing there was an equal parenting time arrangement in place. An important factor for the court in allowing the relocation was that the mother supported the father's relationship with the child, while:[111]

> the negative communication and comments by the father toward the mother, which is sometimes, profane, insulting and aggressive, show his true opinion of her…. Even the father's descriptions of the mother in his affidavit show that he is not able to support her development with the child.

In some cases, judges find that that there has been high conflict between the parents, and acts that may fit within the definition of "family violence," but they should

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[108] 2023 ONSC 734.
[109] 2023 ONSC 734, at para 21.
[110] *L.B. v D.H.*, 2022 ONSC 2268.
[111] *L.B. v D.H.*, 2022 ONSC 2268, at para 113-114.

not be taken into account in the relocation because of the mutuality of the conduct. In *Wu v Yu*[112] the parents were both physicians and had a young daughter. They lived in London, Ontario where the father had good secure employment and the father's parents lived. The mother had difficulty in finding employment in the London area that allowed her to use her specialized skills and be remunerated accordingly. The father seemed to expect the mother to subordinate her career to his and refused to allow her to obtain a better position elsewhere in Ontario. The parents frequently argued, including in the presence of their daughter, who was 3 years old at the time of separation. On one occasion there was a significant argument that resulted in the father being charged with assault by suffocation and that led to the couple's separation. The conditions of release required the father to vacate the family home and communication between the parties was required to be via third parties.

After the separation the mother found a suitable position in Burnaby, British Columbia, where her mother lived, which would have resulted in an increase of more than 50% in her income, and she applied to relocate with the child, who was 4 years at the time of relocation motion. The father had pled not guilty to the criminal charges, which were unresolved at the time of the relocation hearing. Justice Price held that the family violence would not be a factor in his ruling because both parents had engaged in aggressive conduct:[113]

> While the parties differ on the issue of who, between them, was an aggressor, and on how events actually occurred, they agreed that [the child] had been exposed too frequently to the discord in the matrimonial home…
>
> Given the broad definition of "family violence" set out in s. 2(1) of the *Divorce Act*, and the admission of each party to have engaged in behaviour that meets that definition, I find that each of these parties has, to some degree, engaged in family violence towards the other.
>
> Each of them has also acknowledged that they have engaged in inappropriate behaviour towards the other, including speaking disparagingly, within the hearing of their daughter.
>
> Apart from the allegation of choking for which [the father] will be on trial… I find that the family violence in this case, while not excusable, was explicable. Both parents were facing challenges. …I find …that the family violence that afflicted these parties, and in which each participated, does not

[112] 2022 ONSC 3661.

[113] *Wu v Yu*, 2022 ONSC 3661, at para 55, 174-176.

> reflect negatively on their individual abilities to care for their daughter, especially since they are unlikely to reconcile their marriage. I am satisfied that, apart, each is capable of caring for C. without family violence being a factor.

Justice Price allowed the mother to relocate on an interim basis for "compelling economic reasons," and taking account of the fact that the mother had been the primary caregiver for at least half the child's life.

There are also cases in which the court disregards family violence raised by a father as it relates to a past incident perpetrated by the mother and was not actually the reason for the relocation. In *V.S. v F.F.* the father unilaterally relocated the 4-year-old child from Brampton to Wolfe Island (4 hours' drive) and used as one of his justifications the fact that three years earlier during an argument the mother had attempted to stab him with a knife. She had pled guilty to assault with a weapon and had taken anger management courses. In his judgement refusing to allow the relocation and ordering that the child's primary residence would be with the mother, Clay J. concluded that the violent incident was "completely out of character" for the mother and occurred just after she returned from an overseas trip with the child and the father informed her that he was leaving the mother for another woman. Further the father's decision to relocate was not based on any safety concerns. Justice Clay observed:[114]

> I find that the father is not really concerned about any risk of physical or emotional harm to the child in the mother's care. I find that the father has used the mother's conviction with all professionals who interact with the family to try and position himself as the responsible caring parent and the mother as an irresponsible parent who poses a risk to the safety of the child.

Conditions on Relocation, including Child Support

It is a common feature of decisions allowing relocation to impose various terms and conditions on the relocating parenting to govern how the left-behind parent is to maintain a relationship with the child, including provisions for virtual contact, travel,

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[114] *V.S.v F.F.*, 2021 ONCJ 588, at para 253. See also *K.M.L. v G.T.O.*, 2021 ONCJ 498, where father's relocation with a child was not permitted despite the fact that the mother had been charged with assault on the 8-year-old child, after an incident reported by the father that did not involve significant injury to the child.

and decision-making.[115] Although it may be preferable for parents to be able to make these arrangements on their own, allowing for flexible variation as children grow older and circumstances change, in cases where there is a lack of trust or high conflict, detailed court orders will be appropriate. They may, for example, provide detail for when and how the exchange of the child is to occur.

The 2021 legislative reforms specifically provide that the court authorizing the relocation of a child may make an apportionment of costs relating to the exercise of parenting time by the person who is not relocating between and the person who is relocating the child, [116] which may be done by adjusting the amount of child support otherwise payable by the non-relocating parent. [117] In dealing with the costs of visits, courts may consider the relative incomes of the parents and the costs of travel. The costs of travel by the non-relocating may, for example, be adjusted (i.e. reduced) if the relocating parent is able to provide accommodation for visits with the child. [118]

If compliance with the parenting time schedule is a significant concern, the court may decide to retain jurisdiction to address any necessary variations or enforcement proceedings to ensure compliance with the parenting order.[119] However, enforcement of terms of parenting time is very challenging if the relocation is outside of Ontario, and especially if it is international. If there are serious concerns about compliance in an international relocation, this may be a reason not to allow relocation.

Importance of Planning & Supporting Child's Relationship to Other Parent

One of the most common situations where a relocation application is denied are cases where the relocating parent does not have a sound plan for the care of the child after the move and for supporting the continued relationship of the child with the other parent. The plan should include evidence about the new residence, schools, opportunities for extra-curricular activities, social supports for the child and the quality of life in the new community.

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[115] For a detailed discussion of the types of conditions and cost-of-travel orders, as well as very helpful advice for counsel, parents and judges on dealing with these issues, see Himel & Paulseth, 1-800-ZOOM-ME: A Divorce Act Update on Post-Relocation Parenting Time, Travel Costs and Child Support (2022), 41 Can Fam L Q 195.

[116] *Divorce Act*, s. 16.95, *CLRA* s. 39.4(9).

[117] *Logan v Logan,* [2022] O.J. No. 3768 at para 73.

[118] *Wu v Yu,* 2022 ONSC 3661, at para 242.

[119] *Chitsabesan v. Yuhedran,* unreported Ontario Court of Justice, 2013); upheld on appeal 2016 ONCA 105.

Unless there are significant issues of family violence or harmful parenting, and the expectation is that there will be little or no contact with the non-relocating parent, the parent seeking relocation should include a well-developed plan for how the child will maintain a strong relationship with the other parent, including both virtual contact and opportunities for in person parenting time. The nature of the plan will depend on the distances involved, the age of the children, and the resources of the parents. If feasible and necessary, the plan may include financial or other support for the "left-behind" parent, perhaps through a reduction in child support.

If the relocating parent can establish a history of having actively supported the children's relationship with the other parent, that will support the application for relocation. This will be especially important if the move is out of the province (let alone international), as the reality is that once a relocation occurs, the maintenance of the relationship with the left-behind parent will be dependent on the voluntary co-operation of the relocating parent as legal enforcement will be impractical or impossible.[120]

The importance of the history of co-operation by the relocating parent (or lack thereof) was recognized by Jarvis J. in *A.E. v A.B*:[121]

> It is, perhaps, counter-intuitive that fostering a healthy relationship with the other parent may enhance the likelihood of a relocation Order being made. In *O'Brien v. Chuluunbaatar* [2021 ONCA 555] the Court of Appeal upheld a Trial Judge's Order permitting a mother to relocate to Mongolia with the parties' seven-year old son, born and raised in Ontario. Pivotal to the best interests' analysis were the benefits to the child of the mother's enhanced emotional, psychological, social and economic well-being if relocation was permitted, and the trial evidence that
>
> > "...even with the relocation, the mother would facilitate the relationship between the child and the father, which the mother recognized as important. On the trial judge's findings, the mother has always followed the court ordered access; been generous with additional access; encouraged telephone access between the father and the child even when they were in Mongolia; and, allowed the father to attend her residence for access in a period when the father had mental health difficulties."

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[120] See Parkinson & Cashmore (2015), Reforming relocation law: An evidence-based approach, 53 Family Court Review 23 -39; and Saini, Allan-Ebron & Barnes (2015), A Critical Review of Relocation Research Specific to Separation and Divorce, 56 J Divorce & Remarriage 388-408.

[121] 2021 ONSC 7302, at para. 138per Jarvis J.

A lack of proper planning often results in a denial of a relocation application. In *Shaw v Gauthier*,[122] during the Pandemic the mother, who had a shared parenting time arrangement with the father, had moved from Etobicoke to Meaford, where she had recreation property, so that she would not have to pay rent in Etobicoke, and the children continued to attended school virtually in Etobicoke where the father continued to reside. The parents had signed a written agreement that the arrangement was "temporary" and that the two children would return to Etobicoke to attend school when health conditions allowed. With the Pandemic ending, the father brought an application for the children to attend school in person in Etobicoke, and the mother brought a cross-application for them to relocate with her to Meaford. Although the mother introduced evidence that the children enjoyed their time in Meaford and had friends there, she had failed to adduce "credible evidence" about their education in Meaford. She offered a range of vague, unrealistic plans, including that she could drive them to school in Etobicoke when they were with her in Meaford (well over two hours each way) or that they could be enrolled in schools in both communities and alternate schools weekly. The court denied the mother's application to relocate the children to Meaford and ordered them to attend school in Etobicoke.

Conclusions

While the increasing use of various forms of social media and virtual engagement can mitigate some of the effects, relocation of a child after separation can have profound and often irreversible effects on parents and children. These are among the most difficult decisions that family judges face.[123] Advising and representing clients in these cases is very challenging for family lawyers.

Although settlement of relocation disputes is challenging, counsel should be encouraging parents to consider a negotiated resolution. In some cases, significant

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[122] *Shaw v Gauthier*, 2021 ONSC 5790 at at paras 34, 60.

[123] See e.g *G.E. v. J.E.*, 2023 ONSC 563, per Fraser J.) who writes (at para 90):

> these [are] very challenging applications. Relocation …cases, where one parent wants to take a child and move some distance away from the other parent, are among the most difficult cases in family law. If a parent is permitted to move with the child, inevitably the relationship between the other parent and the child will be affected and may suffer. Typically, the court attempts to balance the custodial parent's legitimate interest in relocating with the non-custodial parent's legitimate interest in maintaining a relationship with the child.

periods of parenting time and financial compensation for the non-relocating may be the "sweeteners" that can be the basis for a settlement.

If a relocation case is brought to court for resolution, the 2021 legislative reforms have resolved some of the procedural issues that arise in these cases, but the outcomes of a relocation proceeding can be difficult to predict. The issue of the onus of proof is not insignificant, but the review of Ontario cases suggests that courts give relatively little weight to the issue of onus when making relocation decisions. The focus in each case is on the circumstances of the individual parents and children involved. While the parenting time arrangement at the time of the application and onus are certainly a factor, they are rarely determinative.

Parents should be advised when an initial parenting arrangement is made, whether by court order or agreement, that their future parenting conduct and relationship with the other parent will be very significant, certainly for the well-being of their children, but also in the event that there are future court proceedings. Hostility and controlling behaviour by one parent may result in the other parent being able to make a successful application to relocate. Not being supportive of the other parent's relationship with the child will weaken a future relocation application. A record of being supportive and reasonable, even in the face of hostility, will strengthen a parent's position in a later relocation case. Parents should be advised to avoid unilateral action which will be disruptive to a child, increase tensions and will weaken a parent's position in court.

If a parent wants to relocate, a careful plan should be developed that addresses both the needs of the children in their new home and their ability to maintain a strong relationship with the left-behind parent. In a relocation case, both parents should be introducing evidence about their relationship with the children and their plans for their education, as well as about their history of having supported the children's relationship with the other parent. If a parent seeking relocation does not have a good reason and a sound plan, the court is much less likely to grant the relocation application. Family violence is a good reason for relocation, though it must be proven, and must be more than mutual hostility.

About half of the children involved in relocation cases are relatively young, under the age of 8 years old, so it is often less meaningful to ascertain their views about an -abstract prospective decision on whether or not to relocate. For older children, there is more frequently evidence provided about perspectives and preferences of the

children, and the courts are more likely to give their views weight.[124] Interviews with children in relocation cases should be conducted with sensitivity in relocation cases to avoid placing children having the feeling that they are choosing between their parents, and their views should not be determinative, but there should efforts to ensure that there is reliable, independent evidence about their perspectives and preferences available to the court. There is a need for more use of Voice of the Child Reports in these cases so that the views of those who will be most profoundly affected by relocating or not relocating, can at least be known to the court. These reports may be prepared by the Office of the Children's Lawyer, but if the OCL is not involved, a VOCR can be prepared an independent court-appointed professional with the parents required to pay for it.[125]

The Supreme Court in *Barendregt* makes clear that appeal courts must show very significant deference to the trial courts in relocation cases, at least in part reflecting the recognition that these cases often involve a predictive decision and require judges to balance a number of incommensurate factors. There is often not a clearly incorrect (or correct) decision, and there is value for both parents and children in finality rather than prolonged appeals.

[124] *Banks v Beaupre,* 2022 ONSC 5662, at para 25.
[125] *Canepa v. Canepa,* 2018 CarswellOnt 14657, 2018 ONSC 5154

Law Society of Ontario | Barreau de l'Ontario

TAB 15

17th Family Law Summit

Spousal Support: Appeals, Retirement (PowerPoint)

SSAG FAQS 2022
Your Frequently (Or Occasionally) Asked Questions About the SSA, and Some "Answers"

Professor D.A. Rollie Thompson, K.C, Schulich School of Law
Dalhousie University

Spousal Support Advisory Guidelines: The Revised User's Guide

Professor Carol Rogerson, Faculty of Law
University of Toronto

Professor D.A. Rollie Thompson, K.C, Schulich School of Law
Dalhousie University

March 29, 2023

cpd

SPOUSAL SUPPORT: APPEALS, RETIREMENT

Prof. Rollie Thompson KC

Ontario Family Law Summit
Toronto, March 28-29, 2023

AGENDA

- Ontario Appeal Decisions 2022-23
- SSAG Update: SSAG FAQS 2022
- Retirement Issues
- "Early" Retirement
- Is Motion "Premature"
- Retirement Income Issues
- Double-Dipping: *Boston,* Recipient's Obligations
- Termination of Support
- Living Off Capital
- Appendix: Recent Retirement Cases
- **Materials: SSAG FAQS 2022;**
  RUG, ch 19

"BIG" ONTARIO APPEALS

McGuire v Bator, 2022 ONCA 431 (Benotto JA)
- 5-year cohab, W 51, H badly-behaved
- H no settled intention re W's 9-year-old
- trial J: lump sum, 2.5 yrs, mid-SSAG, $12,248
- CA: disability exception missed, "indefinite" (!)
- mid SSAG $620/mo, "review if material change"(!)

Assayag-Shneer v Shneer, 2023 ONCA 127
- Minutes made 1999 divorce order, H failed to pay SS
- Penalty clause, SS doubled, $506,000 owed
- H brings application to vary, no mat change
- but motion J strikes penalty clause
- CA (Zarnett JA): appeal allowed, no jurisdiction to vary
- no s 96 CJA, no common law authority, not contract (?)

OTHER ONTARIO APPEALS

Sutton, 2023 ONCA 16 (Court)

- H's appeal, lump sum SS $199,144, upheld
- Income of $46,000 imputed to W, not higher
- H retired from DND at age 44, old income imputed
- Cohabited over 20 years, traditional marriage

Kahsai v Hagos, 2022 ONCA 576 (Court)

- H's appeal dismissed, income imputed $100,000
- Lump sum SS, high SSAG, discretionary
- W's strong compensatory claim, 33 years together
- Lump sum to end litigation, H's bad conduct

DIVISIONAL COURT APPEALS

Fracassi, 2022 ONSC 4003 (Corbett J)
- Encourage parties to be clear re retirement
- Pension income included under agreement
- Spousal support reduced, above SSAG, upheld

Santa v Sheridan, 2022 ONSC 5940 (Gordon J)
- Variation, W appeals, post-separation income increase
- Appeal dismissed, no sharing, finding of fact(!)
- If no sharing, retro non-disclosure immaterial

Radosevich v Harvey, 2022 ONSC 3549 (Court)
- W sued her lawyer for negligence
- Negotiation of separation agreement & spousal support
- Action stayed, abuse of process, FLA remedies, s 56(4)
- Appeal dismissed

QUICK SSAG UPDATE

- Spousal Support Advisory Guidelines
  about amount & duration, *after* entitlement
- **SSAG Final Version (July 2008)**
  cited 360 appeals, 4,790 trial level
- **Revised User's Guide (April 2016)**
  cited in 265 cases (34 appeals)
- **SSAG FAQS 2022: 23 questions answered**
- **SCC**: leave denied 19 cases where SSAG used

RETRO SPOUSAL SUPPORT

- **SSAG FAQS 2022, No. 23**
- *Kerr v Baranow,* 2011 SCC 10 (Cromwell J)
- Not really "retroactive", no interim claim:
  MacKinnon (ONCA 2005), *Gayle* (OntDivCt 2020)
- Romilly J awarded back to date of filing only
- CA reversed, SCC reinstated
- *DBS* 4 factors applied, but differently for spouse
- Spousal support different because…
  - no presumptive entitlement
  - notice, delay, misconduct, weigh more heavily
  - amount more discretionary
  - no legal obligation to look out for spouse's interests
- Differences overstated, but more discretion
- See *Revised User's Guide*, ch. 20

DOES *COLUCCI* "APPLY"?

- *Kerr* applied *DBS*, *Colucci,* 2021 SCC 24, changes *DBS*
- Some suggest still just *Kerr*
  - *AE v AE,* 2021 ONSC 8189; *Nault*, 2022 ONSC 904
- Review of law: *CAR v DRR*, 2022 SKKB 218
- Appeals favour *Colucci* changes incorporated
  - *Legge,* 2021 BCCA 365; *Hevey*, 2021 ONCA 740
  - *Bowes,* 2022 NLCA 5; also *Scott*, 2022 ONSC 267
- *Colucci* means 4 factors just to change date
  presumptive date analysis – EN, FN
  more impact retro down, than retro up
- But still *Kerr* re delay
- Blameworthy conduct cuts both ways
- Distinctive entitlement issues re spousal support

SSAG FAQS "No 24" ADDED

- **Lump sum support where "indefinite"**
  "Rule of 20", "Rule of 65"
  all others have maximum time limits
- Do NOT use recipient's life expectancy
  in DivorceMate
- "Indefinite" doesn't mean "permanent"
  subject to variation or review
  (unless it is "permanent support"…)
- **Need to fix a duration to calculate lump sum**
- Lump sum "shares risk" for both

RETIREMENT ISSUES

- **RUG, ch 19**
- Entitlement of recipient
- Is retirement a "material change"? Review?
- What is "early" retirement?
- Income issues on retirement
- *Boston* and what it means
- Double-dipping for payor and the "exception"
  - using the SSAG to apply Boston
- Recipient's obligations
- Grounds for termination of support?
- Living off capital

ENTITLEMENT ISSUES

- No automatic or presumptive termination upon payor's retirement (compare US)
- Compensatory claims
  - if loss not fully compensated by retirement
  - post-retirement ability to pay limits compensation
- Non-compensatory claims
  - need: often stronger post-retirement, lower incomes
  - disability/illness exception more common
  - marital standard of living changes?
  - shifting basis to need: cross-over cases
- Retirement can be grounds for termination
  - end of entitlement, durational issues
  - recipient responds with claim for increased retro support

VARIATION: BASICS

- Most retirement cases are variations, some reviews
- Not retirement itself, but drop in income:
  Henteleff, 2005 MBCA 50
- ***LMP v LS*, 2011 SCC 64: law restated**
- Thompson, "To Vary,…" (2012), 31 CanFamLQ 355
- "Material change": substantial, continuing,
  not taken into account in previous order
- **Do NOT use "foreseeable" or "foreseen"**
  bad e.g. *Hickey v Princ*, 2015 ONSC 5596 (DivCt)
- Parties can define what is or is not "mat. change"…
  can specify retirement as material change
- If previous consent order, need to prove prior circumstances
  ***RP v RC*, 2011 SCC 65 (second retirement, 1991 order)**

Q: EARLY RETIREMENT?

Lucia and Carlos were married for 25 years, separating in 2014. The 2 children lived with Lucia, but both are now adults. The 2014 order provided for spousal support of $2,900/mo, based on incomes of $110,000 and $30,000/yr.

Carlos is a teacher and will retire in June 2023, at the age of 58, with a full (but divided) pension. Carlos says he is just “burned out”. His post-retirement income will be $50,000/yr. Lucia just turned 54, now earns $40,000/yr.

Carlos applies to vary support. Has he proved a material change? Is his retirement “early”?

"EARLY" RETIREMENT

- No definition, unpredictable outcomes
- What is "early" retirement?
  - NOT if involuntary
  - IS if intent to reduce/avoid paying support
  - payor under 60? nature of job?
  - payor less than full pension?
  - longer the marriage, shorter time SS paid?
- 2 methods of addressing:
  - 1st, "no material change", dismissal
  - 2nd, mat change, but then impute income, etc.

WHEN CAN PAYOR RETIRE?

- When "reasonable"? Unhelpful test
- When age 65?
- When unreduced, or good enough, pension?
- Occupational test? nature of work
- Public vs private sector?
- Self-employed/professional/business?
- When the recipient has already retired!
- Do marital plans about early retirement matter?
- What about the retirement age used for pension valuation?
- Does notice of retirement matter?
- When aggregate retirement savings can keep both spouses at reasonable stds of living?
  - *Bullock* (2004), 48 RFL (5th) 253 (OntSCJ)(Corbett J)
  - *Walts*, 2016 ONSC 4777 (Mackinnon J)

RECENT RETIREMENT APPEALS

Hague, 2022 BCCA 325
mat change, similar retirement incomes, SS terminated

Cook, 2021 BCCA 194
pensions, inheritances, no lump sum SS justified

Virgili, 2021 NBCA 7
mat change, SS reduced, H's pension already divided, no exc'n

Nettleton, 2020 ONCA 753
SS reduced, double-dip "to some extent", need

Dillman, 2021 ONSC 326 (DivCt)
SS reduced, future variation possible when W gets pension

Bone, 2020 ABCA 323
argued as double-dipping [really about imputing income to W]

NK v MH, 2020 BCCA 121
lump sum upheld, no evidence from H re pension division

APPLICATION PREMATURE?

- Can you apply to vary *before* you retire?
- Part of "material change" analysis
- *Schulstad*, 2017 ONCA 95
  - "exceptional" case says CA: really?
  - sufficient post-retirement financial information
  - retirement a "certainty"
- Reconsider older case law
  - *Vaughan*, 2014 NBCA 6; *Rondeau*, 2011 NSCA 5
- Reasonable to ask first: *DP v AS*, 2021 NWTSC 30
- Must retirement be a "certainty"?
  - *Carey*, 2021 BCSC 1537; *Rival*, 2019 ONSC 4476
  - really about quality of post-ret'mt income evidence

Q: RETIREMENT INCOME

Lucia and Carlos were married for 25 years, separating in 2014. The 2 children lived with Lucia, but both are now adults. The 2014 order provided for spousal support of $2,900/mo, based on incomes of $110,000 and $30,000/yr.

Carlos is a teacher and will retire in June 2023, at the age of 58, with a full (but divided) pension. Carlos says he is just "burned out". He had always talked about retiring in his 50s. His post-retirement income will be $50,000/yr. Lucia just turned 55, now earns $40,000/yr.

(1) Carlos brings a motion to change. Lucia argues Carlos should find a part-time job, teaching or otherwise earning at least $40,000/yr. Should income be imputed to Carlos?

(2) Carlos argues that Lucia should start to draw down her share of his pension, whether income is imputed to him or not, to reduce or eliminate his spousal support. Is he right?

RETIREMENT INCOME ISSUES

- Sources of retirement income
  - CPP, OAS, GIS
  - RRSP, RRIF, LIRA, etc.
  - Employment pensions: DB, DC, hybrid
  - Investment income: dividends, interest, capital gains
  - Annuities
  - Sale of business
- Post-retirement employment
  - Contract work for former employer
  - Transitional employment after sale of business
  - New career, esp. police, Armed Forces
  - Part-time work: necessity vs choice
  - Imputing income for under/unemployment

RETIREMENT: DOUBLE-DIPPING

- **Boston, 2001 SCC 43**
- Decided before SSAG (2005): see RUG, ch 19
- 3 *Boston* holdings:
  - avoid double-dipping, look to undivided income
  - recipient obligation to use assets, own "pension"
  - exception where hardship/need
- Exception:
  - not just hardship/need, compensation too
  - "exception" swallows the "rule"
- DD only applies to pensions, liquidating assets
  - NOT usually to businesses, investments, etc.
  - ABCA partly wrong: *Bone*, 2020 ABCA 323
  - ONCA right: *Halliwell*, 2017 ONCA 349

DOUBLE-DIPPING: SSAG

- Prevalent methods for payor:
  - formulaic: take undivided pension income
  - calculate SSAG range, eg *Slongo*, 2017 ONCA 272
  - for *Boston* exception, use full pension income to calculate SSAG range
- Both formulas too simplistic
  - formulaic cases large undivided pension/income
  - don't treat payor as if earning $20-$30,000/yr *Brisson*, 2012 BCCA 396
  - need for more flexibility: see RUG ch 19
  - calculate alternate SSAG ranges

RECIPIENT'S OBLIGATIONS

- Recipient's duty to generate own pension
- Mechanics of pension division can affect
  - deferred benefit split of DB pension: BC, NS
  - lump sum rolled out: most others: LIRA, LRSP, RRSP
  - division of CPP credits
- If trade-off, pension vs home/other assets
  - duty to generate income for retirement: *Boston*
- Recipient need not access pension because payor ret'd
  - *Walts,* 2016 ONSC 4777
- Recipient can decide when to retire
- Danger of "double-counting" if interest/annuity
  - if exclude divided pension for payor, equal treatment
  - *Malbon,* 2017 BCCA 427, *Parrett,* 2016 BCCA 151

TERMINATION OF SUPPORT

- SSAG time limits:
  - *without child support* cases less than 20 years
  - *custodial payor, adult child* formulas
  - cross-over cases, to *without child support* formula
- Indefinite orders:
  - cohabit 20 years or more, "rule of 65"
  - *with child support* cases, initial
  - time limits through variation and review
- Retirement as basis for termination
  - near end of time limits, maxima
  - reduction in payor income
  - *Boston*: impact upon both spouses

LIVING OFF CAPITAL

- Low income spouses: CPP, OAS, GIS
- Pension etc. division:
  - long marriages
  - both spouses have good pensions
- Capital:
  - property division
  - Investments: rates of return, imputing
  - sale of matrimonial/other homes
  - inheritances, gifts, etc.
- Lump sum spousal support:
  - *Davis v Crawford*, 2011 ONCA 294

APPENDIX

RECENT ONTARIO CASES

Fracassi, 2022 ONSC 4003 (DivCt)(Corbett J)

importance of being clear what happens on retirement

Molka, 2022 ONSC 6990 (Faieta J)

H retired at 57, construction, SS reduced, high SSAG

McKinnon, 2022 ONSC 4670 (Tellier J)

H retired at 65, SS term'd, W keep house, adult disabled child

Davis, 2022 ONSC 4602 (Broad J)

H retired at 55, met onus, mid-SSAG

Meilleur v Aqui, 2022 ONSC 2990 (Sah J)

H 61, 42 yrs at bank, 2014 notice, SS term'd as of 2016 retirement

MORE ONTARIO CASES

Paragua v Lola, 2022 ONSC 1680 (Lococo J)

H retired at 60, voluntary, no material change

McHardy, 2022 ONSC 1452 (Bell J)

H retired, over 70, W 72 works part-time, both live off capital, SS terminated

Casier, 2021 ONSC 3407 (Howard J)

H forced ret'mt at 60, W ret'd at 50, SS reduced

MacDonald-Hills, 2021 ONSC 3095 (Sproat J)

H retired at 56, psychiatric nurse, SS step down, terminated

Samson v Metail, 2021 ONSC 5212 (Pierce J)

H retired at 57, mill closed, W retired at 57, SS continued

RECENT NON-ONT CASES

Kelly v Gammon, 2022 ABQB 57 (Lema J)
H retired at 60, no SS til pensions divided and flowing
Ernst, 2023 BCSC 65 (Punnett J)
H retired at 58, moved to Philippines, no var'n til 65, lump sum
RLC v RGC, 2021 BCSC 2386 (Walkem J)
H on disability, W disabled, SS reduced, premature to address H's imminent retirement
Wheeler, 2021 BCSC 1269 (Edelmann J)
H's job ended, age 63, pensions divided, no DD, high SSAG
Harper, 2021 BCSC 758 (Baker J)
H police ret'd at 55, inc imputed, W similar income, SS term'd
DP v AS, 2021 NWTSC 30 (Charbonneau J)
H 70, retired, "hardly early", similar incomes, SS terminated

MORE NON-ONT CASES

Andrews-McKay, 2022 NBQB 257 (d'Entremont J)

H ret'd 65, CPP credits divided, H $19.380/yr, can't pay SS

Morrissette v Vermette, 2022 NBQB 9 (d'Entremont J)

H ret'd at 53, CAF, pension divided, H working, mid-SSAG

MacKenzie, 2022 PESC 20 (Campbell J)

H ret'd at 63, retro, W draw pension, SS term'd Oct 2019

SSAG FAQS 2022

YOUR FREQUENTLY (OR OCCASIONALLY) ASKED QUESTIONS ABOUT THE SSAG, AND SOME "ANSWERS"

Rollie Thompson, QC

Over the past five or six years, since the publication of the *Revised User's Guide* (April 2016), I have fielded many questions about the Spousal Support Advisory Guidelines – from lawyers, judges, mediators, arbitrators, and unrepresented spouses. Some questions came via the folks at DivorceMate or ChildView, others by email or questions at conferences (in-person and virtual). Some questions are recurring, some are novel, some are simple, some are complicated. Many of the questions have forced Professor Carol Rogerson and me to think very carefully about what we intended or meant when we wrote a passage in the SSAG Final Version (July 2008) or the *Revised User's Guide* (RUG).

Like in real life, the questions come in no particular order. There are more than twenty questions in this version. The list kept getting longer and longer! I've tried to organise them loosely around some larger topics. I put the "answers" in quotes, because we all know that, in family law, there are some "wrong" answers, some "right" answers, and often more than one "right" answer. Some of the questions were initially raised in Ontario or are distinctive to Ontario, and the DivorceMate terms are used in the "answers". In my answers, for convenience, I have **bolded** references to the SSAG Final Version or the RUG. As of February 2022, the *Revised User's Guide* has been cited 229 times in judicial decisions.

Finally, my "answers" may lead to more questions, or you may think that I have left out your "question". The SSAG have led to an ongoing dialogue about spousal support and spousal support law amongst those of us who "toil in the vineyards of matrimonial discord", to quote our late, great friend Phil Epstein. More questions can be added in later instalments of these "SSAG FAQS".

PENSION CONTRIBUTIONS NOT DEDUCTED

1. Why aren't mandatory Registered Pension Plan contributions deducted in net income calculations under the *with child support* formula? If RPP contributions aren't deducted, why is the related tax break considered?

This has been a frequently-asked question over the years, and thus I begin with these tricky questions, for which the answers are not necessarily intuitive.

First, the Registered Pension Plan/Registered Retirement Savings Plan (RPP/RRSP) contribution issue has **no impact upon the *without child support* formula**, as it is a gross income formula. RPP/RRSP contributions are clearly NOT deducted in a gross income formula. The same holds true for the *custodial payor* and *adult child* formulas, both of which are also gross income formulas (they both deduct grossed-up child support and notional child support, to give priority to child support).

The RPP/RRSP issue does arise for most of **the *with child support* formulas**, including the basic formula (where the recipient spouse has primary care), the shared custody formula, the split custody formula and the step-parent formula.

We addressed the mandatory RPP deduction issue in the **SSAG Final Version (July 2008), at page 77.** This excerpt speaks only of mandatory RPP deductions in calculating INDI, as that was the most difficult part of this general topic. Its wording was not changed from the January 2005 Draft Proposal and reads, in these two paragraphs:

> More contentious are deductions for mandatory pension contributions. We concluded that there should not be an automatic deduction for such pension contributions, but the size of these mandatory deductions may sometimes be used as a factor to justify fixing an amount towards the lower end of the spousal support range.
>
> We reached this conclusion after considerable discussion. Like EI, CPP and other deductions, pension contributions are mandatory deductions, in that the employee has no control over, and no access to, that money. But, unlike other deductions, pension contributions are a form of forced saving that permit the pension member to accumulate an asset. Further, after separation, the spouse receiving support does not usually share in the further pension value being accumulated by post-separation contributions. Finally, there are serious problems of horizontal equity in allowing a deduction for mandatory pension contributions by employees. What about payors with non-contributory pension plans or RRSPs or those without any pension scheme at all? And what about the recipient spouse—would we have to allow a notional or actual deduction for the recipient too, to reflect her or his saving for retirement? In the end, we decided it was fairer and simpler not to allow an automatic deduction for pension contributions.

In calculating Individual Net Disposable Income (INDI) for the *with child support* formula, the RPP contribution is NOT deducted from the contributor's income, unlike taxes, EI, CPP, etc. That much is clear. The mandatory RPP deduction can be taken into account by **location in the range** in cases where there may be ability to pay issues (not unlike other factors that go to ability to pay, like high expenses for commuting to work).

But RPP contributions have **tax consequences** (as do RRSP contributions). Since most of the *with child support* formulas are net income formulas, it is important to reflect the reduced tax paid now, usually for the payor spouse who makes the pension contributions. That reduced income tax *must* be taken into account, given its impact upon

current ability to pay. We know that the RPP/RRSP tax deduction is a tax deferral, but the tax is deferred well into the future for most contributors and, even then, likely with a much-reduced tax rate in retirement. Thanks to the RPP/RRSP tax deduction, it is a very efficient means of saving to accumulate the retirement asset.

Almost all of the *with child support* formula cases involve strong compensatory claims by the recipients, so any tax break that allows a payor to pay off the compensatory loss earlier makes sense. Given the priority of child support obligations, the real limit on compensatory support in most cases is the payor's ability to pay. The *with child support* formula for amount fixes a range based upon a sophisticated formula estimating ability to pay. Lawyers and judges can still use location in the range for amount to adjust in individual cases. Mandatory pension deductions may mean the payor has less ability to pay and thus the outcome has to be lower in the SSAG range.

In some unusual cases, it may even be necessary to locate *below* the SSAG range, as I have explained in repeated presentations. Many pension plans have hiked their employee contributions in order to maintain the solvency of their plans, with contribution percentages rising from the typical 5-7 per cent when the SSAG were first designed, to something more like 8-12 per cent. At these higher levels, in some cases, given the bite the mandatory RPP contributions make, the payor’s ability to pay may be seriously constrained and an amount *below* the formula range may be appropriate. Usually, however, the broad SSAG range for amount should be able to make a satisfactory adjustment within the range.

We have focussed on the payor so far, but the same INDI and tax treatment applies to *a recipient who is making RPP/RRSP contributions*. For a recipient, the same principles at work will keep their income up and thus *reduce* the SSAG range. In some of these cases, this will mean a location *higher* in the range for amount is appropriate.

Although the SSAG refer only to mandatory RPP contributions in the excerpt above, the same treatment applies for a payor or recipient making significant RRSP contributions. The RRSP contributions would *not* be deducted in the INDI calculation, but the RRSP tax deduction would apply for tax and net income purposes.

RRSP contributions can be mandatory under some employment pensions, but most are voluntary decisions by the contributor. In either instance, the contributions allow the acquisition of an asset and there is the same favourable tax treatment.

It is wrong to just ignore the tax deductions associated with RPP/RRSP contributions, as some lawyers do. The RPP/RRSP tax deduction can be significant, depending upon the size of the contributions and the income tax bracket. To ignore the tax deduction would underestimate -- sometimes quite seriously -- the current ability to pay of the payor.

It would also be misleading to "just leave out" the RPP/RRSP contribution and tax deduction, as some lawyers do, without some explanation in the accompanying brief or other documentation.

DivorceMate properly explains the INDI and tax calculations for RPP/RRSP contributions and deductions, consistent with the Spousal Support Advisory Guidelines. Further, there is a clear "cash flow adjustment" on the summary page, with the adjustment of each spouse's net disposable income, there for all to see in a transparent manner.

Since the SSAG are "advisory guidelines", not legislated, then parties are free to negotiate their own terms that might not comply strictly with the SSAG. Equally, a judge may adjust or alter a SSAG calculation or outcome on the facts of a particular case. I can only speak to what the SSAG intended and what the software implements around RPP/RRSP contributions.

TAX CALCULATIONS

2. Should I only input “standard” tax credits and deductions, or do I have to include all the relevant credits and deductions available to the spouse?

The deduction for RPP/RRSP contributions is only one of a number of spouse-specific tax credits and deductions that need to be considered in determining Individual Net Disposable Income (INDI) in net income calculations under the *with child support* formulas. Each spouse must take into account their actual or individual tax information under the SSAG formula.

SOCIAL ASSISTANCE

3. Why is the recipient’s social assistance income treated as zero for spousal support calculations, when the adult portion of social assistance is considered in determining child support, including notional child support?

Under Schedule III to the *Child Support Guidelines,* in determining Guidelines income for child support purposes, section 4 says: “Deduct any amount of social assistance income that is not attributable to the spouse.” The intent is to exclude any amount of assistance intended for a child in the care of the spouse. Only the assistance intended to support the adult should be considered. In most provinces, the adult’s assistance will be less than or slightly above the $12,000 “self-support reserve” for a payor, resulting in no payment or a very small table amount. Weird that a person on social assistance can be held to pay a table amount, but that’s the *Child Support Guidelines* table formula at work.

The reality is that the enriched federal Canada Child Benefit (CCB) now provides all or most of the financial assistance for children in this country. Some provinces top up the CCB for children. It should therefore be straightforward to determine the adult’s income under s. 4 in most provinces and territories.

In determining income under the SSAG, however, the recipient's social assistance income is treated as zero, as is explained in the SSAG Final Version (July 2008):

> **6.2 Social Assistance Is Not "Income"**
>
> Under s. 4 of Schedule III to the *Federal Child Support Guidelines*, social assistance is treated as income, but only "the amount attributable to the spouse". This adjustment is required as social assistance is included in line 150 income. For spousal support purposes, any social assistance received by the recipient spouse has traditionally not been viewed as income, so that a recipient relying entirely on social assistance would be treated as person with zero income.Turning to the payor spouse, a payor who receives social assistance is by definition unable to support himself or herself and thus has no ability to pay.
>
> For purposes of the Advisory Guidelines, section 4 of Schedule III does not apply. **No amount of social assistance should be treated as income, for either the recipient or the payor**. (emphasis in original)

This approach is consistent with the case law and the long-standing policy of private support being preferred to public assistance.

In calculating any "notional table amount" of child support within the *with child support* formula, however, the SSAG will apply s. 4 of Schedule III and use the adult's share of social assistance income. Thus, a recipient with zero income for spousal support purposes might still show a notional table amount for child support! What may seem odd at first glance is not, when you understand the different purposes of the income definitions.

CPP DISABILITY

4. Is Canada Pension Plan Disability social assistance, or is it "income" for SSAG purposes?

It's NOT social assistance. It *is* income for SSAG purposes. CPP Disability is paid to those who contributed to the Canada Pension Plan, and who have become disabled. It is taxable income in the hands of the recipient, although most recipients have such low incomes that little or no tax will be paid. If a person receives CPP Disability, they usually will not receive social assistance. I have been asked this question over and over again, in multiple settings, so I thought it worth repeating here.

Under CPP Disability, a separate portion or benefit is paid for a child to the parent with "custody and control" of the child, on account of the disability of the child's parent. Often the disabled parent will be the parent paying spousal support, but the disabled parent can also be the parent receiving spousal support. This child benefit should be treated as income for SSAG purposes, for whichever parent receives the benefit: see **RUG, pp. 18-19**. The CCP Disability child benefit is NOT taxable income in the hands of the recipient of the child benefit.

OAS/GIS CLAWBACK

5. How do the clawbacks for Old Age Security (OAS) or the Guaranteed Income Supplement (GIS) affect the SSAG range?

Both the OAS and GIS have "clawbacks", direct reductions in the monthly amounts paid for OAS and GIS as the recipient's income rises. A recipient of spousal support will often see their income from these sources go down as support goes up.

The clawback starts at very low income levels for GIS, with the Supplement completely disappearing for a single person in early 2022 at $19,464 (net income on line 23600 of the tax return) and at higher amounts for couples. The OAS clawback for a single person in early 2022 starts at $79,054 of annual net income and the "maximum income recovery threshold" is $128,149 where OAS is completely clawed back.

Both OAS and GIS are reported as part of line 15000 income. But, note that OAS *is* taxable income, while the GIS is not taxable (hence its inclusion at line 14600).

DivorceMate has recently created an automatic adjustment of both OAS and GIS for this clawback. DivorceMate now assumes that OAS and GIS incomes should be clawed back first *before* applying the SSAG, despite the fact that the clawback of those amounts doesn't get factored in until after Line 150 (Line 15,000 now) on a tax return. Here is an example of the "help" now found in DivorceMate about OAS:

> If the party is 65 years of age or older and is in receipt of the Old Age Security pension ("OAS"), input the <u>maximum</u> annual amount of the OAS ($7,707 for 2022; see below for prior years), *and the software will automatically determine the party's <u>net</u> OAS* (ie. T1, Line 11300 (Line 113 before 2019) or T4A(OAS) slip, Box 18 or 19 less any pension recovery tax (herein referred to as "clawback" of OAS).
>
> OAS <u>may</u> get clawed back depending on the party's other sources of income. While the clawback of OAS (T1, Line 23500 (Line 235 before 2019)) occurs after Line 150 (now Line 15000) and is not technically an enumerated adjustment listed in Schedule III or ss. 17, 18 or 19 of the CSG, the most reasonable interpretation of Guidelines Income in keeping with the spirit of the CSG is to include OAS income <u>as adjusted by this clawback</u>.
>
> ***The software will automatically calculate any clawback*** *based on the party's other sources of income (including the receipt or payment of spousal support), and will reflect this clawback (and the party's change in taxes) in the party's NDI in the Support Scenarios and the party's INDI in the "With Child Support" calculation of spousal support. The software will additionally reduce the party's Guidelines Income for the purposes of child and/or spousal support.*
>
> **IMPORTANT: The clawback in the software is based on the assumption that the party is single (ie. no spouse), and qualifies for the maximum OAS payment. If this is not the case and/or you do not want the clawback to be**

> **automatically applied, input the net annual amount of the party's OAS received as "Other taxable income".** (underlining, italics and bolding in original)

A similar method is now also applied to the GIS: the maximum benefit is included, with an automatically-calculated adjustment for the clawback.

This new method offers a more precise assessment of the impact of spousal support upon the incomes of the spouses going forward. Given the higher income thresholds for the OAS clawback, this calculation will more often come into play in spousal cases.

DISABLED ADULT CHILD RECEIVING INCOME ASSISTANCE

6. Where a spouse receives income for an adult child living with the spouse, under ODSP or other similar provincial programs, how should that income be treated in SSAG calculations?

Where an adult disabled child receives funds from income assistance, like the Ontario Disability Support Program (ODSP), then s. 3(2)(b) of the *Child Support Guidelines* applies to the determination of child support: *Senos v Karcz,* 2014 ONCA 459. Because of that receipt of ODSP income, the table-plus-section-7 approach of s. 3(2)(a) is "inappropriate". As *Senos v Karcz* tells us, the sharing of responsibility by the parents and the state makes child support more complicated and more discretionary. There will have to be a budget prepared for the expenses of the adult child, with adjustment of the child support obligations of each parent after taking into account ODSP. In turn, the lower child support amounts will affect spousal support. As the question arose in Ontario, I will refer to ODSP in what follows, but the same principles would apply to any other non-earmarked income assistance intended for an adult child in other provinces and territories.

Once child support is determined under s. 3(2)(b), then the *adult child* version of the *with child support* formula applies, a SSAG formula ignored too often. Remember that the *adult child* formula is a hybrid formula. Each parent's child support obligation is grossed up and deducted from their respective gross Guidelines incomes, before using the same considerations as the *without child support* formula to calculate the range for spousal support – gross income difference and years of cohabitation.

The *adult child* formula only applies where child support for all or the remaining child is assessed under s. 3(2)(b), like one adult disabled child, or that child plus another child away attending university. If the parties or the court determine child support under the s. 3(2)(a) approach, for the adult disabled child alone or along with other children still living with either parent, then one of the other *with child support* formulas will apply, like the basic, split custody, shared custody or custodial payor versions.

For these formulas, does the ODSP for the adult child get treated as income to the recipient parent? The answer is "no", but with an important adjustment. I've considered the alternatives.

If we include in income the Canada Child Benefit, provincial child benefits and other benefits paid for children under these formulas, then it seems hard to distinguish ODSP paid for an adult child: see SSAG 6.3 and RUG 6(a). But there is an important distinction: the child is an "adult", with the potential to have income of their own.

Or, we could just ignore the ODSP income of the adult child completely. Justice Chappel adopted that view in in two cases, by wrongly collapsing ODSP for a spouse with ODSP for a child: *McBennett v Danis,* 2021 ONSC 3610 at para. 294 and *A.E. v A.E.,* 2021 ONSC 8189 at para. 245. To support her view, Chappel J. cites the Divisional Court decision in *Naegels v Robillard*, 2020 ONSC 3918. That appeal was correctly and carefully decided, but it only involved ODSP for a disabled recipient spouse, which raises a different set of policy issues, discussed under FAQ 3 above.

I would suggest a middle way between these two extremes. The ODSP received for the disabled adult child should be treated in DivorceMate as a "cash flow adjustment – increase NDI". Thus, the ODSP will not be treated as part of the parent's income for spousal support purposes, but *will affect their NDI*, their net disposable income position. The ODSP adjustment will show up in the dollar amounts and percentages for NDI.

It may be that the ODSP adjustment should be less than the full amount paid in some cases, where the ODSP is used to cover the cost of special activities or programs, paid to third parties. Further, if child support is less than the table amount in these cases, as it is often us, it is critical to *override* the table amount not only for child support purposes, but also for SSAG calculations.

Parents of disabled adult children will also often receive funds to cover specific activities or respite care or other added expenses for the adult child. These ear-marked funds should obviously NOT be treated as income to the parents in any spousal support calculation. For more on these issues, see the recent illuminating article by Dickson and Battaglia, "Child Support for Adult Children with a Disability: The Impact of ODSP, the Disability Tax Credit, RDSP and RESP" (2022), 40 Can.Fam.L.Q., No. 2 (forthcoming).

CHILD SUPPORT CLAWBACKS ENDING

7. Which provinces still deduct child support received from the income assistance income of the custodial parent?

When we wrote the *Revised User's Guide* in 2016, only one province – British Columbia – had decided to end deducting child support from the recipient parent's assistance income, as of September 1, 2015. The rest of the provinces and territories did "claw back" any child support received, as well as any spousal support received, deducting both forms of support dollar-for-dollar from any assistance received.

Since then, the majority of the provinces have moved to end the "clawback" of child support (as of March 2022): Ontario, January 1, 2017 (ODSP) and February 1, 2017 (Ontario Works); Nova Scotia, August 1, 2018; P.E.I., July 1, 2018; Newfoundland and

Labrador, June 1, 2019; New Brunswick, October 1, 2021. In these provinces, the receipt of child support will no longer affect the amount of income assistance received.

In Alberta, there is no clawback of child support for those parents receiving assistance under the AISH (Assured Income for the Severely Handicapped) program. But Alberta still claws back child support for those obtaining assistance under the general Income Support program.

Manitoba and Saskatchewan continue to claw back child support from the income assistance of the recipient as of early 2022.

To be clear, whatever the treatment of child support, all provinces do deduct or "claw back" any *spousal support* received by an income assistance recipient.

Since any income assistance received by the primary parent is treated as zero for spousal support purposes, whether or not child support is clawed back does not have an impact upon the SSAG range for amount. See the explanation above for FAQ 3.

What does change is the net disposable income or monthly cash flow of the recipient. If the recipient gets to keep their child support, i.e. no clawback, their net disposable income or monthly cash flow will be significantly higher. The recipient will be better off.

PART YEARS AND TAXES

8. If a couple separates part way through a calendar year, why does the *with child support* formula use annualized taxes and benefits to calculate the ranges, rather than the actual taxes and benefits experienced by the spouses in that year?

The Spousal Support Advisory Guidelines use annualized income and tax calculations to provide ranges for the amount of spousal support, after entitlement has first been determined. But what if spousal support is being calculated on a part-year basis, like when the spouses separate part way through a calendar year – should the ranges be calculated differently, to reflect the actual taxes, benefits and net incomes in the remaining part year? This question was raised by an Ontario practitioner, an unusual question, but one warranting a detailed answer.

The answer is, generally, "no", but a more detailed explanation is required.

First, this is not an issue under the *without child support* formula, which uses gross incomes, not net incomes. There are net income *consequences* for both payor and recipient of spousal support, but the formula range will not be affected (except for the "net income cap" in some long marriages).

The part-year issue thus only arises for most of the *with child support* formulas, which do use net incomes to calculate the range.

To begin, we need to be careful about the specific concern under this formula. If a couple separates part way through the calendar year, with spousal support commencing, say, in October for the remaining three months, then the software uses annualized information on income, taxes, benefits, etc. to calculate the SSAG range using net incomes. It assumes that the payor pays tax-deductible spousal support for 12 months, the recipient receives tax-payable spousal support for 12 months, and it assumes that any child benefits will be adjusted to reflect the residential parent's adjusted family net income for 12 months. Other inputs will affect the formula range too, as well as the net disposable incomes of the spouses. But, for payor and recipient, their actual tax position for the calendar year of separation will only reflect the support paid for three months (and their child benefits will not change until later too).

On this view, the SSAG ranges do not properly reflect the *actual* positions of the spouses in the year of separation, which is correct. But that is not how we usually determine the amount of spousal support.

It is worth remembering that periodic spousal support is *prospective* or forward-looking, as is child support. Spousal support orders are intended to be more stable or "stickier", and thus harder to vary than child support, as I have explained: "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012), 31 Can.Fam.L.Q. 355. Spousal support remains discretionary and much less precise than child support, which is now founded upon a very specific table formula, one capable of precise calculation and recalculation. The greater stability of spousal support is intended to discourage relitigation and repeated and possibly inconsistent exercises of discretion by different judges.

Thus, spousal support orders (and agreements) will typically be intended to remain in place for a period of time, usually beyond the immediate calendar year and often for many years. The determination of the amount of spousal support has never been about precise "math". The SSAG formula ranges offer considerable scope for the exercise of discretion, in the location of an amount within the ranges. On "location within the range", see **chapter 9 of the *SSAG Final Version* and chapter 9 of the *Revised User's Guide***. In a judicial decision, there are many reasons for a judge to fix an amount. The net disposable incomes of the spouses are only one factor in that decision.

Lastly, most of these part-year issues will be resolved in the determination of interim or temporary spousal support after separation. Many couples will continue with informal monetary arrangements for a period of time after separation, before consulting lawyers and formalizing support. Parties can agree to using more precise part-year calculations for support, whether interim or ongoing, as part of their negotiations or mediation. Further, the SSAG recognize an exception at the interim stage for "compelling financial circumstances" and, in some cases, the tax implications may have serious implications for ability to pay in the short run. In many instances, temporary support will be determined retroactively, dating an order back to the date of separation, thereby

avoiding much of the problem. Finally, the earlier in the calendar year the parties separate, the less of a "part year" problem there will be anyway.

If you want to get a picture of the actual calendar year taxes, NDI, etc., here's a way to do it: add a new spousal support scenario and input the average monthly spousal support amount based on the support actually paid for the part year. For example, if spousal support of $5,000 was paid for each of October, November, and December, you can take the total support paid, i.e. $15,000, and divide it by 12 to get an average monthly amount over the full year, i.e. $1,250 per month. By specifying this $1,250 monthly amount in a new support scenario, you can see the actual taxes, NDI, etc. for the calendar year.

LEGAL FEES AS "CARRYING CHARGES"

9. Should legal fees be treated as a deduction under "carrying charges"?

The correct answer is that *neither* party should be allowed to deduct legal fees to obtain or resist support under s. 8 of Schedule III of the *Child Support Guidelines*. The adjustments in Schedule III are intended to place those with different sources of income in the same position as a recipient of wage and salary income, the T4 earner which is the basis for the table formula's conversion from its net income underpinnings (it's a net income formula) to using gross Guidelines income for the tables used by the public.

Carrying charges typically involve the interest costs of borrowing to make investments or the costs of fee-based investment advice, permissible under the *Income Tax Act* as costs to earn income. Legal fees to acquire child or spousal support are different.

Legal fees to obtain child support are, inexplicably, still deductible, even though child support is no longer treated as taxable income. The original logic was, when both child and spousal support were taxable income to the recipient, that the legal fees were incurred to earn taxable income. That logic might still hold for spousal support, but doesn't any longer for child support, but the government responded to lobbying and pressure on this issue.

Legal fees for the payor of support have never been deductible for tax purposes, despite multiple efforts over the years by various fathers to argue otherwise. That also goes for a net payor of child support under s. 9 of the *Guidelines*. One of the leading cases on non-deductibility of legal fees by a support payor is *Grenon v. Canada*, 2014 TCC 265, where the Tax Court found no breach of s. 15 of the Charter.

There are a number of Ontario cases which have -- rightly, in my opinion -- rejected any deduction of legal fees for support under s. 8 of Schedule III. The best and most exhaustive would be *S.L.B. v. V.A.H*, 2019 ONCJ 694 at paras. 343-370 (Finlayson J.). Other cases taking this view would be *Nixon v. Lumsden*, 2020 ONSC 147 at para. 184 (Audet J.); *Fielding v. Fielding*, 2018 ONSC 5659 at paras. 135-137 (Monahan J.); and *A.A.G. v. J.L.G.,* 2022 ABQB 119 (Dilts J.) at paras. 188-195. Two older cases that reach

the same conclusion are *Gillespie v. Gillespie,* 2017 NBQB 149 (B. Robichaud J.) at para. 236 and *G.J.L. v. M.J.L.,* 2017 BCSC 688 (Schultes J.)

Recently, Justice Chappel has entered the debate, with a different approach, in *McBennett v. Danis,* 2021 ONSC 3610. Chappel J. ruled that the legal fees of the support recipient were permissible "carrying charges" under s. 8, but the court could then "impute" the same fee amounts back into income under s. 19(1) CSG "where the deduction from the party's *Guidelines* income would yield unjust and distorted results" (at para. 299). Problem is, the deduction yields "unjust and distorted results" in every case, so this roundabout approach is unnecessary. In *McBennett*, Chappel J. did impute income in the end, at least for spousal support purposes (at para. 377), but only after much backing-and-forthing. Justice Chappel repeated these views in *A.E. v. A.E.,* 2021 ONSC 8189 at paras. 249-252. So far, the only reported decision applying this approach is *T.C. v. A.J.,* 2021 BCSC 1696 (Morellato J.) at para. 84.

The simpler answer – and the correct answer – is found in Justice Finlayson's decision in *S.L.B. v. V.A.H.*: *legal fees are not "carrying charges" and thus are not deductible under s. 8 of Schedule III*. It is hard to improve upon his careful research and reasoning at paras. 343-372. Finlayson J. notes that legal fees were not to be claimed on line 221 for "carrying charges" (now line 22100) of the tax return in 1997 when the *Child Support Guidelines* were promulgated, a change in reporting that did not occur until 2012 (paras. 367-368).

In addition to the weird child support implications, if the recipient of spousal support could deduct legal fees from their income under s. 8 of Schedule III, that would increase the SSAG range for the payor. And the payor of spousal support cannot deduct family law legal fees from their net income. This obvious "unfairness" was noted by both Justices Chappel and Finlayson. A double whammy for the payor!

Whatever the interpretation of "carrying charges" for purposes of child support under s. 8 of Schedule III, it would be *wrong* to treat the spousal support recipient's family law legal fees as a deduction under "carrying charges" under the SSAG.

MAXIMUM RANGE OF THE WITHOUT CHILD SUPPORT FORMULA

10. For marriages longer than 25 years, why doesn't the low end of the range for amount keep rising under the *without child support* formula, even if the high end maxes out at 50 per cent?

Under the *without child support* formula, where the couple has cohabited for 25 years of more, the maximum range for spousal support is 37.5 to 50 per cent of the gross income difference between the spouses. At the top end of this range, the parties would end up with equal gross incomes after the payment of support. The top end is subject to a "net income cap", to ensure that the payor keeps at least 50 per cent of his or her net after-tax income. The 50/50 split at the top end of this range is a *permissible* outcome under the formula, but not mandated. Remember what *Moge* said: "As marriage should

be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution." [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 at para. 84. If the range is 37.5 to 50%, then the mid-point of this range, in percentage terms, falls at 43.75%, half way between the two ends. On these issues, see **SSAG 7.4 and 7.4.1 and RUG ch. 7 intro.**

Every now and then, some lawyer suggests that, for marriages longer than 25 years, even though the top end (50%) stays fixed under this formula, the low end should continue to rise, and thus so too should the mid-point be higher. To put it in concrete terms, if the spouses were married for 27 years, this argument goes, then the low end of the SSAG range should be 40.5% of the gross income difference, rather than 37.5%. The mid point would then move up to 45.25%.

That's NOT what the Advisory Guidelines say. *The percentage range remains fixed, whether the parties cohabited for 25 years or 27 years or 30 years or 40 years or 50 years!* The low end does NOT climb up. If the low end did climb up as suggested, then by 34 or 35 years, there would be no "range" at all and a 50% equalization would be mandated in every case under the formula. That would plainly be wrong and inconsistent with everything said in the SSAG.

THE "RULE OF 65"

11. When does the "rule of 65" apply, for "indefinite" support?

The rationale and operation of the "rule of 65" is explained in **SSAG 7.5.3 and RUG 7(e).** The "rule of 65" applies when the years of cohabitation and the recipient's age at separation total 65 or more. Remember it is the recipient's **age at separation** that gets counted. Further, if cohabitation is less **than five years**, the "rule" does not apply. The "rule" – perhaps an awkward term – reflects the dominant pre-SSAG pattern in the case law where courts showed great tenderness on duration towards older recipients of spousal support, being less willing to impose time limits on support in these cases.

In a recent Ontario Court of Appeal decision, *Climans v Latner,* 2020 ONCA 554, at paras. 63-78, the "rule of 65" was subjected to close analysis. The trial judge found the "rule" applied and ordered indefinite support, but the appeal court reversed, on the basis that the trial judge had palpably erred in fixing the starting date for cohabitation on an unusual set of facts. That left Climans just short of "65" after 14 years together and a time limit was imposed on appeal (almost 14 years in total). While it might be understandable that the "rule" was read strictly on the unusual facts of this case, the "rule of 65" should really be seen as more of a "principle" than a strict "rule".

Remember that the "rule of 65" is a less common ground for orders of "indefinite (duration not specified)" duration. It was meant to be a limited exception to time limits for relationships of 5 to 19 years. The most common reason for indefinite support is still that the couple has cohabited for 20 years or more.

Somehow, in much recent case law, lawyers and judges have forgotten this primary basis for indefinite support. The most egregious is the Ontario Court of Appeal decision in *Politis v Politis*, 2021 ONCA 541 where the "rule of 65" is discussed at length at paras. 40-45, unnecessarily, since the parties had been married for *25* years. The trial judge had imposed a time limit, where the recipient had repartnered, a time limit upheld on appeal. This reflects an unnerving pattern of lawyers and judges using the "rule of 65" when the real basis for indefinite support was their cohabitation for 20 years or more: *Boudreau v Jakobsen,* 2021 ONCA 511 at para. 18 (cohabited 21 years); *Outaleb v Waithe,* 2021 ONSC 4330 at para. 86 (22 years); *Smyth v Smyth,* 2021 ABQB 13 at para. 33 (married 34 years!); *Gromer v Gromer,* 2021 BCSC 2206 at para. 44 (26 years).

If the spouses have cohabited for 20 years or more, there is NO need to even consider the "rule of 65"! Maybe we should have called it the *"rule of 20 years",* to give it more prominence! There will still be issues whether spousal support should continue to be "indefinite", or whether support should be time limited or even terminated, especially on variation or review.

GOOD AND BAD NDI ARGUMENTS

12. Are there "target" percentages of NDI (net disposable income) in the SSAGs? What are "good" or "bad" ways to take NDI into account?

The focus on NDI, on Net Disposable Income, is very much an Ontario "thing". We find much less reference to NDI outside of Ontario, or its equivalent of "Monthly Cash Flow" in ChildView (MCF). So I will mostly use the language of DivorceMade in this answer. I originally addressed these issues when I was asked to do a presentation on the topic for "The Six-Minute Family Law Lawyer" in Toronto on December 1, 2020.

Remember to distinguish "NDI" as used in DivorceMate from "INDI", or Individual Net Disposable Income, as used in the *with child support* formula in the SSAG. The NDI you see on the first page in DivorceMate might more accurately be described as "family NDI", i.e. the net disposable income of each spouse after the transfer of child support and spousal support. By contrast, "INDI" in the SSAG formula refers to the individual net income available to each spouse *after* child support obligations have been deducted from each. This question refers only to "NDI" or "family NDI".

There are only *two* situations where the SSAG explicitly use NDI in determining the range for amount:

(1) Long marriage cases under the *without child support* formula
(2) Shared custody cases under the *with child support* formula

Long marriage cases

For very long marriages, of 25 years or more, or long marriages with big income disparities, there is a net income "cap" that comes into play. Remember, this is generally a formula that divides the *gross* income difference between the spouses. After 25 years or more of marriage or cohabitation, the range is 37.5 to 50 per cent of that gross income difference. We added a tweak, in the 2008 Final Version of the SSAG: the support

recipient should never end up with more than 50% of NDI, hence the net income "cap" which recognises the different tax positions of the payor and recipient. This reflects *Moge*, where the Supreme Court of Canada said that, after a long marriage, by way of property division and support, both spouses should end up with similar standards of living. NDI offers a good measure of relative living standards.

Shared Custody Cases

Here's another situation where the SSAG use NDI explicitly. I'm using the old language here, now described in the "new" language as "substantially equal shared parenting". The SSAG range for the *with child support* formula for shared custody cases will always include the amount of spousal support that will generate a 50/50 NDI split, even if that means extending the range upward or downward to capture the 50/50 NDI point. Where there are no new partners and no new children, equal NDI should be the default, or more accurately**, the starting point,** to determine the amount of spousal support in shared custody cases under the SSAG.

Equal NDI will be the result of the transfer of both child support and spousal support from the higher-income shared custody parent to the lower-income parent. This reflects the policy behind the holding in *Contino*: in shared custody cases, a "similar standard of living in the two households concerned" should be secured: *Contino v. Leonelli-Contino,* 2005 SCC 63, [2005] 3 S.C.R. 217, at para. 85. "Children may prefer one household to the other, but that cannot be made to depend on the respective means or resources of their parents."

NDI in DivorceMate (or Monthly Cash Flow in ChildView) is an excellent measure of standard of living in shared parenting cases, where there are no new partners and no new children. To date, Ontario judges have been fairly consistent in using the 50/50 NDI default. Sadly, B.C. judges continue to default to the mid-point of the SSAG range, even in shared custody cases, even where the SSAG say not to do so.

One small technical matter: the 50/50 NDI point moves around the range. For one child, it usually pulls the range UP, but for two children, 50% usually falls somewhere between the mid-range and high end and, for three children, 50/50 will be closer to the mid-range. Where there is a big income disparity between the parents, the 50/50 point is likely to pull the range DOWN.

Apart from shared custody cases, there is no NDI "target" in *with child support* formula cases, but NDI (or Monthly Cash Flow) is an important factor for location in the range. What matters in these cases is not just NDI percentages, but the actual net disposable income *dollars* in each household. Keep in mind, ability to pay is the real limit on spousal support in most *with child support* cases, given the statutory priority to child support.

How Do Courts Use NDI, Plus Some Bad NDI Arguments

There are many ways we see NDI or MCF used in decided cases. Sometimes the court just states the SSAG ranges, reciting NDI percentages as part of that. That's just descriptive, "here's what the printout shows". Sometimes a court states the NDI split that results from its decision about location of amount in the SSAG range. Sometimes a court

will explicitly consider the NDI amount or percentage to determine the precise location in the range, a tendency more noticeable in Ontario. Very rarely, and I would say unwisely, a court will treat NDI as a percentage "target" to determine the amount of support within the range. I say "unwisely", as NDI percentages just aren't that meaningful in most cases.

We also see some **bad NDI arguments**. Somes examples, and my responses:

"I know they were only together for 17 years, but my client wants a 50/50 split of NDI."

A: No, that's not what the SSAG say and that's not what spousal support law says.

Another favourite, and it's a uniquely Ontario argument:

"You can't ever leave a recipient with less than 40% NDI. No matter how briefly they were together!"

A: Why, you might ask? Just "because" or "because that's what we do in Ontario". I don't know where this argument comes from, but there's no principled basis for it, not in the SSAG and not in spousal support law.

Another recurring bad NDI argument, this one in **custodial payor cases:**

"The custodial payor formula is harsh, if it leaves the recipient with only 29% NDI."

A: "Harsh", that's what Justice McGee said in *Papasodaro v. Papasodaro,* 2014 ONSC 30, [2013] O.J. No. 240, referring to the NDI outcome where a husband was claiming spousal support after a 17-year marriage. This is some variant of the previous 40% argument, I think. But much depends upon the length of cohabitation under this formula. Most of these custodial payor cases are non-compensatory claims for support, like Papasodaro's. Remember: under this formula, the higher-income payor of spousal support has custody of the children and often is receiving little or no child support for the children. For more on this issue, see pages 37-40 of the *Revised User's Guide.*

One last bad old NDI argument:

"The recipient with the children can't get more than 50%, or 60%, of NDI."

A: Once upon a time, in a galaxy far, far away, many lawyers for payors argued, often successfully, that the custodial parent and children couldn't get more than 50% of the family's NDI. Even though the recipient might have one or two or three children in their household. The Ontario Court of Appeal buried that view some time ago in *Andrews v Andrews* (1999), 45 O.R. (3d) 577 (3 children, one with a learning disability) and *Adams v Adams* (2001), 15 R.F.L. (5th) 1 (4 children), both cases where the custodial parent received 60% of the family's NDI.

Occasionally, I still hear an argument for a 60% barrier. But there is no such **upper limit** on NDI in the SSAG *with child support* formula. It all depends, as *Andrews* taught us years ago, on the number of children, their needs, the parenting arrangements, and the incomes of the spouses.

FUTURE SECTION 7 EXPENSES

13. How can you take section 7 expenses into account in calculating spousal support if you don't know what they will be in future?

One of the most common errors by those applying the *with child support* formula has been the failure to adjust for section 7 contributions: see **"Common Errors to Avoid", chapter 2, *Revised User's Guide*.** A failure to take into account s. 7 contributions will result in a SSAG range that is too high. But what if you don't know the precise amounts of the future section 7 expenses? There are two alternatives, plus one special one for shared custody cases.

First, it is possible to *estimate* s. 7 expenses, based upon past experience and future expectations. This is the most transparent approach, as then both parties will know what the assumptions are. If the expenses are not too large, then the SSAG range will be a decent estimate. Where child care expenses are involved, thanks to the tax break, in many cases the impact upon the SSAG range will not be that large. Where s. 7 expenses are large, for private school or extensive extracurriculars, estimates become more difficult.

Second, it is possible just to *locate* the spousal support amount *lower in the SSAG range*, to reflect the uncertain s. 7 expenses. While less precise, this approach does honour the statutory priority to child support. Some crude estimates of possible s. 7 expenses can help the parties to estimate how much lower in the range might be necessary.

Third, there is a special s. 7 solution available in *shared custody* cases. The default location for spousal support in such cases is the amount which would leave both parties with equal net disposable incomes after the payment of child and spousal support: see ***SSAG*, section 8.6.3 and *Revised User's Guide*, section 8(f).** This means that each spouse will contribute 50% of the s. 7 expenses going forward and, whatever the amount of s. 7 expenses, the spouses will still each be left with 50% of the family's net disposable income. Only if the spouses agree to this 50/50 split of NDI or if a court orders it, will this be an alternative available to deal with uncertain future s. 7 expenses.

SHARED CUSTODY/PARENTING FORMULA

MORE THAN 50% NDI/MCF?

14. Why is it possible for a shared custody recipient of spousal support to receive more than 50% of the family's NDI/MCF?

We made it clear, in the *SSAG Final Version*, that the default amount of spousal support in typical shared custody cases should be an amount that leaves both spouses with 50 per cent of the family's net disposable income. When I say "typical", I mean cases where there are no new partners and no new children in either shared custody household. But we also responded to those who suggested that no recipient should *ever* receive

more than 50% NDI. Where there are two or more children, most of the SSAG range will leave the recipient with more than 50% NDI, we said in **SSAG, p. 91**:

> In these latter cases, where there are two or more children subject to shared custody and the recipient has little or no income, the formula will produce a range with a lower end that leaves the lower-income recipient with 50 per cent of the family's net disposable income and the rest of the range will obviously go higher. During the feedback process, some criticized this range of outcomes, suggesting that a shared custody recipient should never receive spousal support that would give her or him more than 50 per cent of the family's net disposable income. After all, they suggested, under this arrangement, both parents face the same ongoing obligations of child care going into the future, with neither parent experiencing more disadvantage.
>
> The answer to these criticisms is that the past *is* relevant in these cases, as there is a reason the recipient has little or no income, usually explained by that parent's past shouldering of the bulk of child care responsibilities. In most shared custody cases, both parents have shared parenting during the relationship, so that there is less disadvantage and less disparity in their incomes at the end of the marriage. Where the recipient has little or no income, she or he will have a greater need for increased support in the short run. But the shared custody arrangement will reduce the impact of ongoing child care upon the recipient's employment prospects, such that progress towards self-sufficiency should occur more quickly. In these cases, spousal support will likely be reduced in the near future on review or variation, and the duration of support may be shorter.

The answer is right there in the Final Version of the SSAG, but the question still gets asked regularly.

NOTIONAL CHILD SUPPORT IN SHARED CUSTODY CASES

15. Why does a high-income payor get so little credit for "notional child support" for the child in his or her shared care when calculating spousal support?

A British Columbia lawyer raised this issue. Where a higher-income payor shares custody, then the payor's child support will reflect two parts in the calculation of INDI, even though just the payor's table amount will show up in the math. First, the higher-income payor will actually pay the set-off amount to the lower-income spouse. Second, the remaining amount will be "notional child support", i.e. a proxy for the amount that the parent spends directly on the child in their care. In a set-off situation, that "notional" allowance will be determined, not by the income of the payor, but by the income of the lower-income recipient of child support.

Here's the problem. We have no good data on how child costs are shared in shared custody cases. We have anecdotal experiences as lawyers or parents, but shared custody arrangements and spending run the gamut. Some are true "dual residence/equal

parent" cases, where both spend directly and equally upon the children. Others look a lot more like "extended access", with a non-primary parent spending much less than the primary parent for the children.

Complicating matters further are the flaws in the federal child support formula underpinning the table amounts, as well as the logic of the straight set-off under s. 9 CSG. Remember that the table formula makes a number of dubious simplifying assumptions, one of which is that the payor of child support and the recipient have *the same income*: see *Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report* (Child Support Team, Research Report, Department of Justice Canada, CSR-1997-1E, December 1997).

To understand this problem, it helps to take a specific high income shared custody fact situation, even if it is an unusual one. Three children aged 10, 8 and 6. The norm for shared custody is one or two children. High income payor husband in B.C. at $400,000. Big income disparity, $400,000 vs. $35,000 for the wife. More typically, for shared custody parents, there is less disparity in their incomes.

So in setting the husband's table amount, it assumes he is married to a spouse who also makes $400,000/year. For the wife's table amount, it assumes she is married to a spouse who also makes $35,000/year. (Remember, spousal support paid between spouses is NOT considered income for child support purposes.) Hence, the set-off is quite misleading as to how much is actually spent on the children by the husband in this case. More accurately, for two parents earning $400,000 each, the figure would be 2 x $6,702 = $13,404/month, a number that is too high, as in real life higher income earners spend a smaller proportion of their income on their children. But that's why you get that paltry number of $748/month as a notional amount of his direct spending on the children. If the wife and her husband both earned $35,000/year, i.e. $70,000/year, then the table amounts would suggest they each spend $748/month on the child, or $8,976/year each or a total of $17,852/year on their child. For low-income primary care parents, the equal income assumption works to their disadvantage, as the child support amount assumes the recipient parent can ante up a similar amount as the payor. In the shared custody setting, though, it has a boomerang effect, leaving the higher income parent with a very modest credit for direct spending on the children, if the other spouse has a low income.

It is important for the husband's lawyer here to drive home just how much the higher-income husband will in fact be spending directly on the children, in contrast to the small amount attributed by the table formula and the set-off. That greater spending then can be used to argue location in the range, to that lower level where 50/50 NDI obtains.

A 50/50 split of NDI would permit and acknowledge equal spending upon the children in each household (leaving aside asset/liability positions). In shared custody cases, there are usually both compensatory and non-compensatory grounds for spousal support. One of the non-compensatory aspects would be to maintain similar household

standards of living for the children in shared custody: see Thompson, “The TLC of Shared Custody: Time, Language and Cash” (2013), 32 Can.Fam.L.Q. 315.

Defaulting to the non-50/50 mid-point then has unintended effects, especially noticeable in the British Columbia courts where that trend is too strong. A default to the formula mid-point in this fact situation would leave the recipient with 58% of the family’s NDI, a percentage that is hard to justify in most shared custody cases. That might be rationalised in a strongly compensatory case, as explained in the previous answer, as a payor with the ability to pay more spousal support now might get an earlier termination date for support later. When we were constructing the shared custody SSAG formula, we wanted to ensure that payors weren’t given large spousal support incentives to seek shared custody, given that relatively small child support differences sometimes did so already. But for these high-income facts, if the mid-point is chosen, then there is a significant *disincentive* to shared custody for the payor who is bearing one-half of the child costs (and an even bigger disincentive if he’s paying more than half the costs).

The federal government is unlikely to redesign the table formula or to adopt an income shares formula or to radically alter its approach to shared custody child support. So, in this less common situation, lawyers are left to make sophisticated arguments about spousal support, where there is more flexibility and an ability to “fix” some of the problems with the child support formula.

. By the way, in this fact situation with three children, the 50/50 NDI point is driven way down below the typical SSAG range. At the low end of the range, the recipient’s Individual Net Disposable Income (INDI) percentage is a mere 30.7% (compared to 40% under the usual formula). If there is only one child, even at these incomes, 50/50 NDI falls very close to the “normal” SSAG mid-point. If there are two children, the low end of the range still has to be extended to get the 50/50 split, but not so dramatically (low end INDI is 37%). At $300,000 a year payor income, with two children, the “normal” low end is very close to the 50/50 number.

If the income disparity is less, then the problem goes away too, even for three children. If the payor makes $400,000, but the recipient earns $150,000, then the low end of the SSAG range will be close to 50/50. If the recipient earns $35,000, but the payor “only” makes $130,000, then the 50/50 split doesn’t change the range either.

The 50/50 point moves around the range, sometimes pulling the low end down (as in the posited fact situation) and sometimes pulling the high end up (if there is one child and low-to-middle incomes for the spouses). Where the SSAG range has been extended to include 50/50, I think the greater breadth of the range and that asterisk (in DivorceMate) should be enough to alert lawyers to the impact of the 50/50 point.

CUSTODIAL PAYOR FORMULA

LESS THAN 40% NDI/MCF FOR RECIPIENT

16. Why does the custodial payor formula leave the spousal support recipient with less than 40% of the family's net disposable income or monthly cash flow?

The *custodial payor* formula is a hybrid formula, built around the spine of the *without child support* formula, but adjusting this gross income formula for the child support obligations of the spouses: **SSAG 8.9, RUG 8(j).** The deduction of grossed-up child support amounts reduces the spousal-support-paying income of the custodial payor. This reflects the statutory priority to child support. Further, the spousal range will be driven by the length of cohabitation.

In a 10-to-15-year cohabitation, for example, the sharing percentages will be 15-20% to 22.5-30% of the remaining gross income difference. The result? Only rarely will the family net disposable income or monthly case flow of the spousal support recipient be over 40%. Where there are still minor children, it will be the rare case where the spouses have been married for 20 years or more. For more on this, see FAQ 9 above.

NO CHILD SUPPORT PAID

17. What if the custodial payor is not receiving or seeking any child support?

In every *custodial payor* case, the recipient of spousal support has a lower income than the payor, usually much lower. If the income of the recipient exceeds $12,000/year, then there will be a table amount of child support to be paid. In most cases, the higher-income payor of spousal support does not claim child support. If no child support is claimed, then there needs to be an adjustment in calculating the formula range: there will be *no deduction* of any amount for grossed-up child support for the recipient of spousal support. This means a higher remaining income for the recipient and a lower SSAG range for the amount of spousal support: see **RUG, p. 38**.

Even if child support is paid by the recipient of spousal support, it is often very little. That leaves the custodial payor to bear more of the children's costs than the amount of "notional" child support deducted. Notional child support for the custodial parent is measured by the table amount under the *Child Support Guidelines.* In these cases, there can be some adjustment of location in the range for the amount of spousal support. This is particularly true for low-to-middle-income custodial payors.

HIGH INCOME PAYORS AND NOTIONAL CHILD SUPPORT

18. What if the custodial payor has a high income and thus notional child support is very high?

This is the flip side of the latter part of the previous answer. Where the custodial payor has a very high income, then the grossed-up notional child support will be very large, perhaps too large compared to the actual cost of caring for the children: **RUG, p.**

38. The usual tenderness shown towards custodial payors with the care of children may be misplaced.

How high is “very high”? Certainly, incomes above the SSAG ceiling of $350,000 per year. And remember that the *Child Support Guidelines* introduce discretion under s. 4 for child support on incomes above $150,000. An outcome higher in the SSAG range for amount offers a way to adjust for this concern.

ADULT CHILD FORMULA

19. What, there’s an adult child formula for spousal support? How does the adult child formula adjust for the varied child support arrangements in these cases?

Too often forgotten is the *adult child* formula, one of the *with child support* formulas and, like the *custodial payor* formula, a hybrid formula: see **SSAG 8.10, RUG 8(k).** It applies when child support for the last or remaining adult children is determined under s. 3(2)(b) of the *Child Support Guidelines,* a provision that offers considerable discretion in assessing child support. The *adult child* formula can accommodate a wide range of arrangements for the payment of a child’s education, the most common situation where this formula applies.

Remember that s. 3(2)(b) applies for adult children where the “table-amount-plus-section-7-expenses” approach is “inappropriate”, i.e.

- a child lives away from home for college, university or other post-secondary education
- a child has other sources of income or resources to cover all or most of their higher education, e.g. a good job, grandparents, scholarships, RESPs.
- a child pursues advanced degrees and is expected to contribute a large proportion of their education costs
- an adult child is disabled and receives his or her own social assistance or other independent disability funding

Like the *custodial payor* formula, the *adult child* formula first deducts each parent’s grossed-up child support obligation from their respective gross Guidelines incomes. For most adult child cases, this will require the creation of a child expense budget, followed by a determination of what amount should be contributed by the child and then a prorating of the balance based upon the respective parental incomes. Then, like the *without child support* formula, the SSAG range will be driven by the remaining gross income difference and the years of spousal cohabitation. The relevant section of the ***Revised User’s Guide*, 8(k)**, offers more tips on how to use this formula.

There is one further adjustment that should be considered. What if the adult child goes away from home for post-secondary education, but returns home to live with one or both parents over the summer months? The post-secondary budget under s. 3(2)(b) is usually constructed for the 8-month school year. If the child is at home with a parent for

the 4 summer months, then some lawyers and judges will provide for the table amount to be paid for those months to the parent with whom the adult child resides. In computing the *adult child* formula, that amount of child support should also be deducted and grossed up.

INTERIM/TEMPORARY SUPPORT

20. How do the SSAG apply in determining interim support?

In some parts of Canada, ancient authorities are still cited and applied, suggesting that interim support is just a matter of need and ability to pay, of "needs-and-means". Most of these decisions predate the Spousal Support Advisory Guidelines, some by many years. A classic example would be the Manitoba Court of Appeal decision in *Vauclair v Vauclair* (1998), 39 R.F.L. (4th) 124, which even suggests that matters of economic disadvantage and compensatory support ought not be considered at the interim stage! A commonly-cited interim decision in Alberta is *Bennett v Bennett,* 2005 ABQB 984, to similar effect, which in turn calls in support a number of decisions from the 1990's.

The application of the SSAG at the interim stage is discussed in **SSAG 5.3** and in much more detail in **RUG, ch. 5**. The SSAG *do* apply at the interim stage, of that there is no question. For an early and frequently-cited decision explaining the rationale, see *D.R.M. v R.B.M.,* 2006 BCSC 1921 (Martinson J.). Subject to the important exception for "compelling financial circumstances in the interim period", the SSAG formulas offer a quick, easily calculated method of obtaining an amount, knowing that more precise adjustments can be made at trial. The "interim exception" is discussed in **SSAG 12.1 and RUG 5(c) and 12(a).**

For a nuanced summary of the modern, post-SSAG principles that apply to interim or temporary spousal support, look to *Politis v Politis*, 2015 ONSC 5997, a decision of Justice Harvison Young, who in turn relies upon the leading B.C. case of *Robles v Kuhn*, 2009 BCSC 1163 (Master Keighley). At para. 14, Harvison Young J. sets out 8 principles:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance;
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it;
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best;
4. The courts should not unduly emphasize any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;

6. Interim support should be ordered within the range suggested by the *Spousal Support Advisory Guidelines* unless exceptional circumstances indicate otherwise;

7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out;

8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support.

In Alberta, a recent Court of Appeal decision suggests a more expansive approach to interim support than the *Bennett* case, an approach closer to that found in Ontario and B.C.: *Furry v. Goodwin,* 2020 ABCA 127. What is unusual in Alberta is the use of time limits on interim orders, something rarely if ever seen outside of that province. Interim time limits are intended, it appears, to encourage recipients to move their case on to trial. The traditional interim order, which continues in effect until trial, without a specific time limit, places the onus of moving the case forward upon the payor, which probably is the better place to put the burden. Such interim time limits also reflect the tendency of the Bar to treat interim orders as "final" orders or, at least, as a prediction of ongoing support at trial. Yet these same practices occur outside of Alberta, without actual time limits on interim orders. What is clear is that the SSAG are now used regularly in Alberta in determining the amount of interim spousal support.

One last point of significance, not just in Alberta, but across the country. The amount of interim spousal support may *not* be a good guide to the amount of support after a trial. As *Bracklow* told us and as the SSAG show, there is an interaction between *amount* and *duration* in spousal support. As duration comes into play at trial, the amount may go up or down, especially where there is *restructuring* involved. And we all know that incomes may prove to be different, asset and debt positions change after property division, new partners appear, etc.

DELAYED CLAIMS FOR SPOUSAL SUPPORT

21. How do the SSAG deal with delayed claims for spousal support?

This is a sub-set of cases with which lawyers and judges struggle, where the recipient brings an initial claim for spousal support long after separation. A delayed claimant will likely seek retroactive support as well as prospective support. Here we are considering delayed prospective claims. Retroactive spousal support is dealt with below in FAQ 20. These delayed claim issues are not discussed in the SSAG, but are analyzed in **RUG 15(g).** This section of the RUG has been quoted in full in two recent decisions: *Kraft v Kraft,* 2018 BCSC 496 at para. 101; and *Droit de la famille – 211883,* 2021 QCCS 4139 at para. 29. We may see more delayed claims after COVID.

Where a claimant has seriously delayed seeking spousal support, the SSAG can be used to determine the amount and duration of support, if there is continuing

entitlement. Long delays do create a problem, the problem of what incomes to use in doing SSAG calculations. Ordinarily, on an interim or initial claim for support, we would use the current incomes of the spouses. Not so simple on a delayed claim.

An intervening consideration will be the effect of post-separation income changes. The payor's income may have increased considerably during the period of delay: see Thompson, "Post-Separation Increases in Payor Income and Spousal Support" (2020), 39 Can.Fam.L.Q. 185; and also **SSAG 14.3 and RUG 15(e).** Or, on the other end, the recipient's income may have decreased post-separation: **SSAG 14.4 and RUG 15(f).** In deciding what incomes to use on a delayed claim, guidance can be found in the law governing these post-separation changes, changes which usually arise through the process of variation and review.

For example, for most non-compensatory cases, on a delayed claim, a court will likely use the separation date income of the payor, rather than the payor's current higher income. Conversely, where the claim is strongly compensatory, a court will be more willing to use the payor's current income to calculate the SSAG range, despite any delay.

In these delayed claim cases, in arguing prospective spousal support, it is wise for lawyers to do at least *two* SSAG calculations, one for the separation date incomes and another for the current incomes. Often it will be helpful to do one or more intermediate calculations too, especially where the post-separation income changes are substantial, as partial sharing is a frequent outcome in these cases. Keep in mind that location in the range can also be used to adjust the outcome, like taking the high end of the separation date income range or the low end of the current income SSAG range.

A second dimension for delayed claims is **duration**. If there is also a retroactive claim, then any period of retroactivity will obviously count towards duration, limiting the period of prospective support. In some cases, retroactive claims are refused, due to the delay, with the delay period still having an impact upon prospective duration. Much depends upon the reason for the delay and the strength of the recipient's claim.

A 10-year delay in claiming spousal support by a husband after a 13-year marriage, on a weak set of facts, led to summary judgment dismissing his claim: *Karlovic v Karlovic,* 2018 ONSC 4233 (Kurz J.). Similarly, in *Droit de la famille – 211883,* cited above, a wife delayed 10 years in claiming support after a 10-year marriage with no children, resulting in a finding of no entitlement by Samson J. In *Badrinarayan v Badrinarayan,* 2017 ONSC 2934, after a 26-year marriage and 4 children, where the wife was employed throughout the marriage, Justice Trimble found a non-compensatory claim and the 3-year delay in making the claim was a factor in choosing the low end of the SSAG range for amount. In the case of a strong compensatory claim, where there was good reason for the 7-year delay in claiming spousal support after an 8-year relationship, with a 12-year old autistic child in the recipient's care, Justice Sullivan used their current incomes to determine spousal support for a 3-year duration: *Crew v Lobo,* 2016 ONCJ 632.

LIVING OFF CAPITAL

22. Where spouses are living off their capital, like when both are retired, how do you calculate spousal support using the SSAG?

The Spousal Support Advisory Guidelines offer income-based formulas for amount. Where both spouses are retired or otherwise living off their capital, the critical step is determining what incomes should be attributed or imputed to the spouses. In these cases, it will usually be the *without child support* formula that is being applied.

Entitlement issues can arise at this late stage. By retirement, many spouses will be approaching the end of duration, the end of entitlement. And, as income differences narrow in retirement, with or without the "double-dipping" concerns of *Boston*, then there will be questions about a spouse's continuing entitlement to spousal support.

The Supreme Court reminded us in *Leskun v Leskun,* 2006 SCC 25, that capital is part of "means" and can be the basis for paying periodic spousal support. In the ***Revised User's Guide*, 19(e)**, we only briefly addressed these issues.

First, if older spouses have roughly similar assets after the division of property, a court can terminate spousal support and leave each spouse to manage their own assets to meet their needs, as in *Puiu v Puiu*, 2011 BCCA 480 and *Salt v Salt,* 2019 ABQB 595. Each spouse can then decide what investments to make to maximize their income and what pace to apply in drawing down their capital.

Second, in most low income cases with no assets, the spouses will be left to each rely upon their CPP, OAS and GIS, plus any other small amounts of income. CPP credits are divisible upon separation and divorce, thus narrowing the gap in CPP income, or even equalizing them in long marriages. The technical term for this is "Division of Unadjusted Pensionable Earnings", a calculation done by the federal government on a year-by-year basis, with the unfortunate acronym of "DUPE". Remember also that the Guaranteed Income Supplement (GIS) has its own clawback and any payment of spousal support may have an impact upon the GIS of the recipient.

Third, in a contested case where the parties have significant capital and negligible pensions, then it will be necessary to determine the incomes of the spouses to calculate the SSAG range. Where spouses have made reasonable investment decisions to generate income over the period of their retirement, courts have been willing to give spouses some leeway. Where capital is poorly invested, imputing a reasonable income may be required under s. 19(1)(e) of the *Child Support Guidelines*. Where a spouse has dissipated their assets, a court may also use that provision to impute a reasonable income to the assets they should still be holding.

At some point during retirement, most of us will have to draw down our capital to fund our expenses. In effect, that is what we are doing with the payment of an employment pension (which is a mix of income and capital) or payments from a RRIF (Registered Retirement Income Fund) or an annity. If the parties mostly have capital left, if spousal

support is still paid, to calculate the SSAG formula range, “incomes” will need to be determined. This will require a different kind of “imputing”, to estimate how much capital each spouse should be drawing down as “income” to fund their expenses and, possibly, to pay spousal support. There will be obvious tax issues to take into account at this stage.

There are some non-retirement cases where the payor may have capital, but little income, like in *Leskun*. In these cases, the same sort of issues will arise in determining the payor’s “income” for spousal support purposes.

RETROACTIVE SPOUSAL SUPPORT

23. What are the implications of the Supreme Court of Canada decisions in *Michel v Graydon* and *Colucci* for retroactive spousal support claims and the SSAG?

We devoted the final chapter, **chapter 20, of the *Revised User’s Guide*** to retroactive support issues, including the tax issues. At that point, in 2016, the Supreme Court of Canada had applied the *D.B.S.* analysis to retroactive spousal support in *Kerr v Baranow,* 2011 SCC 10.

There is no question that the introduction of the SSAG has made the calculation of retroactive spousal support much easier, in the same way that the *Child Support Guidelines* have simplified retroactive child support. Retroactive spousal support claims have increased dramatically over the years. Often the parties will agree to use the mid-point of the SSAG range, subject to determination of the previous years’ incomes of the spouses by the court. In many adjudicated cases, courts will reflexively default to the mid-point in locating the proper retroactive amount, just as often happens with prospective spousal support. That should be avoided.

Lawyers should argue “location in the range” in retroactive cases, just as they should in prospective cases.

In the past two years, the Supreme Court has revised and reinterpreted the *D.B.S.* retroactive approach in child support cases: *Michel v Graydon,* 2020 SCC 24 and *Colucci v Colucci,* 2021 SCC 24. I have written two articles about these decisions: “The Supreme Court Begins to Rewrite D.B.S. in Michel v. Graydon” (2020), 39 Can.Fam.L.Q. 95; and “Retroactive Support After Colucci” (2021), 40 Can.Fam.L.Q. 61.

Recently, Justice Chappel has suggested that we should not apply *Colucci’s* reworked approach to *D.B.S.* in spousal support cases in *A.E. v A.E.*, 2021 ONSC 8189 at para. 479:

> The Supreme Court of Canada has not yet had the opportunity to decide whether the revisions that it made to the retroactive child support framework in *Colucci* extend to the spousal support context. In particular, it has not yet addressed whether the four *D.B.S*. factors should still be applied in the spousal support context to determine as a threshold matter whether a retroactive spousal may be advanced, or whether those factors should now only be considered in

> determining whether to depart from the presumptive commencement dates identified in *Colucci*. In my view, the framework set out in *Kerr* continues to apply unless and until the Court of Appeal or Supreme Court of Canada directs otherwise. Given the Supreme Court of Canada's emphasis in *Kerr* on the divergent foundational principles underlying child support and spousal support, and the highly discretionary nature of spousal support as compared to child support, there is no principled basis for simply transplanting the *Colucci* framework into the spousal support field.

This comment was cited and approved by Bale J. in *Nault v Nault,* 2022 ONSC 904 at para. 53. I don't think this interpretation is correct.

Actually, given that *Kerr* was founded upon *D.B.S*. and *D.B.S*. has now been revised in *Michel* and *Colucci,* I would think there is no "principled basis" *not* to apply them in the spousal setting. In *Legge v Legge,* 2021 BCCA 365, the B.C. Court of Appeal showed no compunction about applying the Supreme Court's *Michel* decision in a retroactive spousal support case. The recent Ontario Court of Appeal decision in *Hevey v Hevey*, 2021 ONCA 740 at para. 34, found the "same imperatives" from *Colucci* to apply to disclosure in retroactive spousal support cases.

In my longer article, "Retroactive Support After *Colucci"*, I explained how the Supreme Court's revised approach can, and should, be applied to retroactive spousal support, which I will quote at length here (with most footnotes removed). It is best to read the full article, as the first part of the article explains the impact of *Michel v Graydon* and *Colucci* upon the determination of retroactive child support, which may help understand some of the points made in this excerpt about retroactive spousal support.

"Implications of Colucci (and Michel) for Retroactive Spousal Support

What do *Colucci* and *Michel* mean for retroactive spousal support claims, both up and down? The *Revised User's Guide* included a chapter, Chapter 20, on this topic, based upon the case law up to April 2016, including the Supreme Court's 2011 decision in *Kerr v. Baranow.* In my opinion, the two recent Supreme Court decisions should make spousal support easier to increase retroactively and harder to decrease, given the emphasis in both cases upon full and timely disclosure. There will always be more discretion in spousal support compared to child support, but some of the comments in *Kerr* will need to be reconsidered.

In *Kerr v. Baranow*, Justice Cromwell restored the order for "retroactive" spousal support made by Justice Romilly at trial and applied the *D.B.S.* factors to do so. I use quotation marks here, as the wife had not claimed interim support and only sought spousal support from the date of filing her court application. Was this really "retroactive" support? Cromwell J. would "not venture into the semantics of the word 'retroactive'". Any support prior to the order at trial was treated as "retroactive" in *Kerr*, a similar loose

interpretation as in *D.B.S.* Yet Justice Cromwell does mention the 2005 Ontario Court of Appeal decision in *MacKinnon v. MacKinnon* [75 O.R. (3d) 175] but misunderstands its import. In *MacKinnon*, Lang J.A. was clear that spousal support from the date of the application was not "retroactive" support, but "prospective" support. Thus, when the Ontario Court of Appeal describes the date of filing as the "usual commencement date", the Court means the commencement date for prospective support. No "retroactive" analysis was required. In *Kerr,* Cromwell J. insists that even in a *MacKinnon* situation, a *D.B.S.* analysis is required. Unfortunately, nothing in *Colucci* or *Michel* resolves these "semantics", which have important repercussions for those arguing about "retroactive" support.

Justice Cromwell emphasised the differences between child support and spousal support, in paragraph 208:

(1) The entitlement of a minor child is "automatic", while there is no "presumptive entitlement" to spousal support.

(2) Child support is the right of the child, and thus reduces concerns about notice and parental delay by the recipient parent. "Concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support."

(3) The basic amount of child support depends on the income of the payor, while spousal support requires "a highly discretionary balancing of means and need".

(4) While a parent has a fiduciary duty towards their child, "the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests".

We must be careful not to overstate the differences. First, in Canada, we have a very broad basis of entitlement to spousal support and there are many cases of "presumptive entitlement" – just think of long traditional marriages. Second, it is true that a recipient parent can "give away" their own rights to support, but I will argue that *Colucci* and *Michel* have reduced the weight of these factors for spousal support. Third, the *Spousal Support Advisory Guidelines* have made the calculation of retroactive spousal support much more like that for child support, especially with the judicial tendency to default to the mid-point of the SSAG range in retroactive cases. Fourth, there are certainly fiduciary "elements" between spouses, with modern duties of disclosure and fair bargaining undercutting the sweeping statement by Justice Cromwell.

What *Kerr* did do was to import the *D.B.S.* analysis into spousal support law, without much practical guidance how it might differ in its application. Apart from more discretion and unpredictability in outcomes, most retroactive spousal support cases manipulate the same *D.B.S.* concepts – delay, blameworth conduct, hardship to the payor, effective notice, the "three-year rule", formal notice. The modification of those concepts in *Michel* and *Colucci* can and should have an impact.

First, delay and reasonable excuse for any delay. As Justice Martin says in *Michel,* "a delay, in itself, is not inherently unreasonable". There are many understandable reasons for delay set out in both sets of reasons in *Michel,* reflecting the disadvantaged social and economic position of the recipient parent. Most of those reasons are equally understandable for retroactive claims by recipients of spousal support. Second, the ills of non-disclosure by payors are every bit as blameworthy in spousal cases. The affirmative duty to disclose material changes in income seems to have been transposed into the spousal setting, but now applying to both spouses. Third, notice issues do seem to weigh more heavily in spousal cases, as the niceties of pleading and "fairness" to payors are considered more often.

The new *Colucci* framework for **"retro down"** applications applies comfortably in spousal cases. The five steps in paragraph 113 work like this:

(1) Material Change. The concept of "material change" is much more complicated in spousal support law, as I have explained elsewhere [(2012), 31 Can.Fam.L.Q. 355]. Spousal support is "stickier" compared to child support under the *Guidelines*. In simple terms, there must be a substantial, continuing change that was not taken into account in the previous order or agreement. It requires the analysis of both spouses' situations over time. That said, where the change is an alleged reduction in the payor's income, the analysis is not that complicated – mostly about whether the income reduction is substantial and continuing or, if so, whether income should be imputed. The onus is upon the payor, encouraging full disclosure.

(2) Effective Notice. The payor must provide notice *and* proper disclosure, just as with child support. Most payors will not satisfy this requirement. The "three-year rule" will thus rarely arise here either.

(3) Formal Notice. Where there is no effective notice, then the presumptive start date will be the date of formal notice, usually the date the payor files the application to vary. Most "retro down" cases will use this date.

(4) Departure. The four *D.B.S.* factors will be used to determine whether the presumptive start date should be moved further back or further forward. The conduct of the payor will be central to any departure, both conduct before filing and after filing, notably the payor's disclosure and payment record. If the payor continues to delay making disclosure after filing, a later date may be chosen. In the spousal setting, disclosure will cut both ways, with the recipient required to disclose too. As in *Colucci*, "hardship" is a two-way street: hardship for the payor, but also hardship for the recipient, especially where there might be a need for reimbursement or set-off of arrears.

(5) Quantification. Thanks to the SSAG, quantifying the amount of the reduction is much easier, a matter of doing the formula calculations and picking a location in the range. Trickier in spousal cases can be duration, of which more below.

Where the relevant material change is something other than the payor's reduced income, the retroactive analysis becomes more difficult. Did the recipient's income increase? Should income be imputed to the recipient due to insufficient efforts to become self-sufficient? Has the recipient repartnered or remarried? Has the payor retired, raising questions of "early" retirement or "double-dipping"? Has the recipient's entitlement to support ended, by reaching the end of duration or otherwise?

Where the *with child support* formula is being used under the SSAG, a small reduction in spousal support in a "retro down" case can lead to a large drop in the range, because of the statutory priority to child support. Where retroactive spousal support has been reduced, or even erased, for this reason, keep in mind the exception for "small amounts, inadequate compensation under the *with child support* formula" under s. 15.3 of the *Divorce Act* and its equivalents under provincial laws. Spousal support amounts can later be increased as child support is reduced or ended, and duration can also be extended under this SSAG exception.

As in the child support setting, **"retro up"** spousal applications are much more complicated and the *D.B.S./Colucci/Michel* analysis is much less successful. The added spousal support factors cause further complications, as issues of entitlement and duration come up more frequently in variation cases. I will use paragraph 114 and its five steps from *Colucci*.

(a) Material Change. Most "retro up" spousal cases will raise issues of entitlement, either to share the payor's post-separation income increase or to reflect the recipient's post-separation income reduction. Thus, in addition to the complexities of determining the payor's increased income, there will be an added question whether the recipient is entitled to share all, some or none of the increase. The onus will be upon the recipient. Quite often there will be competing applications to vary, with the payor moving to terminate or reduce support, to which the recipient responds with a claim for retroactive support.

(b) Effective Notice. A recipient will have to "broach" the issue of increased spousal support, in much the same way as for child support. There are the same problems of "information asymmetry" for spousal support upward claims. The "three-year rule" will come up more often, especially where the recipient brings a counter-application for increased support.

(c) Formal Notice. Where the recipient has not given effective notice, then the date of formal notice will be the presumptive start date for "retroactive" spousal support.

(d) Departures. This is where spousal support becomes more complicated. After *Colucci,* the *D.B.S.* factors are used to determine departures from the presumptive start date. Delay by the recipient will be read generously, with many good "excuses". Both spouses will have a duty of disclosure, so the "conduct" of both will be relevant. The payment record of the payor will be

considered. The circumstances of the recipient will be relevant, as they always are in spousal cases. Finally, hardship to the payor will be a factor, especially where there are also child support obligations. I predict that "departures" from the presumptive date will be more common in spousal cases.

(e) Quantification. The SSAG will assist, but there is much more discretion on amount in "retro up" cases, especially for post-separation increases in payor income. Further, there are more likely to be other changes on the recipient's end that will have an effect on the amount. And there will always be questions of duration.

A word or two about duration in retroactive spousal support cases. Any period of retroactive support counts towards total duration under the SSAG. In some cases, parties may wish to think about retroactive vs. prospective duration. For example, if a recipient can obtain support for ten years, it may be wiser to use a more recent start date using higher incomes, rather than going backwards in time. Or vice versa, depending upon the spousal incomes.

There is still very little post-*Colucci* case law on retroactive spousal support. A good example of "retro up" would be *Outaleb v. Waithe*, a decision of Justice Kraft involving both child and spousal support [2021 ONSC 4330]. The wife received substantial retroactive child and spousal support. The spousal support analysis was complicated by two further issues: the sharing of the husband's post-2012 income increases (full sharing); and the appropriate tax rate to discount the SSAG amounts to a lump sum. There haven't been many "retro down" spousal cases. Undoubtedly, post-*Covid*, we will see more downward variations."

My comments above reflect an early view of the impact of *Michel v Graydon* and *Colucci* upon retroactive spousal support claims. Retroactive spousal support cases continue to accumulate, as also do retroactive child support cases, so the law will undoubtedly develop further.

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Spousal Support Advisory Guidelines*:* The Revised User's Guide

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19 Retirement

Retirement cases are now more common, thanks to the "boomers" retiring. Retirement raises a host of tricky issues, usually at the stage of variation or review. In this edition of the User's Guide, we decided to gather these retirement issues in one place, unlike previous editions. In the SSAG itself, retirement only merited a single paragraph under "Exceptions". Obviously, this is a growth area for SSAG analysis.

First there are threshold issues. In a variation case, does retirement amount to a "material change" or not? Is retirement a ground of review? In most instances, retirement means a reduction in the payor's income, but the "early retirement" cases ask whether income should be imputed to the retiring payor, either the former employment income or some other income post-retirement.

Once we get past those threshold issues, before applying the SSAG formulas, there may still be another issue, the "double-dipping" pension issue under *Boston v. Boston*, 2001 SCC 43. *Boston* is treated by the SSAG as a property-based "exception", recognizing the interplay between the division of a pension as family property and the pension's use as income for support purposes.

Finally, former spouses and partners will eventually have to draw down their capital for current needs, a challenge for income-based guidelines.

For an excellent earlier analysis of the retirement case law, see Marie Gordon, "Back to *Boston*: Spousal Support After Retirement" (2009), 28 *Canadian Family Law Quarterly* 125.

(a) Early retirement

When the payor retires "early" and seeks a reduction in spousal support, there will be close scrutiny of the decision to retire. When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed. As Gordon notes, many of these cases involve longer marriages and significant compensatory claims: above at 151-166.

Where there is an application to vary, the court might take the view that the early retirement does not amount to a "material change" and leave spousal support unchanged: *Cossette v. Cossette*, 2015 ONSC 2678 (Div.Ct.); *Sangster v. Sangster*, 2014 NBCA 14; *Walts v. Walts*, 2013 ONSC 6787; *MacLanders v. MacLanders*, 2012 BCCA 482; *Jordan v. Jordan*, 2011 BCCA 518; *Marshall v. Marshall*, 2011 ONSC 5972; *Francis v. Logan*, 2008 BCSC 1028; *Gajdzik v. Gajdzik*, 2008 BCSC 160; *Moffatt v. Moffatt*, [2003] O.J. No. 3912 (S.C.J.) (income maintained for 5 years until normal retirement date). The Ontario Divisional Court also found no "material change" in another early retirement case, but its authority is undermined by a number of errors in its reasons: *Hickey v. Princ*, 2015 ONSC 5596.

Early retirement will be accepted where justified by health issues: *LeMoine v. LeMoine*, [1997] N.B.J. No. 31 (C.A.). Or by economic uncertainty and lay-offs: *Beck v. Beckett*, 2011 ONCA 559. Retirement at a younger age from the Armed Forces has produced conflicting results: *Powell v. Levesque*, 2014 BCCA 33 (justified, support varied), but *Sangster v. Sangster*, 2014 NBCA 14 (not justified, no material change).

In other cases, the courts have found the retirement decision itself to be reasonable, but then a part-time employment income is imputed to the early retiree. In *Donovan v. Donovan*, 2000 MBCA 80, the imputed employment earnings plus his pension brought the retired police officer back to his pre-retirement income level. A similar result obtained in *Rothschild v. Sardelis*, 2015 ONSC 5572, where the payor's employment income was imputed, but only for the one additional year he should have worked before retiring. When the early retiree's income is imputed at or close to the pre-retirement level, the line between this "imputing" approach and the above "no material change" approach disappears in practical terms.

In *Stephen v. Stephen*, 2004 SKQB 386, a part-time income was imputed even where the RCMP officer retired early because of stress and various physical ailments, leaving the payor with an income in-between his pension and his former full-time income. To similar effect, see *LeBlanc v. LeBlanc*, 2013 NBCA 22 and *Beck v. Beckett*, 2011 ONCA 559. On imputing income in such cases, see Rollie Thompson, "Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment" (2006), 26 *Canadian Family Law Quarterly* 135, esp. 158-160.

(b) Does retirement constitute a basis for a change in spousal support?

Retirement may be included as an explicit ground of review in an order or agreement, especially where the retirement is likely to occur in the near future as a "genuine and material uncertainty", to use the language of *Leskun*. In these cases, there is no need to prove a "material change". Given the uncertain and confused treatment of "material change" by some courts, lawyers have frequently used a review clause to avoid that debate. For a court-ordered review at retirement, see *Vaughan v. Vaughan*, 2014 NBCA 6.

Alternatively, retirement may be explicitly included in the definition of material change in an order or agreement as is permitted by *L.M.P.*, e.g. *Slongo v. Slongo*, 2015 ONSC 2093.

If the order or agreement is silent on retirement, retirement is usually a "material change", although some cases continue to apply the wrong test of "foreseeable" from *Miglin*, rather than the correct test, i.e. was retirement considered or taken into account in the previous order (see discussion above under "Variation and Review"). For a discussion of the appropriate test, see Rollie Thompson, "To Vary, To Review, Perchance to Change: Changing Spousal Support" (2012), 31 *Canadian Family Law Quarterly* 355. Some courts still confusingly find retirement is not a material change because it is "foreseeable", e.g. *Hickey v. Princ*, 2015 ONSC 5596 (Div.Ct.).

(c) Previously-divided pensions: double-dipping, "Boston" and the SSAG

Years later, lawyers and judges still struggle with the practical implications of *Boston*. In the SSAG, *Boston* is recognized as an "exception", where the use of the SSAG formulas must be modified in assessing the amount of spousal support.

Boston contained **three important "retirement" holdings**. First, where a pension has been divided as property and a court is addressing spousal support, "to avoid double recovery, the court should, where practicable, focus on that part of the payor's income and assets that have not been part of the equalization or division of matrimonial assets, when the payee's continuing need for support is shown" (para 64). Second, the recipient has an obligation to use her or his share of the divided property to generate income and to make a contribution to self-sufficiency and, if not, then income can be imputed to the recipient. The recipient in effect has to create her or his own "pension" (para 54). Third, the majority in *Boston* recognized that double recovery cannot always be avoided, noting that economic hardship and need may justify an exception to the general rule. For good reviews of *Boston*, see Gordon, above, as well as Carol Rogerson, "Developments in Family Law: The 2000-2001 Term" (2001), 15 *S.C.L.R.* (2d) 307 at 329-354.

Addressing *Boston* issues requires a step-by-step approach. The SSAG starting point in assessing spousal support is usually the full incomes of both parties. First, *Boston* creates an exception to this general approach. The payor thus bears the burden of convincing the court to use an income less than his or her Guidelines income under this exception. By way of actuarial or other evidence, the payor must prove to the court that some portion of his or her current pension income has already been divided as property. Second, if the payor does meet this initial burden of proving the "double-dipping" exception, then the burden shifts to the recipient to convince the court that the hardship or need exception applies under *Boston*.

Boston was decided in 2001, before the advent of the Spousal Support Advisory Guidelines. In *Boston* itself, the Supreme Court ultimately deferred, without much explanation, to the motions judge's reduction of spousal support from $3,433 to $950 per month. The move towards income-based guidelines with the SSAG in 2005 led to courts trying to find a formulaic method to apply the "no double-dipping" approach from *Boston.*

Here's what we had to say in the March 2010 User's Guide about *Boston* and double-dipping:

> The Advisory Guidelines do not change the law from *Boston v. Boston*, [2001] 2 S.C.R. 413, which governs "double-dipping" in respect of pension division and spousal support. That law can best be understood as relating to entitlement, entitlement to share in the already-divided portion of the payor's pension income. Under the Advisory Guidelines, *Boston* is recognized as the basis of an "exception" (SSAG 12.6.3) …
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> *Boston* articulates a general rule against "double-dipping", i.e. that spousal support should not be paid out of pension income from a pension that has already been divided as part of the property division between the spouses. But *Boston* then goes on to recognize exceptions to the rule, exceptions which have been discussed at length in the appeal cases of

Meiklejohn v. Meiklejohn, [2001] O.J. No. 3911 (C.A.); *Chamberlain v. Chamberlain*, 2003 NBCA 34, 36 R.F.L. (5th) 241; and *Cymbalisty v. Cymbalisty*, 2003 MBCA 138, 44 R.F.L. (5th) 27. The most common exceptions to the rule against "double-dipping" are based upon hardship and need. *Boston* applies in cases where there has not been an *in specie* or statutory division of the pension, but instead the recipient spouse has received other assets or a lump sum in lieu of the pension. To apply the *Boston* rule against double-dipping, a court needs evidence of the prior valuation and division of the pension, to determine which portion of the payor's current income has been divided. In some cases the divided portion will be quite small relative to the undivided portion of the payor's pension income and *Boston* will not have any impact: *Leepart v Leepart*, 2009 CarswellSask 54, 2009 SKQB 47.

Where a pension is divided at source when it is paid out, as is the case under British Columbia or Nova Scotia legislation, then the problems of *Boston* can usually be avoided, e.g. *Trewern v. Trewern*, [2009] B.C.J. No. 343, 2009 BCSC 236. In these cases, both spouses simply include the pension payments in their income and the previously divided portions of the pension effectively cancel each other out.

The application of *Boston* within the context of the Advisory Guidelines raises complex issues. The *Boston* exception under the Advisory Guidelines recognizes that some adjustment may need to be made to the application of the SSAG to avoid "double-dipping", but determining when and how that adjustment is to be made raises difficult issues, in part because of the "fuzziness" of *Boston* itself.

In two Ontario cases, courts have made a very formulaic adjustment to the Spousal Support Advisory Guidelines to avoid "double-dipping" that may not accurately reflect the *Boston* ruling. In each case, the court reduced the payor's income by the amount of the divided pension and then calculated the *without child support* formula range on the reduced payor income: *Hurst v. Hurst*, [2008] O.J. No. 3800 (S.C.J.) and *Gammon v. Gammon*, [2008] O.J. No. 4252, 2008 CarswellOnt 6349 (S.C.J.). In both of these cases, the previously-divided pension was a small part of the payor's total income, so the problems were not so obvious. As well, in *Hurst* this method of adjustment was dictated by the parties' agreement. In other cases, however, this formulaic adjustment of income may be too mechanical and rigid, and may lead to inappropriate results. It not only risks by-passing the analysis of the exceptions that are built into *Boston*, but may also lead to arbitrary results under the Advisory Guidelines.

To take a simple example, assume the spouses have been married for 20 years and the wife has an income from non-pension sources of $10,000 per year. The payor husband has retired with an annual income of $50,000, of which $30,000 represents the previously-divided pension. If the above *Boston* adjustment is used, then the SSAG range would be $250-$333/mo. Treating the payor as a person living on $20,000 a year, which is the "floor" for spousal support, could lead to an award at the low end of the range, or even to the elimination of spousal support. This would ignore the payor's base income of $30,000 upon which he can live.

In some recent SSAG cases, courts have taken the full income of the payor into account in calculating the range, relying upon the hardship and need exceptions to the "double-dipping" rule: see *Scott v. Scott*, [2009] O.J. No. 5279 (S.C.J.) and *Jenkins v. Jenkins*, [2009] M.J. No. 271, 2009 MBQB 189.

Another aspect of the *Boston* "double-dipping" rule is the requirement that the recipient spouse convert into income the assets received and "traded off" against the payor's pension in the property division.

In two recent cases, the payor spouse took early retirement and then argued that the recipient wife in her early 'fifties should be required to access her share of the pension or have income imputed for SSAG purposes, but the courts rejected this "reverse *Boston*" argument: *Szczerbaniwicz v. Szcerbaniewicz*, [2010] B.C.J. No. 562, 2010 BCSC 421; and *Swales v. Swales*, [2010] A.J. No. 297, 2010 ABQB 187.

Despite these cautions about a simple formulaic attempt to apply *Boston*, the most common method for adjusting the SSAG formulas to reflect the rule against double-dipping continues to be to plug into the formula only the payor's income generated by the undivided portion of the pension, plus any other non-pension income: *Elliston v. Elliston*, 2015 BCCA 274; *Murphy v. Murphy*, 2015 BCSC 408; *Pascall v. Mbolekwa*, 2015 ONSC 7444; *MacQuarrie v. MacQuarrie*, 2012 PECA 3; *Stephenson v. Stephenson*, 2012 ONSC 1867 (Div.Ct.); *Landry v. Mallette*, 2014 ONSC 5111. An amount is then determined within that lower SSAG range.

Here we have to go back to the basics of *Boston*, some of which are less than clear. We will try to disentangle the three main holdings in *Boston*, and relate them to the SSAG.

First, **the "no double dipping" approach**. In determining spousal support after a pension division, the focus should be upon the undivided portion of the pension received by the payor, said the Court. The complications mostly arise for defined benefit pensions. In most cases, the support recipient has received her or his share of the pension by way of a lump sum paid out of the pension plan and into a locked-in retirement investment, or in other offsetting non-pension assets or by an equalization payment. Eventually, the recipient will have to convert these funds into some form of recurring income for retirement, a "pension" of some kind in the words of *Boston*. It is a very difficult task to impute what the recipient's income should be from the divided assets, or when that income should commence (as most recipients are younger than the payors). It is a simpler task, although not a "simple" task, to exclude the already-divided pension income from the payor's income and then to determine spousal support using that reduced payor income and the actual recipient income. And, as the payor spouse has the necessary information available, the law places the burden upon the payor to prove what portion of the pension income has already been divided as property.

Second, **as a practical matter the recipient spouse will have to generate a "pension" from her or his assets eventually.** Remember that in *Boston* the wife had received the large matrimonial home and some other assets, and had increased her assets over time. There is much discussion of this issue in the Supreme Court majority's reasons. But this can inadvertently lead to another kind of "double-counting", revealed in *Boston* itself and discussed in Rogerson, above. If the payor's

income is reduced, taking out all the previously-divided portion of the pension, and then the recipient's income is *increased* to include investment income on any assets derived from the property division (or, even worse, to include some estimate of the annuity that could be generated from the assets), then there is **double-counting working against the recipient**. To be balanced as between the parties, you must take the divided pension income (or its equivalent in investment terms) ***out of both sides or out of neither***. This point is not clearly stated in *Boston*.

Third, **the hardship or need exception within *Boston***. It is not always clear from *Boston* why this "exception" is limited to need, as has been the subsequent interpretation of the decision. There is much discussion in the case about "hardship" and "need", but little recognition of compensatory claims post-retirement. At first glance, a compensatory claim would seem to have as strong a claim, if not stronger, for an exception after retirement, especially after a long traditional marriage. Given the way that compensatory and non-compensatory factors are intertwined after a long marriage, it may not matter that the exception is treated as one for non-compensatory support. In the end, the Supreme Court did not apply the need exception on the facts of *Boston.* Further, the Court never defined its view of "need" in such cases.

The formulaic approach applied to avoid double-dipping often produces intuitively appealing outcomes on the facts. The ingredient common to all the cases cited above is that the bulk of the pension was NOT divided, leaving most of the pension income available as the payor's "income" for spousal support purposes. In these cases, the undivided pension income of the payor fell in the range of 62 per cent of the full pension income (*MacQuarrie, Stephension*) to 76 per cent (*Pascall*) or 81 per cent (*Murphy*). In *Elliston*, the husband was still working while collecting his military pension, such that his income available for support was 74 to 81 per cent if his full pension income was considered (the husband's pre-cohabitation service portion seems to have been forgotten). The other common element in these cases is that all were lengthy relationships, ranging from 16 to 21 years, such that the *without child support* formula divided a substantial percentage of the remaining income by way of support to the recipient.

If the income from the undivided portion of the pension is below $20,000, **it is important NOT to treat the payor as having an *actual* income below $20,000 and NOT apply the SSAG provisions about the floor**: *Brisson v. Brisson*, 2012 BCCA 396. This important point was ignored in *Stephenson v. Stephenson*, 2012 ONSC 1867 (Div.Ct.) and *Rothschild v. Sardelis*, 2015 ONSC 5572.

Turning to the hardship/need exception, in the majority of post-*Boston* cases, **this "exception" has swallowed the "rule"**. For some recent cases, see: *Hickey v. Princ*, 2015 ONSC 5596 (Div. Ct.); *Senek v. Senek*, 2014 MBCA 67 (needs-based exception applied on appeal); and *Landry v. Mallette*, 2014 ONSC 5111(needs-based exception does not apply because wife's needs being met by income of new partner). For two cases not quite as clear about the exception, see *Flieger v. Adams*, 2012 NBCA 39, affirming 2011 NBQB 237 and *Dishman v. Dishman*, 2010 ONSC 5239. To complicate matters further, many of the "*Boston* hardship/needs exception" cases involve disability or illness issues, as is true of *Hickey v. Princ* and *Landry v. Mallette.*

Where courts use the SSAG to apply this "exception" formulaically, the full pension income of the payor is usually used to calculate the SSAG range, without much explanation: e.g. *Smith v.*

Werstine, 2014 ONSC 5319. The full pension income will generate a higher range, which moves the amount in the direction that is desired. Again, it is not obvious that this formulaic approach offers the appropriate outcome in every case, as was pointed out in *Slongo v. Slongo*, 2015 ONSC 2093. We would suggest that calculations be done for alternative incomes, as discussed under "Determining Income" above. First, do a calculation on the full pension income and, second, do another for only the undivided portion of the payor's pension, before locating an amount under the "exception" within *Boston*. The hardship and need of the recipient will have an impact upon the location of that amount.

Further, it should be remembered that "need" in spousal support law should not be treated as bare or subsistence need, but as a relative concept, tied to the marital standard of living. The longer the marriage, with "merger over time", the stronger the non-compensatory claim to the marital living standard. This view of need should inform the hardship/need exception under *Boston*.

In the end, under the SSAG, ***Boston* requires courts to exercise more flexibility**, both in applying the general "rule against double-dipping" and in applying the rather large need exception to that "rule". The double-dipping "rule" of *Boston* is itself an exception from the ordinary calculation of spousal support. In many cases, the formulaic calculation (seen in cases like *Stephenson*) may produce a tolerable result, but only where the relationship is lengthy and the bulk of the pension is not divided (either because there has been a significant period of pension contribution post-separation or because of other sources of payor income). Similarly, the formulaic use of the payor's full income under the hardship/need exception may generate reasonable outcomes over a range of cases, but not all.

(d) Termination of spousal support

Retirement is one of the reasons that spousal support ends. Retirement cases will usually involve the application of the *without child support* formula. In a long marriage, where one or both parties have pensions that are equalized, retirement may mean both have similar assets and incomes and thus no basis for continuing spousal support in most cases. If neither has an employment pension and both spouses look to their divided CPP/RRQ public pensions and OAS (Old Age Security) and sometimes GIS (Guaranteed Income Supplement), again their incomes will likely be similarly low, e.g. *Arbou v. Robichaud*, 2012 NBQB 16.

In between those two extremes, there will likely be continuing income disparities, although often reduced in size after retirement. In some of these cases, the payor's actual post-retirement income will drop below the "floor" of $20,000 gross per year: *Whittick v. Whittick*, 2014 BCSC 1597; *Heywood v. Heywood*, 2013 ONSC 58; and *A.M.R. v. B.E.R.*, 2005 PESCTD 62. These cases were discussed above under "Ceilings and Floors". There are exceptions where support is continued after retirement and despite a payor income below the floor, but only in long marriages where the recipient has little or no income at all: *Pratt v. Pratt*, 2008 NBQB 94 (wife on social assistance, husband $14,116/yr, support only $300/mo.) and *M.(W.M.) v. M.(H.S.)*, 2007 BCSC 1629 (wife's income zero, husband $17,800/yr, support of $600/mo, low SSAG).

In many cases, by the time the payor reaches retirement, the couple is nearing the end of the duration of spousal support anyway and the drop in payor income at retirement provides the ground for termination, e.g. *Powell v. Levesque*, 2014 BCCA 33 (8-year relationship, recipient disabled,

payor retires on full pension from Armed Forces at 44 with health problems of her own, support paid 12 years, terminated). However, spousal support can continue past retirement, as *Boston* reminded us. For cases of long or late marriages ("rule of 65"), where support is indefinite, retirement and the payor's drop in income will often create the grounds for termination or the imposition of a time limit.

(e) Living off capital and income-based guidelines

Eventually, as we get old enough, we all have to "live off our capital", to drawn down our capital resources to pay for our current needs, especially those without pensions. RRSPs have to be converted into RRIFs (Registered Retirement Income Funds) or annuities. Businesses and farms have to be sold. Interest from investments becomes insufficient to fund daily needs. As *Leskun v. Leskun*, 2006 SCC 25 reminded us, capital is part of "means" and can be the basis for paying spousal support.

This poses a problem for income-based guidelines like the SSAG. In effect, there are two steps to the SSAG analysis at this advanced stage, assuming entitlement: first, what income should be imputed to the spouses as reasonable withdrawals from capital in addition to whatever current income the spouses may earn; and, second, the formula calculation for amount, under the *without child support* formula. Or, if older spouses have roughly similar assets after the division of property, a court can terminate spousal support and leave each spouse to manage their own capital to meet their needs, as occurred in *Puiu v. Puiu*, 2011 BCCA 480 (34-year traditional marriage, separated 2005, husband 66, wife 61, neither working).