



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



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Law Society
of Ontario

Barreau
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Law Society of Ontario

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17th Family Law Summit

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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

9:00 a.m. to 4:00 p.m.

Total CPD Hours = 9 h Substantive + 2 h Professionalism ^P

+ 1h EDI Professionalism ^E

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 )**
- 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.

17th Family Law Summit



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+1 h EDI Professionalism ^e

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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 Corporation*

- 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:
<ul style="list-style-type: none">Attend an approved program in person or online; and/orSelf-study a past approved programCompleting 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.



17th Family Law Summit

March 28, 2023

SKU CLE23-00304

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TAB 1

17th Family Law Summit

Is Artificial Intelligence the Future? Opportunities and Challenges (PowerPoint)

Michael McGinn, Manager, Innovation
Fasken Martineau DuMoulin LLP

Susan Wortzman
McCarthy Tétrault LLP

March 28, 2023



The background features a hand reaching out from the left, touching a glowing digital interface. The interface consists of several rounded rectangular frames, some containing a brain icon, set against a backdrop of abstract, glowing lines and dots in shades of blue and green. The overall aesthetic is futuristic and technological.

Is Artificial Intelligence the Future? Opportunities and Challenges

Presenters:

Michael McGinn, Fasken LLP

Susan Wortzman, McCarthy Tétrault LLP

Presentation Overview

- Artificial Intelligence (AI) Defined
- How is AI applied in Legal Practice? Benefits and Examples
- Generative AI
- Risks & Considerations
- AI in Family Law
- Demonstration (Brain Explorer and Clusters)
- Conclusion

AI Model Types used in Legal Practice

- Rule Based Systems
- Natural Language Processing
- Machine Learning & NLP
- Sentiment Analytics
- Predictive Analytics
- Generative AI

A Note on Generative AI

- Generative AI is a subset of artificial intelligence that uses large datasets to generate new content, including text, images, and audio.
 - Open AI's ChatGPT is a well-known example of Generative AI
- In legal practice, generative AI can be used to automate the drafting of legal documents and assist with legal research and writing.
- Generative AI can also be used to analyze large amounts of legal data to identify patterns and make predictions about legal outcomes.
- While generative AI has the potential to revolutionize legal practice by improving efficiency and reducing costs, there are also concerns about the ethical implications of its use, potential bias and the need for ongoing monitoring and auditing of these systems.

Why Does ChatGPT Sometimes Get Facts Wrong?

M

Can you provide me with a one paragraph explanation as to why ChatGPT sometimes gets facts wrong?



ChatGPT is a language model that generates text based on patterns it has learned from the data it was trained on. Because it is not able to fact-check or verify information, it may generate responses that contain inaccuracies or false information. Additionally, ChatGPT is a machine learning model and can be influenced by the data it was trained on, and therefore may reproduce biases or misinformation present in that data. Additionally, if the information is out of date, it will not be able to provide with the correct information. It's important to keep in mind that ChatGPT is not a reliable source for factual information and should not be used for important decision making.



Risks and Considerations

- **Risk 1: Data Privacy and Security**

- AI tools rely on vast amounts of data, including sensitive client information. Lawyers need to ensure that data is secure and protected from cyber threats.

- **Risk 2: Bias and Discrimination**

- AI tools may perpetuate existing biases and discriminate against certain groups. Lawyers need to be aware of these risks and take steps to mitigate them.

- **Risk 3: Ethical Concerns**

- AI tools may raise ethical concerns around the delegation of legal tasks to machines and the potential for AI to replace human judgment.

Risks and Considerations

- **Risk 4: Generative AI Specific Issues**
 - Generative AI tools, which can create new content such as text, images, and videos, may potentially produce content that includes hallucinations or other inaccuracies.
 - Lawyers should be aware of the limitations of generative AI tools and verify the accuracy of any content created with them before relying on it in legal proceedings.
 - Incorrect Data, Stale Data or Poorly Sourced Data
 - Additionally, lawyers should be mindful of the potential ethical implications of using generative AI to create content that may deceive or mislead others.

Risks and Considerations

- **Consideration 1: Transparency**
 - Lawyers should ensure that the use of AI tools is transparent to clients and that they understand how the technology is being used.
- **Consideration 2: Accountability**
 - Lawyers should be accountable for the outcomes of using AI tools and take responsibility for any errors or biases that may arise.
- **Consideration 3: Regulation**
 - As AI tools become more prevalent in the legal profession, lawyers need to keep up to date with any relevant regulations and ensure that their use of AI tools is compliant.

Benefits of Using AI in Legal Practice

- Increased efficiency and accuracy in high volume, low variance legal tasks, allowing legal professionals to focus on more complex work
- Improved document analysis and drafting, reducing the potential for errors and inconsistencies
- Cost-effectiveness, allowing legal services to be provided at a lower cost and improving access to justice

AI is an Accelerant

AI can be used *daily*

- Using Machine Learning on every mandate enables rapid identification and front-loading of the most relevant information—culling extraneous
- AI can be applied across multiple platforms to accelerate the path to critical, actionable information
- AI helps us find more of what we know we are looking for
- ...and uncover what we didn't know we needed to find

AI is not just for Litigation

- Family law and civil disputes
- Investigations
- Cyber / Breach Response
- Due Diligence



Examples of the Use of AI in Family Law

- One application of AI in family law could be the use of natural language processing (NLP) to analyze large amounts of legal documents in order to identify relevant information, such as assets, debts, and other financial information
- AI can also be used to predict outcomes in family law cases by analyzing past cases and identifying patterns and trends

Examples of the Use of AI in Family Law

- In child custody cases, AI can be used to analyze social media and other digital data to determine patterns of behavior and potential risks to the child's welfare
- AI can also be used to automate the processing of paperwork and other administrative tasks in family law cases, allowing legal professionals to focus on more complex legal issues

Sentiment Analysis

Pre-Built Models

- Deep sentiment analysis can be used to gauge the temperament of communications
- An ever widening array of pre-built AI models to categorize and score content
 - Advertising & Promotions
 - Asking for Advice
 - Bullying & Toxic Behaviour
 - Business Meetings
 - Comments on Appearance
 - Contracts
 - Document Management
 - Employment & Career Advancement
 - Gifts & Entertainment Kickbacks
 - Hate & Discrimination
 - Insulting & Vulgar Behaviour
 - Out of Office
 - Personal/Family Events
 - Pricing/Fees
 - Privileged Content
 - Sexually Explicit Comments
 - Sports Conversations
 - Threatening Behaviour
 - Trading Conversations
 - Work Events
- Powerful custom models based on client-specific data can deliver a bespoke client experience



Multi-Channel Integration

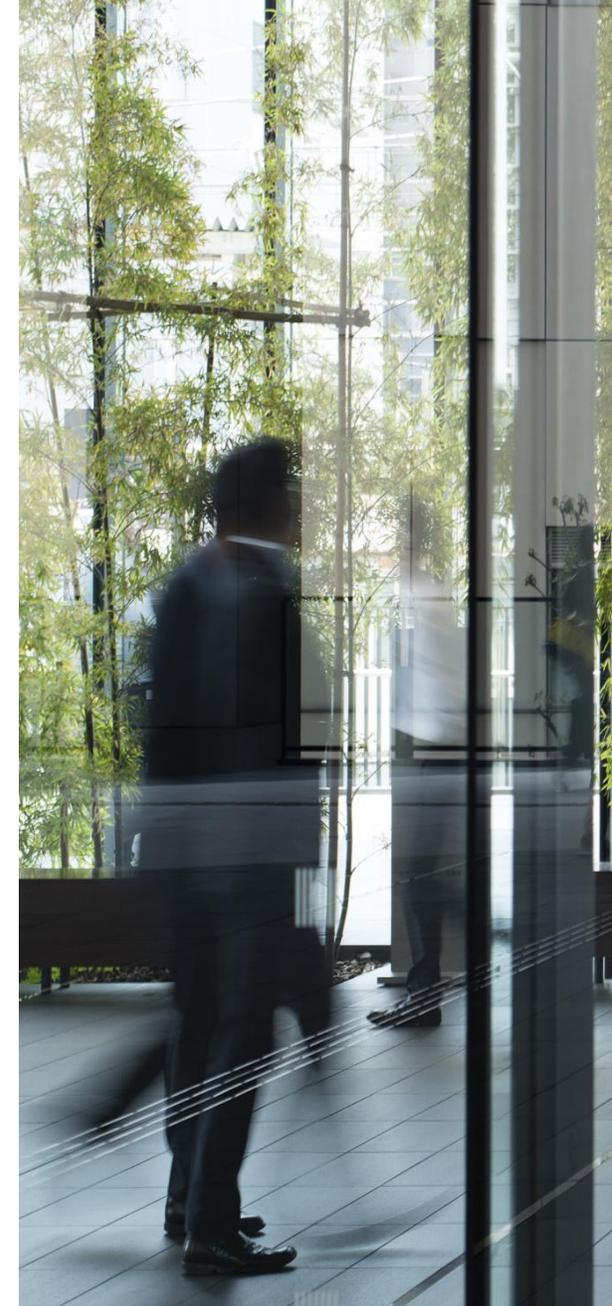
Our AI platforms integrate communications from a wide spectrum of channels:



A Tried and True Process

Embrace a defensible and repeatable process to reduce risk

- Work with client to identify the data set for analysis
- Analyst team works with client IT to collect the data
- The data is processed, creating an index, and the extracted text is prepared for loading into an analysis platform
- Team of experts recommend the most appropriate AI tools, from a CAL review to applying an AI classifier
- In either case, the data will have pre-built or custom models applied to it to classify the records as needed
- This will involve both the use of pre-built models and ongoing manual review by lawyers to strengthen and stabilize the model
- Once the model or CAL process stabilizes, the producible records will be validated prior to production, and the non-producible records will be sampled to validate that nothing has been missed
- Ongoing training of the model will continue as more data is added and more information is known



Conclusion

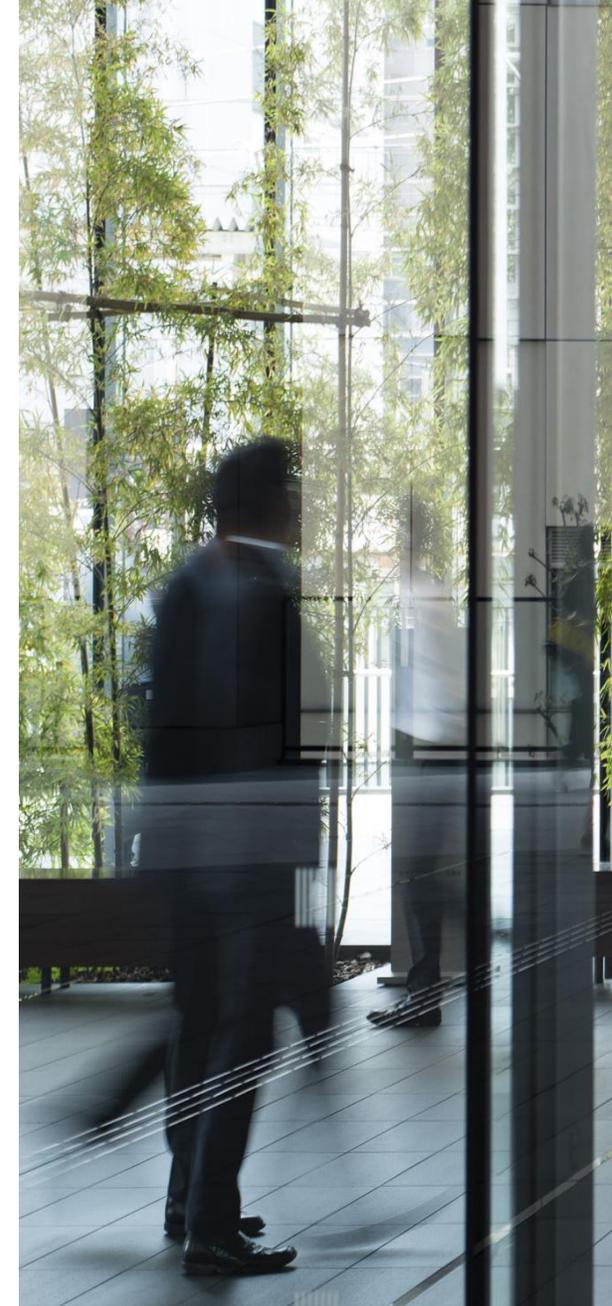
- AI is already being used in legal practice, providing benefits such as increased efficiency, accuracy, and cost-effectiveness
- Generative AI is a subset of AI that has the potential to automate legal document drafting and assist with legal research and writing
- Risks and considerations associated with the use of AI in legal practice include:
 - data privacy and security, bias and discrimination, ethical concerns, and generative AI-specific issues

Conclusion

- To mitigate these risks and considerations, lawyers should prioritize transparency, accountability, and compliance with regulations
- Overall, while there are challenges associated with the use of AI in legal practice, it has the potential to revolutionize the industry and improve access to justice

Conclusion

- While AI will not solve complex legal programs, it will eliminate the need for lawyers to do repetitive tasks so we can focus on doing interesting work for our clients. Deep reasoning is still the domain of legal minds.
- As lawyers, we need to be able to offer our clients confidence that we will be using AI appropriately, ethically, and safely to protect their data. As a trusted advisor for our clients, we should be able to de-mystify the black box of AI.





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TAB 2

17th Family Law Summit

**You Think 45 Cases in 45 Minutes is Impossible?
(Game On...)**

Aaron Franks
Epstein Cole LLP

Adam Prewer
Epstein Cole LLP

March 28, 2023



You Think 45 Cases in 45 Minutes is Impossible?

(Game On...)

Ye Olde Family Law Summit

March 2023

Aaron Franks and Adam Prewer of Epstein Cole LLP

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***F v. N.*, 2022 SCC 51 – Risk of Harm and Foreign Law**

By the slimmest of majority...

The parties were married in Pakistan in 2012, but lived in Dubai for their entire marriage. They had two children together, who were born in 2016 and 2019 respectively. The mother and both children were Canadian citizens. The father was not. With the father’s consent, in June 2020, the mother left Dubai with the children to visit her family in Ontario. Although the mother purchased return plane tickets for herself and the children, once she got to Canada, she told the father that she would not be returning to Dubai, and would be staying in Ontario with the children indefinitely.

The father responded by starting court proceedings in both Dubai and Ontario, asking the Superior Court in Ontario for an Order requiring the children to be returned to Dubai under s. 40 of the *CLRA*, which provides as follows:

40. Upon application, **a court**,

(a) **that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario**; or

(b) that may not exercise jurisdiction under section 22 or that has declined jurisdiction under section 25 or 42,

may do any one or more of the following:

1. Make such interim parenting order or contact order as the court considers is in the best interests of the child.

2. Stay the application subject to,

i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or

ii. such other conditions as the court considers appropriate.

3. **Order a party to return the child to such place as the court considers appropriate** and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application. R.S.O. 1990, c. C.12, s. 40; 2020, c. 25, Sched. 1, s. 17. [emphasis added]

If these provisions look familiar to those not in Ontario, it is because common law jurisdictions in Canada share similarly-worded provisions. As a result, this case is of import to all.

The mother responded to the father’s Application in Ontario by asking the Ontario court to take jurisdiction over the children for a variety of reasons. However, the issue that is of greatest interest for our purposes was the mother’s argument that the court in Ontario should assume jurisdiction pursuant to s. 23 of the *CLRA*, which allows a court in Ontario to decide what parenting arrangements would be in a child’s best interests if the child is in Ontario, and if removing the child from Ontario would cause him or her to “suffer serious harm”:

23 Despite sections 22 and 41, **a court may exercise its jurisdiction to make or vary a**

parenting order or contact order with respect to a child if,

- (a) **the child is physically present in Ontario;** and
- (b) **the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,**
 - (i) the child remains with a person legally entitled to decision-making responsibility with respect to the child,
 - (ii) the child is returned to a person legally entitled to decision-making responsibility with respect to the child, or
 - (iii) **the child is removed from Ontario.** 2020, c. 25, Sched. 1, s. 6. [emphasis added]

The mother argued that returning the children to Dubai would cause them to suffer serious harm because: (1) the children were very young and she had always been their primary caregiver, but she had no independent legal status in Dubai; (2) her ability to remain in Dubai was tenuous at best; (3) she would not be able to get a fair hearing there because the courts did not decide parenting cases based on a “best interests” test; and (4) if the children were returned to Dubai, she would not return with them.

In other words, the mother argued that if the children were required to return to Dubai, there was a very serious risk that they would never be able to see their mother/primary caregiver ever again.

The trial took place in November 2020, and finished on November 26th. The trial judge, Justice Conlan, recognized the urgency of the situation, and released his decision only two weeks later (on December 15th). He rejected the mother’s arguments, and found that although young children can face adverse emotional and psychological impacts when separated from a primary caregiver, it was unknown whether the children in this case would suffer serious harm from such potential adverse impacts. He also found that the children’s best interests would be served by their return to Dubai, with or without the mother, so that a court there could adjudicate the matters of custody, access, and guardianship.

The mother appealed to the Ontario Court of Appeal, and her appeal was argued in January 2021. She successfully argued for a stay pending the appeal.

The Court of Appeal presumably struggled with what to do in this case, because it took almost eight months to release its decision. Ultimately, however, in a 2-1 decision that was released in September 2021, Justice Hourigan and Justice Brown for the majority decided to uphold the trial judge’s decision on the basis that the trial judge’s findings were entitled to deference, and the mother had not established a palpable and overriding error.

In a vigorous dissent, Justice Lauwers explained that he would have allowed the appeal. In his view, the trial judge failed to take into account the mother’s peculiar vulnerability as a foreign national, and as a woman undergoing a divorce process in Dubai under the laws of the UAE, with its effects on the children. Furthermore, he found that the trial judge had erred in finding that it was “unknown” whether sending the children back to Dubai without the mother would result in serious harm, as the risk of this harm was precisely what the trial judge had to assess in order to

make determinations under ss. 23 and 40 of the *CLRA*. Finally, he was not satisfied that the father would take the necessary steps to ensure that the mother would be able to remain in Dubai if she returned with the children, and was concerned that the undertakings the father had said he would give would be unenforceable in Dubai if he subsequently decided to renege.

The mother successfully sought leave to appeal to the Supreme Court of Canada. It also stayed the Orders below pending the appeal.

The case was argued before the Supreme Court of Canada on April 12, 2022. As the children were very young, and had already been in Canada for almost two years by the time the second appeal was argued, we would have thought the Court would have released its decision very quickly (or even from the bench with reasons to follow) if it was going to Order their return to Dubai. However, like the Court of Appeal before it, we suspect that the Court really struggled with what to do here, because the case was under reserve for almost eight months (until December 2, 2022), and still resulted in a 5-4 split in favour of ordering the children's return to Dubai.

The Majority:

Writing for the 5-judge majority, Justice Kasirer agreed with the majority of the Court of Appeal that the trial judge's finding that the children would not "suffer serious harm" if they were returned to Dubai was entitled to significant deference, and the mother had not established "an error in law or a material error in the appreciation of the facts (*Van de Perre*, at para. 13)" that would permit the Court to intervene:

[123] Assessing the application of the s. 23 regime in this case, **I am satisfied that the trial judge properly considered the relevant constellation of factors in this case, weighed them in light of the credibility of the witnesses, and based his conclusion on an individualized child-centered analysis.** As the trial judge recalled, both parents are capable, loving parents; he said, notwithstanding some of the Mother's allegations, that there is not a hint of evidence that she or the children would be subject to abuse if they return. But the trial judge went further, weighing the other relevant factors. For instance, the dissenting judge said the trial judge failed to assess the harm of an involuntary separation. I respectfully disagree: the trial judge considered the Mother's residency status in light of the undertakings; he considered the expert evidence on the options available to the Mother; and he decided that the best interests of the children would be the paramount consideration under UAE law. His conclusion was not based on a misplaced view that the Mother was certain or obliged to return; instead, he assessed the actual harm that would flow from the return of the children, whether or not the Mother went with them. **His finding that the serious harm threshold was not met is owed deference, and the Mother has not persuaded me that he erred. Another judge might have decided serious harm differently, but that is no basis for disturbing the conclusion of the trial judge given the applicable standard of review.** [emphasis added]

The majority also rejected the mother's argument that the father's proposed undertakings to try and alleviate her concerns about returning to Dubai, including helping her secure independent residency in Dubai, and agreeing that the children would reside primarily with her and that they would make major decisions jointly, would be unenforceable. According to the majority, the trial judge had already considered, and rejected those arguments, and his findings were entitled to deference:

[134] Problems associated with the enforceability of undertakings by foreign courts are well known. But, **in this case, the trial judge unreservedly concluded, on the basis of the expert evidence, that the settlement offer proposed by the Father — if agreed to by the Mother — could be incorporated into a valid court order in Dubai, and would be enforceable** (para. 294(ii)). In deciding that the undertakings were a viable commitment from the Father, the trial judge plainly had no guarantee that the Father would not later resile from that commitment, as Lauwers J.A. emphasized in his dissenting reasons (paras. 301-2). **The trial judge did understand that the commitments were not guaranteed but I respectfully disagree that he put blind faith in the Father on the basis of his general finding of credibility.** The undertakings might have been made a condition for the return but, as commentators note, this is not always the practice (Schuz (2013), at pp. 291-92). In my view, what is required is that the judge who hears the parties is satisfied that the undertakings given are adequate (see Schuz (2013), at p. 290). **This assessment is discretionary and must be made in light of the parties’ particular circumstances. I agree with Hourigan J.A. that nothing in the record indicated that the Father would not respect his undertakings** (paras. 71-72). [emphasis added]

That being said, to try to provide the mother with some additional protection, the majority expressly confirmed that the father was bound by his proposed undertakings, and listed the specific steps he was required to take in its reasons, including that he would have them incorporated into a consent Order/Judgment in Dubai. The issue of “undertakings” in the majority decision factor very prominently — perhaps too prominently given that their ultimate enforceability is not without issue.

The majority’s decision also contains an excellent summary of the legal principles that apply when dealing with abductions from non-*Hague* countries that will be of enormous help to family law lawyers and judges across the country when dealing with these types of cases, including:

- “The return order procedure in s. 40 of the *CLRA* thus starts from the premise that the best interests of the child are aligned with their prompt return to their habitual place of residence so as to minimize the harmful effects of child abduction. Returning the child to the jurisdiction with which they have the closest connection is also understood to be in the child’s best interests.” [paragraph 9]
- “. . . the courts recognize that a parent should not be allowed to create a situation that is potentially harmful to the child and then rely upon it to establish a risk of harm to the child (see *Ojeikere v. Ojeikere* (2018), 8 R.F.L. (8th) 253 (Ont. C.A.), at para. 91).” [paragraph 10]
- “A review of legislation in this area reveals that, in general, Canadian provinces treat child abductions in non-*Hague Convention* cases in a manner methodologically comparable to the Convention: first, by declining to decide parental disputes on the merits with respect to children who do not habitually reside in the province or territory, and second, by favouring the return of children to the jurisdiction of their habitual residence. However, these similarities do not mean that an application brought under provincial legislation is treated the same way as one brought subject to the rules of the *Hague Convention* (*Geliedan*, at paras. 26-34).” [paragraph 52] [Keep this in mind as we discuss *K.F. v. J.F.* below.]
- “To account for the fact that, in the non-*Hague Convention* context, Ontario courts do not

benefit from the *a priori* assumption that the best interests of the child principle will be applied to the merits of the custody dispute in the foreign country, judges assessing petitions for return to non-party jurisdictions must therefore consider the tenor of foreign law, generally through expert evidence adduced by the parties.” [paragraph 53]

- “The premise that the children’s best interests are favoured by their timely return to their home jurisdiction is sound. Child abductions harm children ([Baley](#), at paras. 23-25; [Ojeikere](#), at para. 16; A. Grammaticaki-Alexiou, “Best Interests of the Child in Private International Law”, in *Collected Courses of the Hague Academy of International Law* (2020), vol. 412, 253, at p. 325). . . . Consequently, at the preliminary stage of deciding jurisdiction, it is not the role of the judge to conduct a broad-based best interests inquiry, as they would on the merits of a custody application.” [paragraphs 64-65]
- “The onus to prove that the child would suffer serious harm rests on the abducting parent ([Onuoha v. Onuoha](#) (2021), 54 R.F.L. (8th) 1 (Ont. Div. Ct.), at para. 23, aff’g (2020), 49 R.F.L. (8th) 115 (Ont. S.C.J.). The burden is demanding.” [paragraph 69] [We’re not sure what a “demanding” burden — as opposed to an “ordinary” burden might be; there is only one standard of proof — a the balance of probabilities: [F.H. v. McDougall](#), 2008 CarswellBC 2041 (S.C.C.); [McLean v. McLean](#), 2013 CarswellOnt 17995 (Ont. C.A.).]
- “The measure of s. 23 is highly factual and, as the Court of Appeal pointed out, is discretionary, in the sense that it involves the weighing of various factors (para. 52; [Ojeikere](#), at para. 63; E. (H.) , at para. 29; [Volgemut v. Decristoforo](#), 2021 CarswellOnt 16070 (S.C.J.), at para. 99 (CanLII); [Ajayi v. Ajayi](#), 2022 CarswellOnt 13314 (Div. Ct.), at para. 20). Serious harm may be established through a single consideration or may arise from a combination of factors, given the holistic nature of the assessment mandated by s. 23 (C.A. reasons, at para. 140, per Brown J.A.; see also [Ojeikere](#), at para. 63).” [paragraph 71]
- “The analysis is also highly individualized. It should focus on the particular circumstances of the child, rather than on a general assessment of the society to which they are sent back.” [paragraph 72]
- “Given the discretionary, individualized and fact-specific character of the serious harm analysis, a trial judge’s findings are owed deference.” [paragraph 75]
- “Separating an infant from their primary caregiver is a circumstance that most certainly can cause psychological harm to the child. . . . But I reject the argument that such a separation, in and of itself and without regard to the individualized circumstances, will always rise to the level required under s. 23.” [paragraphs 77-78]
- “. . . if a child is separated from their primary caregiver, but is nevertheless returned to their capable left-behind parent and other known caregivers, in a safe and familiar environment, the high threshold of harm may not be met (for the *Hague Convention*, see Guide, at paras. 64-65). Conversely, if the evidence demonstrates that the child would be returned to an environment where they will be left without care or that they feel unsafe with their alternate caregiver, it is very possible that the serious harm threshold will be met (see, e.g., [Aldush](#), at para. 158).” [paragraph 80]
- “When assessing the severity of the harm, judges should also consider whether undertakings

made by the left-behind parent to the primary caregiver in the proceedings — also called ‘protective measures’ — could be joined to the return order made pursuant to s. 40 of the *CLRA* in order to lift the obstacles to the parent’s return or to address any other aspect of the anticipated risk of harm to the child (for the *Hague Convention*, see Guide, at paras. 36-37 and 64-66; see also R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at pp. 291-92; P. R. Beaumont and P. E. McEleavy, *The Hague Convention on International Child Abduction* (1999), at pp. 156-57; for non-Hague Convention disputes in Ontario, see *Bolla*.)” [paragraph 81]

- “As to the likelihood of separation, courts should consider all barriers to the return of the primary caregiver. In some cases, the risk of separation will be involuntary, namely when the primary caregiver faces definitive legal obstacles to their return. It may also be voluntary, in the sense that it flows from the parent’s refusal to return. In general, a parent ought not to be able to create serious harm and then rely on it through their own refusal to return (*Ojeikere* , at para. 91; see also Schuz (2013), at pp. 280-81; Guide, at para. 72).” [paragraph 82]
- “This is not to say that a primary caregiver’s refusal to return will always be taken to be unjustified. An abducting parent may have legitimate and reasonable reasons for not returning to the foreign country, such as significant obstacles to employment or risks to safety, including evidence showing that the left-behind parent is responsible for child abuse or intimate partner violence to the primary caregiver (see, e.g., *Ojeikere*, at para. 91; *Aldush*, at para. 149; B. Hale, “Taking Flight — Domestic Violence and Child Abduction” (2017), 70 *Current Legal Problems* 3; N. Bala and J. Chamberland, “Family Violence and Proving ‘Grave Risk’ for Cases Under the Hague Convention Article 13(b)”, Queen’s Law Research Paper No. 91 (2017), at p. 6).” [paragraph 83]
- “That said, as a general matter, an unreasonable refusal to return cannot be said to be in the child’s best interests: the law requires that parents set aside their differences, and facilitate contact between the child and their estranged partner. The mere fact of undertaking the wrongful abduction suggests an abductor has lost sight of that idea; the subsequent refusal to return, where not reasonably justified, makes further contact between the child and the left-behind parent difficult.” [paragraph 83]
- “As long as the ultimate question of custody is determined on the basis of the best interests of the child, the *CLRA* does not prevent children from being returned to jurisdictions where the law may differ in some respects from that of Ontario. I agree with Hourigan J.A. that it ‘is not enough to point to differences in the law and suggest that a parent may have different rights in a foreign jurisdiction vis-à-vis Ontario’ (para. 79).” [paragraph 87]
- “Nonetheless, there may be instances where foreign laws are so profoundly irreconcilable with Ontario law that remitting the matter to the foreign courts would constitute serious harm within the meaning of the *CLRA*. Drawing the line between what is acceptable and what is not is a delicate exercise.” [paragraph 88]
- “The proper approach recognizes that inconsistencies between local and foreign legal regimes will usually not amount to serious harm if the best interests of the child principle remains the paramount consideration in all decisions concerning children. However, if the incompatible rule automatically applies in a manner that supersedes the best interests of the

child, this will be a determinative factor in the serious harm analysis, when s. 23 is read in light of s. 19(a) of the *CLRA*.” [paragraph 88]

The Dissent:

In a decision written by Justice Jamal, the four dissenting judges agreed with the majority’s summary of the applicable legal principles. However, the dissent was of the view that the trial judge had “seriously misapprehended the evidence in evaluating both the likelihood and severity of the harm.” And, after finding that the trial judge had made palpable and overriding errors, the dissent reweighed the evidence, and concluded that the mother had, in fact, established that the children were likely to suffer serious harm if they were returned to Dubai, as it would result in them being separated from their primary caregiver (the mother), who had legitimate reasons for refusing to return to Dubai (including her precarious residency status and concerns about living as a woman in that jurisdiction).

As a result, the dissent would have dismissed the father’s Application to have the children returned to Dubai, and remitted the case to a different judge of Ontario’s Superior Court of Justice to determine what parenting arrangements would be in the children’s best interests based on the law of Ontario

***K.F. v. J.F.*, 2022 NCLA 33 – The Hague Hybrid Approach**

Never Let Your
Children Go
Anywhere. *Ever.*

[*K.F.*](#) is another abduction case, but unlike [*F. v. N.*](#), it was decided under the *Hague Convention*. It provides yet another clear example of the substantial problems and confusion created by the Supreme Court of Canada’s decision in *Office of the Children’s Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) to adopt a “hybrid approach” to determining a child’s habitual residence, which the majority described as a “fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions” that “requires the application judge to look to the entirety of the child’s situation.” Indeed — who wants “rigid rules” when it comes to returning children to their jurisdiction of habitual residence?

Immediately after [*Balev*](#) was released, the majority’s decision was subject to significant criticism by a number of leading family law experts, including Philip Epstein, who had this to say about it in the [2018-19](#) (May 14, 2018) edition of *TWFL*:

Readers can review Justice McLachlin’s eloquently written judgment and determine why she and the majority favour the hybrid approach, but **in a rather stinging dissent, Justices Coté and Rowe, with Justice Moldaver concurring, I submit, correctly point out the flaws in the majority approach to the habitual residence interpretation.**

The minority notes that if habitual residence is ascertained via the parental intention approach, most cases will turn on a straight forward question, i.e. “Where did the parents last mutually intend for the child to be habitually resident?” **The minority points out that the majority dilutes the importance of parental intent as the primary variable in favour of a multifactor test which the minority calls, “an unprincipled and open ended approach untethered from the text, structure and purpose of the *Hague Convention* — that creates a recipe for litigation”.**

The minority in an equally elegant dissent sets out the merits of the parental intention approach, points out the risks and weaknesses inherent in the hybrid approach and suggests the correct approach for the interpretation of the convention with respect to habitual residence.

This is about as final a judgment on a family law issue as could exist. There is no chance whatever that the *Hague Convention* is going to be opened by the more than 100 countries who are signatories to insert a new definition or interpretation of habitual residence. And thus, parents, lawyers and judges are going to have to live with the hybrid approach for the interpretation of habitual residence for the foreseeable future. **This, I can safely predict, will lead to much more litigation in Hague Convention cases, lengthier hearings, a great deal more uncertainty and some very sophisticated forum shopping.** Clients will have to be warned that there is a danger in entering in any temporary parental agreements on relocation since an ill-motivated parent can use the temporary time to create an appearance of settled intention and open the door to consideration of a host of additional factors the courts will now have to consider in determining whether the child has become habitually resident in another jurisdiction. **What is more alarming is that under the hybrid test it is possible that one parent can unilaterally change the habitual residence of the children. That, very respectfully, is a significant step backward in resolving the Hague Convention cases and**

discouraging parental abductions. [emphasis added]

[K.F.](#) shows that Phil’s concerns were prescient and eminently well-founded.

The father in [K.F.](#) was born in America, and lived and worked in the United States for his entire life. The mother was born in St. John’s Newfoundland, but moved to the United States in 1997.

The parties were married in 2011, and lived in Boston. Their daughter was born in Boston in 2014.

The family lived in Boston until July 2020, when the parties agreed that the mother and daughter would travel to St. John’s to spend time with the mother’s family. Because schools in Boston remained closed for in-person learning, the parties subsequently agreed that the mother and daughter would remain in St. John’s until August 2021, at which point they would return to Boston so the child could start the new school year there. The father also spent significant time in St. John’s after July 2020, including from November 2020 to March 2021. For those of you without a calendar at hand — the child lived in Boston for six years and was in Newfoundland for 13 months.

Despite the parties’ agreement that the mother and child would return to Boston in August 2021, on July 30, 2021, the mother informed the father that she had decided not to return, and that she had filed an Application for divorce in Newfoundland for an Order allowing her to remain in St. John’s with the child.

On August 24, 2021, the father brought an Application in Newfoundland under the *Hague Convention* for an Order requiring the child to be returned to Boston. The mother opposed the Application, and argued that the *Hague Convention* did not apply as the child was not habitually resident in Boston as of July 30, 2021, as by that point she had already become habitually resident in St. John’s. She also raised the grave risk of harm defence under article 13(b) of the *Hague Convention*.

The trial started on September 27, 2021, and finished on October 20, 2021. The trial judge released her decision on November 8, 2021, found the child’s habitual residence was in Boston, rejected the mother’s grave risk of harm defence under article 13(b) of the *Hague Convention*, and ordered the mother to return the child to Boston by November 16, 2021.

As required by [Baley](#), the trial judge reviewed the child’s links to Boston, the circumstances of the move, and the child’s links to St. John’s, and ultimately concluded that although the child had spent “an appreciable period of time in Newfoundland”, she was still habitually resident in Boston as of July 30, 2021 when the mother told the father that she intended to remain in St. John’s.

The mother appealed to the Newfoundland Court of Appeal, and obtained a stay pending the appeal.

The appeal was argued in February 2022, and the Court of Appeal released its decision on May 26, 2022. In a 2-1 decision, the majority determined that the trial judge had misapplied *Baley* because she “failed to focus on the focal point of [the child’s] life immediately before the date of her alleged wrongful retention”, and placed too much emphasis “on parental intention and the circumstances of [the child’s] parents in deciding that [her] habitual residence was Boston.”

Ugh.

And, after reviewing the evidence, the majority concluded that the *Hague Convention* did not apply because the child's habitual residence had already changed from Boston to St. John's by the time the mother told the father that she had decided to stay in Newfoundland:

[126] In the result, I am of the view that the focal point of [the child's] life immediately before July 30, 2021 was St. John's. She had been there for over a year at that time (an appreciable period of time, especially for a seven-year-old child), had completed her full grade one year at there, was integrated into the environment and social fabric of the St. John's, and settled into a secure and stable family life with her mother and her extended family. In short, [the child's] habitual residence had changed from Boston to St. John's by July 30, 2021, like the children in *Beirsto, J.M., Ludwig, and F against M*, whose habitual residences had changed as of the time immediately before the dates of their alleged wrongful retention. While the intentions of [the child's] parents were to return to Boston until [the child's] mother changed her mind, that does not alter the fact that [the child's] habitual residence had changed from Boston to St. John's immediately before July 30, 2021.

Ugh again.

The dissent, with which we strongly agree, was written by Justice Goodridge. He would have upheld the trial judge's decision, as she had "reviewed and applied the proper jurisprudence from [Baley](#), and applied the hybrid test which arises from it. She considered all of the factors, assessed the facts properly and made the ultimate judgment call — a judgment call which was hers to make."

The father applied for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. Not surprisingly given that the Court just dealt with the issues raised by this case in [Baley](#) in 2018, the Court refused the father's request for leave. As a result, it will be up to the Newfoundland Superior Court, and not the court in Massachusetts, to decide what parenting arrangements will be in the child's best interests in this case.

Leigh v. Rubio, 2022 ONCA 582 – Timing of Hague Applications

Time, time, time;
See What's Become
of Me...And My
Hague Application.

In *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, the Supreme Court of Canada made it clear that child abduction cases under the *Hague Convention on the Civil Aspects of International Child Abduction* ("*Hague Convention*") **must** be dealt with expeditiously, and that judges **must** control the process to ensure that the matter is completed as quickly as possible:

[83] The first object of the Hague Convention is the prompt return of children: see Article 1(a). For this reason, **contracting states are required, by Article 2, to "use the most expeditious procedures available" to secure within their territories the implementation of the *Hague Convention's* objects.**

...

[88] Despite the quick work of all the judges below in deciding the case before them and releasing reasons for their decisions, this proceeding was unacceptably delayed. **The hardship and anxiety that such delays impose on children are exactly what the *Hague Convention's* contracting parties sought to prevent by insisting on prompt return and expeditious procedures.**

[89] In light of this appeal, this Court has taken steps to ensure that *Hague Convention* cases are flagged internally and expedited by our registry. I hope other Canadian courts will consider what further steps they can take to ensure that Hague Convention proceedings are determined using the most expeditious procedures available. **Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much civil litigation in Canada, *Hague Convention* proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously.** [emphasis added]

Unfortunately, none of this happened in *Leigh v. Rubio*.

The parties in *Leigh* were from Peru. They were married in Peru 2012, and their son was born in Peru in February 2013. They separated shortly after their son was born. They had always lived in Peru.

After the parties separated, they engaged in extensive family law litigation in Peru, and in 2018, the Court in Peru granted them joint custody of their son. The decision was upheld by the Peruvian Court of Appeal. In its decision, the appellate court in Peru also:

- [43] ... • Confirmed the importance of the father's relationship with the child;
- Referred to the fact that the mother had been repeatedly in violation of court orders and had received multiple warnings;
 - Found the mother's allegations to be unsubstantiated;
 - Made no mention of violence on the part of the father, but commented that there had been "violence on both sides";

- Confirmed that the various restraining orders (called “protective measures”) do not imply that abuse was committed and do not suspend the father’s rights;
- Expressly stated, that “it is also determined that the...father shows no signs of altered mental status that may pose risks for the [child] and the [child] wants his father to visit him”;
- Stated that the mother’s claim that the father’s wish to extend visitation with the child to harm her “is based on subjective matters and cannot set aside the results of the social inquiry and psychological reports filed, nor can it void the validity to enforce an order that has been issued by a higher court”; and
- Ordered that the mother not leave the country without the father’s consent.

In October 2019, in breach of the Peruvian Court of Appeal's Order, the mother and the child left Peru without the father's consent, came to Ontario, and refused to return.

In March 2020, the father commenced an Application in Ontario under the *Hague Convention* to have the child returned to his habitual residence in Peru. The mother defended the Application on a number of grounds, including that ordering the child to return to Peru would expose him to a grave risk of harm under Article 13(b) of the *Hague Convention*, which provides as follows:

Article 13

Despite the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

...

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The Ontario hearing started on September 21, 2020, which was almost a year after the child was removed from Peru, and almost 7 months after the father commenced his Application. While this delay is obviously inconsistent with the expedited process required by the *Hague Convention*, given that the COVID-19 pandemic had only just started, and virtual hearings were still in their infancy, we suspect that it actually took significant effort by the Court and the parties to get the matter ready to be heard this quickly.

But things then went seriously off the rails. What was meant to be a prompt six-week determination under Article 11 of the Hague Convention actually took an incredible 68 weeks. Even though the evidence in chief from the parties and most of their witnesses went in by affidavit, the hearing still took 33 days spread out over 5 months to complete (from September 2020 to February 2021). It then took another 4 months for the decision to be released (in June 2021).

Part of the reason the hearing took so long was that the trial was conducted virtually, and much of the evidence had to be translated. However, a significant part of the delay was caused because the parties were permitted to call far too many collateral witnesses, including friends, family members, and former lawyers, to give evidence about anything and every little thing that happened during the entire course of the parties' relationship.

In lengthy reasons (84 pages), the hearing judge ultimately concluded that the mother had wrongfully removed the child from Peru. However, she nevertheless dismissed the father's request for return because she was satisfied that the mother had established that the child would be exposed to a grave risk of harm under Article 13 because of the father's abusive conduct, and because the Peruvian justice system was not able to control or prevent the husband's behaviour from continuing:

[288] **Peru has a system in place for dealing with family law cases, including those that involve domestic violence. However, it appears that the mother has not been adequately protected.** If the child were ordered to be returned to Peru, the mother would return to Peru with him. If she were to return to Peru with him, I do not doubt that she would continue to face more of the same. She will not find practical support there. **The mother and the child have protective measures in their favour but it appears that the father will be free to continue to approach her without consequence.** [emphasis added]

The father appealed to the Ontario Court of Appeal. He was self-represented by that point (a very serious problem in Hague matters), and he did not perfect his appeal in a timely manner. As a result, it took until July 2022 for the appeal to be heard (almost 13 months after the hearing judge's decision was released). Two months later (in August 2022), the Court of Appeal released its decision.

Although the Court of Appeal ultimately dismissed the father's appeal, it did not do so because it agreed with the Application judge's decision, or the process that was followed. In fact, the Court took the most serious issue with the conduct of the hearing, and raised a number of concerns about the correctness of the decision.

With respect to the conduct of the hearing, the Court of Appeal found that the hearing judge erred by not taking control of the process, and allowing the hearing to go on far too long:

[26] To conclude that the mother had established grave risk, **the application judge conducted a year-by-year analysis of the mother's allegations, seemingly delving into every issue and allegation the parties made from the date of their separation and reciting allegations and counter-allegations at length.** Parents, friends, family members, former lawyers, and others gave protracted evidence. Since translators and interpreters were required, this approach exponentially augmented delay. **This is not the mandated approach from *Balev*,** as outlined in para. 89:

Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much litigation in Canada, Hague Convention proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously. [Emphasis added.]

[27] Paragraph 59 of the application judge's reasons acknowledge the troubling delay and explain that "there were delays caused by COVID health concerns, technical issues (including issues with Zoom both in and out of the courtroom) and issues with the availability of witnesses and interpreters". None of those issues can

justify the extent of the delay. Rather, **the expansive nature of the hearing which detailed events over a six-year period led to inevitable delay. An allegation that the art. 13(b) exception applies does not cancel the court's obligation under the Convention for prompt resolution.** Since the hearing days were not consecutive, the hearing extended for a period of five months. The total time elapsed from March 2019, when the father filed his application, to the release of the decision was well over a year. [emphasis added]

The Court of Appeal also had three other significant concerns about the application judge's reasons themselves.

First, based on the hearing judge's reasons, it appeared that she simply re-stated and adopted the mother's evidence about the various altercations the parties had over the years as fact, without any meaningful explanation as to why she preferred the mother's evidence to the father's.

Second, the Court of Appeal was troubled by the lack of explanation as to judge's failure to explain why she disagreed with the findings the courts in Peru had already made about the matter. While the Court of Appeal recognized that the hearing judge was not *bound* by these findings, it concluded that the "failure to address the discrepancies between her findings and those of the Peruvian family courts causes concern."

Finally, the Court of Appeal was concerned that the hearing judge had not explained the basis for her conclusion that "the courts in Peru are not capable of determining the child-related issues." This is a matter of comity. If Canada expects Peru to respect the decisions of Canadian courts, Canadian courts must do the same absent clear and articulable reasons.

However, because of the significant amount of time that had already passed since the child was removed from Peru (in October 2019), and because the child was, by then, apparently estranged from the father, the Court of Appeal concluded that it was "simply too late" to return the child, and that the only option at that point was to send the matter back to the Superior Court to be decided afresh. The Court also ordered an expedited assessment about the needs of the child under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, and asked the Superior Court to appoint a single judge to case manage the ongoing proceeding.

In terms of how the case ought to have been handled, the Court of Appeal indicated that, at the start of the hearing, the trial judge ought to have exercised her case management function to address whether and why it would be appropriate or necessary to permit the parties to re-litigate what had already happened in Peru, and the give directions to ensure the hearing could be completed expeditiously.

We completely agree with the Court of Appeal's comments about the problems with how long this case took. To repeat what we said in our comment on *McBennett v. Danis* (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.) in the November 15, 2021 edition of *TWFL*, which was another family law case that took 30 days to try:

We also want to comment on the length of the trial in this case. Family law cases should never take 30 days to try. Not only are long family law trials unaffordable for the vast majority of Canadians, but they also hoard already scarce resources from other cases that would benefit from timely judicial intervention.

In a recent article in the *Lawyers Daily*, Brenda Hollingsworth wrote about how Florida's civil jury system has managed to get to the point that it is now expected that a regular civil jury trial will take no more than a week, and that if it does not finish by then, there is a strong chance that the trial judge will declare a mistrial. (Florida Man completes personal injury jury trial in five days by Brenda Hollingsworth, online: <https://www.thelawyersdaily.ca/articles/29209/florida-man-completes-personal-injury-jury-trial-in-five-days-brenda-hollingsworth>.)

If a regular personal injury civil jury case can be tried in five days or less, there is no reason we should not be able to do the same in family law cases in Canada. We simply cannot keep giving family law litigants unlimited amounts of court time. Before a trial is scheduled, the parties must be given strict time limits, and they need to be held to them. If lawyers and parties know that they have a limited amount of time to present a case, that is what will happen. There is no absolute right to a trial on all issues or in all cases; there must be a reason to expend the personal and societal resources: *Merko v. Merko* (2008), 59 R.F.L. (6th) 439 (Ont. C.J.); *Rannelli v. Kamara*, 2011 CarswellOnt 14161 (C.J.).

However, it is also important (and only fair) to note that the hearing judge was not entirely responsible for what happened here. *Hague* cases require serious pre-trial planning (particularly since it was going to be conducted virtually and many of the witnesses required translators), and the judge(s) who dealt with the matter at the pre-trial stage should have helped the parties limit the number of witnesses and the amount of time they would each have to call their respective cases. And, if the parties were unable to agree to reasonable limits on their own, the pre-trial judge should have imposed limits on the parties. Parties are not entitled to as much trial time as they want or think they need.

Fortunately, in October 2022, *Ontario's Family Rules* will be amended to try to avoid repeats of what happened in this case. New Rule 37.2 will provide, among other things, that in *Hague Convention* cases, a judge shall be assigned to manage the matter and ensure its progress, and the parties shall meet with a judge within 7 days of the case being commenced to timetable the matter, set a hearing date, and make any other necessary Orders. It also provides that the Rules shall be applied in a manner that will provide "the timeliest and most efficient disposition of the case that is consistent with the principles of natural justice and fairness to the parties and every child involved in the case." Hopefully, this new *Rule* will help ensure that abduction cases are dealt with far more expeditiously than they are now.

***Leinwand v. Brown*, 2021 ONSC 6866 – Family Dispute Processes (Yes, it’s from 2021 – but it’s important!)**

No motion for
you!

(At least not
right now.)

In *Leinwand*, the applicant/husband brought a single issue to court: the determination of school placement for the child of the marriage (“JAL”) commencing September 2022 (that is, a year away). The parties could not agree on whether the child was to attend parochial school or public school with the addition of Sunday Hebrew School.

Counsel for the wife argued that the Court should not make a disposition at the time, but that the Court should instead order the parties to attend a “family dispute resolution process” pursuant to s.16.1 of the *Divorce Act*.

The parties were married on August 16, 2015. They separated on March 19, 2019. Their only child was JAL, born in September of 2018.

The parties mediated their outstanding issues (with the assistance of Philip Epstein no less) in May of 2019. They reached an agreement on all financial and parenting issues, subject to a review in September 2020. If the parties were not able to reach agreement at the time of the review, they were to determine the dispute resolution process.

The husband issued an application in December of 2020, seeking relief with respect to parenting, a custody/access assessment (or, I suppose now a Decision Making Authority/Parenting Time Assessment), and other financial relief.

After a Case Conference, the parties agreed to a 2/2/3/3 shared residential schedule for JAL. They also agreed to share the Jewish holidays.

Other than the residency schedule for JAL to which the parties had agreed, there was currently no parenting agreement/parenting plan in place, and there was no agreement or order in place with respect to decision-making authority.

The husband had arguments – wonderful arguments -- as to why JAL should attend public school and Hebrew School. And the wife had arguments – fantastic arguments -- as to why JAL should attend Hebrew Day School. But Justice Kraft seemed quite intrigued by the arguments of the wife’s counsel, detailed below.

Significant amendments to the *Divorce Act* came into force on March 1, 2021. These amendments modernized the language in the *Act* by removing any reference to the terms “custody” or “access” and replacing them with terminology that focuses on parent’s responsibilities for their children, with the goal of helping to reduce parental conflict. The *Act* introduced new terminology relating to “parenting orders”, “parenting time” and “decision-making responsibility”, and further added other terms and definitions including “*family dispute resolution process*”, “family justice services”, “family member” and “family violence.” As noted by her Honour, these were welcome changes, meant to help reduce parental conflict.

The amendments to the *Act* also provide that the Court may now make an order directing the parties to attend a “family dispute resolution process” pursuant to s.16.1(6). The definition for “family dispute resolution process” is set out in s.2(1) of the *Act*, as follows:

Family dispute resolution process means a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law; (*mécanisme de règlement des différends familiaux*)

As did Justice Meredith in Kentucky, Justice Kraft noted that the parties before her had a demonstrated history of being able to reach agreement in relation to matters concerning JAL. For example, they were able to reach a parenting agreement in mediation in May 2019. Then, after the husband commenced his application, and even though he sought a custody/access assessment and had raised some concerns about the wife’s mental health, and parenting abilities, the parties were able to agree on an equal-time shared parenting residential schedule at their case conference.

Again, at mediation, the parties had agreed to the parenting schedule to be in place for one year and then to be reviewed in September 2020 and -- failing agreement -- the parties were to determine the dispute resolution process.

As determined by Justice Kraft:

While court is unquestionably a dispute resolution process, I find that a court application was not a dispute resolution process of first resort envisioned by the parties when they signed their agreement at mediation. Had court been the first option, they could easily have said so.

Justice Kraft then noted (as did Judge Meredith in Kentucky) that there was no urgency to the court making a determination about JAL’s school placement for September 2022. There was, in Justice Kraft’s view, an opportunity here for the parties to attempt a less divisive solution. The parties could enter into a family dispute resolution process where, “with creativity and compromise” they might be able to negotiate a further agreement regarding decision-making responsibility and design a comprehensive parenting plan including addressing such matters as: how information was to be shared and communicated between them; how other related issues were to be addressed, such as the involvement of a new partner with the child; how future disagreements about the child were to be resolved; whether or not a parent should have a right of “first refusal” is the scheduled parent is unable to personally be with the child; how the parents were to manage attendance at child-related events; which parent was to hold the child’s government-issued documents; how travel with the child could take place; how the children’s personal items were to be managed – and what school JAL was to attend. That is, they might be able to resolve all of the presenting issues, and not just the immediate issue of school placement.

Justice Kraft had this to say about s.16.1(6) of the *Act*:

Section 16.1(6) is a new useful tool that can be used by the Court to assist parties who cannot agree about a major decision that impacts their child(ren) prior to making such a determination, **in circumstances where such a decision is not time-sensitive**. Having parents arrive a decision together, with the assistance of a skilled professional,

is far better for children than having the Court impose a decision on a family where parents cannot reach a resolution about an important matter affecting children. If parents, even those who have tremendous difficulty, can be part of the design of a parenting plan, they will no doubt be far more likely to follow the terms of the plan since they were invested in making up the terms and plan.

...

The amendments to the *Act* which enable the Court to order the parties to attend a family dispute resolution process, in my view, are a reflection of the growing body of research about the effects of separation and divorce on children which can be reduced if parents are able to develop parenting plans that meet the needs of children and promote children's healthy development. (**emphasis** added)

Therefore, found Justice Kraft, there was no compelling reason for the Court to determine the issue of school placement for September 2022 **now** in October of 2021.

In sending the parents to a family dispute resolution process, Justice Kraft also made two further orders.

First, her Honour ordered no costs, as "an Order for costs at this point would be inimical to the consensual dispute resolution process I have ordered." Clever.

Second, her Honour made it clear that her Order was not meant to be a means to delay a decision or to "run the clock." Therefore, if either party unreasonably delayed in the family dispute resolution process, the matter could be returned to her. Clever again.

As the terms of the actual order are important, there are reproduced:

1. Pursuant to s.16.1(6) of the *Divorce Act*, the parties shall make immediate arrangements to attend a family dispute resolution process with a mediator skilled in the area of high-conflict parenting and/or family law. The purpose of this process is to assist the parties in designing a comprehensive parenting plan that addresses all pertinent issues related to JAL. If the parties cannot agree on a mediator within ten days, then each party shall submit a name of a mediator he/she proposes to the Court, to be brought to my attention, and I will make the determination. I encourage the parents to review the Association of Family and Conciliation Courts (AFCC-Ontario) parenting plan guide which can be found at [AFCC-O-Parenting-Plan-Guide-Version-2.0-August-2021.pdf](https://www.afccontario.ca/parenting-plan-guide) ([afccontario.ca](https://www.afccontario.ca)) prior to commencing the family dispute resolution process.
2. If, after engaging in a family dispute resolution process, the parties do not reach agreement on the school placement decision for JAL commencing September 2022 by April 15, 2022, the parties shall notify the Family Law Office to advise that this issue remains outstanding and I shall make a determination on this issue, without the need for the parties to file additional motion material or re-attend on the motion, unless they agreed to do so on consent.

Keeping in mind that this interim resolution and a referral to a family dispute resolution will only work where the issues before the court are not pressing -- we like it. We like it a lot.

M.D. v. C.S., 2022 ONSC 6671 – Binding Judicial Dispute Resolution

And Now for Something
Completely Different!

(For some of us...)

This is the first endorsement in Ontario we are aware of that discussed Ontario’s Binding JDR process. For those interested, the pilot program is described at the following website: <https://www.ontariocourts.ca/scj/practice/binding-judicial-dispute-resolution-pilot/>.

The idea of Binding Judicial Dispute Resolution is quite new in Ontario, only having been around since May of 2021, with (at least anecdotally) fairly minimal uptake in the few judicial centres in which it is being piloted. And Binding JDR is wholly foreign to some provinces. But the concept itself is not new and has been in place in other jurisdictions — Alberta and Nova Scotia for example — for years, with (again, anecdotally) very good results.

In Binding JDR, a judge meets with the parties (and their lawyers, if any) to explore possibilities for resolution — essentially a form of judicial mediation. Each party is expected to explain the facts that support their position and to explain their proposal to resolve the outstanding issues.

If the parties cannot reach an agreement, the judge will hear from both parties about the orders that they are seeking. The judge may ask questions and request additional information from the parties, and will also be able to hear anything the parties consider important, *regardless of the formal rules of evidence* (this is the part that gives some lawyers — and some judges — some angst).

At the conclusion of the Binding JDR process, the judge will provide a final decision on all outstanding issues, including those that have been resolved on consent.

In Binding JDR, the parties explicitly understand that the judge who assists them in trying to resolve the issues will make a final decision on any matters that were not capable of resolution. In Ontario, the parties specifically waive Rule 17(24) of the *Family Law Rules*, O. Reg. 114/99, which ordinarily prevents a Settlement Conference judge from hearing the trial of the matter (or a contested motion).

As explained by Justice Madsen in her decision:

[4] JDR is a court process that is intended to provide separated families with a faster, simpler, less acrimonious and more cost-effective way of resolving family law issues, as compared with a trial. In the Ontario Superior Court of Justice, JDR is currently being offered as a pilot program in certain courts, operating under local Practice Directions. This endorsement arises from the first JDR in the Kitchener Unified Family Court.

The process is designed to be more practical, efficient, and interactive, and less adversarial than a trial. It is also meant to help families create bespoke solutions where possible. The intention is that the parties, counsel, and the judge work together to craft a Consent Order that very day. As the parties have the benefit of receiving immediately actionable input from the judge, many issues can be (and are) resolved without a ruling, and any remaining unresolved issues can then be determined in a fairly focussed hearing.

The Binding JDR process is voluntary and not appropriate for all cases. At least initially, it is meant for cases with only a few issues that are not complex, where credibility is *not* a significant

concern, and where disclosure is complete — things like parenting arrangements, uncomplicated child support issues, and select property and equalization issues. Cases where there are concerns about serious family violence are not appropriate.

Once it is determined that Binding JDR is appropriate for a case, the parties must then complete a signed document for the court requesting participation in Binding JDR. That document provides, among other things, that the parties:

- (a) commit to keeping their financial disclosure up to date;
- (b) agree to provide to the other party and the court a comprehensive settlement proposal in the form of a draft Order, that can be used during the JDR process;
- (c) agree to have their case decided without a trial, in an expedited and less formal manner;
- (d) waive any right to the strict application of the rules of evidence;
- (e) acknowledge that the court may rely on reports prepared by professionals including agents of the OCL, without the attendance of those individuals at the JDR; and
- (f) agree and request that the same judge will preside over both portions of the process.

Parties also each serve and file brief affidavits.

It is crucial to note that *all statements* made during the process — *whether during the settlement discussions* or the adjudication phase of the hearing — *are evidence* that may be relied on if the Court is required to determine an issue.

Again, the scheduling and rules of the Binding ADR process are set out in local Practice Directions. In Kitchener, Binding JDRs are scheduled for a half-day. The intention is that between 90 minutes and two hours be allocated to the negotiation phase, during which the judge will help the parties identify their interests, consider options, and reach resolution. The Court can — and is meant to — express opinions, *and this does not preclude the Court's later determination of the issues*. In fact, as Justice Madsen noted in her decision:

[10] . . . this is one of the main benefits of the JDR process. Parties have an opportunity to discuss with the judge who is deciding their case, what that judge's approach to the issues will be, and to receive guidance regarding the strengths and weaknesses of their respective positions. Equipped with that information, parties can usually craft their own resolution.

If any issues are left unresolved, the afternoon is then devoted to the decision-making phase. There is no formal procedure mandated, but the idea is that each party should be given a chance to make submissions. The judge may ask questions and elicit further information directly from the parties, and the parties may raise questions for the judge to consider. The process is designed to be very flexible.

If a decision is required on any issues, the idea is that the reasons should be brief and focused, and the intention is that — either through settlement, a decision, or both — the parties will reach a resolution that very day.

At the Binding JDR that was before Justice Madsen in *M.D. v. C.S.*, the parties resolved most of their issues with the assistance of counsel and the Court, and Justice Madsen then decided the remaining minor issues.

The parties — dubbed Monet and Chloe — were the parents of an eight-year-old girl, Alex. They had been separated for six years and, although they had a parenting routine, there was still a lot of conflict.

The parties came close to resolving all of the parenting issues through several Court conferences, but could never quite close the entire deal. They agreed on the larger issues — such as 50/50 parenting — but they could not agree on the actual schedule, transitions and holidays.

The next step was supposed to have been a Trial Management Conference, and then an anticipated five-day trial. But a trial did not make sense here, and likely for that reason, both parties requested the Binding JDR process.

The issues for the Binding JDR — none of which were terribly “legal” — were as follows:

- a. Transition times for the regular 5/5/2/2 schedule (mornings or afternoons);
- b. How exactly to articulate the principle that major decision-making authority over health or education (the parties having already agreed to parallel parenting) does not directly implicate related section 7 expenditures, for which consent is still required;
- c. How to allocate vacation time between them equally, but also in a manner that shares most holidays rather than alternates them, and recognizes that in a 5/5/2/2 schedule, one parent by default has all Mondays (and therefore long-weekend Mondays) while the other has Fridays (when most PD days fall) which are alternated, creating an imbalance;
- d. How to best address Mother’s Day where, as here, there are two mothers;
- e. Travel provisions within Ontario, within Canada, and internationally;
- f. Whether the parties should apply for citizenship and a passport for the child where she is also entitled to EU citizenship, where one parent felt this provides opportunities and the other has an underlying fear about the child’s possible removal from Canada;
- g. Who should keep which of the child’s documents (birth certificate, passport, social insurance number, and health card); should this be alternated, or should each parent have two of them;
- h. Logistics regarding exchanges of the child; and
- i. Whether the parents should be permitted to attend at extra-curricular activities while in the other parent’s care.

At the outset, Justice Madsen made the following clear to the parties and to counsel: if she were ultimately asked to resolve any of the issues, she would be guided by the following principles (in her considerations of best interests):

- Minimizing Alex’s exposure to conflict;

- Simplicity in implementation (which also helps reduce conflict);
- Consistency and routine for Alex;
- A consideration of the existing arrangements (the status quo);
- Consideration of Alex's age and stage of development; and
- Consistency of school attendance.

The parties made good progress in the settlement phase. They both made compromises, and were able to resolve most of the issues. As a result, the settlement phase was longer than originally anticipated.

At the end of the settlement phase, only the following narrow issues were left for the Court to decide:

- (a) The language required to ensure that final decision-making on an issue does not obligate the other in terms of section 7 expenses;
- (b) Exchange locations; and
- (c) Whether both parents could attend the child's extra-curricular activities, whenever scheduled.

Justice Madsen heard from both parties and counsel on these issues. There was no cross-examination, *per se*, but Justice Madsen asked a range of questions, and a full airing was given to the outstanding issues.

The Court's specific determinations on each of the remaining issues in dispute is irrelevant for our purposes. It is the process that is important. What could have been a four or five day trial — and all the preparation that goes along with a four or five day trial — was collapsed into a single day, where most of the issues were resolved on consent, and the remaining issues determined judicially.

People will undoubtedly raise procedural and evidentiary concerns with the Binding JDR process. Remember, however, that this process is not meant for every case. Cases where credibility is a major issue or where there are serious evidentiary or legal issues may not be appropriate. But for cases/issues that are appropriate, this is a process counsel should consider for their clients. Sometimes, clients just need or want resolution. And this appears to be a quick way to get it.

***Butler v. Butler*, 2022 ONSC 4675 – Settlement Privilege and Mediation**

If you know, you know.

This case dealt with the issue of settlement privilege at a *closed* mediation, enforcing settlements, and the application of the recent Supreme Court of Canada decision of *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54.

The father brought a motion to enforce a Memorandum of Understanding ("MOU") that was *dictated* at the conclusion of a mediation held on January 18, 2022. The mediator had dictated the terms in front of the parties and their lawyers at 6:35 pm after an 8½ -hour day of mediating. A portion of the MOU specifically stated that the parties would have an opportunity to canvas any concerns with respect to the MOU, which would need to be received by January 25, 2022.

A Net Family Property calculation was circulated by the mediator at the same time as the MOU.

On January 25, 2022, the mother advised the mediator and the father that she had various comments and questions. The e-mail she sent stated that she was "not in agreement with certain terms." The father was of the view that the MOU was clear and unambiguous, that the matter was settled, and that he was not prepared to re-negotiate the terms.

The mother's specific concern was that while the mediator said that the mother's date of separation figures had been used for the NFP calculation, in fact, the father's preferred date of separation had been mistakenly used and there were also errors in the calculation. The father disagreed -- the parties had mediated for 8½ hours, and he had already made many concessions to arrive at the MOU.

Ultimately, the parties disagreed as to whether the mother's requested changes were to correct errors in the calculation or whether she had just changed her mind and was trying to renege from the agreement.

The father brought a motion to enforce the MOU. He put forward the MOU, a redacted e-mail from the mother's counsel, an e-mail from the father, and e-mails from the mediator. The mother objected to the disclosure of information about the mediation. She claimed that all such communication was privileged.

Again, this was closed mediation. The Mediation agreement had the following two paragraphs regarding disclosure:

- Paragraph 9: All information, documents, notes, correspondence, calculations, memoranda of understanding, drafts or any other communications prepared or provided by any person for the purpose of the mediation shall, **unless otherwise discoverable, be treated as without prejudice settlement discussions**, and shall be inadmissible for any purpose, including the mediator's file.
- Paragraph 11: Closed mediation is a confidential, off-the-record process. Although the mediator cannot guarantee absolute confidentiality, the purpose of a confidentiality rule is to help parties feel comfortable freely exchanging information, ideas, options, offers and concerns. **The parties agree not disclose any communications made during the mediation process to anyone who was not present, including memorandum of**

understanding and emails from or to the mediator or between themselves, unless they all consent. [emphasis added]

Justice Himel (correctly) determined that the Supreme Court's decision in *Association de Mediation* applied. There is an exception to settlement privilege in situations where otherwise privileged documents and communications may be used to prove the fact of and terms of an alleged agreement. Absent very specific language making it clear that this exception to settlement privilege does not apply, a mediation agreement does not remove this exception.

Here, there was nothing in the mediation agreement to suggest that the exception to the settlement privilege did not apply. Paragraph 9 of the Mediation Agreement anticipated that the documents for the mediation could be discoverable as may be required by law.

While the Court found that it could receive evidence of an alleged agreement, it found that the MOU fell short of being enforceable. Under s.55(1) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, a domestic contract is unenforceable unless it is made in writing, signed by the parties and witnessed. The Court stated that a court could enforce a settlement that did not comply with the *Family Law Act* if there was a "meeting of the minds." There must be a consensus between the parties. In order to reach a consensus, the terms of an agreement must be clear enough to give effect to the reasonable expectations of the parties:

[27] While the court can enforce a settlement in the absence of compliance with the *Act*, there must be a meeting of the minds: *Williams v. Williams*, 2022 ONSC 3867. Moreover, in order to relax the strict provisions of section 55(1) of the *Act* there must be consensus between the parties. In order to reach a consensus, the terms of an agreement must be clear enough to give effect to the reasonable expectations of the parties: *Aberback v. Bellin*, 2019 ONSC 3866.

To this we would add the point that, again in Ontario, to avoid the strictures of s.55(1) the parties need be in litigation (as litigation can always be settled): *Geropoulos v. Geropoulos* (1982), R.F.L. (2d) 222 (C.A.). [For more on this, see *Williams v. Williams*, 2022 ONSC 3867 – the next case in this paper.] (It does seem that Butler had previously been in litigation based on the court file number.)

In Butler, the Court did not have to address the Geropoulos issue as Justice Himel was not, in any case, prepared to find that the parties had a requisite meeting of the minds to enforce the terms of the MOU for the following reasons:

- A. The late hour in the day when the mediator dictated the terms of the MOU, following a long day of negotiation.
- B. The lack of opportunity on January 18, 2022, for each party to review the written MOU privately with their lawyers.
- C. The statement in the MOU that both parties would have a chance to canvas concerns.

D. Neither party adduced evidence on the record that unequivocally showed that they agreed or disagreed with or wanted to vary any term of the MOU itself after hearing the mediator's dictation on January 18, 2022.

E. The disagreement between the parties as to whether the wife's concerns were a result of errors or the wife changing her mind.

F. The e-mail sent by the wife on January 25, 2022, clearly indicating that she did not agree to the terms contained in the MOU.

The lesson here? If you're in mediation, and you want a binding deal, sign Minutes of Settlement that make the binding nature of the deal clear, rather than a Memorandum of Understanding that can leave room for doubt. Or, if the mediator is going to dictate terms (as often happens), one of those terms must clarify that the parties agree that they have a binding agreement. Anything less is just a trip to court.

Williams v. Williams, 2022 ONSC 3867 – Binding Settlements in Family Law

The Rule we might
Want is not always
the Rule we've Got!

Williams is yet another decision about whether the parties to a family law case entered into a binding settlement.

On September 3, 2021 -- *before* litigation had started -- the wife served a comprehensive Offer to Settle through her lawyer to resolve all issues, including the buyout of the wife's interest in the matrimonial home.

Although the husband was represented by counsel at the time, on September 13, 2021, he personally emailed the wife's lawyer that he accepted the Offer. (About an hour later, the husband's lawyer advised the wife's lawyer that she was no longer acting for the husband.)

The next day (September 14, 2021), a new lawyer contacted the wife's lawyer on behalf of the husband and advised that he was in the process of being retained. And, the following week, the husband's new lawyer reiterated that he was reviewing the settlement with the husband as quickly as possible, and requested a copy of the draft Separation Agreement incorporating the agreement that the wife's lawyer had referred to in his prior correspondence.

Instead of providing the draft Separation Agreement, however, on September 28, 2021 (i.e. only 2 weeks after the husband accepted the offer), the *wife's* lawyer advised the husband's new lawyer that the wife was withdrawing all previous offers, and would be starting an Application because the husband was "delaying beyond reason".

The matter proceeded to litigation, and the husband ultimately brought a motion to enforce the terms of the Offer that he had accepted on September 13, 2021. The wife responded that the correspondence between their lawyers after the Offer was accepted showed that the husband "had no intention of proceeding with the Agreement after retaining [new counsel] to represent him." In other words, the wife argued that the husband had repudiated the agreement.

Justice Mandhane started by reviewing the law of anticipatory repudiation – a very important concept for family lawyers. Anticipatory repudiation occurs where: (1) one of the parties expressly or implicitly informs the other party that they do not intend to comply with their obligations under the contract; and (2) the other party clearly and unambiguously elects to terminate the contract. As the Court of Appeal recently explained in *Glen Schnarr & Associates Inc. v. Vector (Georgetown) Limited*, 2019 ONCA 1012:

[29] **Anticipatory repudiation occurs when a contracting party, “by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due”**: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 585. ...

[30] However, **an anticipatory repudiation of a contract does not, in itself, terminate or discharge a contract; it depends on the election made by the non-repudiating party**: *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, at p. 440; *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, at para. 42. As Cronk J.A. stated in the latter decision at para. 45:

It appears to be settled law in Canada that where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, **the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time.** Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: *McCamus*, at pp. 659-61. [**Emphasis added.**]

Furthermore, when determining whether there has been anticipatory repudiation (sometimes called “anticipatory breach of contract”), the test is “an objective one”, and “the court is to ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by it.” (*Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at para. 42).

After carefully reviewing the correspondence between the wife's lawyer and the husband's new lawyer from September 13, 2021 (when the Offer was accepted) to September 28, 2021 (when the wife purported to withdraw all Offers), Justice Mandhane concluded that the husband had *not* repudiated the agreement, and had *not* elected to accept the wife's attempt to repudiate it. Accordingly, the wife could not rely on anticipatory repudiation as a basis for resiling from the agreement.

But that, of course, was not the end of the matter (at least in Ontario), because s. 55(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, provides that a domestic contract (i.e. a family law agreement in Ontario) is unenforceable unless it is in writing, signed by the parties, and witnessed. And in this case, it does not appear that the husband's email accepting the wife's Offer met the requirements of s. 55(1).

Despite the wording of s. 55(1) of the *Family Law Act*, the Ontario Court of Appeal determined in *Geropoulos v. Geropoulos* (1982), R.F.L. (2d) 222 (C.A.) that courts in Ontario have discretion to (and often do) enforce family law agreements that do not comply with s. 55(1) in certain circumstances. As Justice LaForme (as he then was) explained in *Harris v. Harris*, 1996 CarswellOnt 2794:

[10] The authorities following *Geropoulos* have interpreted that judgment as establishing the principles of, (a) courts encouraging settlement and, (b) that it is within the discretion of the court as to whether such a settlement is enforceable. In other words, **whether the parties will be bound by the terms of an agreement that does not conform to subsection 55(1) of the *Family Law Act* is a matter for the courts to determine and decide on a case by case basis.** While I have no doubt that there are many and varied factors that a court will consider in deciding whether a settlement is enforceable, certain minimum factors that a court will have to consider will include:

1. Were either of the parties represented by legal counsel or the beneficiary of legal advice?

2. Was either party otherwise disadvantaged at any time during the course of the negotiations?
3. Can the written material the parties prepared, or the oral representations, that are being relied upon support a *prima facie* conclusion that either constitutes a settlement agreement?
4. Does the evidence demonstrate that the parties intended that the written or oral representations or negotiations are to be binding on them?
5. Was there an intention that some final act or determination be made before the settlement was to be final and binding?
6. Does the enforcement or non-enforcement of the negotiated resolution result in an injustice to either of the parties?
7. Does enforcement encourage negotiated settlement and discourage litigation and does it support the overall purpose and intent of the principles of the *Family Law Act*? [emphasis added]

In this case, Justice Mandhane was satisfied that signing a full written agreement was *not* a condition precedent to a binding settlement, and that there was no good reason in this case not to hold the parties to the terms of their agreement. As a result, she made an Order enforcing the terms of the settlement.

While we generally agree with the outcome here (people should be held to their agreement attained with the benefit of independent legal advice and full disclosure), we do have one rather important caveat: while we might agree this *should be* the law – it does not appear to presently actually *be* the law. *Geropoulos*, and the vast majority of the cases that have followed it, dealt with situations where, unlike the settlement in *Williams*, the settlement in issue was reached *after* litigation was already underway. It was, in fact, a very important consideration for the Court of Appeal that, *once started*, counsel with apparent and ostensible authority can settle *litigation*. As the Court of Appeal explained in *Geropoulos*:

[18] In my opinion, **the section plainly is not aimed at or intended to apply to authorized settlement agreements like the present, made with legal advice during the pendency of court proceedings which, to be effective, require the intervention of the court.** Such agreements derive their effect from an act of the court; their authenticity is assured by the court's supervision and control over them; and ample protection is afforded the parties to these agreements, wholly independent of the section. The court's jurisdiction to enforce settlements or refuse to do so, notwithstanding any agreement between solicitors or counsel, is well established; whether they should be enforced or not, in the final analysis, is a matter for the discretion of the court and, in litigation under the *Family Law Reform Act*, a matter that would be subject to the court's overriding jurisdiction with respect to domestic contracts: *Scherer v. Paletta*, supra; 3 Hals. (4th) 650-51, paras. 1182-83; and ss. 18(4) and 55 of the Act. [emphasis added]

The fact that litigation had started was a critical factor for the Court of Appeal in *Geropoulos*.

Although this issue was not discussed in *Williams*, the caselaw is still unclear about whether the *Geropoulos* exception to s. 55(1) of the *Family Law Act* also applies to settlements that predate litigation. But the weight of authority suggests not. While there are several lower court decisions that have purported to extend “the *Geropoulos* Rules” to apply to pre-litigation purported settlements, the leading decision being Justice Perell’s decision in *Pastoor v. Pastoor*, 2007 CarswellOnt 4661 (S.C.J.) -- it is unclear whether these decisions are correct in law.

When *Pastoor* was first released in 2007, Philip Epstein expressed doubts about its correctness (see the August 28, 2007 edition of *TWFL*). And, more recently, in *Lindsay v. Lindsay*, 2021 ONSC 4674 (S.C.J.), aff’d 2021 ONSC 7085 (Div. Ct.), Justice Finlayson noted that although some cases have followed *Pastoor*, the issue has still not been considered by an appellate court, and it remains unclear whether it is, in fact, good law in Ontario.

Furthermore, given the proliferation of unrepresented litigants, any consideration (or re-consideration) of the *Geropoulos* Rule must also consider whether the Rule also applies to pre-litigation settlements where one or both parties are unrepresented.

Perhaps coming soon to an appellate court near you.

***Anderson v. Anderson* (2021), 61 R.F.L. (8th) 265 (Sask. C.A.), leave to appeal granted 2022 CarswellSask 159 (S.C.C.) – Property and Agreements that do not meet formal requirements**

Miglin v. Miglin

+

Rick v. Brandsema

=

*Anderson v.
Anderson?*

On April 7, 2022, the Supreme Court of Canada granted leave to appeal in *Anderson v. Anderson*. On December 5, 2022, oral arguments were heard and we now await the decision. *Anderson* considers how to determine the weight, if any, that should be given to family law property agreements that do not meet the formal requirements of the relevant matrimonial property legislation.

The husband and wife in *Anderson* signed an agreement about how they would divide their assets. Neither party had independent legal advice before the agreement was signed. The agreement also did not comply with the formal requirements for a binding interspousal agreement under s. 38 of Saskatchewan’s *Family Property Act*, S.S. 1997, c. F-6.3 (the “*FPA*”), which provides as follows:

38(1) The terms of an interspousal contract mentioned in subsection (4) are, subject to section 24, binding between spouses, whether or not there is valuable consideration for the contract, where the spouses have entered into an interspousal contract:

- (a) that deals with the possession, status, ownership, disposition or distribution of family property, including future family property;
- (b) that is in writing and signed by each spouse in the presence of a witness; and
- (c) **in which each spouse has acknowledged, in writing, apart from the other spouse, that he or she:**
 - (i) **is aware of the nature and the effect of the contract;**
 - (ii) **is aware of the possible future claims to property he or she may have pursuant to this Act; and**
 - (iii) **intends to give up those claims to the extent necessary to give effect to the contract.**

38(2) A spouse shall make the acknowledgment mentioned in subsection (1) before a lawyer other than the lawyer:

- (a) **acting in the matter for the other spouse; or**
- (b) **before whom the acknowledgment is made by the other spouse.** [emphasis added]

While there was no dispute that the parties’ agreement did *not* comply with s. 38 of the *FPA*, s. 40 of the *FPA* still allowed the Court to take it account:

40. The court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable.

The wife wanted the Court to enforce the parties’ agreement, while the husband wanted the Court

to disregard it entirely.

In order to decide the case, the Court of Appeal had to decide what test to apply when considering s. 40 of the *FPA*. Drawing heavily from the Supreme Court of Canada’s decisions in *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.) (which dealt with assessing the weight that should be given to an agreement about spousal support) and *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.) (which curiously extended the *Miglin* approach to property issues), the Court of Appeal established the following 4-step framework for future courts to consider:

[58] . . . (a) **Step one** — a court must ask itself **whether there is an agreement in the contractual sense of *consensus ad idem***. If the existence of an agreement is itself in question, the party seeking to enforce its terms must prima facie establish its existence. Where the existence of the agreement is challenged, a court should be particularly attentive to the lines of inquiry outlined in *Tether* [*v. Tether* (2008), 56 R.F.L. (6th) 250 (Sask. C.A.)] (at para 62):

- (i) Was there a meeting of the minds that would be “manifest to the reasonable observer”?
- (ii) Did the parties achieve consensus on the “essential terms of the agreement”?
- (iii) Was the agreement intended to be “conditional upon, and subject to”, some other condition being met?

(b) **Step two** — **if an agreement is prima facie established, the onus shifts to the party asserting it to be invalid, unenforceable or that it should be given little weight**. If challenged, a court must look to the circumstances surrounding negotiation and execution to determine whether there is any reason to discount the agreement. While the list of factors used to assess these matters is not closed or exhaustive, a court should pay particular attention to the following:

- (i) evidence of the conditions of the parties, i.e., whether there is any indication of “oppression, pressure or other vulnerabilities” in the circumstances at hand that would warrant a finding that the negotiation process was fundamentally flawed (*Miglin* at para 81); and
- (ii) evidence as to the “conditions under which the negotiations were held”, e.g., the duration of the negotiations, whether professional assistance was provided, etc.

(c) **Step three** — **if no issues arise with respect to the negotiation or execution of the agreement, a court must go on to examine the substance of the agreement to determine if its terms are fair and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA***. In keeping with the *dicta* in *Miglin*, “Only a significant departure from the general objectives of the Act will warrant the court’s intervention on the basis that there is not significant compliance with the Act” (at para 84).

(d) **Step four** — **where the agreement is found to be in substantial compliance with the general objectives of the *FPA* at the time it was prepared, great weight should be given to it, unless a new or a changed circumstance has arisen such that its terms “no longer reflect the parties’ intentions at the time of execution” or are no longer in substantial compliance with the general objectives of the *FPA*** (at para 88). In this respect, the test is

not strict foreseeability; rather, a court will examine “the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application” (at para 89). **If the change in circumstance can be said to have been within the contemplation of the parties at the time of execution, then the agreement may be given great weight.** [emphasis added]

After considering the evidence, the Court of Appeal concluded that even though the agreement did not meet the requirements of s. 38 of the *FPA*, it should still govern the parties’ property rights because it “was fairly negotiated and substantially compliant with the *FPA* at the time of its execution”, and the subsequent decline in the value of one of the assets “was not completely unanticipated or unforeseeable[.]”

The husband applied for leave to appeal to the Supreme Court of Canada and, as previously noted, leave was granted on April 7, 2022. The Court’s eventual decision will be of significant interest to family law professionals across Canada, as most provincial family law property statutes have similar provisions to s. 40 of the *FPA* — see, for example: s. 8(g) of Alberta’s *Family Property Act*, R.S.A. 2000, c F-4.7; s. 5(6)(g) of Ontario’s *Family Law Act*, R.S.O. 1990 c. F.3; and s. 20(2) of New Brunswick’s *Marital Property Act*, R.S.N.B. 2012, c. 107.

S.H. v. D.K. 2022 ONSC 1203 (Div. Ct.) – Interim Variation of a Final Parenting Order

Would a variation by
any other name not
smell as sweet?

-William Shakespeare,
LL.B.

In this case, a unanimous Divisional Court panel addressed the test for an interim variation of a final parenting order.

The mother and father were married in 2006 and separated in 2013. There was one child, a daughter, “O”. In 2014, the parties entered into a Separation Agreement that was converted into a final order. Of particular relevance was a paragraph in the final order that read “The parties may review [O.’s] residence schedule on or after April 1, 2019

without having to prove a material change in circumstances.”

The schedule that was in place for seven years (including the period before the final order) saw O having time with her father on Tuesdays and on alternating weekends from Friday to Monday morning. There was one small change in 2017 when O began spending overnight time with her father on Tuesdays.

On January 30, 2020, the mother brought an application to obtain updated financial disclosure from the father, to review his child support obligations in light of his increased income, and to make some minor adjustments to the schedule relating to school breaks and religious holidays.

The father served his answer on March 6, 2020 (as amended on August 19, 2020) wherein he made a claim for joint decision-making authority and an order “varying” the final order such that the parties would have equal and shared parenting of O. The fact that the father used the term “vary” was of particular importance in this case.

The father brought a motion on April 27, 2021, seeking a temporary order “varying” the final order and increasing the father’s parenting with time O to an equal and shared scheduled by “varying” two paragraphs in the final order. The motion was heard on June 10, 2021 and was characterized as a “motion to vary a final consent order on an interim basis” and where the father sought a “temporary variation of a final parenting order.”

O was 12 at the time of the motion.

Releasing his reasons on June 25, 2021, the motion judge found in favour of the father granting him an interim equal parenting schedule with O. He also awarded costs to the father in the amount of \$25,000.00.

The mother sought leave to appeal to the Divisional Court, which was granted on October 8, 2021. The Divisional Court panel also stayed the motion judge’s decision pending the appeal and ordered the appeal expedited.

The Divisional Court then set out the proper test for an interim variation of a final order, which has vexed the family law bar (at least in Ontario) for quite some time.

Section 16.1(1) of the *Divorce Act*, states that the court may, upon the application of either or both spouses, make a parenting order with respect of a child of the marriage. Section 16.1(2) allows a judge to make an interim parenting order pending the determination of an application made under 16.1(1).

Section 17(1) of the *Divorce Act*, allows a judge to vary, rescind or suspend a parenting order (or a support order for that matter). However, section 17(5) requires that an order under section 17(1) can only be made if the court first satisfies itself that there has been a change in circumstances. In the case of a parenting order, there must be a change in the circumstances of the child since the making of the order sought to be varied.

While there is no explicit power under section 17 permitting judges to make interim variation orders, Courts have interpreted the *Divorce Act* to permit them to do so. The question, however, is: what is the appropriate test to grant a temporary (that is, interim) variation of a parenting order?

The Divisional Court took great pains to set out the fundamental difference between a “review” and a “variation.” A review has been interpreted to allow for parties to alter an order or agreement *without* having to demonstrate a material change in circumstances. It is a fundamentally different beast than a variation. The Court made it clear that if a party is seeking to bring an application for review – they ought to label it exactly that.

In this case, the Divisional Court determined that while the father’s answer was, ultimately, for a review of parenting, the motion itself was for an interim *variation* and as such it was subject to the material change requirement under section 17 of the *Divorce Act*.

The Divisional Court set out that the test for an interim variation was a stringent one. The onus is on the party seeking a temporary variation to establish that in the current circumstances the existing order results in an untenable or intolerable situation, jeopardizing the child’s physical and/or emotional well-being, and that the new proposed arrangement is so necessary and beneficial that it would be unfair *to the child* to delay implementation. See *F. V. v. A.K.*, 2020 ONSC 3726 at para. 52, *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.) at para. 15 and *Crawford v. Dixon* (2001), 14 R.F.L. (5th) 267 (Ont. S.C.) at para 14.

While the motion judge cited the correct cases, and the correct test, he set out a caveat that led to an error in law. Specifically, the motion judge stated that the stringent test should not be read in a manner that places too much emphasis on maintaining the status quo.

In his reasons, the motion judge made a series of findings about the child’s best interests *before* undertaking any analysis as to whether the father had met the stringent test for a variation of a final order. The motion judge then engaged in an analysis of the facts of which exercise the Divisional Court was highly critical – so much so, they found it was in O’s best interests to alter the final order. The motion judge weighed two contradictory Voice of the Child reports, one from December 2020 (wherein O reported that she wanted an equal schedule) and the other from March 2021 (wherein O reported that she wanted to maintain the current schedule). In weighing the evidence, the motion judge determined that the mother had influenced O into changing her mind. This was despite the significant evidence (including bullying text messages sent to O the day after the second Voice of the Child Report) that the father was placing the child in a loyalty bind.

The motion judge determined that it would be in O’s best interests to have an equal time-sharing arrangement. In doing so the motion judge determined that O was experiencing stress and reducing the number of transitions would reduce that stress. In addition, the motion judge found that there

was evidence that O felt pulled in both directions and the equal schedule better reflected O's true preference.

After making that finding the motion judge stated, "I could end the analysis there, but I am obliged to demonstrate why the change from the status quo is compelling." The motion judge cited the stress that O was experiencing from the litigation and O's "true wishes" as compelling reasons to put the equal time-sharing arrangement in place immediately.

This was the error of law according to the Divisional Court: the motion judge reached his conclusion and then reasoned backwards, labelling as compelling the considerations that informed his determination that a change was in the best interest of the child.

The Divisional Court determined that there was nothing in this case that met the stringent test. This was not a case where there was evidence of "exceptional" circumstances that would justify the interim variation of a final order. While the motion judge attempted to avoid putting too much emphasis on the status quo, he conflated that with the requirement that there be compelling reasons to make an order on an interim variation order.

E.K. v. R.K., 2022 NLCA 62 – Varying an Interim Parenting Order

Sure it's a change...But is it *compelling*???

This was E.K.'s appeal of a motion to vary an interim parenting order, giving the Court of Appeal for Newfoundland and Labrador the chance to comment on the appropriate legal test to do so.

EK and RK were the parents of a 5-year-old girl. A court case started.

While EK applied to the Family Division for a decision on parenting, during a Case Management hearing, the parties agreed to an Interim Consent Order regarding parenting. Pursuant to the Consent Order, their daughter would primarily reside RK (the father), and EK (the mother) would see the child during set time periods, which time was to be supervised.

EK's time was to be supervised -- not because of any parenting concerns regarding EK (in fact, EK had been the child's primary caregiver during the relationship) but because she was in a relationship with a man who had been convicted of killing a prior intimate partner. This person had also threatened EK, suggesting he would kill her if she was ever unfaithful. A social worker from the Department of Children, Seniors and Social Development ("CSSD") was of the view that it was not safe for EK to be the primary parent or to have unsupervised access while part of that relationship.

Six months after consenting to the Order, EK sought to vary it.

In Newfoundland Rule F19.02 of the *Rules of the Supreme Court, 1986, Part IV, Supreme Court Family Rules*, provide that leave of the court is required before a person can look to vary an interim order. Therefore, EK had to ask the Family Division for leave to vary the interim Order. The Supreme Court Family Rules further provide that a party cannot even ask the Court to consider varying an interim order without first showing the presence of certain factors:

F19.02 (1) A party must request a judge's permission to proceed with an application to vary an existing interim order.

(2) To request a judge's permission to proceed with an application to vary an interim order, a party must file an Application to Vary an Interim Order in Form F19.02A.

(3) A judge may grant permission to proceed with an application to vary an interim order where

(a) there has been a **compelling change of circumstances** since the date the interim order was made;

(b) there is an **urgent or immediate need** to hear the application as irreparable harm will likely occur before the matter can proceed to a final hearing; and

(c) either

(i) the party has taken steps to advance the matter to a hearing or otherwise resolve the issues in dispute, or

(ii) there is a valid reason why the matter has not advanced to a hearing or final resolution. [**emphasis added**]

While some cases suggest there is no jurisdiction under the *Divorce Act*, RSC 1985, c. 3 (2d. Supp.), to vary an interim order [see, for example, *Brooks v. Brooks* (1998), 39 R.F.L. (4th) 187 (C.A.); *Gebert v. Wilson*, 2015 SKCA 139], most provinces accept the "compelling

circumstances” or “compelling change” standard to vary an interim order: *Shwaykosky v. Pattison*, 2015 ABCA 337; *Chambers v. Nyhus*, 2022 ABCA 287; *P.(D.) v. B.(R.)*, 2007 CarswellPEI 69 (C.A.); *Coe v. Tope*, 2014 ONSC 4002; *Miranda v. Miranda*, 2013 ONSC 4704; *McGillis v. McGillis* (1996) 113 Man.R. (2d) 73; *D.G. v. H.F.*, 2006 NBCA 36.

This certainly makes sense. Once a schedule is in place, it should generally be in place until trial, unless a sufficiently compelling change makes the current schedule unsuitable. Temporary orders are intended to be...well...*temporary*, meant to only last for a short period of time. To vary a temporary order is to substitute new temporary arrangements for arrangements that are already meant to be temporary. However, this rationale assumes parties can get to trial in a reasonable time. If that is not possible, then the rationale behind not varying a temporary order starts to wither.

Here, the mother relied on two changes in circumstances: She had changed jobs and both parents now lived in St. John’s. Supervision was no longer necessary because she had demonstrated over the preceding six months that she could be trusted not to see her daughter with her partner present.

A judge of the Family Division denied EK leave to ask to vary the Consent Order, finding that neither EK’s change in employment nor RK’s change in residence amounted to a “compelling change of circumstances.” The judge also decided that EK had not shown any urgent or immediate need to hear vary the Consent Order and that she had not taken any steps to advance the matter through the court.

EK suggested that the trial judge erred in refusing leave and in applying the Rule F19.02 criteria.

The Court of Appeal noted that the term “compelling change in circumstances”, first appearing in the Rules in 2017, had yet to be judicially defined. Furthermore, whether an interim order affecting children is made under provincial family legislation or the *Divorce Act*, a party seeking to vary the order is required to demonstrate that there has been a “material change in circumstances” – a change which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order: *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27.

What is the interplay between “material change in circumstances” and “compelling change in circumstances”?

Of course, “compelling change” must mean something different than “material change.” And if a family court judge is satisfied that under Rule F19.02(3) that there has been a “compelling change in circumstances,” then the result will be a variation application at which the applicant will have to show a material change in circumstances (having already established a compelling change in circumstances).

The difference between these two standards cannot be defined in purely relative terms, that is that one -- “compelling” -- is higher than the other -- “material” -- or once leave was granted to bring a variation application based on a “compelling” change, that would automatically prove the material change needed on a variation application. Therefore, determined the Court of Appeal, the best approach to interpret a rule of procedure is to consider the underlying functional considerations of the terms.

As determined by the Court of Appeal:

[19] In the context of a request for permission under rule F19.02(3), a compelling change of circumstances should be one that is powerful enough to demand the attention of the parties and judge. If it is, then the application to vary can proceed, and the judge can decide whether the change is a material one that justifies variation in the Interim Order.

To be candid, this seems a bit tortured. This means that a change could be found to be so compelling that leave is granted to bring a variation application – where it might then not pass the material change threshold? Because the change was either not foreseen or could not have been reasonably contemplated? It’s hard to think of a “compelling change in circumstances” that would not also be a “material change in circumstances.”

In any case, here the Family Division judge decided that there was no compelling change of circumstance; no urgent or immediate need to hear the application; and that EK had not taken steps to advance the matter to a hearing or otherwise resolve the dispute. EK argued that each of those decisions was made in error.

At the Court of Appeal, EK conceded that neither her job change nor the residence change, alone, would constitute a compelling change. However, argued EK, the change in her job and in RK’s residence, together with her compliance with the supervisory terms of the Interim Order for a period of six months, cumulatively constituted a compelling change of circumstances that justified proceeding with an application to vary the terms of the Order.

The Court of Appeal did not agree that compliance with the current order amounted to a compelling change. The requirement for supervision arose solely because EK was in a relationship with a person of some concern. And the CSSD social worker testified that CSSD would not support any parenting arrangement that involved EK having unsupervised access because of their continuing relationship. The mere fact of EK’s relationship with her current partner who presented a threat to her and her daughter led to the supervision requirement, and that circumstance had not changed. And however one defines “compelling” or “material” – something that did not change was neither “compelling” nor “material.”

Therefore, the Court of Appeal did not accept that it was an error for the Family Division judge to have rejected EK’s position that her record of compliance, taken by itself or in combination with her job change and R.K.’s address change, was compelling enough to require a variation hearing.

Absent a compelling change, leave to vary an interim order had to be denied. And it was. Properly so.

***Pham v. Ho*, 2022 ONSC 1625 – Interim Variation of a Support Order**

Oh the times, they are-a
-chaaangin'...(as long
as the circumstanes are
compeeeelling)

-Bob Dylan

In July 2009, the parties separated after an 11-year marriage. The parties resolved all of their parenting and child support (\$1,115/month) issues by way of Consent Order on June 4, 2012 (the “Consent Order”). The Paisley Order mandated the respondent to pay child support in the amount of \$1,115.00 per month.

There were two children of the marriage. A was 21 years old and in her last year of post-secondary studies. T was 17 years old and in Grade 12, planning to attend university in September 2022.

The Consent Order did not deal with the sharing of post-secondary expenses (in fairness, the children would have been 11 and 7 years old when the Consent Order was signed).

The Mother argued that the Father had not paid proper child support, including failing to pay his proportional share of post-secondary expenses. To address this argued failing, the Mother started a Variation Application in late 2020. Within that Variation Application the Mother brought a motion for an interim order that the Father:

- (a) pay increased child support commencing on January 1, 2022;
- (b) contribute 58% towards the costs of the children’s post-secondary expenses (based on her view of the parties’ incomes) in line with the Applicant’s view of the parties’ 2020 incomes); and
- (c) pay child support arrears from 2013 to the present, in the total amount of \$43,744.45.

Therefore, the Mother’s motion was a motion to change a final order on an interim basis.

Historically, a motion to vary a final order on an interim basis was met with a variety of responses:

1. “No!” -- the *Divorce Act* does not provide jurisdiction to make an interim variation of a final order: *Bradley v. Callahan*, 2021 BCCA 452; *Y.(H.) v. Y.(D.)*, 1998 CarswellPEI 104 (C.A.); clear and easy to remember – but maybe not so fair all the time.
2. “No! Unless it’s really urgent”): *Hilborn v. Hilborn*, 2007 CarswellOnt 5904; a little less clear; a little more flexible/fair.
3. “No! Unless it would be “incongruous or absurd” to not make an interim variation”): *Crawford v. Dixon* (2001), 14 R.F.L. (5th) 267; *Fredette v. Fredette*, [2005] O.J. No. 4938; even less clear; even more flexibility.
4. “OK...but under the *Family Law Act*.” *Clark v. Vanderhoeven*, 2011 CarswellOnt 2577; interesting and perhaps a little unconstitutional;
5. “Yes...if you can show a *prima facie* case of material change; hardship; and clean hands”: *Hayes v. Hayes*, 2010 CarswellOnt 4796, 2010 ONSC 3650; clean hands?
6. “Yes...but we must proceed cautiously with an interim variation when there are material issues in dispute that require a trial: *Connell v. Connell*, [2006] P.E.I.J. No. 12 (C.A.); so really a “tentative” yes;

7. “Yes...if you can show that there is, on the balance of probabilities, a clear and compelling need to make a change: *Huliyappa v. Menon*, 2012 CarswellOnt 12475 (S.C.J.); *J.B-S v. M.M.S.*, 2021 NBQB 96; another “tentative” yes.

For the benefit of all humanity, the Ontario Division Court recently cleared up some of the confusion in *S.H. v. D.K.*, 2022 ONSC 1203 – but with respect to the interim variation of parenting orders.

In *S.H.*, the Divisional Court confirmed that there is “a very limited discretion” to vary a final order on an interim basis – and the test for granting an interim variation of a final order is “stringent”, requiring any supporting evidentiary basis to be “compelling.”

The question before Justice Diamond was – is a motion for an interim variation to a support order different?

In *S.H.*, Justice Dambrot for the Divisional Court offered the following helpful comments (again, referring to interim variation of parenting orders):

...While the court has the authority to grant a temporary variation of a final order in the appropriate circumstances, the evidentiary basis to grant such a temporary variation must be compelling. The onus is on the party seeking a temporary variation to establish that in the current circumstances the existing order results in an untenable or intolerable situation...

The imposition of a stringent test for the granting of a temporary variation of a final parenting order of a court is sound in principle, since the purpose of an interim or temporary order is simply to provide a reasonably acceptable solution to a difficult problem until trial, when a full investigation will be made...

...

To all of this, the appellant added, in her factum, that this stringent test (i) ensures that important and difficult decisions relating to a child’s best interests are not, save for exceptional circumstances, made on the basis of incomplete information, (ii) limits the amount of judicial resources that are allocated to cases which have already been resolved by way of a court order, and (iii) ensures that a child’s routine and schedule are not turned upside down on a motion only to be potentially changed again at a final hearing. I adopt these considerations as well as those identified in the cases I have referred to.

The motion judge accepted the statement of the law in *F.K. v. A.K.*, with one caveat. While he agreed that there must be compelling evidence to support changing a final order on an interim basis, he cautioned that the stringent test in *F.K. v. A.K.* should not be read in a manner that places too much emphasis on maintaining the status quo.

I have already said that the imposition of a stringent test for the granting of a temporary variation of a final parenting order of a court is sound in principle and consistent with authority. Before embarking on an inquiry into the best interests of the child, the court

must first be satisfied that circumstances exist of so compelling and exceptional a nature that they require an immediate change. I would only caution that there may be exceptional circumstances that justify a temporary variation of a final order other than those described in *F.K. v. A.K.* It will be recalled that Pazaratz J. insisted that a temporary variation of a final parenting order could only be made where the child's physical and/or emotional well-being is in jeopardy and the proposed new arrangement is so necessary and beneficial that it would be unfair to the child to delay implementation. That is certainly an indication of how exceptional the circumstances must be to make an interim variation of a final parenting order, but I would not foreclose the possibility that other, equally compelling circumstances might meet the test."

Justice Diamond saw no compelling reason to avoid using the same approach when dealing with an interim request to vary existing final support orders. He found that, to vary a support order on an interim basis, the Mother had to show the existence of "compelling and exceptional circumstances." While Justice Diamond is likely correct, and while it is certainly easier that the tests are the same, we do note significantly more cause for concern when varying a parenting order on an interim basis. The need for "compelling and exceptional circumstances" is certainly justified when dealing with changes for a child. But need the test be equally stringent for a support case? Is a 20% decrease in a payor's income sufficiently "compelling and exceptional" to justify an immediate interim support reduction?

In this case, Justice Diamond found no such compelling and exceptional circumstances to justify an interim variation. And he was right.

***Barendregt v. Grebliunas*, 2022 SCC 22 – Relocation and Fresh Evidence**

Some evidence just don't smell so fresh...

On May 20, 2022, the Supreme Court of Canada released their long-awaited reasons in *Barendregt v. Grebliunas* (the appeal was granted in December 2021 with reasons to follow).

Barendregt was about the mother's request to let the children move with her to the Bulkley Valley, which is about 1,100 km away from the family's home in Kelowna.

The trial judge granted the mother's request to relocate. However, the B.C. Court of Appeal reversed his decision, in large part because of new (as opposed to "fresh") evidence (i.e. "evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial") that showed one of the trial judge's major assumptions about a key factual issue was no longer correct.

In admitting the new evidence, the B.C. Court of Appeal concluded (as had several appellate courts before it) that the test for allowing new evidence on appeal is less stringent than the test for admitting fresh evidence (i.e. "evidence that existed at the time of the trial but was not adduced at that time") set out in *R. v. Palmer*, 1979 CarswellBC 533 (S.C.C.), which requires the appellate court to be satisfied that the proposed fresh evidence could not have been adduced at trial through the exercise of due diligence; is reasonably credible; bears on a potentially decisive issue; and if believed, would likely have affected the result at trial.

The majority of the Supreme Court of Canada disagreed — strongly disagreed — with the B.C. Court of Appeal on this issue, and concluded that the test for *new* evidence is, in fact, exactly the same as the test for *fresh* evidence. And, since the father could have adduced the evidence in question at trial with the exercise of due diligence, he could not adduce it now for the first time on appeal:

[3] In my view, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below, **regardless of whether the evidence relates to facts that occurred before or after trial**. Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.

[4] In cases where the best interests of the child are the primary concern, the *Palmer* test is sufficiently flexible to recognize that it may be in the interests of justice for a court to have more context before rendering decisions that could profoundly alter the course of a child's life. At the same time, finality and order are critically important in family proceedings, and factual developments that occur subsequent to trial are usually better addressed through variation procedures.

[5] In this case, the Court of Appeal for British Columbia held that *Palmer* did not strictly govern the admission of new evidence on appeal. Instead, it applied a different test and admitted the evidence. It erred in doing so.

[6] In my view, the evidence did not satisfy the *Palmer* criteria. The respondent sought to overturn an unfavourable trial outcome by adducing evidence on appeal that could have been available at first instance, had he acted with due diligence. Effectively, he was allowed to remedy the deficiencies in his trial evidence on appeal — with the benefit, and guidance, of the trial reasons. This gave rise to considerable unfairness. And in any event, evidence in family law appeals that is tendered for the purpose of showing a material change of circumstances is more appropriately raised at a variation hearing. *Palmer* should not be used to circumvent a variation scheme that Parliament specifically designed to address such developments. Admission of this evidence on appeal was not in the interests of justice. [emphasis added]

Having found that the B.C. Court of Appeal erred in admitting the new evidence, the Supreme Court then had to decide whether to allow the mother to move the children to the Bulkley Valley. This is where things get a bit strange.

The new relocation provisions of the *Divorce Act* did *not* apply in this case because the trial took place *before* they came into force. Nevertheless, the majority took the opportunity to discuss these new provisions at length, without the benefit of a legislative or factual record — or even significant argument. In doing so, the Court expressed the view that the *Divorce Act* amendments essentially codified the Court’s earlier decision in *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.):

[148] More than two decades ago, this Court set out a framework for relocation applications in *Gordon*: paras. 49-50. It applies to relocation issues that arise at first instance and in the context of applications to vary existing parenting orders.

[149] **Since then, our jurisprudence has refined the *Gordon* framework, and, subject to two notable exceptions, the *Divorce Act* has largely codified it. Where the *Divorce Act* departs from *Gordon*, the changes reflect the collective judicial experience of applying the *Gordon* factors.** While *Gordon* rejected a legal presumption in favour of either party, the *Divorce Act* now contains a burden of proof where there is a pre-existing parenting order, award or agreement: s. 16.93. And although *Gordon* restricted whether courts could consider a moving party’s reasons for relocating, this is now an express consideration in the best-interests-of-the-child analysis: s. 16.92(1)(a).

[150] The new *Divorce Act* amendments also respond to issues identified in the case law over the past few decades, which did not arise in *Gordon*. Section 16.92(2) now provides that trial judges shall not consider a parent’s testimony that they would move with or without the child. Furthermore, ss. 16(3)(j) and 16(4) of the *Divorce Act* now instruct courts to consider any form of family violence and its impact on the perpetrator’s ability to care for the child. [emphasis added]

We are not sure we agree that the new mobility/relocation provisions of the *Divorce Act* actually codify *Gordon* “as refined” by 20 years of subsequent jurisprudence.

We also find ourselves tending to agree with Justice Côté, who in a lone dissent, indicated that she would have avoided addressing the new relocation provisions of the *Divorce Act* as they were not actually engaged on the facts of this case:

[192] I respectfully part company with my colleague’s analysis on two points. First, it is in my

view inappropriate to comment on the *Gordon v. Goertz*, [1996] 2 S.C.R. 27, framework in the context of this appeal. This issue was not raised by the appellant, Ms. Barendregt ("mother"), nor was it formally raised by the respondent, Mr. Grebliunas ("father"), who did not cross-appeal. It is therefore not properly before this Court. Even if it were, **I do not believe it prudent to comment on amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), without the benefit of submissions and of a full evidentiary record on the matter.** It follows that I cannot agree with my colleague's analysis as set out in paras. 105-89 of her reasons. I will say no more on this issue; it ought to be left for another day. [emphasis added]

If cases — and appeals — are to be decided based on the pleadings, and if new issues are not supposed to be raised on appeal — Justice Côté has a point. However, as the law is what the majority of the Supreme Court of Canada says it is, it doesn't really matter what we think. Accordingly, paragraphs 92 to 189 of the majority's reasons are essential reading for anyone dealing with a mobility case.

Finally, the majority made it clear that the Court really meant it when it said, in *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.), that there is a *very* narrow standard of review in parenting cases, and that mobility cases are no exception:

[104] Absent an error of law or a palpable and overriding error of fact, deference is vital: *Housen*, at paras. 8, 10, 36 and 39. Appellate courts must review a trial judge's reasons generously and as a whole, bearing in mind the presumption that trial judges know the law: *G.F.*, at para. 79. As I have explained, an appeal is not a litigant's opportunity for a "second kick at the can", especially in parenting cases where finality is of paramount importance: *Van de Perre*, at para. 13.

This is important because although most appeals from parenting Orders are doomed to fail because of the high standard of review, the same could not always be said in relocation cases, where the odds often felt closer to a coin flip than anything else. In fact, for several years, the best way to predict the ultimate winner in a mobility case was to see who lost at trial.

Not anymore.

***S.F. v. D.R.*, 2022 ONSC 2079 — Interim Relocation and Notice**

Required Notice in Writing should be...well...in writing!

S.F. v. D.R. is a decision about interim relocation.

The parties were married from 2003 to 2009. They had two children together, D and L, who were 16 and 14 years old respectively at the time of the motion. During the marriage, the family lived in London, Ontario.

The parties signed a Separation Agreement, and they were divorced. The Separation Agreement provided for joint custody of the children. The Agreement also provided that if either party wanted to relocate from London with the children, s/he would give the other party 120 days notice, and would “be at liberty to change the residence of the child at the expiration of that period of time unless the parties have agreed to the contrary or the [other] parent has obtained an Order of a Court of competent jurisdiction in Ontario preventing the change.”

Although the Separation Agreement provided for both children to reside primarily with the mother, D eventually started living primarily with the father, while L remained primarily with the mother.

In late April/early May 2021, the mother *verbally* advised the father that she wanted to move to Nova Scotia with L (and that D could remain in London with the father). According to the mother, the father *verbally* agreed to her request to relocate. Based on the parties’ verbal agreement, the mother had her lawyer draft an Amending Agreement that incorporated the terms of the alleged verbal agreement, and provided it to the father in early June 2021. She also gave up her rented home in London, purchased a home in Nova Scotia, registered L in school in Nova Scotia for September 2021, and verbally told the father that she and L were planning to leave for Nova Scotia on July 28, 2021.

On July 13, 2021, the father’s lawyer sent the mother’s lawyer comments about the draft Amending Agreement, but did not object to any of the terms that dealt with the mother’s plan to relocate to Nova Scotia with L at the end of the month. However, instead of signing the Amending Agreement, and less than a week before the mother’s scheduled departure date, the father told the mother and L that he did not consent to the move. As the mother had already given up her home in London, the mother and L were forced to move in with her parents. This was problematic for the mother, as she had a difficult relationship with her parents, and they disapproved of her decision to re-partner with another woman after she separated from the father. It was also problematic for L, who had come out to his mother as transgender, as he did not want to tell his grandparents that he was transitioning.

On November 9, 2021, the mother started an Application in London, and requested an Order permitting her to move to Nova Scotia with L. The father opposed the mother’s request to relocate.

Despite having commenced an Application to relocate, on December 8, 2021, the mother unilaterally moved to Nova Scotia with L, because the living situation with her parents had become an “extremely toxic environment” for both her and L. However, she did not explain why she did not bring a motion to authorize her to move pending trial — another example of preferring to beg forgiveness than ask permission.

The mother argued that she had not acted unilaterally, and claimed she had complied with the relocation provisions of the Separation Agreement, because she had told the father about her plan

to move in late April/early May 2021, and the father had not obtained an order prohibiting her from doing so within the 120-day period set out in the Agreement. Somewhat surprisingly, at least to us, Justice Fregeau accepted this argument:

[66] I conclude that the mother, in her capacity as the custodial parent of [L], has complied with the notice of relocation terms of the parties' 2009 separation agreement. The father has not, during the lengthy notice period provided for in the separation agreement, moved to secure an order preventing the move. To the contrary, for a period of approximately 90 days after having received notice of the mother's intention to relocate with [L], the father led the mother to believe that he was not opposed to the move. This resulted in the mother undertaking certain irreversible actions in furtherance of her intentions.

Respectfully, *having started* a proceeding for an Order authorizing her to move to Nova Scotia with L, it should not have been open to the mother to then just pick up and move without prior judicial authorization (or the father's consent). As Justice Danyliuk said in *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.), "having released the custody genie from the procedural bottle, [a party] cannot unilaterally seek to shove it back inside." One cannot invoke the jurisdiction of the court only to then ignore it and engage in self-help.

In any event, as Justice Fregeau recognized that he might be wrong about the Separation Agreement, he then went on, quite correctly in our view, to consider whether the move to Nova Scotia would actually be in L's best interests under the applicable legislation.

As the parties were divorced, but no order had been made for corollary relief, Justice Fregeau determined that the matter was governed by Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "CLRA"). While it is true that the CLRA applied in this case, we note that as long as the parties were divorced in Canada, which is unclear from the reasons, the Court could have also dealt with the matter under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). As Justice Maczko explained in *Low v. Henderson* (2001), 17 R.F.L. (5th) 111 (B.C. S.C. [In Chambers]):

[18] . . . **There is always jurisdiction to grant corollary relief after granting of a decree nisi: *Hughes v. Hughes* (1976), 30 R.F.L. 199, 1 B.C.L.R. 234 (B.C. C.A.). The fact that the decree of divorce is silent as to support does not make the subsequent application a variation application under the *Divorce Act*, rather it is an originating application: *Farquar v. Farquar* (1983), 35 R.F.L. (2d) 287 (Ont. C.A.). *Currie v. Currie* (1987), 6 R.F.L. (3d) 40 (Man. Q.B.) per Carr J. is to the same effect: a variation proceeding is only appropriate where the a party is seeking to vary an order that specifically provides for support; **where the decree nisi is silent on this point, the application should be classed as a corollary relief proceeding under the *Divorce Act*** (at pp. 43-44). [emphasis added]**

Although these comments were made with respect to spousal support, they are equally applicable to claims for parenting orders. The strict "Occupies the Field" Doctrine of paramountcy has long been replaced by the "Operational Incompatibility" Doctrine: *Kolupanowicz v. Cunnison* (2009), 68 R.F.L. (6th) 84 (Ont. S.C.J.); *Multiple Access Ltd. v. McCutcheon*, 1982 CarswellOnt 128 (S.C.C.); *Huazarik v. Fairfield* (2004), 48 R.F.L. (5th) 275 (Ont. S.C.J.); *Cheng v. Liu*, 2016 CarswellOnt 11183 (S.C.J.), var'd (2017), 94 R.F.L. (7th) 23 (Ont. C.A.).

Under the CLRA's relocation provisions, which are found in ss. 39.1 to 39.4 and largely (but not

entirely) mirror the relocation provisions of the *Divorce Act*, the mother was supposed to have provided the father with at least 60 days *written* notice of her request to relocate, along with the information set out in s. 39.3(2) of the *CLRA* (including the expected date of the proposed relocation, the address of the new residence and contact information of the person or child, and a proposal for how decision-making responsibility, parenting time or contact could be exercised):

Relocation

39.3 (1) A person who has decision-making responsibility or parenting time with respect to a child and who intends a relocation **shall**, at least 60 days before the expected date of the proposed relocation, notify any other person who has decision-making responsibility, parenting time or contact under a contact order with respect to the child of the intention. 2020, c. 25, Sched. 1, s. 15.

Notice requirements

(2) **The notice shall be in the form prescribed by the regulations** or, if no form is prescribed, **shall be in writing** and shall set out,

- (a) the expected date of the proposed relocation;
- (b) the address of the new residence and contact information of the person or child, as the case may be;
- (c) a proposal as to how decision-making responsibility, parenting time or contact, as the case may be, could be exercised; and
- (d) any other information that may be prescribed by the regulations. 2020, c. 25, Sched. 1, s. 15.

Exception

(3) On application, the court may in any circumstance provide that subsections (1) and (2) or anything prescribed by the regulations for the purposes of subsection (2) do not apply, or apply with any changes the court specifies, if the court is of the opinion that it is appropriate to do so, including if there is a risk of family violence. 2020, c. 25, Sched. 1, s. 15. [emphasis added]

Upon receiving written notice from the mother, the father would have then had 30 days to provide *written* notice that he objected to the move, along with the information set out in ss. 39.3(5) and 39.3(6) (including his reasons for objecting, and his views about the mother's proposal). If the father failed to object in writing within the 30 day notice period, the mother would have been authorized to relocate pursuant to s. 39.4(2)(b), which provides that "[a] person who has given notice of a proposed relocation in accordance with section 39.3 and who intends to relocate a child may do so as of the date referred to in the notice if, . . . (b) no objection to the relocation is made in accordance with subsection 39.3(5) and there is no order prohibiting the relocation." Again, to quote the statute:

Objection

(5) A person with decision-making responsibility or parenting time who receives notice of the proposed relocation under subsection (1) may, no later than 30 days after receiving the notice, object to the relocation by,

(a) notifying the person who gave the notice of proposed relocation of the objection to the relocation; or

(b) making an application under section 21. 2020, c. 25, Sched. 1, s. 15.

Notice requirements

(6) A notice under clause (5) (a) **shall be in writing** and shall set out,

(a) a statement that the person objects to the relocation;

(b) the reasons for the objection;

(c) the person's views on the proposal referred to in clause (2) (c); and

(d) any other information that may be prescribed by the regulations. 2020, c. 25, Sched. 1, s. 15. [emphasis added]

There was no dispute in this case that the mother had not complied with s. 39.3(2) of the *CLRA*. But that was not the end of the matter, because s. 39.3(3) of the *CLRA* gives the court authority to dispense with the notice requirements “if the court is of the opinion that it is appropriate to do so”. Furthermore, s. 39.4(3) of the *CLRA*, which lists the factors that courts are required to consider when determining whether to authorize a relocation, includes the following provision:

39.4(3) . . . (d) whether the person who intends to relocate the child has complied with any applicable notice requirement under section 39.3 and any applicable Act, regulation, order, family arbitration award and agreement;

This makes it clear that failure to comply with the notice requirements is not a complete bar to being able to relocate (as otherwise there would have been no need to include s. 39.4(3)(d) in the statute).

That said, the *CLRA* (and the *Divorce Act* for that matter) very clearly requires that the original notice and any notice of objection be *in writing*. Surely, this is to ensure there is a written record of the relocation request and to avoid precisely the sort of situation that arose in this case. For this reason, in our view, the written notice requirements should be waived only in rare cases (cases with serious family violence, for example.)

Relying on these provisions, Justice Fregeau concluded that the mother's failure to comply with the formal notice requirements of the *CLRA* did **not** prohibit him from authorizing the move, and that the mother's verbal notice to the father was sufficient in the circumstances:

[72] For the purposes of the motions before the court, and in the unique circumstances of this case, I conclude that it is appropriate to apply the provisions of s. 39.3(3) of the *CLRA* and waive the requirement that the mother provide *written* notice of the proposed relocation to the

father. In my opinion, it is appropriate in the circumstances of this case to treat the mother's late April/early May 2021 verbal notice of her intention to relocate to the Maritimes as proper notice to the father. In the alternative, the mother's June 2021 verbal notice of her intention to relocate specifically to Springhill serves as proper notice to the father. [emphasis in original]

After considering the rest of the factors set out in s. 39.4(3) of the *CLRA*, including that L, who was already 14 years old, wanted to stay in Nova Scotia and was doing well there, Justice Fregeau granted the mother's motion, and ordered that L was to continue living with the mother in Nova Scotia pending trial. He also determined that, as the mother was the successful party, she was presumptively entitled to costs.

While the decision to let L remain in Nova Scotia may have been reasonable on the particular facts of the case, and although the father's conduct was also problematic, we would have preferred to see the Court criticize how the mother handled the matter. This entire situation could have been avoided if the mother had simply complied with the statutory notice requirements, and the mother absolutely should have brought a motion to allow her to move to Nova Scotia instead of just acting unilaterally. This result will only encourage this sort of conduct in the future. What we permit, we promote: *Benarroch v. Abitbol et al.*, [2017 CarswellOnt 12968](#) (S.C.J.).

It is, in our view, essential for courts to send a clear message that the notice requirements in the provincial acts and in the *Divorce Act* are to be followed in relocation cases, and that self-help will absolutely not be tolerated. To that end, while costs have not yet been adjudicated, we hope the Court will consider whether awarding the mother significant costs would send an inappropriate message to other litigants in relocation cases, and hope that the Court will consider Rule 24(4) of Ontario's *Family Law Rules*, O. Reg. 114/99, which provides that "a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs."

***J.K. v. J.P.B.*, 2022 MBQB 43 — Relocation and Family Violence**

A Combination of
Double-Secret
Probation and the
Star Chamber: No
Notice for You!

Pursuant to ss. 16.8(1) and 16.9(1) of the *Divorce Act*, parents are generally required to notify each other if they intend to change their place of residence, or want to relocate with the child(ren). However, ss. 16.8(3) and (4) and ss. 16.9(3) and (4) permit the court to dispense with the notice requirement in certain circumstances, “including where there is a risk of family violence.”

In *A.J.K.*, Justice Dunlop was required to interpret and apply ss. 16.8(3) and (4) and ss. 16.9(3) and (4) as part of determining whether to grant the mother’s request to change the children’s residence and/or relocate with them without notice to the father. This is one of the first reported decisions to consider these provisions of the *Divorce Act*.

The mother and father separated in or around 2015, and had two young children together. Although the children’s ages are not stated in the reasons, they were both less than five years old when their parents separated.

In 2016, the Court ordered that the children would reside primarily with the mother, but that the father would have “reasonable access . . . with the dates, times, and conditions to be determined as the parties may agree[.]”

In or around 2017, the father started threatening the mother, and his behaviour towards her and the children became increasingly aggressive, frightening and concerning. As a result of the father’s conduct, the mother applied for and obtained a Protection Order against the father from a Justice of the Peace pursuant to *The Domestic Violence and Stalking Act*, C.C.S.M. c. D93, (the “DVSA”). The Protection Order provided, among other things, that for the next three years (the maximum period of time allowed under the DVSA), the father was prohibited from following the mother, having contact with her, or being within two city blocks of her. However, it did not prohibit the father from having contact with the children.

The father applied to set the Protection Order aside. In February 2019, Justice Kroft dismissed the father’s application, but agreed to shorten the Protection Order’s duration to 18 months.

Despite the Protection Order, the father continued threatening the mother, and was arrested at least twice for breaching the Order. The father also stopped seeing the children in or around September 2019, and did not request further contact with them after that time. However, he continued acting in ways that caused the mother to be afraid for both herself and the children.

In December 2019, the mother applied for a Protection Order against the father on behalf of the children. A Justice of the Peace granted the Order, and determined that it should be in place for three years. The mother also obtained a further Protection Order for herself against the father for another three years shortly before the first Protection Order was set to expire.

Despite the Protection Orders and the involvement of the police, the father continued harassing and threatening the mother. He also started threatening other people, and was even charged with uttering threats against both the Premier of Manitoba and the Chief Medical Officer of Manitoba.

As all of the mother’s efforts to force the father to leave her alone had failed, in early August 2021,

she brought an *ex parte* motion pursuant to ss. 16.8(3) and (4) and ss. 16.9(3) and (4) of the *Divorce Act* to allow her to change her residence and/or relocate with the children without having to provide the father with her new address or any contact information. She also requested a sealing Order and an Order initializing the decision.

Given the extreme nature of the alleged family violence by the father, the Court granted an interim sealing Order to protect the mother and children until the matter could be heard on a final basis.

In late August 2021, Justice Dunlop heard the mother's submissions on the *ex parte* motion, and granted the motion with written reasons to follow. The reasons were released in March 2022.

In analyzing the issues on the motion, Justice Dunlop started by explaining that, "[t]here is no actual guidance in the Act itself about how a court should exercise its discretion to either waive the notice requirements or allow an application to waive such notice requirements to be made without notice to the parent with parenting time." Accordingly, his Honour was required to consider and determine the principles that apply when one parent is seeking to change residences or relocate with the child(ren) without having to notify the other parent.

After noting that such Orders should be granted in only "exceptional cases", and considering the rules that govern *ex parte* Orders (including that the moving party must provide "full and fair disclosure of all material facts", and must serve the Order and all of the materials that were filed on the motion "on the other party 'forthwith' unless the court determines otherwise"), Justice Dunlop concluded that this case required him to answer the following questions:

1. Has the mother established that the motion should proceed without notice to the father?
2. Would it be in the children's best interests to allow the mother to change her residence and/or relocate with the children?

In answering the first question, Justice Dunlop was satisfied that the mother had provided full and fair disclosure, and that it would be appropriate for the motion to be heard without notice to the father because of the history of family violence:

[48] In making my finding that a without notice motion is allowed in this case I am cognizant of the fact that the general change of residence or relocation provisions of the Act were legislated in the first place because such changes when made can serve to fracture a parent/child relationship. Relocation in particular can have severe and long-term consequences for children. **Thus, the no notice exception must be approached with caution and rigour.**

[49] **The section in the Act allowing for a without notice motion requires the court to both assess the risk of family violence and its impact on the children. There is ample evidence in this case that family violence is present and has been for some time.** The sealing order was put into place because of the level of family violence in this case and as discussed below in more detail, the family violence has affected the court's determination of what is in the best interests of the children.

[50] As a result of the past severe and escalating family violence (coercive and controlling) found in this case, **it is fair to think that the risk of future family violence is high. This**

combined with the impact of the family violence on the children discussed below, justifies this hearing being authorized on a without notice basis to the father. [emphasis added]

With respect to the second question — the best interests of the children — Justice Dunlop pointed out that where, as in this case, the children spend the vast majority of their time with the parent who is seeking to relocate, s. 16.93(2) of the *Divorce Act* places the onus on the other parent to prove that the relocation would *not* be in the children’s best interests.

However, there is something “wrong” with the notion of applying a presumption on a motion where the party having to overcome the presumption will not be participating. But Justice Dunlop adeptly dealt with this issue. To avoid this problem, Justice Dunlop determined that s. 16.93(2) does *not* apply where, as in this case, the other party “will not have the opportunity to present his or her position on the issue at any hearing” because it is being dealt with on an *ex parte* basis. Therefore, he placed the onus on the mother pursuant to s. 16.93(3), which provides that “[i]n any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.” That is, in bringing an *ex parte* motion, the mother lost the benefit of the presumption such that she actually had to prove that the relocation met the best interests of the children.

After considering the statutory best interests factors set out in ss. 16(3), 16(4), and 16.92(1) of the *Divorce Act*, Justice Dunlop had no difficulty finding that it would be in the children’s best interests to allow them to relocate with the mother in order to protect them from further family violence from the father:

[62] **The mother has looked to the court in desperation. She sees that her only road to peace and security for herself and her children is to escape from the father and to essentially hide from him.** While a person should expect the criminal courts to prevent the father from engaging in the behaviour that he has by offering up more severe consequences (and perhaps that has happened with his threatening of the Premier and the Chief Medical Officer of the Province of Manitoba) the civil courts have had few tools at its disposal. Fortunately for this mother, the emphasis and recognition of family violence in the new Act is one step that has been taken to protect individuals who find themselves in this mother’s situation. **The Act recognizes that a parent may need to move with their children without notice to the other parent with parenting time in situations involving family violence. This is her motivation for relocating and should not ever be construed as an attempt to alienate the father from the children.**

[63] Although the decision to waive notice is a discretionary one, the strong evidenced based definition of family violence in the Act provides significant assistance to the decision making process. **I have also taken into account the additional seven best interests factors set out in s. 16.92(1) in determining to authorize the change of residence or relocation. The reasons for the relocation, the impact that the violence has had on the children and the fact that the father has chosen not to see his children in several years are enough to allow for the move without the usual notice. I have no hesitation in this case in finding the existence of family violence and I order that ss. 16.8(1) and (2) and 16.9(1) and (2) do not apply in the circumstances of this case. *The mother may change her residence and relocate to wherever she wishes* without the consent of or notice to the father.** [emphasis added]

Justice Dunlop also had to decide whether to grant the mother's requests for a sealing Order, and an Order initializing the proceeding. These requests required his Honour to consider the Supreme Court of Canada's recent decision in *Sherman Estate v. Donovan*, [2021 CarswellOnt 8339](#) (S.C.C.), where the Court set out the following test for determining whether to limit the presumption in favour of court openness in a particular case:

[38] . . . In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

In this case, Justice Dunlop was satisfied that the mother had met the test from *Sherman Estate v. Donovan*, because:

- Allowing public access in this case “would pose a serious risk to the important public interest of keeping the mother and the children safe from the father’s escalating violent and irrational behavior.”
- Other “reasonable alternative measures” had been tried, including multiple Protection Orders, but had not prevented the father from continuing to engage in family violence against the mother and the children; and
- Given the threat the father posed to the mother and the children, the benefits of the Order outweighed its negative effects. Justice Dunlop also noted that the public interest “requires the courts not to be an instrument whereby further violence is facilitated.”

As a result, Justice Dunlop initialized his reasons, and confirmed that the interim sealing Order had been correctly made when it was initially granted back in August 2021. He also ordered that the sealing Order would remain in place for another 30 days.

This result is not surprising as the best interests of innocent children, and the desire to protect those children from significant harm, are regularly determined to be a value of super-ordinate importance sufficient to override the open court principle. See, for example: *Foulidis v. Foulidis* ([2016](#)), [86 R.F.L. \(7th\) 338](#) (Ont. S.C.J.); *Himel v. Greenberg* ([2010](#)), [93 R.F.L. \(6th\) 357](#) (Ont. S.C.J.); *K. (M.S.) v. T. (T.L.)*, [2003 CarswellOnt 9517](#) (C.A.); *M.M. v. N.M.* ([2018](#)), [20 R.F.L. \(8th\) 196](#) (Ont. S.C.J.); *A.P. v. L.K.* ([2019](#)), [29 R.F.L. \(8th\) 205](#) (Ont. S.C.J.); *Danso v. Bartley* ([2018](#)), [13 R.F.L. \(8th\) 341](#) (Ont. S.C.J.). The court is responsible for ensuring that a court file created to protect a child's best interests does not become the instrument of harm: *K. (M.S.) v. T. (T.L.)*, [2002 CarswellOnt 3091](#) (S.C.J.), rev'd [2003 CarswellOnt 9517](#) (C.A.).

Finally, Justice Dunlop had to decide whether and when the mother would be required to serve the father with the *ex parte* Order and her motion materials. In concluding that ***the mother did not need to serve the father with any of the materials***, his Honour had this to say:

[67] **In normal circumstances it would be unreasonable for an individual not to be given notice of an order affecting the parenting of their children.** The Rules contemplate notice being given of any without notice order but allow for exceptions based upon the discretion of the decision maker. **In the exceptional circumstances of this case and in keeping with the spirit and intent of the family violence provisions of the Act I am dispensing with the requirement that the father be served with a copy of my order herein.**

[68] **I initially was of the view that waiting six months to release this decision and then providing the father with a copy of the order would provide the appropriate barrier that the mother required to achieve her relocation.** However, on reflection, the father’s violent and escalating behavior is still too fresh not to have fear that he will immediately, if given notice at this time, do something “improper” or “irrevocable” to use the terms referred to by Arbour S.C.J. in *Ruby*. **A more appropriate remedy is for him on his own, to ask to review the court pocket at the Court Registry when he realizes that the mother has relocated with the children.** One would hope that if he proceeds in this manner that he will come before the court with reason and a renewed and purposeful desire to see his children. This may be naive thinking. However, on occasion, with distance and time come reason. **The court is always available for a full hearing on the merits should he decide to take such action.**

[69] **The father, does have an avenue to access justice in this case even without being served with a copy of the court order.** I am ordering that the sealing order on the court pocket be lifted within 30 days of the date of this judgment and **I will stay seized of this matter should the father wish to bring any kind of motion before the court.** The mother will also be required to take out the terms of this order within 30 days of the signing of this decision. **If the father at some point determines that he wants to see his children, he simply has to look at the court pocket to determine what has happened. This way, the service of an order upon him will not serve to trigger more violence.** [emphasis added]

Respectfully, while we certainly agree with the balance of Justice Dunlop’s decision, we are somewhat troubled by this part of it. We recognize that the father’s behaviour was serious and concerning, and that Justice Dunlop was satisfied that the mother had provided full disclosure (including the fact that the father had not attempted to see or contact the children since September 2019). However, in our view, *at some point* (even be it a year or 18 months later) the mother, the Court — or perhaps a lawyer designated by the Court — should at least have to inform the father that an *ex parte* Order had been made against him, and that he could obtain a copy of it from the court file should he wish to do so. There is something wrong with a person walking around for an indeterminate amount of time not knowing of an Order being made against them.

Furthermore, while we understand why Justice Dunlop waited six months to release his reasons, we wonder whether his express statement that he did this to “provide the appropriate barrier that the mother required to achieve her relocation”, combined with his decision to leave it entirely up to the father to figure out that an *ex parte* Order had been made, could be problematic if his Honour’s decision is ever reviewed by another court in the future.

In any case, we now have a well-written, well-reasoned decision to consider the next time the interplay of relocation and family violence arises. That said, it is clear that the results of this case should be reserved for the most concerning constellation of facts.

***Bhadoria v. Cote*, 2022 ONSC 3088 — Family Violence and Relocation**

Violence, Relocation
and Legal
Headaches

As you all know, the *Divorce Act*, the *Family Law Act* and many other provincial family law statutes were amended in 2021 to require courts to consider an expansive definition of “family violence” when deciding what parenting arrangements are in a child’s best interests. Although the amendments have not been in force for long, we have already seen a large number of cases that have considered them, (see e.g. *Heimlick v. Longley* (2022), 71 R.F.L. (8th) 454 (Sask. Q.B.) and *A.J.K. v. J.P.B.* (2022), 71 R.F.L. (8th) 418 (Man. Q.B.).

Bhadoria is another case involving allegations of family violence. It required Justice Shelston to decide whether the mother’s allegations of family violence justified her decision to relocate the parties’ very young child from Ottawa to France without the father’s knowledge or consent — and without a court Order authorizing her to do so.

The parties were not married. They started living together in 2019, and had a child together in December 2020. They separated in late July/early August 2021.

After they separated, the mother severely restricted the father’s time with the child, and she insisted that all exchanges be supervised by a third party of her choosing.

The parties attended several mediation sessions to try to work out a parenting plan, and ultimately agreed that the father would have parenting time every Wednesday from 8:30 a.m. to 4:00 p.m., and every Saturday from 9:00 a.m. to 4:00 p.m. Although the agreement did not expressly require supervision, the mother took the position that the exchanges had to be supervised, and the father ultimately relented.

In late December 2021/early January 2022, a dispute arose between the parties about whether the supervised exchanges should continue. The father was prepared to have the exchanges take place in a public place and/or in the presence of a third party, but refused to agree to a professional supervisor. The mother, however, insisted on having the exchanges supervised by a professional supervisor. As neither party was willing to compromise or concede, the father was not able to have any further contact with the child. (Obviously, this was not a good decision by the father, who should have taken whatever time with the child he could get, while also giving serious thought to starting a court proceeding to deal with the situation.)

Unbeknownst to the father at the time, on March 8, 2022, the mother took the child to France, moved into her parents’ home in southern France, and planned to keep the child in France indefinitely.

On March 13, 2022, the father learned that the mother had listed her house in Ottawa for sale. He sent the mother several emails asking her to contact him. When she did not respond, he called the police.

The police contacted the mother, and she told them that she had moved to France with the child. When the father learned what the mother had done, he started a court proceeding in Ontario, and brought an urgent motion to require the mother to return the child to Ottawa.

The mother conceded that Ottawa was the child’s habitual residence and that the Ontario court had

jurisdiction. However, instead of returning with the child, she responded with a cross-motion to allow her to stay in France with the child pending trial.

While the mother acknowledged that it would have been better for her to have notified the father of her plan to move to France with the child, she claimed that she had not done so because of concerns about family violence, including the “father’s threats, harassment, control, intimidation, and lack of good faith to negotiate[.]”

The mother also claimed that it would be in the child’s best interests to stay in France with her and her parents for a variety of reasons, including that the father had not seen the child since December 2021 (this is why we say the father should have agreed to supervision and started a claim; he essentially handed the mother this argument), and argued that if she returned, she would be “subject to psychological abuse amounting to family violence[.]” She also argued that she could not work in Canada because she had already given up her professional licence, and she had already sold her home.

The father vigorously denied the mother’s allegations of family violence.

As the parties were not married, the case was governed by the Ontario *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 (the “*CLRA*”). Section 39.3 of the *CLRA*, which is similar to the *Divorce Act*’s relocation provisions, requires a person who seeks to relocate with a child to “notify any other person who has decision making-responsibility, parenting time or contact under a contact order”, and to do so in writing. However, it also allows a court to dispense with the notice requirements “if the court is of the opinion that it is appropriate to do so, including if there is a risk of family violence.”

Accordingly, in order to decide the matter, Justice Shelston had to determine whether the mother had established, on a balance of probabilities, that there had been family violence that was sufficient to justify her unilateral decision to move to France with the child without giving notice to the father or getting the father’s consent, and without a court Order permitting her to relocate. As his Honour explained in his decision:

[52] The mother did not have the right to remove the child from Ottawa and move to France because she did not have the consent of the father, or a court order permitting such a move. However, if the mother can prove, on the balance of probabilities, that it was appropriate for her to move based on certain factors including the existence of family violence against the mother and or the child, the court may permit such a move.

While this is certainly the correct “sentiment” in s. 39.3(3) of the *CLRA*, we are concerned that this paragraph makes it sound as if it is generally sound strategy to “beg forgiveness rather than ask permission” — or to “move first and ask permission later.” But it is not, and it should not be remotely encouraged. Section 39.3(3) is clear that on application, the court may dispense with the notice requirement if, in the court’s opinion it is appropriate to do so, including if there is a risk of family violence. Section 39.3(4) then clarifies that an application to dispense with notice under s. 39.3(3) may be made without notice. This clearly suggests that any such motion to dispense with notice to move should be made *before* the move, not after. Yes, the court can permit a move without notice; but a party wanting to move without giving notice should ask permission — either on notice or *ex parte* — *before* the move, not after. For the court to suggest it is a viable option to

move first and ask permission later is a dangerous suggestion. In *YZVM v. DTT* (2022), 69 R.F.L. (8th) 249 (Alta. C.A.), the Alberta Court of Appeal specifically noted that the purpose of the notice requirements was to help protect children’s relationships with enumerated parties, to ensure the status quo pending a proper hearing, and to deter “self-help.”

In the same decision, the Alberta Court of Appeal, in approving the chambers judge’s order that the children be returned, found that it was reasonable for the court to be concerned about delay, and whether allowing the children to stay in the new location would “put the children on a particular path” such that it would then be “harder for the court to reverse the decision.” Respectfully, it should be notice (or motion to dispense with notice) first; move later.

Justice Shelston noted that courts **must** be cautious when dealing with allegations of family violence based on untested affidavit evidence:

[61] The court must be cautious in making findings of family violence where the evidence is based on untested affidavits with no opportunity for *viva voce* evidence. The court should seek documentary evidence such as emails or text messages or some other type of corroborative evidence to allow the court to make at least an initial finding regarding these very serious allegations.

This is a very important point to keep in mind when dealing with these types of motions. Without objective evidence (e.g. documents and/or evidence from reliable third parties with first-hand knowledge), and without cross-examination, it is unlikely that a motion judge will be able to make the necessary findings of fact. See e.g. *Ierullo v. Ierullo* (2006), 32 R.F.L. (6th) 246 (Ont. C.A.) at para. 18.

Accordingly, when preparing for these types of motions (and for any motions where you will be asking a judge to make findings based on competing evidence without cross-examination), you should always ask yourself the following questions:

1. Who bears the burden of proof? (In this case, the mother bore the onus of establishing that there had been family violence, and that it would be in the child’s best interests to remain in France pending trial.)
2. What evidence is required to prove the client’s case, bearing in mind that: (a) it is difficult for courts to make findings about significant matters in dispute based only on a paper record; (b) the other side will undoubtedly have a different story to tell; and (c) the other side will presumably ask the court to draw adverse inferences with respect to any inconsistencies, omissions, or gaps in your client’s evidence. (As discussed further below, the mother failed to provide documentary evidence or evidence from third parties with firsthand knowledge to substantiate her claims, and failed to disclose important information that she clearly should have been provided.)

Although the mother’s motion materials were voluminous and included affidavits from four of her friends, she did not produce **any** documentary evidence to substantiate her claims of family violence. Furthermore, the third party evidence from her friends was based on hearsay from the mother, as none of them had actually seen or heard the father do anything that could realistically rise to the level of family violence. Furthermore, all four of the mother’s friends made it clear that

they did not like the father, which raised doubts about the neutrality and objectivity of their evidence.

The mother also did not file evidence to substantiate her claim that “her decision to fly to France on March 8, 2022, was a desperate act done at the last minute”, or to explain why she had not started a court proceeding in Ontario and sought urgent relief (instead of engaging in self-help). As the mother had substantial financial resources (e.g. she had apparently sold her house in Ottawa for \$1,250,000, and had been earning \$450,000 a year before she moved to France), and as the mother could have easily adduced evidence to corroborate her claim that the move to France had been a last minute decision (e.g. whether she quit her job, gave up her professional licence, listed her house for sale, etc., *before* or *after* she had moved to France), these were very significant omissions.

It also does not appear that the mother ever asked to cross-examine the father, or offered herself up for cross-examination prior to the motion.

Based on the record before him, it was clear to Justice Shelston that the mother had not met her onus of establishing that the unilateral relocation was justified, or that it would be in the child’s best interests to remain in France pending trial.

[62] I do not find that the mother has met her burden of proof to show on the balance of probabilities that she was a victim of family violence being primarily psychological abuse and financial abuse...

...

[66] The parties separated on August 4, 2021. The child was living in the primary care of the mother. The father had limited parenting time with the child. The parties could not agree on the need for supervisor for the exchanges with the child. The parties seem to have reached an impasse where they were not returning to mediation and the father has not seen the child because of the mother’s insistence on the need for the supervisor. There was no pending court proceeding. There was no interaction between the father and the mother except by emails. The mother was employed, owned a home and the child was living with her in Ontario. It was the mother who acted unilaterally to sell her house, quit her job, and remove the child from daycare. She cannot make these decisions and now say that she cannot return to Ottawa because she has no place to live, no job and no daycare for the child.

Justice Shelston ordered the mother to return the child to Ottawa immediately, restrained her from removing the child from Ottawa absent a written agreement signed by the father or further court Order, and ordered her to turn over the child’s passports to the Clerk of the Superior Court.

This was not a surprising result based on the facts, and it is a good case to keep in mind when dealing with claims of family violence, especially when they involve relocation issues.

A.J.L v. J.G.L., 2022 BCSC 1344 – Parenting Orders after Relocation

Like we need to make it *more* difficult to settle relocation cases...

This case dealt with the question of whether or not a court retains jurisdiction over a child after the court has granted an order allowing for relocation to another jurisdiction. The answer is concerning and should influence how family lawyers advise their clients.

On December 14, 2021, the mother successfully obtained an order permitting her to relocate with the child, B, from British Columbia to Boolaroo, New South Wales, Australia. The father had opposed the relocation. For those readers not familiar with the metropolis of Boolaroo (population 1,200) it is a few hundred kilometers north of Sydney, and in Boolaroo, you will find...well...not a whole lot.

The order granting the mother authorization to relocate to Australia included several provisions regarding parenting time depending on whether or not the father chose, in the end, to also move to Boolaroo. If he did, the Court ordered that the parties have equal parenting time. If not, his parenting time was set out to be:

In the event that the [father] does not relocate to Australia, [B.]'s primary residence will be with the [mother] and the [father] will have:

- i. reasonable and generous in-person parenting time with [B.] in British Columbia and Australia as agreed upon by the parties or as further ordered by this Court;
- ii. video or telephone parenting time with [B.] at least three times per week on the days and times agreed upon by the parties or as further ordered by this Court;
- iii. video or telephone parenting time with [B.] on:
 - 1) Father's Day;
 - 2) B.'s birthday;
 - 3) the [father]'s birthday; and
 - 4) Christmas Day.

The Mother moved to Australia with B on December 21, 2021. The Father did not, in the end, relocate to Australia. He did appeal the relocation order, the appeal proceedings being ongoing at the time of this decision. The parties continued to have parenting disputes after the relocation.

The Father sought a further parenting order from the British Columbia Supreme Court. The Father argued that the Court had preserved its jurisdiction by virtue of the line in the order that stated he would have generous in-person parenting time with B as agreed upon by the parties “or as further ordered by this court.”

The Mother took no position on the Court’s jurisdiction.

The Court determined that it may only exercise its jurisdiction over a child that is habitually resident within its physical jurisdiction. Where a court has authorized a child to relocate to another

country, and the relocation has happened, that court cannot retain jurisdiction over a child that is no longer habitually resident in the jurisdiction – regardless of what an Order may or may not say.

The Court then considered whether the child was habitually resident in British Columbia in accordance with section 6.3 of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) which states:

Child habitually resident outside Canada

6.3(1) If a child of the marriage is not habitually resident in Canada, a court in the province that would otherwise have jurisdiction under sections 3 to 5 to make a parenting order or contact order, or a variation order in respect of such an order has jurisdiction to do so only in exceptional circumstances **and if the child is present in the province.**

Exceptional circumstances

(2) In determining whether there are exceptional circumstances, the court shall consider all relevant factors, including

- (a) whether there is a sufficient connection between the child and the province;
- (b) the urgency of the situation;
- (c) the importance of avoiding a multiplicity of proceedings and inconsistent decisions; and
- (d) the importance of discouraging child abduction.

To determine whether or not the child was habitually resident in British Columbia, the Court used the hybrid approach to habitual residence as described by the Supreme Court of Canada in *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16. While *Balev* was decided in the context of the Hague Convention, the Court in this case determined that the hybrid approach was applicable to the *Divorce Act*.

However, it is not at all clear that this is the correct approach to determining the question of “habitual residence” under the *Divorce Act*. While there are some cases that apply the definition of “habitual residence” in Hague cases to non-Hague matters (for example, *Maldonado v. Feliciano*, 2018 ONCJ 652; *Moussa v. Sundhu* (2018), 11 R.F.L. (8th) 497 (Ont. C.J.); *McKay v. Labelle*, 2019 CarswellOnt 4524 (Ont. C.J.); and *A.M. v. D.L.*, 2019 ONCJ 155 at paras. 44 and 45) the weight of authority seems to suggest that where a statute has a self-contained definition for “habitual residence”, that definition (and arguably those specific considerations) should govern. See *Smith v. Smith*, 2019 SKWB 280; *Kong v. Song*, 2019 BCCA 84; *Guo v. Chan*, 2020 ONSC 7237; *Gelieden v. Rawdah*, 2020 ONCA 254; *D.S.M. v. T.J.K.*, 2022 ONSC 2497; and *N. v. F.*, 2021 ONCA 614 (from which we still wait for a decision from the Supreme Court of Canada).

It does make sense that, where a statute specifically addresses the notion of “habitual residence”, that definition govern.

While the *Divorce Act*, in contrast to over provincial statutes such as the *Children’s Law Reform Act*, does not contain a specific definition of the term “habitually resident” it does not necessarily follow that the approach for the Hague Convention would apply.

But in any case, the hybrid approach in *Balev* determines a child's habitual residence by considering all relevant factors to determine the "focal point" of a child's life. These considerations may include:

- A. The child's links and circumstances in country A;
- B. The circumstances of the child's move from country A to country B; and
- C. The child's links to and circumstances in country B.

In assessing the child's links and circumstances in country A and B, a court may consider the following factors:

- A. The child's nationality;
- B. The duration, regularity, conditions and reasons for the child's stay in the country that the child is presently in; and
- C. The circumstances and intentions of the child's parents.

The Court determined that once the mother moved with B from Canada to Australia with the Court's authorization, B's habitual residence changed from Canada to Australia. From that point on, the focal point of B's life became Australia.

The Court also noted that while it is possible for a child to have two habitual residences, that is usually where parents have joint parenting responsibilities and the child spends equivalent time in both jurisdictions. In this case there was no evidence that B had spent a significant amount of time in Canada since the relocation.

As a result, the Court found it had no jurisdiction to make an order regarding B.

This decision is of some concern, especially in suggesting that, once the court has authorized a move, there is a change in habitual residence such that the Court no longer has jurisdiction over a child -- regardless of what the order may or may not say. Not all relocation/mobility disputes are intractable or defy resolution. But one thing most (if not all) parents minded to *consent* to a relocation will want is to know that the province of original jurisdiction can (and will) retain jurisdiction for at least some period of time so as to ensure that all goes "as planned."

Of some solace is the fact that there are opposing views. For example, in *Cosentino v. Cosentino*, 2016 ABCA 377, Alberta retained jurisdiction over variation proceeding (where the father lived) even though mother and child had been in Ontario for five years. While we are not suggesting courts retain jurisdiction in these situations for overly lengthy periods of time, we do prefer the safeguards provided in *Cosentino*. Relocation cases are challenging enough without taking away ways to resolve them.

***B.J.T. v. J.D.*, 2022 SCC 24 – The Appropriate Standard of Review in Parenting Cases and The (Lack of) Importance of Biology**

Another presumption bites the dust.

B.J.T. v. J.D. was a child protection case that required the Court to determine whether to place a young child with his biological father, or with his maternal grandmother.

The trial judge placed the child with the maternal grandmother because, although both the father and grandmother were essentially equal in their ability to parent, she was concerned that the father would not promote a relationship between the child and the grandmother and his older half-brother.

A majority of the Prince Edward Island Court of Appeal overturned the trial judge’s decision for a number of reasons, and determined that, all other things being equal, a child should be placed with a biological parent — sort of a biological tie-breaker:

[112] The natural parent factor is but one factor of many relevant factors but one that is very important. It is not, however, a trump card. The focus is still on the best interests of the child.

[113] However, **in cases where, after consideration of all relevant factors, the answer is unclear such as the case where the parent and the non-parent are more or less equal or comparatively equal, or perhaps even where the case for the non-parent is slightly better, the natural parent factor should be decisive.** [emphasis added]

In overturning the Court of Appeal’s decision, the Supreme Court started by explaining that unless the applicable legislation says otherwise, the exacting standard of review it established for parenting appeals in *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) (and that it reiterated in *Barendregt v. Grebliunas*, 2021 CarswellBC 3793 (S.C.C.) described below), also applies in the child protection context:

[57] This narrow scope of appellate review means that, absent a material error, the “Court of Appeal is not in a position to determine what it considers to be the correct conclusions from the evidence. This is the role of the trial judge” (*Van de Perre*, at para. 12 (emphasis deleted)). **An appellate court is therefore not permitted to redo a lower court’s analysis to achieve a result that it believes is preferable in the best interests of the child.**

[58] **The *Van de Perre* standard reflects the significant deference that the decision of a judge at first instance as to a child’s best interests attracts**, owing to the polymorphous, fact-based, and highly discretionary nature of such determinations (*Hickey*, at para. 10). **In my view, absent something specific in the governing legislation, this same standard applies to custody decisions pursuant to child protection legislation.**

[59] Nothing in s. 2(2) of the *Child Protection Act* supports or suggests a different standard of appellate review. Further, the same justifications expressed in *Hickey* that animated significant deference to child support awards apply with equal force to custody disputes under child welfare legislation. In both cases, **what is needed is an approach that promotes finality in family law litigation, recognizes the importance of the highly discretionary nature of the decision and the appreciation of the facts by the judge at first instance who heard the parties directly, and avoids giving parties an incentive to appeal judgments** in the hope

that the appeal court will have a different appreciation of the relevant factors and evidence (*Van de Perre*, at para. 11; *Hickey*, at para. 12). [emphasis added]

As the father was unable to persuade the Supreme Court that the trial judge had made a “material error, serious misapprehension of the evidence, or legal error”, a unanimous Supreme Court overturned the Court of Appeal, and restored the trial judge’s decision to place the child with the maternal grandmother.

The Supreme Court also made it clear that it completely disagreed with the Court of Appeal’s determination that, all other things being equal, it is in a child’s best interests to be placed with a biological parent. Instead, the Court concluded that, for the following reasons, “a biological tie in itself should generally carry minimal weight” (query why, in that case, they did not officially “ditch” the fact of biological connection):

- “First, too great an emphasis on biological ties may lead some decision makers to give effect to the parent’s claims over the child’s best interests. Parental preferences should not usurp the focus on the child’s interests.” [paragraph 102]
- Second, “[s]ince biological ties are a presumed proxy for a bond, any advantages that favour the biological parent will usually be captured and subsumed within the broader inquiry into a child’s best interests. . . . To the extent a parent relies on biology for considerations related to the child’s culture, race or heritage, it may be addressed within those factors.” [paragraph 105]
- “Third, the benefit of a biological tie itself may be intangible and difficult to articulate”, which “makes it difficult to prioritize it over other best interests factors that are more concrete.” [paragraph 106]
- Finally, “courts should be cautious in preferring one biological tie over another absent evidence that one is more beneficial than another. . . . Comparing the closeness or degree of biological connection is a tricky, reductionist and unreliable predictor of who may best care for a child.” [paragraph 108]

Even before *B.J.T.*, however, the case law was already moving in the direction of minimizing the weight that should be given to biological ties when making decisions about a child’s best interests. For example, in her recent decision in *Jacobs and Coulumbe v. Blair and Amyotte*, [2022 ONSC 3159](#) (Ont. S.C.J.), which was released only a few days before *B.J.T.*, Justice Gregson had this to say about this very issue:

[222] I concur **there is no presumption in favour of the biological parents or genetics when determining a parenting order for a child**. The governing principle as per subsection 24(1) is best interests, having regard to the considerations outlined in 24(2) and the factors outlined in 24(3) of the *CLRA*. **The best interests standard is a child-centered approach.**

[223] I agree with the comments made by Keast, J. in *Pheasant v. Idowu*, 2008 ONCJ 420 when he aptly stated at Paragraph 31:

There is no hierarchy of rights in considering the best interests of children under the Act. **To place emphasis on parental rights may diminish the importance of the attachment process in the healthy emotional development of children.** If there is a right, it is the

right of the child to maximize his or her attachment and emotional development and minimize attachment uncertainties, regardless of blood relationship. [emphasis added]

B.J.T. is unquestionably the final nail in the coffin for the concept that biology should trump other more important considerations (or even serve as a tie-breaker) when a court is tasked with determining a child's best interests. And in our view, rightfully so.

***Czyzewski v. Fabro*, 2022 ONSC 4883 – The AFCC-O Parenting Guidelines**

Coming Soon to a
Parenting Plan Near
You!

In 2020, the Association of Family and Conciliation Courts - Ontario Chapter ("AFCC-O") published a Parenting Plan Guide, and it updated the Guide in 2021 (the most recent version can be found online at <https://afccontario.ca/parenting-plan-guide-and-template>). The Parenting Plan Guide, as Justice Chappel explained in *McBennett v. Danis* (2021), [57 R.F.L. \(8th\) 1](#) (Ont. S.C.J.) at para. 92, "summarizes basic social science knowledge about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of the children." So that sounds pretty helpful.

The Parenting Plan Guide is not legislated, and it is not binding on the courts. However, neither were the *Spousal Support Advisory Guidelines* (the "SSAGs") when the initial draft proposal was released back in 2005, or when the final version was released in 2008. And, as we all know, it did not take long for the SSAGs to become largely presumptive.

In the 2022-23 (June 27, 2022) edition of *TWFL*, we discussed four recent cases where judges gave significant weight to the Parenting Plan Guide, and posited that we were seeing the start of a trend towards the courts giving more and more weight to the Parenting Plan Guide when deciding what parenting arrangements would be in a child's best interests (see "Hey! Check Out The AFCC-Ontario Parenting Plan Guidelines! They Might Just Catch On! But Should They?").

Justice Shore's recent decision in [Czyzewski](#) provides further evidence that this trend is already well underway, at least in Ontario.

The parties in [Czyzewski](#) were never married, and they never cohabited. However, they had a 20-month-old son together. The child had always resided primarily with the mother, but was also having regular parenting time with the father, including weekly overnights, and two full days every other week.

The father brought a motion to significantly expand his parenting time. He asked for a week-on/week-off schedule, as he had been able to arrange his schedule so he would be off work every other week so he could care for the child full-time. For reasons that are not discussed in the decision, the father was not able to arrange his work schedule to be able to have shorter, but more frequent, blocks of time with the child.

The mother opposed the father's motion, and argued that it would not be in the child's best interests to be away from his primary caregiver for more than two to three days in a row. She also argued that such a schedule would be contrary to the Parenting Plan Guide, and relied on the prior cases we discussed in the 2022-23 (June 27, 2022) edition of *TWFL*:

The Mother referred to the decision of Justice McGee in *Melbourne v. Melbourne*, 2022 ONSC 2299, 72 R.F.L. (8th) 84, where support and weight is given to the "extensively researched" AFCC Parenting Guidelines. Specifically, at para.19:

[19] The AFCC Parenting Guidelines were prepared by the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-Ontario) to assist parents and their

professional advisors in specifically developing the best, child-focused, and realistic parenting plans . . .

[20] I agree with Justice Chappel in *McBennett v. Davis*, 2021 ONSC 3610, when she states in paragraph [92] that:

The AFCCO-O Guide summarizes basic social science knowledge about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of the children.

[21] As further stated by Justice Kraft in *H. v. A.*, 2022 ONSC 1560:

The parenting plan guide produced by the Association of Family and Conciliation Courts — Ontario (“AFCC-O”) has been found by many courts to be of great assistance in determining parenting schedules that are in a child’s best interests, depending on the age of the child and his/her developmental stage. While not binding on the courts, the Guide provides a great deal of helpful information and reflects a professional consensus in Ontario about the significant of current child development research for post-separation.

[footnotes omitted]

Justice Shore agreed with Justice Chappel and Justice Kraft that the Parenting Plan Guide contained “helpful information in understanding a child’s developmental stage and schedules”, and relied on it for the proposition that for toddlers (18-36 months), equal time schedules may be appropriate “if parents have fully shared in the caretaking arrangements before the child has reached this age, and the child has an easy temperament”, but only if “the separations from each parent are not too long (no more than two to three days or two nights for example).”

However, based on the information contained in the Parenting Plan Guide, there were two serious problems with the father’s motion. First, the parents had not “fully shared in the caretaking arrangements”, as the child had always resided primarily with the mother. According to the Parenting Plan Guide, therefore, an equal time sharing arrangement was contraindicated.

Second, the father’s proposed schedule would have required the 20-month-old child to be separated from the mother for significant periods of time, and the father’s work schedule precluded the Court from considering other potential options for an equal or close to equal time sharing arrangement:

While both parents are good parents, the Mother and Father have not been equal parents to date. **But even if they were equal parents, it is not recommended that children of [the child’s] age spend more than two to three days away from either parent. The Father’s schedule does not permit an equal sharing of time where the child is not away from either parent for more than a few days.** The Father’s schedule would mean that [the child] would be away from his Father for a week. This separation is too long for the parties to have an equal time-sharing schedule at this time. **The child should not go for a full week without seeing his Mother (with only one night in the middle), and then go an entire week without seeing**

his father, just to have an equal time-sharing arrangement. This is not in the best interest of the child at this age. This means the Mother is going to continue to be the primary parent for now. To me, this does not mean that the Father's time should be restricted with [the child], but more that [the child] should not spend extended time away from his Mother. There is a conceptual difference. As the child gets older and can be away from his Mother for longer periods of time, the schedule may well develop into a week about schedule.

In this case, I agree with the Mother, that it is not in [the child's] interest, at this age, and in these circumstances, to spend too long a period of time away from his Mother. Again, **this in no way is a reflection on the Father's ability to care for the child, but more a reflection on the child's developmental needs at this time in his life.** [emphasis added]

However, Justice Shore still found that it would be appropriate to increase the father's parenting time from two non-consecutive overnights during every two week period, to five overnights broken up into one 2-night block and one 3-night block, which was still a significant increase in the circumstances.

There are now more than 15 decisions available on *Westlaw* that reference the Parenting Plan Guide, which is a very significant number given that it was only released in 2020. There are not yet any reported decisions from anywhere other than Ontario, and the Parenting Plan Guide has still not been considered by an appellate court, but it is only a matter of time before both of these things happen. While it remains to be seen how much weight the courts end up giving to the Parenting Plan Guide, it would not surprise us at all if, as happened with the *SSAGs*, the Guide becomes largely presumptive, subject only to the evidentiary particularities of the case.

In the meantime, if you have yet to read the Parenting Plan Guide . . .

M.W. v. B.J., 2022 NWTSC 25 – Child Protection and Unborn Children

I suppose SCOTUS
Might Have Decided
this One Differently

A Justice of the Peace granted an *ex parte* Emergency Protection Order (“EPO”) against the (female) Respondent, B.J., on September 17, 2022, at the request of the (male) Applicant, M.W.

The parties were not married and the relationship ended when B.J. became pregnant. At the time the EPO was issued, B.J. was eight months pregnant.

The EPO was reviewed by a Supreme Court Justice as required by s. 5 of the *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24 (the “*Act*”). At the review, a question arose as to whether M.W. was in the category of person who could apply for an EPO pursuant to s. 2(1) of the *Act*.

Along with the parties, the Attorney General of the Northwest Territories was invited to make submissions on this point. The Attorney General was of the view that M.W. was not eligible to apply for an EPO because he was not (or at least not yet) the parent of a child with B.J.

Section 2 of the *Act* specifies who can apply for an EPO and clarifies that not all family or intimate relationships will qualify for protection under the *Act*.

Section 2(1) of the *Act* states:

The following persons may apply for an emergency protection order or a protection order:

- (a) a spouse or former spouse of the respondent;
- (b) a person who resides with, or has resided with, the respondent in an intimate or family relationship;
- (c) a person who is, together with the respondent, a parent of a child;
- (d) a parent or grandparent of
 - (i) the respondent, or
 - (ii) a person referred to in paragraph (a), (b) or (c).

The *Act* was meant to provide protection to specified individuals in specified intimate relationships but, by its wording, it was not intended to cover *all* people in all intimate relationships. As noted in *Lenz v. Sculptoreanu* (2016), 78 R.F.L. (7th) 29 (Alta. C.A.):

[30] The *Protection Against Family Violence Act*’s extraordinary procedure was designed and intended to address one subset of abusive relationships — violence among prescribed family members — whereas common law restraining orders are available for broader forms of abusive relationships. The *Act* is a specially designed instrument that seriously abridges the liberty of person, and its application should be restricted to its intended familial context.

[31] In summary, the *Protection Against Family Violence Act* has the specific purpose of targeting violence amongst persons with familial relations, as defined under the statute. The

EPO scheme is reserved for those that fall within the strict definition of “family members”.

An EPO is an extraordinary remedy, only available in certain situations of family violence and where there is sufficient urgency to have an EPO issued immediately and on an *ex parte* basis: *Siwiec v. Hlewka*, [2005 CarswellAlta 1290](#) (Q.B.) at para. 17.

Here, the parties were in an intimate relationship, but they were not spouses or former spouses. Nor did they live together. Nor had they *ever* lived together. So the “spousal” definition did not give M.W. standing to claim an EPO. But was M.W. “the parent of a child” within the meaning of s. 2(1)(c) of the *Act*? Remember, at the time, B.J. was eight months pregnant.

In s. 1 (1) of the *Act*, a “child” is a person under the age of 19 — and a “reasonable interpretation” of that phrase required a person to have been born because a person does not acquire an age until after birth: *Baby R., Re* [\(1988\), 15 R.F.L. \(3d\) 225](#) (B.C. S.C.) at para. 17.

Her Honour looked to the definition of “person” in the *Interpretation Act*, S.N.W.T. 2017, c. 19, but it was of no help.

At criminal law, a “child” does not become a “human being” until it has been born alive as specified in the *Criminal Code*, and in *R. v. Sullivan*, [1991 CarswellBC 59](#) (S.C.C.), the Supreme Court of Canada held that “person” was synonymous with “human being.” Therefore, a “child” does not become a “person” until it has been born alive. We can sense a good number of SCOTUS justices rolling in their chambers.

Outside the criminal context, in *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)* [\(1997\), 31 R.F.L. \(4th\) 165](#) (S.C.C.), the Supreme Court of Canada stated as follows in considering the rights of an unborn child:

[11] I turn to the general proposition that the law of Canada does not recognize the unborn child as a legal or juridical person. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. This is a general proposition, applicable to all aspects of the law, including the law of torts.

See also *Liebig v. Guelph General Hospital*, [2010 CarswellOnt 4012](#) (C.A.).

Justice Smallwood notes that there are simply differences in law as to how the unborn child and the born child are treated, and that the general proposition is that an unborn child is not a legal or juridical person.

Her Honour is also quick to note that her ruling is not a biological or spiritual conclusion, but just a legal one long recognized by the common law — perhaps in an effort to prevent any of the majority SCOTUS justices from caravanning up to Yellowknife.

Nothing in the *Act* suggested a different interpretation was meant. And, therefore, the *Act* did not permit the Applicant to apply for an EPO.

L. v. L., 2022 ONSC 4787 - RESPs

Everything you *Ever*
Wanted to know
about RESPs...and a
lot you didn't.

So what exactly is an RESP? Is it a trust relationship? Are children the beneficiaries of an RESP? Do the contributors own it? All excellent questions considered — and answered — by Justice Faieta in [*L. v. L.*](#).

The parties were married in 2003 and had two children together. They separated in 2010. They signed a Separation Agreement in 2011 that provided, among other things, that they would both make annual contributions to a registered education savings plan ("RESP") for the children, and that they would use the RESP to pay for the children's post-secondary educations.

Over the next decade, the parties contributed approximately equal amounts to the children's RESP (the mother contributed about 57% and the father contributed about 43%), and by 2022, the RESP had a total value of approximately \$206,000.

The parties' eldest child, DL, was accepted to McGill for September 2022, and told the father that she would need funds from the RESP. The father, who was estranged from DL at that point, refused to release funds from the RESP. Instead, he took the position that:

- The RESP should be divided between the parents in proportion to their respective contributions, and that they would then use their respective shares to cover their proportionate shares of DL's post-secondary expenses; and
- The mother should be paying for the vast majority of DL's post-secondary expenses, as she was earning more than \$1,000,000 a year, while he was earning less than \$100,000.

Not surprisingly, the mother disagreed. She had already advised the father that she was prepared to pay for all of the children's s. 7 expenses without contribution from him, and wanted to be able to use the RESP to pay for the children's post-secondary school expenses.

Both parties brought motions to ask the Court to decide what should happen.

Historically, the law regarding RESPs has not been entirely clear. Some cases have suggested that, no matter who contributes, an RESP is used to reduce the cost of post-secondary education: *H. (M.J.) v. N. (B.E.)*, [2007 CarswellNS 694](#) (S.C.); *Crisp v. Crisp*, [2012 CarswellOnt 9038](#) (S.C.J.); *Hesketh v. Wright*, [2007 CarswellOnt 855](#) (C.J.).

Other cases have suggested that where only one parent contributes after separation, only that parent gets the benefit of the RESPs saved: *L.A.U. v. L.L.L.*, [2016 CarswellPEI 6](#) (S.C.); *E.B.H. v. E.H.*, [2017 CarswellOnt 14004](#) (S.C.J.); *T.M.R. v. S.M.S.* (2019), [24 R.F.L. \(8th\) 235](#) (N.B. Q.B.). That is, the non-contributing parent cannot reap the benefits of the other's RESP contributions post-separation.

Where both parents contribute, post-separation RESP contributions are to be credited to the parent that contributed: *Rumpel v. Wills*, [2010 CarswellSask 679](#) (Q.B.); *C.S. v. D.A.S.*, [2020 CarswellOnt 292](#) (C.J.).

Other cases have gone further to suggest that, where one parent alone contributes to RESPs post-

separation, the RESP will not be included in the child support calculation — rather, it is to be considered a prepayment of future obligations by the parent establishing the plan: *Foster v. Amos*, [2010 CarswellSask 742](#) (Q.B.); *Urquhart v. Loane* (2016), [82 R.F.L. \(7th\) 290](#) (P.E.I. C.A.). In fact, in *Urquhart*, the Court agreed that it did matter whether the funds were contributed pre-marriage or post-separation.

To us, it seems logical that RESPs owned on the date of separation should be used to reduce the overall cost of education, and that RESPs saved after separation should be to the credit of the party making the contributions. However, this analysis skips a step. The first question is: are the RESPs owned by either or both parties — and if so, what is the nature of that ownership? *L. v. L.* considers the nature of RESPs and whether they are actually owned by the annuitant.

Here, the mother asked for an Order transferring the RESP into her sole name, and allowing her to use the funds solely for the purpose of funding the children’s post-secondary school expenses (in the alternative, the mother asked for an Order giving her sole carriage of the RESP, and sole authority to disburse the funds to the children).

The father asked for an Order dividing the RESP into two separate accounts for each party in proportion to their respective contributions, and requiring the mother to sign any necessary documents to complete the division. Justice Faieta dismissed the father’s motion because he was not satisfied that he had jurisdiction to divide an RESP. (Although the father attempted to rely on *Christakos v. De Caires*, [2016 CarswellOnt 1433](#) (S.C.J.), the Order dividing an RESP in that case was made on consent, and the decision did not actually consider or discuss whether the Court actually had jurisdiction to make such an Order.)

The mother argued that the parties were holding the RESP in trust for the children. The father disagreed, and argued that the RESP belonged to the parties in proportion to their respective contributions. To decide who was right, Justice Faieta started by thoroughly reviewing what RESPs are, and how they work:

[45] . . .

- The basic framework for an RESP is established under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (“*ITA*”).
- **An RESP is a contract between an individual (“the subscriber”) and an organization (“the promoter”) designed to help parents, family, and friends to save towards a beneficiary’s post-secondary education:** Canada Revenue Agency, Information Circular No. IC93-3R2, *Registered Education Savings Plans*, May 4, 2016 (“*CRA Circular*”), page 2; *ITA*, s. 146.1 (1).
- Under the contract, **the subscriber names one or more beneficiaries and agrees to make contributions for them, and the promoter agrees to pay educational assistance payments to the beneficiaries.** The subscriber’s contributions are not deductible from their income tax.
- Aside from helping a child finance their cost of post-secondary education, the benefits of an RESP are that: (1) **taxes on income earned on contributions are deferred until the income is withdrawn**, and (2) **federal government grants are paid on**

contributions made to an RESP.

- Various government grants and incentives are available. A basic Canada Education Savings Grant ("CESG") of 20% on the first \$2,500 of annual RESP contributions is paid into the RESP under the *Canada Education Savings Act*, S.C. 2004, c. 26 ("CESA").

- An RESP is a vehicle designed for individuals to accumulate income for post-secondary education.

- **The only permissible payments out of an RESP are:**

- o Subject to the terms and conditions of the RESP, **the promoter can return contributions to the subscriber or to the beneficiary at any time.**

- o **Educational Assistance Payments** (which does [not] include a refund of contributions but does include the RESP's accumulated investment earnings (earnings on the money saved in the RESP) and CESGs) can be paid to or for the beneficiary student to help finance the cost of post-secondary education if the student is enrolled in a post-secondary educational institution or other qualifying educational program or if the beneficiary student is at least 16 years old and is enrolled in a specified educational program.

- o **Accumulated income payments** ("AIPs"), which are investment earnings that accumulate on contributions made to a RESP and on amounts paid under the *CESA*, can be paid to a subscriber if the beneficiary is 21 years old and is not pursuing post-secondary education and the plan has been in existence for at least ten years. AIPs must be included in the subscriber's income for the year the payments are received. The payments are subject to a 20% additional tax on top of the regular tax rate payable on the subscriber's income. The subscriber can reduce or eliminate this additional tax by contributing the AIPs to his or her RRSP or to a spousal RRSP up to a maximum of \$50,000.00.

- o **Repayment of amounts under the CESA:** See section 11 of the *Canada Education Savings Regulation*, S.O.R./2005-151.

- o **Payments to a designated educational institution** and payments to a trust to accommodate transfer of property between RESPs.

- **Any amount received by a taxpayer in satisfaction of a subscriber's interest under an RESP must be included in computing the taxpayer's income except:**

- o Any amount received in satisfaction of a right to a refund of payments under the plan: *ITA*, ss. 146.1 (7.1)(b), 146.1 (7.2)(b)(ii).

- o Any amount received by a taxpayer under a court order or agreement relating to a division of property between the taxpayer and the taxpayer's spouse or common-law partner in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership: *ITA*, ss. 146.1 (7.11)(b), 146.1 (7.2)(b)(iii).

- **The subscriber of a plan can change the named beneficiary under an RESP if the terms of the plan allow:** CRA Circular, paras. 74-75.

- If a subscriber dies, their estate may continue the RESP or name another individual as an alternate subscriber. The terms of the RESP and provincial law will dictate what happens to the RESP: CRA Circular, para. 8. [emphasis added]

After explaining what RESPs are and how they work, Justice Faieta considered whether the RESPs generally belong to the subscriber (as argued by the father), or whether the subscriber is holding the RESP in trust for the beneficiary (the children) (as argued by the mother).

The cases that have considered this issue are not consistent. On the one hand, in *McConnell v. McConnell*, [2015 CarswellOnt 4939](#) (S.C.J.), Justice Price held that “[a]n R.E.S.P. is not property belonging to or in the possession of either spouse.” Rather, it is “a trust fund held by the trustee, who is the administrator of the R.E.S.P., on behalf of the children, who are its beneficiaries.”

On the other hand, there are a number of cases where courts have held that RESPs are property that belong to the subscriber, including *Payne, Re*, [2001 CarswellAlta 1379](#) (Q.B.), *Vetrici v. Vetrici* ([2015](#)), [57 R.F.L. \(7th\) 18](#) (B.C. C.A.); *Zwack v. Butler* ([2015](#)), [67 R.F.L. \(7th\) 356](#) (B.C. S.C.); *Barnes v. Bates*, [2014 CarswellBC 1410](#) (S.C.); *C.S. v. D.A.S.*, [2020 CarswellOnt 292](#) (C.J.); *M. (C.S.) v. L. (W.S.)* ([2015](#)), [68 R.F.L. \(7th\) 229](#) (B.C. Prov. Ct.) at paras. 26-28; and *Chong v. Donnelly*, [2021 CarswellOnt 10986](#) (S.C.J.).

After considering the authorities, Justice Faieta ultimately disagreed with *McConnell*, and concluded that, as a general rule, an RESP belongs to the *subscriber*, and not the beneficiary:

[50] Having regard to solely the statutory framework for an RESP, it is my view that the establishment of an RESP does not establish a trust for a beneficiary given that the *ITA* permits a subscriber to, at any time, obtain a refund of their contributions from the promoter. A subscriber also has the right to change beneficiaries: See Canada Revenue Agency, *Registered Education Savings Plans (RESP)*, RC 4092(E) Rev. 21 (17 November 2021), at p. 12.

[51] Accordingly, unless the circumstances dictate otherwise, an RESP is the property of the subscriber. This conclusion also appears to be supported by s. 146.1(1) of the *ITA* which in its definition of “subscriber” appears to contemplate that an RESP may be considered to be the property of a subscriber. The definition states:

. . . an individual who has before that time acquired a subscriber’s rights under the plan pursuant to a decree, order or judgment of a competent tribunal, or under a written agreement, relating to a **division of property** between the individual and a subscriber under the plan in settlement of rights arising out of, or on the breakdown of, their marriage or common-law partnership. [emphasis in original]

We agree with Justice Faieta on this point. As Philip Epstein explained in his discussion of *Elias v. Elias* ([2018](#)), [11 R.F.L. \(8th\) 213](#) (Ont. S.C.J.), in the [2018-39](#) (October 1, 2018) edition of *TWFL*, which was another decision about RESPs that considered *McConnell*:

Justice Maddalena of the Ontario Superior Court of Justice says, “it is clear and courts have held in the past that RESPs do not form part of net family property”. *McConnell v. McConnell*,

2015 CarswellOnt 4939 (Ont. S.C.J.), is cited for that proposition. Respectfully, I do not think that is the case. **An RESP belongs to the person in whose name it is registered unless the other parent has an argument about resulting or constructive trust in relation to the RESP. It is not a trust fund for the children. RESP funds are not impressed with a trust on behalf of children.** This issue is discussed in *M. (C.S.) v. L. (W.S.)*, 68 R.F.L. (7th) 229 (B.C. Prov. Ct.) by Judge Saunders. [emphasis added]

That being said, Justice Faieta also determined that an RESP can be held in trust for the beneficiaries if all three of the elements for the creation of a valid trust (i.e. the “three certainties”) have been established, namely, “certainty of intention to create a trust; certainty of subject matter; and certainty of objects: *Corvello v. Colucci*, [2022 CarswellOnt 1931](#) (C.A.), para. 7.”

In this case, Justice Faieta was satisfied that all the three certainties had been established because, as previously noted, the Separation Agreement required the parties to use the RESPs for the children’s post-secondary educations:

[54] To ascertain certainty of intention in the absence of a written trust agreement, “the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed, and as to how the parties conducted themselves” must be considered: [Corvello](#), para. 10.

[55] In this case, there is no evidence of a written trust agreement nor the RESP contract between the subscribers and the CIBC. However, the parties signed a [Separation Agreement] which states:

The RESPs maintained by the parties shall be used for the children’s postsecondary education. [Emphasis added]

[56] I find that the RESP is held in trust for the children’s post-secondary education given that the three certainties have been established by the language of the [Separation Agreement] as follows: (1) the use of the word “shall” establishes a legal, rather than a moral, obligation that the RESP be used for the beneficiaries; (2) the subject-matter or property of the trust is certain given the reference to “the RESPs maintained by the parties” and thus includes the CIBC RESP; and (3) the objects of the trust are certain in that the “children” are identified as the beneficiaries. [emphasis in original]

After finding that the RESP was being held in trust for the children, Justice Faieta relied on the court’s inherent jurisdiction to give the mother sole authority to disburse the funds in the RESP, and ordered her to account to the father for any withdrawals within 14 days. However, he also confirmed that this arrangement was without prejudice to any further motion that might be brought to determine whether all of DL’s expenses should be paid out of the RESP (i.e. the mother’s ultimate position), or whether these expenses should be shared pursuant to s. 7 of the *Guidelines* (i.e. the father’s position).

To avoid this type of dispute in the future, it is important to include clear wording in the parties’ settlement instrument about how RESPs are to be used, and whether:

- The RESP will be divided (whether notionally or actually) between the parties so that

they can each use the funds how they see fit (including but not limited to covering their respective shares of any post-secondary expenses pursuant to s. 7 of the *Guidelines*); or

- The RESP will be used to pay for the child's post-secondary expenses, and the parents will only share any post-secondary expenses that are not covered by the RESP pursuant to s. 7.

The settlement instrument should also address how any disputes are to be resolved.

If only one party is named as the sole subscriber of an RESP that was established during the marriage, it is important to take steps to ensure that the subscriber will actually be obliged to use the RESP to cover a child's post-secondary expenses (e.g. by having the other party's name added to the account or splitting the account into two). Otherwise, there will be nothing to prevent the sole subscriber from withdrawing the funds from the RESP at any time and using them however s/he sees fit — even though the RESP was not included in the property division.

McGuire v. Bator, 2022 ONCA 431 – Non-Compensatory Spousal Support Claims

How to Win Friends
and Influence
People. Just not
Judges.

This case offers an excellent lesson in client management and reminds us that, sometimes, bad guys finish . . . well . . . last.

The appellant (“McGuire”) had a 9-year-old son, M. They lived in McGuire’s condominium. M’s biological father was long out-of-the-picture and had paid no child support.

The respondent (“Bator”) had three children from previous relationships: a 26-year-old stepson, and two biological children, one of whom, T, was 7 years old.

When the parties met, McGuire was 50 years old and Bator was 55.

The relationship between McGuire and Bator progressed, and the couple introduced their children to each other.

McGuire and M moved into Bator’s home on January 1, 2013. They lived as a family, and McGuire looked after the household chores and cared for M and T when T he was not with his mother. She also maintained her employment, as did Bator.

In 2015, McGuire sold her condo and used the proceeds to pay for household expenses (about \$65,000) and paid \$16,705 for the installation of new windows in Bator’s home. (This would later form the basis for McGuire’s claim for unjust enrichment.)

In 2016, McGuire became ill and unable to work. She was designated “disabled” by Canada Pension Plan, and her only source of income became her disability payment of about \$1,200 a month.

Bator was upset that McGuire was no longer able to contribute to the household — and he asked her and M to leave. When she did not leave, on February 2, 2018, Bator gave McGuire an ultimatum: either sign a contract to perform household services, pay rent of \$1,250 a month retroactive to October 2017, in which case she and M could stay until June; or be immediately evicted as a trespasser.

As McGuire did not leave and (shockingly) did not sign the contract, less than a week later, Bator gave her a document entitled “Trespass Notice and Eviction” requiring her to leave within four days (by February 12, 2018). As she and M had nowhere to go, and as she was not able to work, she could not leave.

On February 13, 2018, when M was at school, Bator called the police to have McGuire removed from his home. She did not even have time to properly pack their belongings. And Bator had no further contact with M since.

McGuire sued Bator for child and spousal support and for an interest in Bator’s home.

After a 7-day trial, the trial judge concluded that:

1. McGuire was not entitled to child support because Bator was not standing *in loco parentis* to M — Bator did not have a settled intention to treat M as his own.

2. McGuire was entitled to spousal support on a non-compensatory basis given her inability to work. The trial judge ordered lump sum support for the period January 1, 2018 to June 30, 2020.

3. McGuire’s claim for a constructive trust interest in Bator’s home was dismissed.

The court below also ordered no costs.

McGuire appealed. While the result with respect to child support and unjust enrichment was somewhat predictable — keep reading to see what the Court of Appeal does with spousal support. It is a bit concerning. Bator sought leave to appeal the order for no costs.

Child Support and *In Loco Parentis*

It was not hard for the Court of Appeal to dismiss the appeal with respect to child support. Drawing on *Chartier v. Chartier* (1999), 43 R.F.L. (4th) 1 (S.C.C.) at para. 39, the Court of Appeal agreed that McGuire had not established that Bator had a settled intention to treat M as a child of his own:

The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child’s relationship with the absent biological parent. The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly.

The trial judge had clearly made her findings for what is a textbook case for no finding of *in loco parentis*:

- The parties did not share a bank account and did not pay for M’s expenses from that account;
- Bator expected McGuire to pay him back for M’s expenses;
- Bator did not discipline M and was not involved in M’s bedtime routine;
- M did not refer to Bator as “dad”, but called him by his first name;
- Bator introduced M to third parties as McGuire’s son, not his son; and
- Bator treated M differently from his own children, being far more involved in their day-to-day activities.

Although not specifically referenced by the Court of Appeal, there are really two policy ends at play in the whole idea of *in loco parentis*. On one hand, once a person becomes a “step-parent” and starts to treat a child as a child of his or her own, the law does not want to simply allow that party to wholly financially withdraw from what has become a new family financial unit. But on the other hand, if courts too readily determine that new partners are standing *in loco parentis*, that will discourage repartnering: *Widdis v. Widdis*, 2000 CarswellSask 594 (Q.B.); *Watts v. Watts* (2011), 99 R.F.L. (6th) 225 (Ont. C.J.).

Bator had also relied on his “eviction” to show that he had no parental role with M. Bator actually swore an affidavit saying:

The decision to evict [McGuire] and [M] from my home without contemplating the impact it would have on [M], in my opinion, further demonstrates that I did not view [M] as my son.

Clearly, Bator was a recent graduate of the Dale Carnegie Charm School Course on “How to Win Friends and Influence People.”

Unjust Enrichment/Constructive Trust

McGuire argued that Bator had been unjustly enriched because she paid for the new windows to his home (\$15,705) and gave him \$65,000 after the sale of her condo. Bator argued that McGuire needed help paying her mortgage and expenses, and that she had agreed to repay him once she sold her condo.

The trial judge accepted that the \$65,000 was a repayment. She also found that there was no unjust enrichment because there was no evidence that the home improvements increased the value of the home.

The Court of Appeal saw no reviewable error here either. We note, however, that the evidence need not have shown that the improvements increased the value of the home; it would also have been relevant whether the improvements *maintained* the value of the home.

Spousal Support

Here is where things get interesting.

The trial judge found non-compensatory entitlement to spousal support based on McGuire’s disability, and she awarded McGuire lump sum spousal support “to permit the parties to move on with their lives”. The trial judge made appropriate reference to the SSAGs, and based on the parties’ incomes, their ages, and a 5-year cohabitation, the SSAGs suggested mid-range monthly support of \$620 a month for 2 1/2 to 5 years. Using the mid-range of the SSAGS and the lowest duration, the trial judge converted the periodic support to a lump sum of \$12,248.

The Court of Appeal found “several problems” with this approach:

- (i) there was no analysis of how the award achieved the objectives of spousal support;
- (ii) there was no explanation of why, in the case of an ill and disabled spouse unable to work, a mid-range support amount for the lowest duration was appropriate; and
- (iii) a lump sum to achieve a clean break was not appropriate in the circumstances.

As a result, in addition to the amount ordered by the trial judge for spousal support (a lump sum of \$12,248), the Court of Appeal ordered Bator to pay periodic monthly support of \$620 a month.

But let’s now consider the reasons offered for doing so.

First, the Court of Appeal was concerned that the trial judge offered no analysis as to how — and whether — the lump sum support award achieved the objectives of spousal support.

The Court of Appeal noted that the objectives for non-compensatory/needs-based spousal support were set out by the Supreme Court of Canada in *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.), at para. 46:

Following *Moge*'s broad view of causation in compensatory support and the concomitant acceptance of the availability of non-compensatory support, courts have shown increasing willingness to order support for ill and disabled spouses. Sometimes they have done this as a "transition" to self-sufficiency. But more often, they have frankly stated that the obligation flows from the marriage relationship itself. Collecting cases, Rogerson explains in "Spousal Support After *Moge*":

The [more dominant] approach, . . . particularly in cases of earning capacity permanently limited by age, illness or disability, and the one generally supported by the developing Court of Appeal jurisprudence, has been to award continuing support without regard to the source of the post-divorce need. On this approach, which I earlier referred to as the "**basic social obligation**" approach, causal connection arguments have been rejected not only in determining entitlement to support, but also in assessing the extent of the obligation. The message coming from the cases adopting this approach appears to be that one takes one's spouse as one finds him or her, subject to all his or her, weaknesses and limitations with respect to income-earning capacity; and a spouse with higher earning capacity has a basic obligation to make continuing provision for a spouse who is unable to become self-sufficient at the end of the marriage. One is simply not allowed to abandon a spouse to destitution at the end of a marriage if one has financial resources which might assist in relieving the other spouse's financial circumstances. [emphasis in original]

Here, as there was evidence that McGuire's disability would continue, the Court of Appeal was concerned that the trial judge ordered spousal support at the mid-range of the SSAGs formula, and at the lowest end of the SSAG duration from the date of separation. According to the Court of Appeal, "there was no explanation as to why the support terminated when the need clearly continued." Unfortunately, the trial decision is not available.

The Court of Appeal then states as follows:

[29] As stated by this court in *Gray v. Gray*, 2014 ONCA 659, 122 O.R. (3d) 337, at para. 49, "[t]he duration of support is also an issue that ought to be contemplated under the SSAG". For support to terminate there must be a realistic prospect of the spouse being able to become self sufficient: *Reisman v. Reisman*, 2014 ONCA 109, 118 O.R. (3d) 721, at para. 28 [20-year traditional marriage and 4 children]. This court has upheld an indefinite support order in the case of ongoing need due to disability (*Gray*) and has overturned a time limit for support for a disabled spouse (*Djekic v. Zai*, 2015 ONCA 25, 54 R.F.L. (7th) 1, at para. 9) [Rule of 65 met].

[30] Here the appellant remains disabled and unable to support herself. She lives on government disability payments. There is no evidence that her situation had changed or will change in the future.

[31] One of the purposes of a spousal support order is to relieve financial hardship; another is for a former spouse to fulfil a basic social obligation to provide support where they are able to

do so and the recipient spouse is not. Nothing in the trial judge's reasons explains how the termination of support after only two-and-a-half years achieves these or other objectives of spousal support.

Respectfully, we are concerned about these comments. While McGuire certainly had a disability such that she was not able to work, despite the basic social obligation model, we cannot forget that this case is about a cohabitation of, perhaps, five years duration, without children. The social obligation model does not make one spouse the insurer of the other such that the payor has to meet all of the need forever: *Rayvals v. Rayvals* (2008), 51 R.F.L. (6th) 391 (B.C. S.C.).

Gray, *Reisman* and *Djekic* are all false comparators. *Gray* was a case about a 16-year traditional marriage with four children. *Reisman* was about a 20-year traditional marriage with four children. And in *Djekic*, the claimant met the Rule of 65. These cases do not offer comparability to a 5-year relationship without children.

Then, while *Bracklow* is certainly a governing authority with respect to non-compensatory support, *Bracklow* does not suggest a presumptive right to support based on disability. Nor does *Bracklow* suggest that the support award for a disabled spouse should equal the amount of the need. In *Bracklow*, the Supreme Court also says:

[54] Fixing on one factor to the exclusion of others leads Mrs. Bracklow to an **artificial distinction between amount and duration**. The two interrelate: a modest support order of indefinite duration could be collapsed into a more substantial lump-sum payment. It also leads her to the **false premise that if need is the basis of the entitlement to the support award, then the quantum of the award must meet the total amount of the need**. It does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need. Nothing in either the *Family Relations Act* or the *Divorce Act* forecloses an order for support of a portion of the claimant's need, whether viewed in terms of periodic amount or duration. **Need is but one factor to be considered**. This is consistent with the modern recognition, captured by the statutes, of the variety of marital relationships in modern society. *A spouse who becomes disabled toward the end of a very short marriage may well be entitled to support by virtue of her need, but it may be unfair, under the circumstances, to order the full payment of that need by the supporting spouse for the indefinite future.* [emphasis added]

As we will see, it is arguable that this is precisely what the Court of Appeal does — it orders Bator to meet “the full payment of that need . . . for the indefinite future.” See also *Shen v. Tong* (2013), 40 R.F.L. (7th) 257 (B.C. C.A.) and *Powell v. Levesque* (2014), 38 R.F.L. (7th) 261 (B.C. C.A.).

There is also the fact that support for a totally disabled spouse is said to require a “delicate balancing” of interests such that the family, society at large, and the disabled person themselves must contribute: *Aujla v. Singh*, 2012 CarswellOnt 11695 (S.C.J.).

And, finally, focussing on Bator's ability to pay suggests a reversion to the idea that a disability entitles a recipient to support for life, just because the payor can afford it. That is contrary to *Bracklow*: *Bridgen v. Gaudet* (2015), 57 R.F.L. (7th) 199 (N.S. S.C.).

Next, the Court of Appeal was concerned that the trial judge offered no explanation as to why, in the case of an ill and disabled spouse, a mid-range support amount for the lowest duration was

appropriate:

[33] The SSAGs are an excellent advisory guideline for typical cases. They assist in achieving consistency and predictability. They are not a substitute for judicial analysis, particularly in exceptional cases.

[34] The trial judge erred in failing to explain her choices and in failing to engage explicitly with the exceptional circumstances of illness and disability that she found as facts. Consideration was required as to whether the circumstances of illness and disability should result in a departure from the basic formula.

That is, the choice to use the basic SSAG formula required explanation. And, furthermore, the trial judge also appeared to have ignored the explicit SSAG exception with respect to disability.

However, we do not know that this criticism is warranted. (Again, it is hard to completely comment as the judgment below does not seem to be reported anywhere.) In the view of the Court of Appeal when dealing with disability, the SSAGs (Chapter 12) suggest that, “[t]he formulas are intended to generate appropriate outcomes in the majority of cases” but that cases of illness and disability often require “restructuring” of duration and/or quantum. But this is what the lower court did — it restructured the monthly payments into a lump sum. Therefore, it is not wholly clear that the trial judge ignored the SSAG disability exception.

Finally, the Court of Appeal questioned whether a lump sum was appropriate in the circumstances of this case, and suggested that the trial judge may have misunderstood the notion of a clean break. It was suggested that, without further explanation, it was difficult to see how the notion of a clean break might apply in the case of support for a person with a disability.

As a result, McGuire’s support appeal was allowed, and as noted above, in addition to the \$12,248 ordered by the trial judge, the Court of Appeal ordered additional periodic spousal support (in the monthly amount set by the trial judge and used to restructure into a lump sum) of \$620 a month (indexed to inflation) in accordance with s. 34(5) of the *Family Law Act*, R.S.O. 1990, c. F.3. And the periodic support was to continue *indefinitely* “subject to review based on any material change in circumstances.”

Just so we’re all on the same page, to be clear, a “review based on any material change of circumstances” improperly blends two concepts. A “review” does not require a material change of circumstances. In fact, the very purpose of a review is to relieve the applicant from having to show a material change of circumstances: *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.); *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.); *Sappier v. Francis* (2004), 8 R.F.L. (6th) 218 (N.B. C.A.); *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.); *Verkaik v. Verkaik* (2020), 49 R.F.L. (8th) 69 (Ont. Div. Ct.); *Cvetkovic v. Cvetkovic-Gorovic*, 2021 CarswellOnt 4162 (C.A.).

A *variation* of support requires a material change. And herein lies the problem. McGuire is disabled. She is unable to work. She is likely to remain disabled and remain unable to work. What possible material change will there be in the future upon which Bator might be able to rely to reduce spousal support? That is, save for being able to argue that “entitlement is always in issue” and “enough is enough” — this support obligation is going to last a very long time. And based on a 5-year cohabitation, to quote the Supreme Court of Canada in *Bracklow*, “. . . it may be unfair . . . to order the full payment of that need by the supporting spouse for the indefinite future.”

As for Bator's costs appeal?

Let's recall: Bator evicted McGuire and her son from his home. He took the position that McGuire was not entitled to any support. Rule 24(4) of the *Family Law Rules* can be used to deny that costs be paid to a party that has behaved unreasonably. The trial judge found that Bator behaved unreasonably. Was there a chance the Court of Appeal was going to allow the costs appeal and award costs to Bator? Not a chance. And they did not.

Ward v. Murphy, 2022 NSCA 20 – Attribution of Pre-tax Corporate Income

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Ward v. Murphy is an important decision from the Nova Scotia Court of Appeal about the attribution of corporate pre-tax income under the *Child Support Guidelines* (the “*Guidelines*”). But as discussed further below, it is also yet another opportunity to give some serious thought to the important principle of proportionality in family law.

The parties in Ward had a young son together. In 2017, Justice Gregan heard the mother’s initial claim for child support. As the father’s disclosure was seriously lacking, Justice Gregan had to do the best he could with the available information, and ultimately concluded that the father should be imputed with an income of \$120,000 a year. This was based on \$60,000 a year of imputed income from employment and EI benefits, and \$60,000 a year for expenses the father had unreasonably deducted from his income (plus the gross-up on those expenses). This resulted in Table child support of **\$994** a month based on the child support Tables that were in effect at that time.

In 2018, the father commenced a variation application. He argued that he had never actually earned \$120,000 a year, and he asked that his child support payments be reduced in accordance with the income he reported on his income tax returns, which was significantly less than \$120,000 a year. This was not a great way for the father to frame his case given that, as we discussed in our comment on *Janiten v. Moran* (2019), 32 R.F.L. (8th) 280 (Alta. C.A.) in the 2020-04 (February 3, 2020) edition of *TWFL*:

. . . to allow a party to ignore their disclosure obligations and then claim a material change by producing them would eviscerate the financial disclosure process: *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.). Remedying one’s own default cannot constitute a material change in circumstances and cannot ground a material change in circumstances. Where a party is imputed with income on account of non-disclosure, *Trang v. Trang* (2013), 29 R.F.L. (7th) 364 (Ont. S.C.J.) offers the court a way to deal with the matter: **assume the original order is correct; consider why income was imputed and the basis for the imputed income; and then consider whether those circumstances have changed.** [See also *Power v. Power* (2015), 67 R.F.L. (7th) 138 (N.S. S.C.); *Ruffolo v. David* (2016), 75 R.F.L. (7th) 16 (Ont. Div. Ct.); *Gray v. Rizzi, supra*] **[emphasis added]**

At first glance, it certainly did not appear that anything material had changed since the initial hearing before Justice Gregan in 2017. The father was still qualified as a mechanic, carpenter, and scaffolder. He still relied on EI benefits to supplement his income. He still owned various rental properties that generated additional income for him, although he now owned 10 rental properties instead of the eight he owned at the time of the hearing in 2017.

The trial judge, however, determined that while Justice Gregan had treated the income from the father’s rental properties as personal income, the evidence showed that, at all material times, the rental income had actually been earned by a company that was solely owned and controlled by the father. This, according to the trial judge, constituted a material change in circumstances that gave the Court jurisdiction to review the child support arrangements going back to October 2018.

Although the issue of whether there had been a material change was not raised by either party in

the Court of Appeal, it is not at all clear to us how the father's disclosure of the fact that he was receiving rental income through a company instead of personally constituted a material change in circumstances. The father had every opportunity to explain his financial circumstances at the initial hearing before Justice Gregan, and his recent revelation that he owned his various rental properties through a corporation instead of personally was hardly a sufficient basis to allow him to re-litigate almost the entire case — especially given s. 18 of the *Guidelines* and the ability to impute pre-tax corporate income.

In any event, having found a material change, the trial judge proceeded to re-calculate the father's actual income for support purposes going back to 2018. Although the father had only reported earning an average of \$43,000 (rounded) in annual employment income on his personal income tax returns, the trial judge was not persuaded there was any basis to depart from Justice Gregan's finding from 2017 that the father was intentionally underemployed and should be imputed with \$60,000 a year in employment income pursuant to s. 19(1)(a) of the *Guidelines*.

The trial judge then went on to examine the father's company's pre-tax income, and the personal expenses that the company was paying for the father's benefit. As the company had lost money in 2018 and 2020, and had only earned a nominal profit in 2019, the trial judge basically decided to ignore the company's profits and losses. Instead, she added the approximate \$31,000 to \$33,000 (rounded) a year in personal expenses that she found the company had paid for the father's benefit directly to the father's income, along with a 23% gross-up. This resulted in slightly more than \$40,000 a year being added to the father's income for support purposes in each of 2018, 2019, and 2020, and resulted in the father having a total income for support purposes of \$101,000 in 2018, \$103,000 in 2019, and \$104,000 in 2020 (rounded).

In other words, the trial judge's Order reduced the father's child support payments from **\$994** a month, to **\$862** a month in child support in 2018, **\$876** a month in 2019, and **\$883** a month in 2020 and 2021.

In reaching this conclusion, the trial judge relied primarily on s. 18 of the *Guidelines*, but also noted that "if that is not the correct approach, I would impute the same amounts to [the father] under s. 19(1)(g) on the basis that he 'unreasonably deducted' these same amounts."

The trial judge also ordered that the father would require leave of the court to commence any further proceedings with respect to child support as she was persuaded the combination of the history of his litigation with the mother and his actions during the hearing justified the imposition of a leave requirement going forward.

The father appealed the trial judge's decision to the Nova Scotia Court of Appeal on numerous grounds. Most of the grounds of appeal, including his attack on the trial judge's order requiring him to obtain leave before commencing a further child support proceeding, were dismissed. But the interesting one for our purposes — and that resulted in a 2-1 split decision — was that the trial judge erred in law in how she dealt with the income from the father's company and the expenses that it had paid for his benefit.

In writing for the majority, Justice Van den Eynden agreed with the father. She found that the trial judge had misapplied s. 18 of the *Guidelines*, which for ease of reference states as follows:

Shareholder, director or officer

18(1) Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income as determined under Section 16 does not fairly reflect all the money available to the parent for the payment of child support, the court may consider the situations described in Section 17 **and determine the parent's annual income to include**

(a) **all or part of the pre-tax income of the corporation**, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

18(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), **all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income**, unless the parent establishes that the payments were reasonable in the circumstances. [emphasis added]

As previously noted, the trial judge effectively ignored the father's company's pre-tax income and losses. However, based on the wording of s. 18 of the *Guidelines*, which makes it clear that the court should *first* consider whether expenses should be added back to a corporation's pre-tax income, and *then* whether all or part of the adjusted pre-tax income should be attributed to a parent's income for support purposes, this was a clear error of law. As noted by the majority:

[117] I now turn to the s. 18 analysis, which the judge used to determine whether pre-tax corporate income should be attributed to [the father] for the purpose of determining his child support obligations. **Section 18 allows a judge to lift the corporate veil if satisfied income under s. 16 (the payor's Line 150 income) does not fairly reflect all income available for child support purposes.** This is particularly important in the case of a sole shareholder (as is the case here) because that shareholder has the ability to control the income of the corporation.

[118] As noted, on this record the judge was correct to resort to s. 18 as the preferred path. However, **the judge erred in principle because she completely by-passed, without any explanation, critical steps under s. 18.** Specifically, **she did not turn her mind to what the company's actual pre-tax income was after adjusting for certain expenses.** Since she did not do this, she did not turn her mind to what portion of the pre-tax income might be available for attribution. . . . [emphasis added]

The majority also found that the trial judge's reference to s. 19(1)(g) of the *Guidelines* as an alternative basis for justifying her conclusion did not fix the problem:

[134] The judge's reference to s. 19(1)(g) does not rectify her error in principle. I say that because **a fundamentally flawed analysis is not saved by merely saying the same incorrect amounts would be imputed under another mechanism, in this case s. 19(1)(g), without some justification.**

[135] **Had the judge correctly conducted the analysis she undertook pursuant to s. 18, she could not have arrived at the same amounts. The company did not have pre-tax income to attribute in the amounts the judge added directly to [the father's] personal income.** In fact, the disparity in pre-tax income, but for one year, is stark. There is no indication in the record or the judge's decision that she turned her mind to this quandary. **Had the judge been alive to her error and had she provided some justification for attributing income well beyond what the company's pre-tax income was, I might be persuaded otherwise. She did not and I could not identify any plausible justification on this record.** [emphasis added]

After adding back the expenses the trial judge found were personal in nature to the company's pre-tax income, the majority found that, at most, there was only \$15,000 of pre-tax income available to be attributed to the father in 2018, \$42,500 in 2019, and \$7,000 in 2020 (rounded). Accordingly, even if it was appropriate to attribute *all* of the company's pre-tax income to the father, his income for support purposes would have totalled, at most, \$75,000 in 2018, \$102,500 in 2019, and \$67,000 in 2020 (rounded).

Unfortunately for the parties, as the trial judge did not make the necessary findings of fact about whether the company's pre-tax income was available for child support purposes, the majority sent the matter back for a re-hearing before a different judge (unless the parties agreed otherwise). And, in the meantime, the majority ordered the father to pay the mother **\$512** a month in child support based on an income of \$60,000 a year. It also provided the following list of principles for judges to consider in future cases when dealing with corporate income under ss. 18 and 19 of the *Guidelines*:

[151] Section 18 was implemented for the purpose of making some (or all depending on the circumstances) of a corporation's pre-tax income available for the purpose of calculating child support. In my view, **when the record is conducive, judges should prefer s. 18 and its rigorous analysis in situations where a court wants to add back expenses deducted from corporate income, which could conceivably fall under s. 18 or s. 19(1)(g).** Otherwise, as this case makes clear, in circumstances where a company has a legitimate pre-tax net loss before adding back any expenses, there is a valid fairness argument for using s. 18 versus s. 19 because the results may be materially different.

[152] In my view, **s. 19 should be utilized in such circumstances where a payor is a controlling shareholder or operator of a corporation and there is insufficient evidence available to use s. 18** (which is not the case here). This approach gives meaning to the legislature's intent of differentiating s. 18 from s. 19. If trial judges default to use s. 19 in all circumstances, s. 18 would become meaningless. And as illustrated, the distinction on when to use s. 18 versus s. 19 becomes important when the amount attributed or imputed under each provision differs materially (as it does in this case).

[153] In short, a s. 18 analysis should not be shied away from when its use is appropriate. Here are some general, non-exhaustive, considerations that may assist in deciding whether income should be attributed under s. 18:

- Attribution of pre-tax corporate income to a payor pursuant to s. 18(1)(a) is a factual exercise, undertaken by a judge on a case-by-case basis.

- A judge is not required to add any pre-tax corporate income to a payor's income. The *Guidelines* merely allow for a judge to do so.

- The reasonableness of a deduction is a discretionary determination; however, the objective is to ensure the allocation of pre-tax corporate income between business and family purposes is fair. **At the end of the day, one should not interfere with reasonable economic decisions needed to meet corporate sustainability.**

- The onus rests on the shareholder parent to establish that pre-tax income of the corporation is not available for support purposes. This means the parent, who is typically the payor, **must lead evidence** that the pre-tax corporate income is not available for support purposes because it will jeopardize the capacity of the corporation to meet its financial obligations.

- When deciding the amount of pre-tax corporate income to attribute to the payor, consideration should be given to:

- What is the nature of the business?
- Is there a business reason for retaining earnings?
- What is the historical practice for retaining earnings?
- What degree of corporate control does the payor exercise?
- Is there only one principal shareholder or other bona fide arm's length shareholders involved?
- Depreciation;
- Possible economic downturns;
- Return on invested capital; and
- If the corporation, after adding back expenses to the pre-tax corporate income, has an overall negative pre-tax income (also known as a loss), no amount of pre-tax corporate income can be attributed to the payor's income. (As illustrated above, this was not relevant in this case.) [**emphasis** added; *emphasis* in original]

Justice Beaton, on the other hand, would have dismissed the father's appeal on the s. 18 issue. Although Justice Beaton agreed with the majority that the trial judge did not apply s. 18 correctly, she was nevertheless satisfied the same result could be achieved under s. 19 of the *Guidelines*, which gives trial judges broad discretion to impute income in appropriate circumstances:

[77] It can easily be said the judge's overall rationale in calculating [the father's] income for support purposes, regardless of which section of the *Guidelines* she applied, was made clear in her reasons, and was grounded in the evidence she accepted. **Had she treated the "add-back" amounts by conducting only a s. 19 analysis to recognize the benefits conferred on [the father], rather than using s. 18(2) to address those same benefits, I am satisfied the**

judge would ultimately have ended up in the same place — ascribing to [the father] additional annual income, in an amount reflecting expenses assumed by his company from which he directly benefitted despite the absence of any equivalent cash transfer. The judge said as much when she stated her alternate intention to employ s. 19. Doing so was within her purview.

[78] The judge was clearly cognizant the finances of his company were super-imposed on [the father's] income. While she did not, strictly speaking, complete the exercise in s. 18, the judge nonetheless arrived at a set of conclusions about [the father's] income that, practically speaking, took her decision and the parties to an outcome supported by the evidence. **I am not persuaded the effect of the judge's lapse in this case, occurring as it did despite her correct recitation of the law, amounts to an error that requires this court's intervention. Nor does it, in the end, unduly prejudice [the father].** While the judge's decision adopts an approach to s. 19 to which my colleagues object, in the end her reasons permit a clear understanding of the analysis she used to reach her conclusions. As I alluded to earlier, **the exercise of imputing income is inherently not one of precision. However, the judge did much more than "guesstimate" in arriving at final numbers she was satisfied were a reasonable representation of [the father's] income in each year assessed.** [emphasis added]

In our view, the majority's analysis under s. 18 of the *Guidelines* is, from a *technical* standpoint, certainly correct. Section 18 provides a clear formula for attributing corporate pre-tax income to a person's income for support purposes. While it permits a court to add back various expenses to a company's pre-tax income, it does *not* give the court authority to go beyond that. If a company does not actually have any pre-tax income even after adding back any personal expenses and applying any necessary gross-ups, then there is nothing to attribute for support purposes. [This is perhaps an oversimplification given the disagreement between various provincial courts of appeal as to whether the "Limited Rule" from *Bear v. Thompson* (2014), 52 R.F.L. (7th) 257 (Sask. C.A.), or the "Unlimited Rule" from *Mason v. Mason* (2014), 47 R.F.L. (7th) 173 (Ont. S.C.J.), rev'd (2016), 83 R.F.L. (7th) 1 (Ont. C.A.) applies. In a nutshell, the "Limited Rule" suggests that no pre-tax income can be attributed if there was no pre-tax income in the most current year. The "Unlimited Rule" suggests that, through a combination of ss. 17 and 18 of the *Guidelines*, pre-tax corporate income can be imputed in a year even if there was no pre-tax corporate income in the immediate preceding year.]

That being said, on the particular facts of this case, we much prefer Justice Beaton's more holistic approach to the situation over the majority's more technical approach. The father in this case had a history of non-disclosure, and had already been imputed with income on the basis that he was intentionally underemployed. There was also no question that the father had been writing off tens of thousands of dollars in personal expenses as business expenses through his company.

While the trial judge did the best she could to determine what the father was actually earning and capable of earning, anyone who has been involved in disputes over how much income to impute for intentional underemployment and/or whether a particular expense is personal, knows that these issues elude mathematical precision. Accordingly, we agree with Justice Beaton's decision to point out that the trial judge had not properly completed the necessary analysis under s. 18 of the *Guidelines*, but to ultimately conclude that the income figures that the trial judge arrived at were reasonable enough in the circumstances, bearing in mind that s. 19 gives the court broad discretion to impute income in appropriate circumstances.

We also think that the majority's decision to remit the matter for a re-hearing instead of deciding the matter on the existing record was problematic.

The *Guidelines* specifically state in s. 1 that their objectives include, among other things, “to reduce conflict and tension between parents by making the calculation of child support orders more objective”, and “to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement”. Sending this matter back for yet another hearing is, in our view, wholly inconsistent with these objectives.

Requiring the parties to have yet another court hearing to finalize their child support arrangements was, in our view, unnecessary given the nature of the issues, and the amounts of money that were actually in dispute. The end cannot possibly justify the means.

The initial decision from 2017, where the father failed to comply with his disclosure obligations, required him to pay the mother just under **\$1,000** a month in child support. The trial judge's decision to give him a second chance during the course of a 6-day variation proceeding in 2021 nominally reduced his child support payments to approximately **\$875** a month. The majority's decision reduced the child support payments to just over **\$500** a month, but left it open to the mother to seek additional support at the rehearing. Whatever amount of child support ultimately turns out to be “right” at the re-hearing, the difference cannot possibly justify requiring the parties (particularly the mother who appears to simply be trying to get the father to comply with his child support obligations), to spend even more time and money trying to bring an end to what ought to have been a straightforward child support case.

Respectfully, an order for a re-hearing in these circumstances was unfair to the parties (particularly the mother) who were left without finality despite already having gone through a 6-day trial and an appeal, and inconsistent with the Supreme Court of Canada's exhortation in *Hryniak v. Mauldin*, [2014 CarswellOnt 640](#) (S.C.C.) for courts to ensure that “[t]he balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just”, and its warning that “when court costs and delays become too great, people look for alternatives or simply give up on justice.”

***Kahsai v. Hagos*, 2022 ONCA 576 – Lump Sum Spousal Support**

If you don't want the Court to Order Lump sum Spousal Support, Don't give them a reason to award Lump sum spousal Support!

We have selected to discuss because of what the Court of Appeal has to say about lump sum support.

The appellant also argued that the trial judge's management of the trial was unfair and favoured the respondent. These arguments did not go anywhere.

While a trial judge must be open to persuasion and must treat both parties fairly during the hearing, the management of a trial is otherwise left to the trial judge. The Court of Appeal will not micromanage a trial with 20/20 hindsight and will not conduct a post-mortem on a trial: *R. v. Samaniego*, 2020 ONCA 439, 151 O.R. (3d) 449, at paras. 15-17, *aff'd* 2022 SCC 9. Here, the trial judge was found to be very patient with the the parties and counsel, allowing the trial to go far longer than anticipated, and the Court of Appeal was not interested in criticizing her reasonable and balanced efforts to corral counsel.

It has become common to include an allegation of bias in an appeal. But such claims should not be *de rigueur*. They should be reserved for situations where there is a real and articulable concerns that the parties were not treated fairly and that can overcome the presumption of impartiality and integrity: *R. v. Arnaout*, 2015 ONCA 655; *The Queen v. S*, [1997] 3 S.C.R. 484; *Bizon v. Bizon*, 2014 ABCA 174; *Fraser-Tabak v. Tabak*, 2016 ABCA 79.

It is also not judicial error or evidence of bias that the trial judge found the evidence of one party to be more credible. It is the purview of the trial judge to make credibility assessments of the parties and witnesses. And here, the trial judge had several reasons to discount the appellant's evidence.

The parties' relationship began in 1978, in Eritrea. Their oldest child was born in Eritrea in 1980. In 1984, the family immigrated to Canada, settling in our nation's capital. The parties separated in 1985 and divorced in 1987. After separation, the child lived primarily her mother, the respondent. In September 1990, the parties resumed cohabitation and lived together until September 22, 2013, when the respondent moved out of the family home to Toronto. During this second period of cohabitation, the parties had two more children.

Despite this evidence, the appellant asserted that the parties had *never* been in a committed relationship – not before 1985 or after 1990. But this did not at all jive with the fact that they had a child in 1980, moved to Canada as a family in 1984, or their resumed cohabitation from 1990 to 2013 – or their clear life together as a family. The appellant's position in argument was also contradicted by his own pleadings and affidavit, in which he admitted that the parties had been married.

On top of that, the evidence of *both* experts accountants was that the financial information provided by the appellant was "unreliable" and impossible to reconcile. Getting a true picture of the appellant's finances proved elusive, because, as found by the trial judge, the appellant was motivated by a wish to avoid a support obligation.

Parties with incredible evidence should not later complain that their evidence was found to be...well...incredible. In the end, the trial judge found that imputing an income to the appellant of \$100,000 per year was warranted and reasonable.

The appellant argued that the calculation of the lump sum payment in lieu of periodic spousal support was erroneously calculated by the trial judge on a monthly base of about \$1,800, rather than the interim amount of \$1,000 fixed earlier on an interim motion. However, the \$1,800 used by the trial judge was based on her determination of support based on the high-range of the SSAGs rather than the middle range. Of course, this decision was entitled to deference: *Hickey v. Hickey*, [1999] 2 S.C.R. 518. And the decision to do so was based on the strong compensatory claim: a long-term relationship, caring for the children, the ages of the parties, and the economic consequences that flowed from their relationship which were overwhelmingly in the appellant's favour.

The appellants' main substantive claim was that this was not a proper case in which to order lump sum spousal support. While this argument may have had wings in the day of *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (C.A.), motion for leave to appeal to SCC refused, where the Ontario Court of Appeal suggested that such lump sum awards should be "rare" – the availability of lump sum awards was expanded very significantly by the Ontario Court of Appeal in *Davis v. Crawford*, 2011 CarswellOnt 2512 (C.A.). Now, to make a lump sum support order, a court need only consider the perceived advantages (terminating ongoing contact or ties; providing capital; ensuring support is paid, etc.) against any presenting disadvantages (no future ability to vary; difficulties in calculating), along with the ability to pay a lump sum award: *Davis v. Crawford*, 2011 CarswellOnt 2512; *Litzenberger v. Litzenberger*, 2012 CarswellSask 213; *Racco v. Racco*, 2104 ONCA 330; *Mwanri v. Mwanri*, 2015 ONCA 843; *Beck v. Beckett*, 2011 CarswellOnt 8467 (C.A.); *Hathway v. Hathway*, 2017 ONSC 3490. (Both *Beckett* and *Hathway* offer a good summary of advantages and disadvantages.)

Here, the trial judge, Justice MacEachern considered the following factors in support of the lump sum award: the length of the relationship, the parties' ages, the roles adopted during the relationship, the relationship's economic consequences, and the respondent's strong compensatory claim. Her honour also noted that a lump sum would provide the respondent with an immediate capital payment to address her immediate needs. And, the trial judge clearly wanted to see the parties disengage from each other and to put an end to the litigation and the appellant's conduct within it. The Court of Appeal took no issue whatsoever with these considerations.

The most interesting argument put forward by the appellant was that a lump sum award would effectively deprive him of a future motion to vary, which was prejudicial to him given he was 67 years old. It is true that an award of lump sum support will deprive a payor from varying support in the future. Money paid is money paid. And, it is also true that, in some jurisdictions, such as Ontario for example, it may be possible for a recipient to vary a lump sum award: *Tierney-Hynes v. Hynes*, 2005 CarswellOnt 2632 (C.A.). But ultimately, these arguments go to the calculation of the award and the appropriate time value and risk discount to be applied, not the initial question as to whether a lump sum should be paid in a particular case.

In this case, as noted by Justice MacEachern, it was precisely such ongoing engagement that the trial judge was looking to end. In the words of the trial judge:

Throughout Mr. Hagos' testimony, he took credit for all of the family's successes and blamed Ms. Kahsai for all of its challenges...

In his evidence, Mr. Hagos was motivated to present himself as a saviour, while Ms. Kahsai was the villain. Mr. Hagos was consistent in attacking Ms. Kahsai's character from every possible angle. In Mr. Hagos' view, Ms. Kahsai was stupid, uneducated, financially irresponsible, promiscuous, had a poor reputation, had no friends, did not contribute anything to the family, was a parasite, and was a bad and neglectful parent.

The Court of Appeal found absolutely no basis for the appellant's argument as to the approach the trial judge took regarding spousal support.

R. L. v. M.F., 2022 ONSC 1677 – Sale of the Matrimonial Home

Be careful what
you tell you kids.

In this case, Justice Kurz considered a motion for the pre-trial sale of the jointly-owned matrimonial home.

The parties were married in February 2006. They separated in February of 2020. They continued to live separate and apart in the matrimonial home until the father moved to a rented apartment in January of 2022 (a month prior to the hearing of this motion). There were two children of the marriage, ages 15 and 13.

The husband was an investment banker and had an income of at least \$1,552,000.00. The wife was a radiologist who earned approximately \$350,000.00. The father was paying child support of \$18,541.00 a month and spousal support of \$14,000.00 a month along with 72% of the children's extensive section 7 expenses.

The husband brought a motion for the immediate sale of the home. He argued that the parties needed to take advantage of the lucrative “spring market.”

The Court set out the standard tests for an interim sale, citing *Davis v. Davis*, [1953] O.J. No. 733.

The husband argued that a court has a “narrow” discretion to refuse a partition and sale. A sale should only be denied where there is malicious, vexatious or oppressive conduct. Alternatively, to avoid a sale, the responding party must show that a sale would prejudice a bona fide family law claim – such as a claim for exclusive possession.

Justice Kurz noted that while this was generally the test for partition and sale of any jointly-owned property, a matrimonial home brought certain unique considerations into play. The court’s analysis does not end with the joint owner’s *prima facie* right to sale. A court must consider the best interests of any children that are involved in the case. Orders for the sale of the matrimonial home prior to trial are not to be made as “a matter of course.” The onus remains on the individual resisting the sale – but each case will be considered on its own facts. The person resisting the sale must demonstrate that a legitimate claim would be prejudiced in some way or that the children’s best interest would be negatively impacted. When considering the best interests of the children, the court will consider the *specific* circumstances of the *specific* children in question, not just an abstract notion of how children in general would be affected by sale before trial. The best interests of the children before the court may, in themselves, may be sufficient to overturn the presumption regarding partition and sale, unless other facts mandate that sale.

Justice Kurz summarized it in the following two paragraphs:

In a nutshell, while partition and sale is presumptively available at the behest of a joint owner, that principle is subject to greater discretion when the court is dealing with a matrimonial home and when the request is made at an interim rather than trial stage of the proceedings. In an interim motion, the court is called upon to engage in a holistic review of the merits of the sale, while considering the interests of each party and the children. Further the court must balance the prejudice to the claims of each party regarding the home against prejudice to the other and the advantages of sale.

A key point in the interim family law context is how the best interests of the children before the court, rather than an abstract notion of children in general, would be affected by sale before trial. The best interests of the children before the court may, in themselves, may be sufficient to overturn the presumption regarding partition and sale, unless other facts mandate that sale

Justice Kurz then applied this framework to the facts of this case and determined that he would *not* order the sale of the matrimonial home. Justice Kurz did so for the following reasons:

- The father had implicitly admitted that it was in his children's best interest in the matrimonial home when he and the wife had a conversation with them a couple of months before the motion wherein he indicated that he would do anything in his power to keep them in the home.
- The sale of the matrimonial home would prejudice the wife's claim to exclusive possession of the home until the eldest child completed high school.
- The husband would owe the wife a significant equalization payment, so significant that she could easily afford to buy him out of the home.
- As a result of the equalization payment the husband would not see a benefit from the sale of the matrimonial home – his half of the net proceeds would be paid into trust.
- The husband's rental apartment was very comfortable, with significant amenities.
- While the husband might miss the spring market – in these volatile times Justice Kurz stated that it "cannot be said that there is a clear prejudice or advantage to selling now."

Justice Kurz denied the husband's motion to sell the home, but did give the husband leave to bring the motion on again if the parties' matter was not reached on the fall trial list and the husband was not responsible for that delay.

***Pennington v. Pennington*, 2022 ONSC 1631 – Trust Claims and Bankruptcy**

Trying to have one's cake; eat it too; and then have a some of someone else's cake.

In this case, Justice Scott considered a husband's claim for an equalization payment and a resulting trust claim in the matrimonial home.¹ The parties disagreed as to the date of separation. The wife argued that they had separated in 2008 and the husband argued they had separated in 2012. The Application had begun in 2018.

At the beginning of the trial, the husband chose to withdraw his claim for an equalization payment. While the husband indicated that it was because the claim was "minimal" in value, the Court set out that as it was beyond the six-year limitation period that the concession "did not really amount to much."

The wife argued that the husband was out of time to claim an equitable interest in the matrimonial home. She argued that it was a six year limitation period (which was incorrect as the limitation period is 10 years under the *Real Property Limitations Act*, R.S.O. c. L15). The court also set out that the expiration of time to bring an equalization payment did not mean that the time to bring a constructive or remedial trust claim had expired. Equalization claims and equitable trust claims are distinct and separate claims.

The Court the considered the husband's trust claim. The matrimonial home had been in the wife's sole name. For reasons that are not clear, the wife claimed that it was not a matrimonial home because it was registered in her name and the parties "were not happy together" when they lived there.² The Court noted that the home met the definition of matrimonial home, though no significant issue turned on that fact.

What was, however, crucial was the fact that the husband declared bankruptcy in 2009. At that time, the husband did not declare an interest in the matrimonial home when he filed for bankruptcy. His failure to do so meant that he could not make a claim after he was discharged from bankruptcy to say that he was a part owner all along. The Court found that he did not have a beneficial ownership interest in the property.

¹ There were also child support issues that are not particularly relevant to our purposes today.

² If you were curious, yes the wife was self-represented.

Ginther v. Gaulton, 2022 NLCA 51 – Characterization of a Gift or a Loan

All Roads Lead to
Repayment

This appeal concerned a question as old as the earth itself: was it a gift; or was it a loan?

Although the parties were in a common law relationship from approximately May 2004 to March 2007 (just short of 3 years), Ginther’s claim for the recover of loaned funds was not was not pled (or argued) based on family law principles. In fact, neither even made reference to the *Family Law Act*, RSNL 1990, c. F-2. Rather, the case was argued on the basis of gift vs. loan and unjust enrichment.

During their cohabitation, the parties usually lived in properties owned or rented by Gaulton. In the Fall of 2005, Ginther sold the home she owned (in which the parties lived for a short time) for about \$54,000 in net proceeds. At the same time, Gaulton bought a property. Ginther’s evidence was that she advanced Gaulton a \$40,000 loan for the down payment for the purchase of the property. Gaulton claimed that the \$40,000 was a gift.

Finding that the \$40,000 advance was made without any form of acknowledgment of debt or any form of security, court below found that the advance was not a loan.

This finding it a hard to understand given that the presumption of resulting trust is alive and well in Newfoundland by way of s.31 of the *Family Law Act*, RSNL 1990, c F-2 (the “Act”):

Presumptions

31. (1) The rule of law known as the presumption of advancement is abolished in respect of the ownership of property as between spouses and in its place the rule of law applying a presumption of resulting trust shall be applied **in the same manner as if they were not married.**

Gaulton conceded that \$35,000 of the \$40,000 from Ginther was for the down payment for the house he bought. He could not remember the reason for the \$5,000 advanced a week later. However, the Court of Appeal was of the view that the evidence supported the inference that the \$5,000 was also for the purpose of the purchase.

The trial judge approached the decision from the perspective of mutual contributions of the parties during their cohabitation. Based on these considerations, the judge concluded that, “in the context of this relationship...I cannot find authority upon which I could base a specific stand-alone transaction permitting separate relief.”

There is certainly authority for the proposition that the court need not consider the minutiae and the give-and-take of mutual contributions over the daily life of a cohabitation: *Kerr v. Baranow*, 2011 SCC 10; *Junker v. Hughes*, 2016 ONCA 81; *Farkas v. Bedic*, 2016 ONCA 82; *Gionet v. Pingue*, 2018 ONCA 1040. The breakdown of a relationship is not a general call for a forensic accounting of all financial events in the history of the relationship: *Geishardt v. Ahmed*, 2018 ONSC 6061.

However, here, the Court of Appeal determined that the trial judge erred in his approach because he relied on family law principles regarding the sharing of property by cohabiting parties. But those principles did not apply to a determination of a claim in debt or unjust enrichment as pleaded in this case and as argued by the parties. The evidence necessary to determine a division of property based on family law principles was not adduced by either party.

In this case, as noted above, the trial judge did not find that the \$40,000 was a loan. But he also did not find that the advance was intended as a gift. He found that additional information would be required in order to find that Ms. Ginther intended to give him a gift of \$40,000. But, again, is that not the function of the presumption of resulting trust? The law assumes loans and/or trusts and not gifts: *Barber v. Magee*, 2017 ONCA 558. If the evidence of gift was not there – that should have been the end of it. In the absence of any evidence of donative intent at the time of the advance (as here), the law presumes a loan or a resulting trust: *Reiter v. Hollub*, 2017 ONCA 186.

However, rather than just deal with issue based on the legal presumption of loans or the presumption of resulting trust, since the trial judge erred in applying family law principles when the case was not presented that way, and because the trial judge did not find that the \$40,000 payment was a loan or a gift, the Court of Appeal thought it is necessary to consider whether the equitable principle of unjust enrichment was engaged on the facts of the case. That is, rather than proceed by way of the presumption of resulting trust, the Court of Appeal undertook the more circuitous unjust enrichment analysis.

Let's all recite the elements of unjust enrichment: an enrichment; a deprivation and no juristic reason: *Kerr v. Baranow*, 2011 SCC 10.

Here, the Court of Appeal found evidence the enrichment of Gaulton at Ginther's expense: Ginther advanced the \$40,000 Gaulton, a benefit could be restored to Ginther by repayment of the money.

So, on to the lack of juristic reason: was there a reason in law or justice for the retention of the benefit?

The first step was to consider the established categories of juristic reasons. Established categories of juristic reasons include contract, donative intent, or "other valid common law, equitable or statutory obligations": *Kerr v. Baranow*, 2011 SCC 10 at para. 43.

Absent a justification from an established category, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied: *Garland v. Consumers' Gas Co.*, 2004 SCC 25. If no established category is identified, the second step permits the court to take into account the legitimate expectations of the parties and "moral and policy-based arguments about whether particular enrichments are unjust": *Kerr v. Baranow*, 2011 SCC 10 at para. 43

The Court of Appeal was satisfied that no juristic reason has been established to deny recovery to Ginther recovery of the \$40,000 advance. There was no dispute that Ginther had advanced the

\$40,000. And the Court of Appeal noted that the \$40,000 payment amounted to a significant portion of the proceeds of approximately \$54,000 that she received from the sale of her house. Again, interesting, but irrelevant in a resulting trust analysis, where the Court of Appeal could have simply stopped at “no evidence of intention to gift.”

It would have been far more simple for Ginther to have brought her action based on resulting trust. Curiously, the Court of Appeal also noted that, “Mr. Gaulton did not adduce evidence that would challenge the basis of that action by claiming distribution of assets according to family law principles that would engage consideration of the contribution of the parties to their relationship.” But, respectfully, there were no family law principles to apply here with respect to the distribution of assets, as the parties were not married, and in Newfoundland, the equalization provision of the *Act* only apply to married spouses.

As a result, the Court of Appeal was satisfied that Ginther made out her claim in unjust enrichments, and she was entitled to her \$40,000 back. It just took a more circuitous route to get there.

***Van Delst v. Hronowsky*, 2022 ONCA 349 — Property Transfers to Secure Equalization**

Section 9(1)(d) of the *Family Law Act*:
It's Not Just for Reading Anymore

This case has been written about before in previous papers (and in *This Week in Family Law*), but some cases have more than one lesson to offer, and such is the case with [Van Delst](#), which recently made its second trip to the Ontario Court of Appeal.

In 2017, the respondent wife brought an application against the appellant husband for, among other things, equalization of net family property. The most controversial issue at trial was the valuation of the parties' pensions for equalization purposes.

Ultimately, the trial judge determined that the husband's pension should be valued based on a "normal" age of retirement of 60, while the wife's pension should be valued based on a "reasonable" age of retirement of 65. As a result, it was determined that the wife was entitled to an equalization payment of \$563,560.23 (plus pre-judgment interest).

The husband appealed and was partially successful. The Court of Appeal concluded that the value of *both* parties' pensions should have been based on a "normal" age of retirement of 60, and the matter of calculation was remitted back to the Superior Court: [Van Delst v. Hronowsky \(2020\), 42 R.F.L. \(8th\) 300](#) (Ont. C.A.) and [Van Delst v. Hronowsky, 2020 CarswellOnt 8484](#) (C.A.).

As a result of the recalculation, the husband was ordered to pay the wife \$348,538.69 in equalization, \$13,063.04 in post-judgment interest, \$32,732.32 in costs, and some other small amounts that brought the total owing up to \$395,392.26.

It was also ordered that if the husband did not pay by a certain date, the amount he owed was to be transferred to the wife from either the husband's non-registered investment account, or from his pension (into a LIRA in the wife's name), pursuant to s. 9(1)(d) of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3. And, finally, the Court ordered the husband to pay the wife her full recovery costs.

The husband appealed again. The primary ground of appeal was that the court below was wrong to make an order under s. 9(1)(d) for satisfaction of the amounts owing from his investment accounts if the amounts were not paid.

Subsection 9(1)(d) of the *Family Law Act* states:

Powers of court

9 (1) In an application under section 7 [for equalization], the court may order,

- (a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;
- (b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;
- (c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and

- (d) that, if appropriate to satisfy an obligation imposed by the order,**
- (i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or**
 - (ii) any property be partitioned or sold.**

[emphasis added]

The Court of Appeal saw no error. The wife had brought a motion for security or enforcement, and the trial judge properly exercised discretion under s. 9(1)(d) to both secure and enforce payment within 15 days. This was reasonable given the husband's past behaviour, including non-compliance with previous orders; failing to provide proof of his annual income; non-payment of costs orders; and delaying the resolution of the matter by disputing garnishment proceedings.

Section 9(1)(d) is, in our opinion, an underused provision, and it was used entirely appropriately in this case to ensure the husband paid what he owed. If a party's prior conduct gives rise to the reasoned belief that amounts owing are not going to be paid, then resort to s. 9(1)(d) is entirely appropriate.

The husband also sought leave to appeal the costs awarded against him. He was not successful here either, mainly because the wife had beat her own Offers to Settle thus invoking the cost consequences of Rule 24(14) of the *Family Law Rules*, O. Reg. 114/99, and because the husband insisted on the first trial when the pension valuations were within \$1,000 of each other.

V. v. S., 2022 ONSC 7311 – Refusing to Recognize a Divorce and Public Policy

This Russian divorce is Borsht...But *should* it Be?

Our apologies in advance, but this is going to get a bit technical. We might suggest reading this one with beverage in hand. But as technical as it is, it is also very interesting, and for some of us, very important.

We have discussed what we have called the “Rothgiesser Problem” numerous times in this Newsletter. See for example “Recognizing a Foreign Divorce – From Russia (Without Love or Notice)” in the February 24, 2020 edition of *TWFL*, and “How Do You Solve a Problem Like *Rothgiesser*” in the May 11, 2020 and May 18, 2020 editions of *TWFL*. The long-and-short of it is:

- (a) Section 91(26) of *The Constitution Act*, 1867, 30 & 31 Vict, c. 3 (the “*Constitution*”) gives Parliament jurisdiction to legislate over “marriage and divorce.”
- (b) Section 92(13) of the *Constitution* gives the provinces jurisdiction to legislate with respect to “property and civil rights” in a province.
- (c) To avoid impeding upon provincial powers, the Federal government can only legislate over matters of child support, spousal support and custody issues if doing so *corollary* to its power over divorce – hence the term “corollary relief.” That is, the Federal government only has jurisdiction to legislate with respect to support and custody matters if doing so corollary to a divorce: *Papp v. Papp*, [1970] 1 O.R. 331 (C.A.); *Zacks v. Zacks* (1973), 10 R.F.L. 53 (SCC); *Jackson v. Jackson*, [1973] SCR 205. No divorce – no corollary relief. This is one of the reasons only married spouses can have resort to the *Divorce Act*, RSC 1985, c 3 (2nd Supp).
- (d) Subsequently, it was clarified that the Federal government can only legislate with respect to support and custody issues (including variation of such issues) if doing so corollary to a *Canadian* divorce – and a Canadian court cannot vary a foreign divorce order: *Rothgiesser v. Rothgiesser* (2000), 46 O.R. (3d) 577 (C.A.); *Leonard v. Booker*, 2007 NBCA 71; *V. (L.R.) v. V.(A.A.)*, 2006 BCCA 63, add’l reasons at 2006 BCCA 341; *Harman v. Harman*, 2009 CarswellAlta 2020 (C.A.); *Okmyansky v. Okmyansky* (2007), 86 O.R. (3d) 587 (C.A.); *R.N.S. v. K.S.*, 2013 BCCA 406; *Cheng v Liu*, 2017 ONCA 104. [Note: Quebec may not agree with this: *G.M. v. M.A.F.*, [2003] R.J.Q. 2516 (Q.C.A.)].
- (e) In some provinces, provincial legislation only allows a “spouse” – as opposed to a “former spouse” to claim spousal support. For example, see section 30 of the Ontario *Family Law Act*, RSO 1990, c F.3. By way of further example, under the Nova Scotia *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, only a *spouse* (as opposed to a *former* spouse) can claim property division. (The definition of spouses in subsection 2(g) of the *Matrimonial Property Act* doesn’t include divorced spouses.)
- (f) As a result, a spouse *validly* divorced in a foreign jurisdiction (ie. a divorce that is recognized by Canadian courts) cannot claim support under the *Divorce Act* (and may not

be able to claim support under the provincial Act – some provinces, such as British Columbia, have fixed the problem by legislating that a “former spouse” can claim spousal support).

To understand what happened in this case, we also have to review the rules regarding the recognition of a foreign divorce in section 22 of the *Divorce Act* [the emphasis and snarky comments in the brackets are ours]:

Recognition of foreign divorce

22 (1) A divorce granted, on or after the coming into force of this Act, by a competent authority shall be recognized for the purpose of determining the marital status in Canada of any person, **if either former spouse was habitually resident** in the country or subdivision of the competent authority for at least one year immediately preceding the commencement of proceedings for the divorce. [Nothing interesting here. If either former spouse was habitually resident in the foreign jurisdiction that granted the divorce, Canada will recognize it – assuming notice, natural justice, etc.]

Recognition of foreign divorce

(2) A divorce granted after July 1, 1968 by a competent authority, on the basis of the domicile of the wife in the country or subdivision of the competent authority, determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for the purpose of determining the marital status in Canada of any person. [This is historic, antiquated and of no interest to us right now. Distinguishing between “residence” and “domicile” is *so* European.]

Other recognition rules preserved

(3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act. [Ah! This is what we are interested in. This preserves the recognition of foreign divorce based on the “real and substantial” connection of either party to the jurisdiction that granted the divorce: *Indyka v. Indyka*, [1967] 2 All E.R. 689. See also *Powell v. Cockburn*, [1977] 2 S.C.R. 218; *Wilson v. Kovalev*, 2016 ONSC 163; *Novikova v. Lyzo*, 2019 ONCA 821; *Abraham v. Gallo*, 2022 ONCA 874; *R.N.S. v. K.S.*, 2013 BCCA 406; *El Qaoud v. Orabi*, 2005 NSCA 28.]

And there you have it: in *some* provinces, a foreign divorce recognized in Canada will prevent a former spouse from claiming support in that province. This situation is rather unsatisfactory, but “it is what it is”, and results, primarily, from the Federal/provincial division of powers, resulting constitutional imperatives, and the fact that, in some Canadian jurisdictions, a “former spouse” cannot claim support under provincial acts. In our respectful view, the problem requires a legislative fix; not a judicial one. But we are growing old waiting.

This case saw the Court refuse to recognize a Russian divorce on the basis that to do so would be contrary to public policy. As one of our kids used to say – this is a “tricky bit.”

The parties met in or around 2010 and started living together at the end of 2011. They were married in Russia in 2012 and had a child together. The parties immigrated to Canada in March of 2018 and were, at the time of the hearing, both permanent residents of Canada. They also both continued to be Russian citizens.

On November 17, 2019 – only about 1½ years after moving to Canada -- the parties separated (it must have been the Canadian air). The husband moved out of the matrimonial home and applied for a divorce in Russia. The wife filed an objection with the courts in Russia, as was her right. She argued, among other things, that the proceedings ought to be determined in the parties' place of residence, Toronto, and in accordance with the laws of Ontario.

A Justice of the Peace in Russia granted the divorce on or about January 13, 2020.

Some six months later, on July 15, 2020, the wife commenced proceedings in the Ontario Court of Justice. The Ontario proceeding was subsequently transferred to the Superior Court of Justice.

The wife first tried to argue (in the first case) that she had no notice of the divorce proceedings in Russia and that, as a result, Canada should not recognize the divorce. This would have been an excellent argument [see *Novikova v. Lyzo*, 2019 ONCA 821] save for one problem: the wife clearly had notice of the Russian divorce proceeding and had received the documents. In fact, she contested the Russian proceeding. Therefore, this motion by the wife was dismissed: *V. v. S.*, 2021 ONSC 8627.

Importantly, her Honour *also* found that the parties had a real and substantial connection to Russia. She does so in both decisions. This becomes the essence of our issue with this case.

Section 22(3) of the *Divorce Act*, noted above, allows a court to use common law conflict of law principles to recognize (or to not recognize) a foreign divorce: *Wilson v. Kovalev*, 2016 ONSC 163 at para. 9; *Janes v. Pardo* (2002), 24 R.F.L. (5th) 44 (Nfld. S.C.). A divorce that is granted in a foreign jurisdiction enjoys a presumption of validity, and the onus is on the party seeking to not have the foreign divorce recognized in Canada: *Powell v. Cockburn*, [1977] 2 S.C.R. 218.

As noted above, a valid foreign divorce prevents an individual from claiming spousal support in some provinces, including Ontario. As a result, if the Russian divorce was recognized as valid, then the wife would have no claim for spousal support in Ontario, and would have to claim support in Russia.

Here is where, to us, things may have gone a bit sideways. The wife argued that the husband had obtained the divorce in Russia for the sole purpose of, and with the specific intent to, limit his financial obligations to her. The evidence was that the wife was in dire financial straits in Ontario and that she was the primary caregiver of the parties' child. While she was a lawyer in Russia, she had not worked outside of the home since the child's birth. The wife did not speak English and required a Russian interpreter during the proceedings. In contrast, the husband had a Ph. D. in engineering and was employed as a manager earning approximately \$85,000.00 per year. What's that saying about bad facts and bad law?

The evidence before the court established that the wife would not receive spousal support under Russian law. This was not disputed by the husband. (And it was an important piece of evidence before the Court – evidence that is often lacking in recognition of foreign divorce cases.)

Her Honour found that the husband had been on a website on which Russian nationals discussed issues about living in Canada, including methods to avoid paying spousal support. While the husband claimed that he had obtained the Russian divorce because the process in Russia was more simple and faster than the Ontario system (which he also claimed to not understand), the Court rejected this. The husband was intelligent and organized. The Court determined that he had obtained the divorce in Russia to avoid spousal support obligations.

There are several bases upon which a Canadian court will not recognize a foreign divorce: *Wilson v. Kovalev*, 2016 ONSC 163; *Ho v. Lau*, 2019 ONSC 5573 (Div. Ct.); *Abraham v. Gallo*, 2022 ONCA 874. As set out in *Wilson v. Kovalev*, 2016 ONSC 163:

[10] At common law, there are presumptions in favour of the validity of a foreign divorce decree. Accordingly, there is an onus on a party alleging that the divorce is invalid to adduce some evidence to establish that the divorce was not properly obtained (*Powell v. Cockburn*, 1976 CanLII 29 (SCC), [1976] S.C.J. No. 66 (S.C.C.); *Martinez v. Basail*, 2010 ONSC 2038 (S.C.J.); *Janes v. Pardo* (2002), 24 R.F.L. (5th) 44 (Nfld. S.C.). The grounds upon which the court will decline to recognize a foreign divorce are very limited, and include the following:

1. The Respondent did not receive notice of the Divorce Application;
- 2. The foreign divorce is contrary to Canadian public policy;**
3. The foreign court or other authority that granted the divorce (“the granting authority”) did not have the jurisdiction to do so under the law of the foreign country;
4. Where there is evidence of fraud going to the jurisdiction of the granting authority;
or
5. There was a denial of natural justice by the granting authority in making the divorce order. [**emphasis added**]

It is the “contrary to public policy” angle that is of interest here, as that is the basis on which her Honour does not recognize the Russian divorce.

In considering whether the Russian divorce was contrary to Canadian public policy, the Court considered the history leading up to the parties’ separation, the Russian Divorce, and the parties’ behaviour following the order. It was critical to her Honour’s decision that, in her view, the husband had intentionally obtained the Russian Divorce Order in an effort to avoid his spousal support obligations:

[53] It is one thing if parties divorce in another jurisdiction and the by-product is that one spouse cannot obtain spousal support in Ontario. However, in my view, it is another thing altogether if one party races to another jurisdiction to obtain a foreign

divorce to avoid paying spousal support under Ontario law, when the family resides in Ontario.

That is, her Honour determined that the *husband's actions* (as opposed to the *foreign law*) were contrary to Canadian public policy because it is a moral and fundamental value in Ontario that spouses are required to financially support dependent partners.

While the Court suggests, with reference to *Sonia v. Ratan*, 2022 ONSC 6340 (at paras. 213 and 214) and *Essa v. Mekawi*, 2014 ONSC 7409, that there are cases where a party's actions have been determined to be contrary to Canadian public policy, respectfully, neither of those cases stands for the proposition that a foreign order may not be recognized because of the *behaviour* of one of the parties, as opposed to because of the foreign law itself being contrary to public policy (of course, we are not referring to behaviour such as no notice, fraud, etc.). In *Essa*, the Court did *not* refuse to recognize an Egyptian divorce on grounds of public policy partially due to the *applicant's* own actions (she had wrongfully removed the children from Egypt to Canada against an Egyptian court order). Similarly, in *Sonia*, in recognizing the foreign divorce, Justice Monahan finds that a party trying to invoke Canadian public policy as a ground for refusing to recognize the validity of a foreign divorce cannot themselves have conducted the litigation in a manner contrary to principles of Canadian public policy. That is, in both *Essa* and *Sonia*, the behaviour of the party asking the Court to not recognize the foreign divorce was under scrutiny – not the party supporting the foreign divorce.

Her Honour also noted that in *Zhang v. Lin*, 2010 ABQB 420 and in *Marzara v. Marzara*, 2011 BCSC 408, the Alberta Court of Queen's Bench and the British Columbia Supreme Court, respectively, refused to recognize foreign divorces from Texas and Iran, because of how those jurisdictions dealt with spousal support. But neither *Zhang* nor *Marzara* have a terribly significant following, and *most* cases that cite either case (on the public policy issue that does not involve issues of lack of notice or a breach of natural justice in the foreign hearing) go on to distinguish them, and recognize the foreign divorce: *Essa v. Mekawi*, 2014 ONSC 7409; *Hosseini v. Nouh*, 2018 ABQB 912; *Pontes v. Viana*, 2017 NBQB 130; *Cao v. Chen*, 2020 BCSC 735; *R.N.S. v. K.S.*, 2013 BCCA 406.

In any case, relying on these cases, her Honour found that the Russian Divorce should not be recognized:

[58] Similar to *Marzara*, [the husband] raced to court in Russia to obtain a divorce in order to circumvent the adjudication of spousal support under Ontario law. As noted above, he filed for divorce in Russia three days after leaving the matrimonial home, having previously secured the marriage certificate. From a policy perspective, Ontario law recognizes the obligation to provide support to a spouse. The *Family Law Act*, R.S.O. 1990, c. F.3 (the “*FLA*”) recognizes, in s. 30, that spouses have an obligation to provide support for the other spouse “in accordance with need, to the extent that he or she is capable of doing so.” The *FLA* builds in other protections, including the ability of the court to set aside a provision for support or a waiver of the right to support in a domestic contract, if the provision for support or the waiver of the right to support results in unconscionable circumstances: *FLA*, s. 33(4). The *FLA* also contemplates

the purposes of a spousal support order, in s. 33(8), including to make fair provision to assist the spouse to become able to contribute to his or her own support; and to relieve financial hardship. [The husband] sought to circumvent this obligation.

...

[60] In addition, it would not be possible in Ontario for these parties to be divorced two months after [the husband] walked out, as there was not yet a breakdown in marriage as defined in the *Divorce Act*. However, the parties were divorced in Russia within two months of separating.

[61] This case involves exactly the sort of “moral” and “fundamental values” that underlie the public policy defense. The Russian divorce, which was obtained less than two months after separation, gives [the husband] a back-door with which to escape his legal responsibilities, and runs counter to the four spousal support objectives set out in s. 15.2(6) of the *Divorce Act*.

The question of when a court should not recognize a foreign order on the basis of public policy was addressed by the Supreme Court of Canada in *Beals v. Saldanha*, 2003 SCC 72 – and this is where, very respectfully, we may get into problems:

[71] The third and final defence is that of public policy. This defence prevents the enforcement of a **foreign judgment** which is contrary to the Canadian concept of justice. The public policy defence turns on **whether the foreign law** is contrary to our view of basic morality. As stated in Castel and Walker, supra, at p. 14-28:

...the traditional public policy defence appears to be directed at the concept of **repugnant laws and not repugnant facts**.

[72] How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is **founded on a law** contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.

[73] **The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court’s refusal to enforce the foreign judgment.** The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, **would shock the conscience of, or would be unacceptable to, reasonable Canadians.** The appellants claimed that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian. It was argued that, if the respondents and their witnesses were truthful in the Florida proceeding, it must follow that the laws in Florida permit a grossly excessive award for lost profits absent a causal connection between the acts giving rise to liability and the damages

suffered. Such a result, the appellants submitted, would shock the conscience of the reasonable Canadian. **I do not agree.**

[74] J. Blom, *supra*, predicted the appellants' request for the expansion of the public policy defence (at p. 400):

The only change that the *Morguard* approach to recognition may bring in its wake is a greater **temptation to expand the notion of public policy, so as to justify refusing a foreign default judgment that meets the *Morguard* criteria, but whose enforcement nevertheless appears to impose a severe hardship on the defendant.**

[75] The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by **condemning the foreign law** on which the judgment is based. **It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.**

[76] The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. ***The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.*** [Emphasis added]

In the emphasized portions of *Beals*, above, the Supreme Court makes a few points clear:

- The public policy defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the *foreign law* is contrary to our view of basic morality.

But, here, is it the foreign divorce that might be contrary to “our view of basic morality”? Or is it the impact of the foreign divorce in Canada where some provinces do not allow a “former spouse” to claim support or property relief?

- The traditional public policy defence appears to be directed at the concept of *repugnant laws and not repugnant facts*.

But, here, the Court found it repugnant that the husband might have purposefully sought a divorce in Russia to avoid support. That is, at most, a “repugnant fact” not a “repugnant law.” And, again, is it any less “repugnant” that the problem is not the foreign law, but the laws in some Canadian provinces?

- The *defence of public policy should not be broadened* to include cases where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign judgment.

At the risk of repetition, again, the outcome is only egregious because of the impact of the foreign law in Canada. Arguably, it is the Ontario law that offends our notion of fairness; not the fact that a person with a real and substantial connection to Russia can be divorced in Russia.

- The notion of public policy (and the related defence) *should not be expanded* so as to justify refusing to recognize a foreign judgment only because recognition or enforcement might impose a severe hardship.
- The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. *The defence of public policy should continue to have a narrow application.*

Again, is it the law of Russia that is to be condemned? Or ours? This situation could be fixed easily by giving "former spouses" the right to claim support (and, in some cases, property) relief.

- The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court *with a real and substantial connection* to the cause of action *for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages (or support?) in Canada.*

There was a real and substantial connection to Russia. The wife had notice of the Russian divorce. She did not claim in Canada (under the *Family Law Act*, as she could have) before the Russian divorce was pronounced. It appears that in not recognizing the Russian divorce, the Court here did exactly what the Supreme Court of Canada admonished against.

Tough facts. Tough decision. We're glad we did not have to make it. The Court would not have been in the position of having to make this difficult decision on these difficult facts if the law of Ontario allowed former spouses to claim support. Again, this requires legislative action.

Assayag-Shneer v. Shneer, 2023 ONCA 14 – Penalty Clauses in Orders

Remember what you learned in law school about penalty clauses? Forget it.

Below, Justice Hood offered a reminder that a financial penalty upon default will be unenforceable unless it constitutes a genuine pre-estimate of damages on account of the breach. But here, the Ontario Court of Appeal tells us that some “reminders” need not be remembered. It now appears that, with proper wording, planning and execution, penalty clauses may be enforceable. This represents a significant change in the law. Read on...

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

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

The Agreement also provided that in the event of a default, the husband would owe the wife *twice* the then outstanding amount, plus an extra \$50,000. That would be the alleged penalty clause.

The support provisions of the Separation Agreement – including the penalty clause -- were then incorporated into a Consent Order. As we will see below, the turns out to have been incredibly important.

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

Neither party took any steps to deal with the matter until 2017 (that is about 15 years after the default), when the Family Responsibility Office started trying to collect the money that the husband owed the wife. At that point, the husband started a variation proceeding, and took the position that the default provision was unenforceable because it was a "penalty clause", and that the support provisions of the order and Agreement should be varied because of he claimed that his health and finances had declined precipitously since 1999.

Given the husband waited almost 15 years to seek a variation, Justice Hood rejected the husband’s request to reduce his outstanding support obligation:

[32] The husband has made choices along the way. In my view these choices were not forced upon him by his circumstances. He chose to stop paying support and made no efforts to pay it after January 2001. He chose to move to a country where he knew he could not work. He chose to start a new family and life ignoring his first wife's needs and the divorce order. His health issues have not truly impacted his earning capacity. His own evidence discloses that this is not the case. The failure of [his business] AdvantEDGE was a possibility in 1999 and its demise in 2000 was not unforeseen. In my view the company's success or failure was specifically contemplated at the time of the divorce judgment. It was therefore not a material change as that term was defined

by the Supreme Court in *Willick v. Willick* [1994] 3 S.C.R. 670, at p. 688, where the Court explains, "if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation." See also *L.M.P.*, at para. 67.: see also *L.M.P.*, at para. 67.

[33] Moreover, the failure of AdvantEDGE took place in 2000, when Mr. Shneer was 39 years old. There has been ample time since then and well before his health issues, even if they were material, for Mr. Shneer with his self-acknowledged business experience and acumen to find alternative employment so as to put himself in a position to pay the support. As mentioned above, there have been several years where he succeeded in doing just that, and nonetheless declined to pay support.

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

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

The classic rule was heavily criticized over the years, most recently in Justice Wakeling's dissent in *Capital Steel Inc. v. Chandos Construction Ltd*, 2019 ABCA 32. In that case, Justice Wakeling would have abolished the classic rule, and replaced it with a rule whereby a term of a contract stipulated the consequences for a breach should be enforced unless "it is so manifestly grossly one-sided that its enforcement would bring the administration of justice into disrepute." Justice Wakeling's reasons also include a comprehensive history of the classic rule and an analysis of the fundamental problems with it, including the following:

[161] **First, it is not clear what constitutes a penalty.** "The test for distinguishing penal from other principles is unclear". This is a significant drawback. If an adjudicator does not know what the core element of a principle is, it is impossible to apply it rationally and consistently.

...

[167] **Second, because the penalty rule is confusing, it produces inconsistent results that cannot be rationally explained.** This is not a trait of a useful norm. It is the mark of a misleading and suspect measure.

[168] **Third, even if the benchmarks of a penalty term were universally acknowledged, it is not readily apparent that the penalty concept captures the essence of judicial reluctance to enforce some contract terms and provides much assistance in deciding whether a contested term should be enforced or not.** A determination that a provision is a penalty provides little assistance to an adjudicator who must decide whether it is appropriate to relieve a promisor of a contractual obligation. How does the knowledge that a term is a penalty assist a court to decide whether it should be enforced? Characterizing a stipulated-consequence-on-breach term as a penalty is no more helpful than describing it as a remedial term or written in English. ...

[169] **Fourth, the distinction between a penalty and a pre-estimate of damages is of limited value.** There are fact patterns which make it exceedingly difficult, if not impossible, to estimate damages. This might mean that a stipulated-consequence-on-breach term is unenforceable even though it makes sound business sense.

[170] **Fifth, the penalty aspect of a provision can often be camouflaged by clever drafting.** An onerous obligation can be transformed into a beneficial option, as Justice Heath explained more than 200 years ago in *Astley v. Weldon*...

...

[173] **Sixth, it is not obvious why a promisor's commitment in a commercial agreement to pay a sum for breach of another term of the agreement that may bear no relationship to the damages that a court would award for non-performance is contrary to public policy.** A stipulated-consequence-on-breach term in a commercial contract and the common law damages principle serve completely different purposes. The former is adopted to avoid the need to utilize the common law damages protocol to resolve the consequences of nonperformance of a contract promise. The latter is resorted to because the parties have been unable to resolve the obligation of the promisor to the promisee on the former's breach of a contractual obligation. [footnotes omitted; emphasis added]

The Supreme Court of Canada granted leave to appeal in *Capital Steel Inc*, but it declined to decide whether the rule against penalty clauses should be reformulated (2020 SCC 25 at para. 22).

It appears that the courts in British Columbia may also be “relaxing” the strict rule regarding penalty clauses. In B.C., a specific negotiated term to provide for a specific payment is not a penalty clause – it is just part of the contract and a term specifically negotiated by the parties: *Do v. Nichols*, 2016 BCCA 128 (Query, however, what would happen if the negotiated sum was so large as to be a clear penalty.)

However, in most of the country, the strict rule was still applied, and the question of whether a clause is a penalty clause depends on its construction and on the circumstances at the time of contracting: *Dundas v. Schafer*, 2012 CarswellMan 158, rev'd 2014 MBCA 92 (leave to appeal to SCC ref'd); *Mortgage Makers Inc. et al. v. McKeen*, 2009 NBCA 61; *Haas v. Viscardi*, 2019 ONCA 133) (a liquidated damages clause will continue to be struck as a penalty if it was not a genuine pre-estimate of actual losses).

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

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

[44] **The doubling of the outstanding support plus an additional \$50,000 bears no relationship to any loss or damage that [the wife] could suffer through a default in payment.** It is simply a lump sum payable regardless of the loss or damage. I do not accept

her argument that this amount is an attempt to recognize the legal fees that she would necessarily incur upon default and is thus a genuine pre-estimate of her loss. **The clause bears no relationship to what her costs might be in the event of a default. Moreover, costs are a separate issue.** If successful in seeking to enforce payment she might be entitled to some indemnity of her legal costs, but to suggest that this was the intention of the clause in the first place and that it is a valid liquidated damages clause or genuine pre-estimate of loss is untenable. [emphasis added]

As a result, Justice Hood dismissed the husband's Motion to Change, but also granted a declaration that the clause in the consent order was a penalty and, therefore, unenforceable.

This was the wife's appeal.

The Court of Appeal reasoned that by deleting the "penalty" clause, the motion judge had, in effect, varied the Divorce Order. This, according to the Court of Appeal, was an error in law because a support order cannot be varied absent a material change in circumstances. A material change is a requirement whether a court order is imposed on parties, a consent order or the result of converting a separation agreement into an order (see *L.M.P v. L.S.*, 2011 SCC 64). And, as set out above, Justice Hood had explicitly found that there *had not* been a material change.

This raises an interesting question: would it have made a difference had the husband been more careful in his pleadings (perhaps with the benefit of hindsight) by for example, pleading to set aside the offending terms in the consent and order? Probably not. But that said, that pleading may have forced the Court of Appeal to grapple with the idea (as discussed below) that a consent order is only as good as the consent that supports it.

The Court of Appeal also found that neither the common law doctrine regarding penalty clauses in contracts nor s.98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (which confirms the Ontario Superior Court's power to relieve against penalties and forfeitures on such terms as are just), could justify the motion judge's order. This is because, according to the Court of Appeal, the penalty clause doctrine was meant to apply to *contracts* not to court *orders*. The Court of Appeal reasoned that the separation agreement ceased to be a separation agreement when it was incorporated into the parties' divorce order. If the husband had a problem with the penalty clause, he ought to have raised his concern at the time the order was entered into. The Court of Appeal stated at paragraphs 41 and 42:

[41] There can be many reasons why a clause in a contract that is arguably a penalty ends up being enforced by a court order. A party may choose not to argue that the clause is a penalty, or the court might rule that the clause is not a penalty and should be enforced. It does not matter which occurs. **The question of whether a clause in a family law agreement is valid and enforceable is a question that must be raised before the clause is enforced by including its provisions in a court order that directs its performance. Once that occurs, the question of contractual enforceability has been determined, by a judge presumed to know the law and in an order that is presumed correct. The order is then enforceable as a judgment of the court.**

[42] If the respondent wished to avoid enforcement of a provision of the Minutes he considered to be a penalty, the time to do so was before the term was reflected in the divorce judgment. He could have opposed the inclusion of what became para. 3 of the divorce judgment on the basis of his penalty arguments. If he did not like the outcome, he could

have appealed. Having not raised any concerns about the provision being an unenforceable penalty at the time it was converted into a judgment, he cannot now do so.

All this is to say that a penalty clause may still be unenforceable at common law; but the time to argue about it is *before* it is incorporated into a consent order. Once that happens, it is too late. Therefore, the issue is going to have to be addressed by the judge that is being asked to incorporate the clause into a court order.

However, in deciding the matter in this fashion, the Court of Appeal does not actually address whether Justice Hood was correct on the law to rule the clause a penalty clause. Given that spousal support is about need, ability to pay, and compensation – one would think that an automatic doubling plus \$50,000 could only be a penalty as opposed to a genuine pre-estimate of damages.

Similarly, section 98 of the *Courts of Justice Act* gives the court authority to protect parties against penalties or forfeitures provided for in a *contract* – nothing in that section suggests that it applies once a judge has ordered a contract to be performed (and the order has not been appealed). Another judge of the same court did not have the power to review the order and rule on its correctness. The motion judge did not have the jurisdiction to find that a portion of the divorce order was unenforceable as a penalty clause.

The result? A penalty provision that might be wholly unenforceable in a separation agreement *will be enforceable* once incorporated into an order of the Court.

While this may result in a welcome change for some – especially those that would like to include such penal provision in domestic contracts, this ruling results in a few interesting questions – things that make us go “hmmmm?” if you will:

- (a) First, while a consent order is a binding decision of the court passed on using the court's jurisdiction [*Bank of Montreal v. Coopers Lybrand Inc.*, 1996 CanLII 5026 (Sask. C.A.)]; a consent order is ultimately just that – the formal expression of an *agreement* -- and is, therefore, generally interpreted as if it was a contract: *D.(B.G.) v. D.(R.W.)*, 2003 BCCA 259; *Shackleton v. Shackleton*, 1999 BCCA 794. Would the usual provision of contract interpretation, including the rule against penalty clause, then not also apply to the interpretation of a such a clause?
- (b) Having their foundation in contract, a consent order is only as strong as the agreement giving rise to it and may be set aside on the same grounds as the underlying contract: *Rick v. Brandsema*, 2009 SCC 10; *Monarch Construction v. Buidevco*, [1988] O.J. No. 332 (C.A.); *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (C.A.); *Shackleton v. Shackleton*, 1999 BCCA 794; *Pond v. Pond*, 2017 BCCA 243; *Ruffudeen-Coutts v. Coutts*, 2012 ONCA 65. Therefore, if a contractual provision is void or invalid, arguably the resulting order would also be invalid. By way of example, an agreement that was negotiated under duress or that is unconscionable does not become enforceable because it was incorporated into a consent order.
- (c) As noted above, a penalty clause may still be unenforceable at common law (the Court of Appeal does not suggest it is questioning the penalty clause issue as have the courts in B.C.

and Alberta); but the time to argue about it is *before* it is incorporated into a consent order. Therefore, the issue is going to have to be addressed by the judge that is being asked to incorporate the clause into a court order. However, this means that courts *can* incorporate these clauses into consent orders. And if a court *can* do so, why would they *not* do so, being presented with a consent where the ink is still wet? This means that such clauses are going to be regularly incorporated into consent orders and enforced.

- (d) One common reason parties have historically wanted to use penalty clauses in domestic contracts is to penalize a party for claiming support (or other relief) contrary to the provisions of the agreement. See, for example, *Dundas v. Schafer*, 2012 CarswellMan 158, rev'd 2014 MBCA 92 (leave to appeal to SCC ref'd). According to the Ontario Court of Appeal in *Shneer*, this may now be possible *if* the provision is incorporated into a consent order (which is presumably more practical for a separation agreement than a marriage contract).

However, a court cannot order a spousal support release; a support release is a creature of contract. And while parties can agree to a consent dismissal of a claim for spousal support, the dismissal of a claim for spousal support can actually be varied if there is a material change of circumstances: *Tierney-Hynes v. Hynes*, 2005 CarswellOnt 2632 (C.A.); *Gill-Sager v. Sager*, 2003 BCCA 46; *Sandy v. Sandy*, 2018 BCCA 182. And once the support provision of an agreement are incorporated in a consent order, those provisions are variable on a material change: *L.M.P v. L.S.*, 2011 SCC 64 at para. 36.

As a result, counsel would prefer to have a spousal support release in a contract (so as to attract the Miglin standard for claiming support contrary to the provisions of a contract) rather than have a consent support dismissal (which is variable on the much lower material change standard).

In *Shneer*, the Court of Appeal found that the penalty clause in question was part of the support provisions of the Agreement; in fact, that is the basis upon which the penalty clause was enforceable. Therefore, we are in a strange position: To have the penalty clause enforceable (if it is part of the support provisions of a domestic contract), the penalty clause must be in an order. But to have a support release be as effective as possible, the release should be in an agreement.

So now what? Super easy. All counsel must do is include the support release (or other support provisions) and the penalty provision in the separation agreement, but only include the penalty provision (dressed up to not look like part of the support provisions) in the consent order. That should leave support provisions governed by *Miglin* in the agreement; an enforceable penalty provision in the consent order. As we said – real easy.

Lepp v. The Regional Municipality of York, 2022 ONSC 6978 – The Preparation of Materials

The road to hell is paved with adverbs.

– Stephen King

Lepp is a civil case. Its facts are unimportant for our purposes. What is important, however, is the concerns that R.S.J. Edwards expressed about the serious problems that are created when lawyers decide to just "dump" voluminous and (and sometimes disorganized) materials on the court.

In addition to being offside the applicable Rules of Court, Practice Directions, and Notices to Profession, "throwing the kitchen sink into a document dump that you hope the court will be able to sort out" is a terrible way to try to persuade a judge as to the merits of your client's case. Generally, annoying the person you are trying to persuade is not a winning strategy. Judges are incredibly busy, have heavy caseloads, and can't be expected to decide motions correctly or in a timely manner if they aren't provided with the tools they need to do so. This is especially true in some of the busier court sites, where daily lists can regularly have 10, 20, or even more matters on it.

In an effort to assist counsel in the future –and perhaps in an effort to help judges retain their sanity, R.S.J. Edwards took the time to set out "twelve ways to win your motion". We can do no better than repeat them in full (the list refers to Caselines several times, which is the document management system that Ontario is currently using for virtual hearings – for those of you who don't practice in Ontario, just replace the references to "Caselines" with whatever document management system your jurisdiction is using, if any):

[15] While tempted to suggest there are many ways counsel regularly create unnecessary impediments to a successful motion, **let me suggest that there are twelve ways the Bar can ensure that their clients will have a good chance of winning the relief that is being sought from the court.** In my view the following reflect twelve ways to win your motion or to have a productive pretrial (I include pre trials because the written pretrial memo is crucial to a successful pretrial for your client).

- a) **Before you even serve you motion materials ask the fundamental question is the time and expense of the motion really worth the effort.** Keep in mind that statistics show that well over 95% of all cases will settle without a trial. So, ask the question how much impact, if any, will the motion being contemplated improve the chances your case will resolve in a manner favourable to your client.
- b) Assuming you have decided that a motion is needed **consider doing something really old fashioned and that is to pick up the phone and talk to your opponent.** In person discussion whether by phone or may I dare say actually a meeting, might obviate the need for the motion or perhaps narrow the issues you need to argue. All too frequently the Court will be confronted with affidavits to which are appended numerous email communications between counsel. Regrettably what counsel sometimes say in their emails will not portray counsel in a positive light.
- c) **The single most important guiding principle as it relates to written advocacy might start with an old saying "less is more".** Put another way your motion judge will be greatly impressed with a motion record that contains only the documents that are fundamental to the determination of the motion.

d) Following along with the “less is more” principle it is fundamental to a positive outcome for your client that counsel comply with the Notice and Rule 4.05 (3). **File a compendium that only contains the critical documents you will refer to in argument together with extracts of any case law you intend to refer to in oral argument.** Ensure the documents and caselaw are hyperlinked so the reader doesn’t become frustrated trying to find them.

e) While it is not every motion that may require a factum **if your motion is important enough to the outcome of the case you may want to consider filing a factum even where the Rules specifically don’t require a factum.**

f) In any case where you are either required by the Rules (as an example Rule 20 and Rule 21 motions) or where the importance of the motion dictates good practice in filing a factum consider the following: I) a simple argument might very well be a winning argument; ii) make sure the issues you are asking the court to decide are clear from the beginning and narrow the issues down to the one or two real issues that need to be decided; iii) refer the reader to the leading appellate authority(s) that address the issues you say need to be decided; iv) if there are critical parts of a document such as the language of a contract consider reproducing right in the factum an extract of the document. Put in layman’s language **the easier you can make the job of the decision maker the greater the likelihood of a positive decision for your client.**

g) When there is a page limit – as with the Central East 15-page limit for pretrial memos - there is no requirement that you actually file 15 pages. **Less is more. But where there is a page limit do not exceed it.**

h) While the filing of a compendium is an essential component to good written advocacy, where other documents are filed that include multiple exhibits, make sure those exhibits are readily accessible to the reader - either with separate electronic tabs, hyperlinks or bookmarks, **The reader i.e., your motion judge will not scroll through hundreds of pages to find a document.**

i) Before the hearing of your motion **take the time to check Caselines and ensure that the documents you will be referring to have been properly uploaded to Caselines and are easily accessible.** This may only take you a few minutes, but it may save considerable embarrassment when you get to oral argument only to have your motion judge say he or she hasn’t read anything because the documents have not been uploaded to Caselines or they have been uploaded into the wrong bundle.

j) **Once you have served and uploaded everything and you have reviewed everything that your opponent has served consider the wisdom of another phone call with your opposite side.** Can the motion be resolved? Can the issues be narrowed? Is the motion ready to be heard or will there be a late breaking request to adjourn-if so, better you try and resolve that before your attendance than to waste precious court time.

k) **Come prepared to argue costs or at the very least exchange your Costs Outline** as required by Rule 57.01 (6) - better still **consider discussing with your opponent an agreed upon amount for costs to the successful party.** You can be

rest assured that even if you are the losing party the presiding judge will likely have positive memories of counsel who can agree upon costs rather than being subjected to having to write a costs endorsement.

l) Last but not least **Upload to Caselines a draft order in Word format**. It may come as a surprise to many that some judges - myself included, have great difficulty manipulating a "Pdf". Your motion judge will greatly appreciate seeing in Word format what it is that he or she is being asked to order. [**emphasis added**]

R.S.J. Edwards' decision also refers to an excellent article about advocacy that was written by the late Justice Marvin Catzman (formerly of the Ontario Court of Appeal) called "The Wrong Stuff: How to Lose Appeals in the Court of Appeal". We strongly commend it to you if you haven't read it yet. It is a short, entertaining and educational read. Although it was published in the Advocates' Society Journal more than 22 years ago, it can be found online on the Supreme Court Advocacy Institute's website at <https://www.scai-ipc.ca/pdf/Catzman-TheWrongStuff.pdf>. And, if you enjoy it, you should also know that Justice Catzman wrote a series of follow up articles. Although we weren't able to find any free online sources that have them available and they aren't available on Westlaw, they should be readily accessible through your local law library, and have some really catchy titles, including:

- Losing Tip # 9: Make your Factum Read Like War and Peace – Justice Marvin Catzman;
- Losing Tip # 11: Distinguishing the Indistinguishable (and a Note on Alphabet Soup) – Justice Marvin Catzman;
- Losing Tip # 13: Never Discard a Hopeless Argument – Justice Marvin Catzman;
- Losing tip # 20: Losing by Confusing; and
- Losing tip #25: Misspelling and the Art of Judicial Alienation.

We also recommend the following articles to you, both of which can be found through free online sources:

- Justice Brown's 2017 update to Justice Catzman's series - "How to lose an appeal in the Court of Appeal: The Next Generation" - which can be found on the Ontario Court of Appeal website at (<https://www.ontariocourts.ca/coa/en/ps/publications/TAS.lose.appeal.pdf>)
- Justice Quinn's incredibly entertaining article from a 2012 CLE entitled "A Judge's View: Things Lawyers Do to Annoy Judges; Things They Do to Impress Judges", which can you find on the OBA's website (https://www.oba.org/en/pdf/a_judges_view.pdf)

***DiPoce v. DiPoce*, 2022 ONSC 2099 – Monetary penalties for non-disclosure**

This fine is fine.

Rule 1(8) of Ontario’s *Family Law Rules*, O.Reg. 114/99 gives courts in Ontario broad authority and discretion to deal with breaches of court Orders short of a formal finding of contempt:

Failure to obey order

(8) If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, **including**,

- (a) **an order for costs;**
- (b) an order dismissing a claim;
- (c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;
- (d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;
- (e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;
- (f) an order postponing the trial or any other step in the case; and
- (g) on motion, a contempt order. [**emphasis added**]

However, unlike the contempt provisions of the *Family Law Rules* which *expressly* state that a court can impose a monetary penalty or fine as a remedy for contempt (see Rule 31(5) of the *Family Law Rules*), Rule 1(8) does not *specifically* refer to monetary penalties or fines. However, the wording of Rule 1(8) is clearly broad and open ended (with an inclusive, not restrictive, list of possible remedies), and as far back as 2008, , the court relied on the predecessor Rule 14(23), to impose a daily monetary fine/penalty on a recalcitrant litigant to cajole him into complying with his court ordered disclosure obligations: *Mantella v. Mantella*, 2008 CarswellOnt 5632. (Although now-repealed Rule 14(23) was replaced with Rule 1(8) in 2014, the former Rule also gave courts broad authority to deal with breaches without making specific reference to monetary penalties or fines.)

In *Mantella*, the court ordered the husband to produce various disclosure to the wife by April 25, 2008, failing which he would have to pay her a fine of \$2,500 a day (\$912,500 a year) until he complied. The husband eventually provided the necessary information, but did not do so until July 7, 2008, which was 74 days after the court-ordered deadline. As a result, the wife brought a motion to confirm that the husband owed her a total of \$185,000 (\$2,500 a day x 74 days). The motion was granted by Justice Van Melle.

The husband appealed Justice Van Melle’s Order to the Court of Appeal (*Mantella v. Mantella*, 2009 ONCA 194), and argued that the court did not have jurisdiction to Order a monetary fine or penalty punishment in the absence of a finding of contempt.

The Court of Appeal acknowledged that the issue was novel and important, but nevertheless quashed the husband’s appeal because the Order in question was interlocutory, and as such his appeal lay to the Divisional Court with leave:

[23] The central issue raised in this appeal is whether, absent a finding of contempt, a judge has the jurisdiction under the *Family Law Rules* to impose and order payment of a fine as part of the case management process. In other words, as submitted by the respondent, is the authority conferred by any of Rules 1(8), 14(23) or 19(10) broad enough to allow for the making of such orders? **Whether a fine or penalty can be imposed absent a finding of contempt, and to whom the fine is payable, are novel issues and are important. The novelty and importance of the issues do not, however, make the order into a final one for purposes of appeal.** [emphasis added]

It is unfortunate that the Court of Appeal could not address the issue on the merits, because since 2009, many conflicting decisions have been released about whether a court can or cannot make the type of Order that was made in *Mantella*, which we will refer to as a “*Mantella* Order” for ease of reference. For example, in 2018, in *Shapiro v. Feintuch*, 2018 ONSC 6746, despite a number of previous decisions to the contrary, Justice Monahan found that the court did *not* have jurisdiction to make a *Mantella* Order. Then, in 2019 in *Granofsky v. Lambersky*, 2019 ONSC 3251 – despite a number of decisions to the contrary -- Justice Diamond found that he did, in fact, have jurisdiction to make such a *Mantella* Order. . The law was hopelessly conflicted.

The two recent decisions that are discussed below – Justice Shore’s decision in *DiPoce* where she granted a *Mantella* Order, and Justice Faieta’s decision in *Altman* where he found he did not have jurisdiction to do so – show that the conflict in the jurisprudence continues even now, some 13 years after *Mantella* was originally decided. And, as discussed further below, even though the Court of Appeal found in 2009 that this issue was both novel and important, and even though in 2022, Justice Faieta in *Altman* said this issue needs to be resolved by an appellate court -- the Divisional Court inexplicably just rejected the wife’s motion for leave to appeal in *Altman*. This is very hard to understand.

In May 2021 and November 2021, the husband in *DiPoce* was ordered to produce certain financial disclosure to the wife. When he failed to produce all of the court ordered information, the wife brought a motion for a *Mantella* Order, and asked that he be required to pay her a significant daily financial penalty until he brought himself into compliance.

Justice Shore accepted the wife’s argument that the husband had not complied with the disclosure Orders, and her argument that rule 1(8) did, in fact, give the court authority to make a *Mantella* Order:

[15] Fines have been awarded in circumstances similar to the present motion. In *Mantella v. Mantella*, the Court of Appeal quashed an appeal of a trial judge’s order that the Respondent pay a fine in the amount of \$2,500 each day until disclosure was complete:

2009 ONCA 194. The fine was imposed because of the Respondent's delay in producing documents the court previously ordered to be produced by a certain date.

[16] There have been a number of other cases where fines or monetary payment have been ordered to ensure disclosure: see for example *Granofsky v. Lambersky*, 2019 ONSC 3251 and *Florovski v. Florovski*, 2019 ONSC 5013. In *Granofsky*, at paras. 28, 30-31, Justice Diamond stated that:

In my view, the Court has jurisdiction under the Family Law Rules to order a fine or monetary payment as part of its role to control and enforce its own process ... [While it] should be reserved to exceptional and/or egregious circumstances, the respondent has been given opportunity after opportunity to comply with his duty to disclose financial information and documentation and I find the case before me to be a fitting example.

...

[C]osts orders have been made against the respondent, and while he has complied with those costs orders, their impact has not resulted in compliance with his duty to disclose financial information/documentation.

A daily, monetary penalty payable to the applicant will hopefully have a different impact.

(Unfortunately for our purposes, her Honour did not refer to *Shapiro v. Feintuch* the other cases that have found that a court cannot make a *Mantella* Order in her reasons.)

Given some of the serious findings that were made against the husband earlier in the proceeding, including that he was engaged in "a scorched earth approach", and the facts that the parties had already been separated since 2017 and in litigation since early 2018, Justice Shore found that this was an appropriate case for to impose a monetary penalty to try to deal with the husband's non-compliance. And, given the husband's substantial wealth (he had an income of more than \$12,000,000 in 2019 and assets of more than \$100,000,000), she ordered him to pay the wife a penalty of \$2,500 a day (\$912,500 a year) for each day his disclosure remained outstanding.

***Altman v. Altman*, 2022 ONSC 4479; leave to appeal refused 2022 ONSC 6952 (Div. Ct.) – Contempt and disclosure**

This fine is not so fine. Let me *Mantella* you a story..

The parties in *Altman* were married in 2003 and separated in 2019.

The husband had a significant net worth as a result of various investments in biotech, technology, e-sports, and real estate, and admitted that his Net Family Property was more than \$30,000,000.

In January 2021, the husband retained a senior and experienced business valuator to value his business interests and calculate his income for support purposes. However, the reports were never completed because the husband failed to provide his valuator with the necessary information.

As a result of the husband’s significant delays, the wife brought a motion that resulted in a number of Orders being made against him, including an Order requiring him to produce his income and valuation reports by October 25, 2021.

The husband failed to comply with the prior Orders, and the wife brought another motion to strike his pleadings. Although the court declined to strike the husband’s pleadings, it made a further Order requiring him to produce additional disclosure, and to comply with the prior Orders, including the Order for an income and valuation report, by January 17, 2022.

As the husband yet again failed to comply with the prior Orders, the wife brought another motion to strike his pleadings, and to allow her to proceed with an uncontested trial. She also requested an Order requiring the husband to pay her \$3,500 a day (\$1,277,500 a year) for each day that he failed to cure his breaches of the prior Orders (retroactive to January 17, 2022).

Justice Faieta was less than impressed by the husband’s litigation conduct (to say the least), but decided to give the husband one last chance to comply with his disclosure obligations before his pleadings were struck. He ordered that if the husband did not bring himself into compliance within 90 days, his pleadings would be struck, and the wife would be able to proceed with an uncontested hearing.

Justice Faieta also dismissed the wife’s motion for a *Mantella* Order, as he did not think he had jurisdiction to make such an Order. In reaching this conclusion, his Honour largely relied on *obiter* from the Ontario Court of Appeal’s recent decision in *Bouchard v. Sgovio*, 2021 ONCA 709. In that case, the majority expressed serious doubts about whether the remedies set out in the contempt provisions of the *Family Law Rules*, including penalties and fines, could be imposed in the absence of a successful contempt motion. As Justice Paciocco explained for the majority of the court of Appeal:

[52] I use the term *prima facie* authorized because I do not mean to suggest that there are no limits to the kinds of enforcement orders that can be made under r. 1(8). For example, **it may well be that the remedies that are provided for in r. 31(5), which is reproduced below, cannot be imposed pursuant to r. 1(8), absent a successful contempt motion as contemplated by r. 1(8)(g): see *Mantella v. Mantella*, 2009 ONCA 194. This proposition seems sensible since contempt orders require proof beyond a reasonable doubt, and although they are remedial in purpose, they are punitive in nature, and are therefore**

to be used as a last resort: *Hefkey v. Hefkey*, 2013 ONCA 44, at para. 3; *Prescott–Russell Services for Children and Adults v. G. (N.)* 2006 CanLII 81792 (ON CA), [2006] 82 O.R. (3d) 686 (Ont. C.A.), at para. 26. **I need not resolve this specific question since the ground of appeal before us concerns only the temporary parenting order and the Building Bridges order, neither of which are remedies contemplated by r. 31(5);** the father did not appeal the Hughes Order where the motion judge did impose punitive fines without making a finding of contempt against the father, nor did he raise any objections in this appeal to the motion judge's order that those fines would "remain in full force and effect". Nevertheless, this illustration demonstrates that there may be other legal limits on the kinds of orders that courts may impose under r. 1(8). [emphasis added]

Based on this reasoning, Justice Faieta concluded that he did not have jurisdiction to make a *Mantella* Order:

[43] ... While there is a pressing and growing need for the efficient, effective and timely management of family law cases, **the need for fairness requires placing limits on the broad authority provided by Rule 1(8) to impose a remedy for non-compliance with a court order.**

[44] **There is express authority to order a person to pay fine or penalty under Rule 31(5) of the *Family Law Rules* if that person is found in contempt of the court for failing to comply with an Order. A finding of civil contempt requires proof of the following elements beyond a reasonable doubt:** (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order must have actual knowledge of it; and (3) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Chong v. Donnelly*, 2019 ONCA 799, para. 5 (C.A.). As noted in *Carey v. Laiken*, 2015 SCC 17, para .32, “[t]hese three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases”. **These heightened requirements and the procedural safeguards provided by Rule 31 are avoided if Rule 1(8), which has no such requirements or procedural safeguards, is used to impose a penalty upon a party for non-compliance with an order.**

[45] Accordingly, I dismiss the [wife’s] request to impose a penalty of \$3,500.00 per day on the [husband]. [emphasis added]

While there is certainly something to Justice Faieta’s reasoning based on the rules of statutory interpretation. Rule 31(5) of the *Family Law Rules* expressly refers to monetary penalties and fines as potential penalties for contempt of court, which requires the moving party to prove all three elements of contempt beyond a reasonable doubt: (a) “the order alleged to have been breached states clearly and unequivocally what should and should not have been done; (b) the party alleged to have breached the order had actual knowledge of it; and (c) the party allegedly in breach intentionally did the act the order prohibits or intentionally failed to do the act the order compels”: *2363523 Ontario Inc. v. Nowack*, 2016 ONCA 951 at para. 20).

In contrast, Rule 1(8) only requires proof on a balance of probabilities that the responding party has not obeyed an Order. Had the drafters of the *Family Law Rules* wanted to allow courts to impose monetary penalties and fines under rule 1(8), they could have easily said so expressly within the rule itself. But then again, as noted above – differentiating between a penalty of “costs”

and a “fine or other penalty” is a bit like dancing on the head of a pin. Both are payments to the other party in the nature of a penalty.

Furthermore, Rule 1(8) is also clear that the court can deal with a failure to comply with an order “by making any order that it considers necessary for a just determination of the matter”, which based on a plain reading is certainly broad enough to encompass monetary penalties and fines. And further, from a practical standpoint, the ability to Order a monetary penalty or fine to get a family law litigant to comply with his or her disclosure obligations – rather than having to engage the full contempt machinery of the court -- can be an incredibly useful tool in appropriate circumstances.

In any event, until just a few weeks ago, we had thought that we would finally get appellate guidance about whether a court can, in fact, make a *Mantella* Order, as the wife in *Altman* applied for leave to appeal Justice Faieta’s decision on this issue to the Divisional Court. Given the Court of Appeal’s 2009 finding that the issue was both novel and important in *Mantella*, and given Justice Faieta’s suggestion that the issue needed to be addressed by a higher court, and given the numerous conflicting decisions on the issue, we thought a successful leave application would have been a “slam dunk.” However, we were surprised and disappointed to find out on December 16, 2022 that, unfortunately, the Divisional Court dismissed the wife’s motion for leave to appeal. And, because the Divisional Court does not give reasons when dismissing applications for leave to appeal, we have no idea why it did not agree to hear the matter. Importantly, a dismissed application for leave to appeal does not amount to an endorsement of the decision below.

Where Do We Go From Here?

Since we have hopelessly conflicting lines of cases about this important but vexing issue, but the Divisional Court has decline to address the issue (for reasons that escape us), , it appears that the only way to clarify the situation will be for the Family Law Rules Committee to clarify Rule 1(8).

It the Rules Committee agrees to take up the issue, we hope they will allow courts to make *Mantella* Orders. Contempt motions are far more complicated, expensive, risky, and time consuming, and it should not be necessary to try to invoke a quasi-criminal process that potentially can lead to incarceration before lesser methods have been tried. As Justice Jamal (as he then was) explained in *Moncur v. Plante*:

[10] ... Courts discourage the routine use of this power to obtain compliance with court orders. The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort. A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance: *Carey [v. Laiken, 2015 SCC 17]* at paras. 36-37; *Chong v. Donnelly, 2019 ONCA 799, 33 R.F.L. (8th) 19*, at paras. 9-12; *Valoris pour enfants et adultes de Prescott-Russell c. K.R., 2021 ONCA 366*, at para. 41; and *Ruffolo v. David, 2019 ONCA 385, 25 R.F.L. (8th) 144*, at paras. 18-19.

In appropriate cases, requesting a monetary fine or penalty to try to compel compliance is a reasonable and proportionate way of dealing with non-disclosure before seeking more drastic

interventions like contempt or striking pleadings. That being said, we would urge the Rules Committee to set out the principles that courts should consider when deciding whether to make a *Mantella* Order including, most importantly in our view: (a) ensuring that the amount ordered is proportionate given the issues in dispute and the means of the parties; and (b) preventing litigants from trying to use *Mantella* Orders to weaponize the disclosure process. As the Court of Appeal put it in *Kovachis v. Kovachis*, 2013 ONCA 663:

[34] ... Although full and frank disclosure is a necessary component of family law litigation, exhaustive disclosure may not always be appropriate. Courts and parties should consider the burden that disclosure requests bring on the disclosing party, the relevance of the requested disclosure to the issues at hand, and the costs and time to obtain the disclosure compared to its importance: see *Chernyakhovsky v. Chernyakhovsky* (2005), 137 A.C.W.S. (3d) 988 (Ont. S.C.J.) [2005 CarswellOnt 942 (Ont. S.C.J.)] at paras. 8, 15; *Boyd v. Fields* (2006), [2007] W.D.F.L. 2449 (Ont. S.C.J.) [2006 CarswellOnt 8675 (Ont. S.C.J.)] at paras. 12-14. Disclosure orders must be fair to both parties and appropriate to the case.

Help please.

***Radosevich v. Harvey*, 2022, ONSC 3549 (Div. Ct.) — Solicitor's Negligence and Improvident Settlements**

Does anyone care
about my opinion?

No?

Alright.

The Divisional Court’s decision in *Radosevich v. Harvey* is the first time an appellate court in Canada has considered the following question:

Can a spouse sue their family law lawyer for negligence in relation to an improvident settlement before exhausting their remedies against the former spouse?

Based on the Divisional Court’s decision, the answer to this question is now clearly “no”.

In October 2017, the Appellant, Ms. Radosevich, and her former husband, Mr. Radosevich, signed a Separation Agreement that resolved the issues arising out of the breakdown of their marriage. The Respondent lawyer, Ms. Harvey, represented Ms. Radosevich throughout the negotiations, and when the Separation Agreement was signed.

After the Separation Agreement was signed, Ms. Radosevich decided she was not happy with the settlement. She also claimed that she had not understood the nature and consequences of the Agreement because her lawyer failed to properly advise her of her rights (particularly with respect to retroactive spousal support and the husband’s income), and because she had been under duress when she signed it because of a power imbalance between her and Mr. Radosevich.

In Ontario, we regularly see claims to override spousal support agreements pursuant to *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), and to set aside agreements pursuant to s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3, which allows a court to set aside all or part of 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;
- (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 (i.e. duress, unconscionability, undue influence, mistake, etc.).

Based on *Miglin* and s. 56(4), if Ms. Radosevich could prove that she had not understood the nature and consequences of the Agreement and/or had been under duress, she would certainly have had a decent chance of being able to override and/or set aside the Separation Agreement. And, had she been able to do so, she could potentially have eliminated (or at least seriously mitigated) her potential claim for damages against Ms. Harvey.

But Ms. Radosevich decided not to bother trying to make a claim against Mr. Radosevich to override or set aside the Separation Agreement. She skipped that step entirely, and proceeded straight to a negligence claim against Ms. Harvey for damages based on the support she believed she should have received from Mr. Radosevich.

Ms. Harvey brought a motion to stay Ms. Radosevich’s claims on the basis that they were an abuse of process which, as the motion judge, Justice Vella, explained, “is a flexible doctrine that vests

discretion in the court to consider whether the current proceeding is unfair to the point that it is contrary to the interests of justice”, and that permits “proceedings that are inconsistent with the objectives of public policy [to] be barred.”

The 2015 case of *Sutton v. Balinsky*, 2015 CarswellOnt 11289 (S.C.J.) involved an almost identical set of facts. In that case, Justice Dunphy determined that it was, in fact, an abuse of process for the wife to sue her professionals (her lawyer and accountant) over an allegedly improvident family law settlement *before* she had pursued her potential remedies against her former husband. Some key excerpts of the decision are set out below:

[13] I also find that the action as framed is an abuse of process and should be stayed for that reason. **The plaintiff is pursuing her legal and financial advisors in damages for a remedy that ought to have been pursued, if at all, under the *FLA* as against her husband. It would be contrary to public policy and fundamental principles of fairness to permit the plaintiff to circumvent the *FLA* in this fashion.** The defendants have no right of contribution or indemnity against the husband whose obligation it is to provide support or make equalization payments. Her rights to support and divisions of property arise under the *FLA* and should be determined under that statute and not in this collateral fashion.

...

[177] . . . The plaintiff is seeking in this action to accomplish indirectly (via a damages claim) what she chooses not to seek to do directly in *FLA* proceedings (seek to set aside the Marriage Contract and claim greater support and equalization payments). There is no election of remedies between civil and statutory remedies where *FLA* rights are concerned. **If the plaintiff has a claim under the *FLA*, she must pursue it directly under the *FLA* and not indirectly via a negligence or similar action against her lawyer or financial advisor, particularly where the consequences of the very thing she complains of — lack of disclosure and proper understanding — have been considered and provided for by the legislator.**

...

[179] **It would be contrary to public policy to permit a spouse in [the plaintiff’s] situation to treat support and equalization as something that she can elect to pursue from the pocket of her choice if she believes she has been led into a bad domestic contract.** It would be fundamentally unfair to permit her to treat her lawyers and financial advisors as de facto guarantors of her rights to support or equalization payments, particularly where they have none of the rights that guarantors have of contribution or indemnity from the party upon whom the obligation primarily lies. [emphasis added]

In concluding that the claim was an abuse of process, Justice Dunphy also considered the wife’s argument that she should not be forced to incur costs to pursue potentially risky claims against the husband before she could sue her advisors. However, his Honour rejected this argument because, in his view, the risk and issues in both actions would be “substantially the same”:

[172] The plaintiff’s position is that she is under no obligation to sue all possible defendants. In particular, **she claims that a law suit against her husband would be a potentially risky**

affair as the husband would likely plead that she fully understood the nature and consequences of the Marriage Contract by reason of the advice of [her lawyer]. The law of mitigation does not oblige her to run such risks and she may choose her defendant. **It is no abuse of process to pursue her legitimate legal rights and choose the path that seems to her or her legal advisors to offer the best chance of success with least risk. She is not obliged to choose the path best suited to the defendants or to maximize their own chances of obtaining contribution.**

[173] **The flaw in the plaintiff's position is that there is no material difference in terms of risk as between the proceeding she has chosen to bring and the one she chose not to bring.** She alleges that the negligence or breaches of duty of the defendants prevented her from appreciating the nature and consequences of the agreement she was entering into and that the failures of disclosure brought about by those same breaches deprived her of the ability to know what she w[a]s getting and what she was giving up. The statute which gave her the rights she claims to have lost (the FLA) also provides her with a direct means of recovering them (through an application to set aside the Marriage Contract under s. 56(4)). **The issues in this case (were it heard on the merits) and the issues in a suit to set aside the Marriage Contract under the FLA would be substantially the same: whether she received disclosure of all material assets and whether she understood the nature and consequences of the Marriage Contract when she entered into it.**

[174] In my opinion, **it would be fundamentally unjust and an abuse of process to permit the plaintiff to claim what amounts to a variation of her Marriage Contract through the device of a damages claim instead of pursuing the remedy specifically provided for that purpose under the FLA.** [emphasis added]

Now back to *Radosevich*. The motion judge, Justice Vella, adopted Justice Dunphy's reasoning in *Sutton*, and granted Ms. Harvey's motion for a stay. However, she also made it clear that it was open to Ms. Radosevich to apply to lift the stay once she had pursued her remedies against Mr. Radosevich:

[14] For these reasons, I concluded that Ms. Radosevich must attempt to vary the separation agreement, and otherwise avail herself of whatever remedies she might have against her former husband under the relevant family law legislation first, before coming to the civil court to advance an action based on solicitor's negligence against her former lawyer. The remedies advanced by Ms. Radosevich against Ms. Harvey are, in substance, matters governed by the *FLA*; namely, whether retroactive spousal support ought to be paid by her husband, and whether the lump sum spousal support agreed to be paid was fair in light of her husband's true financial picture.

[15] However, in the event that after pursuing her remedies under the relevant family law legislation, Ms. Radosevich is in fact without a remedy because she may not be able to establish any of the grounds under s. 56(4) of the *FLA*, as urged by her lawyer before me, this order is without prejudice to her right to bring a motion to lift the stay and revive this action.

Ms. Radosevich applied for, and obtained, leave to appeal Justice Vella's decision to the Divisional Court. (Generally, an Order granting a stay is considered a final Order for the purposes of an appeal — see *McClintock v. Karam*, 2017 CarswellOnt 4552 (C.A.) at para. 1. However, there is an

exception to the general rule where, as in this case, a matter is stayed pending the disposition of other proceedings — see *General Capital Growth Ltd. v. Burlington (City)*, 1979 CarswellOnt 422 (C.A.) at para. 3.)

Before the Divisional Court, Ms. Radosevich argued that any attempt to set aside or override the Separation Agreement “would be doomed to fail, and that she should not be required to suffer the costs consequences of a frivolous action.” But Ms. Radosevich was unable to persuade the Court that her claims against Mr. Radosevich were “doomed to fail” given the significant overlap between her potential claim against Mr. Radosevich, and her claim against Ms. Harvey:

[7] The appellant argues that a claim under the *FLA* is doomed to fail. We disagree. **Whether the appellant can succeed on a claim to set aside parts of the separation agreement will depend on the evidence led by the parties.** However, the *FLA* clearly governs the dispute. Contrary to the appellant’s arguments, **the grounds alleged against the respondent solicitor are the very grounds that may be used to set aside a separation agreement under the *FLA*.**

...

[11] **It inexorably follows that it was open to the motions judge to conclude that the action against the solicitor was an abuse of process.** The appellant may seek to lift the stay of the civil action if she is unsuccessful in family court. However, to begin with the civil claim is to litigate with the cart before the horse. We see no basis for appellate intervention. [emphasis added]

While this is certainly a reassuring result for family law lawyers across Canada — and at the risk of hate mail — we must wonder whether the pendulum may have swung a bit too far.

In most improvident settlement claims against a family law lawyer, it will probably be reasonable to insist that clients take reasonable steps to pursue their family law remedies against former spouses before they can sue their advisors.

But there are also going to be situations where it may not be fair or reasonable to force a client to incur significant costs to pursue a former spouse (and to take on the risk of having to pay costs if they are unsuccessful), as a precondition to being able to pursue a negligence claim. The law is clear that even if a court finds that there are sufficient problems with a family law agreement to engage *Miglin* and/or s. 56(4) of the *Family Law Act* (or the equivalent statutory provisions in the other provinces and territories), it still has discretion to uphold the agreement. As the Ontario Court of Appeal explained in *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (Ont. C.A.):

[33] **It is now well established that a finding that a party has violated a provision of s. 56(4) of the *FLA* does not automatically render the contract a nullity.** Rather, a trial judge must determine whether it is appropriate, in the circumstances, to order that the contract be set aside. **This is a discretionary exercise.** See *Dochuk v. Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.). . . . [emphasis added]

The proper balance in these types of cases has generated a significant amount of debate. Sine may think that the reasoning in *Radosevich* is largely correct, and thinks it is difficult to come up with even a hypothetical fact scenario where a court would be willing to allow a lawyer’s negligence to

leave a client with significantly less money than s/he ought to have received at law, or to give the opposing spouse a windfall because of the other spouse's lawyer's negligence. In these types of cases, it seems far more likely than not that the court would intervene and make things right *between the spouses*. And, if the client whose lawyer was negligent ultimately gets what s/he ought to have received in the first place, that would eliminate (or at least significantly mitigate) any potential claim for damages against the lawyer.

Others think that *Radosevich* is an invitation to be negligent and that *Radosevich* will result in too many instances where a client who was, in fact, poorly served by a lawyer will be precluded from pursuing a remedy because s/he simply does not have the resources to litigate the claim to set aside or override the family law agreement, and/or may not want to take on the risk of pursuing contentious litigation against a former spouse. This is also far less of a problem in civil claims against lawyers, because, unlike in family law, lawyers in civil cases can act on contingency.

Let's assume for a moment that the respondent lawyer in this case *was* negligent. Let's assume that after lengthy negotiations, the lawyer never told her client, the wife, that she could claim retroactive spousal support. And let's assume that the client then settled her matter without any retroactive spousal support and signed a Separation Agreement with the benefit of the lawyer's Certificate of Independent Legal Advice. Should the client have to first try to set aside the Separation Agreement? The husband is going to rely on the Certificate of Independent Legal Advice provided by the lawyer attesting to the fact that the wife understood her rights, obligations and the agreement. The wife may not be able to afford to unsuccessfully sue her husband and take on the risk of having to pay his costs if she is unsuccessful, and may then be left without sufficient resources to be able to sue her lawyer.

We also wonder if the situation might not be different with respect to a marriage contract (as in *Sutton v. Balinsky*) and a separation agreement (as in *Radosevich v. Harvey*). A marriage contract is prospective. A separation agreement is retrospective, assigning rights and obligations based on past events. Giving bad advice with respect to those past events should perhaps be treated differently.

In any event, no matter who is right, we are inevitably going to see more and more of these types of motions in the months and years to come, and it will be interesting to see how the courts balance these competing arguments. We suspect we may also see more cases where parties decide to simply sue both the lawyer and former spouse at the same time, or try to avoid the abuse of process issue entirely by finding more creative ways to frame claims against family law lawyers to ensure that they do not directly overlap with the client's potential family law remedies.

L.S v. B.S., 2022 ONSC 5796 – The Ability of Parents to Access Records

The Careful
Balancing Act of
Competing Rights

This case dealt with the production of records pertaining to children held by third parties.

The parties had been involved in a high conflict parenting dispute. The mother had started an Application in October 2017. There were two children involved, B (age 14) and E (age 13). Both children were primarily in their mother's care.

In 2018, Justice Fryer ordered reunification therapy for both children and selected Dr. F to provide the reunification therapy. Justice Fryer did not make an order for individual therapy for the children, and their order was silent regarding Dr. F's obligation to report or the release of the records pertaining to therapy. The reunification therapy ended without any involvement of the Court, and shortly after the children began individualized therapy with the Catholic Family Services of Durham. As of the date of this motion, the children were still receiving therapy through this service.

On April 27, 2022, Justice Finlayson determined that the father may proceed with a motion for the production of records pertaining to the children. Additionally on this date the OCL was appointed to help provide the children's positions with respect to a motion about their counselling and medical records. The father's motion regarding the release of the children's personal health records under s. 20(5) of the *Children's Law Reform Act* was argued on September 20, 2022.

The father also sought the notes and records of Dr. B and the Shoniker Clinic. E. was receiving gender identity care through this facility.

Justice Finlayson was confronted with a number of important issues in this case:

- (1) What is the proper scope of a parent's right to their child's personal health information under s. 20(5) of the *Children's Law Reform Act*? And in doing so what is the interaction between family law legislation, the provisions of the *Personal Health Information Protection Act, 2004 ("PHIPA")* and the *Health Care Consent Act*?
- (2) What happens when that right conflicts with a capable child's objection to the release of that information?
- (3) Does a parent have the right to their child's personal health information under the *Family Law Rules* where a capable child does not consent?
- (4) Whether a parent's potential right to their child's personal health information under either family law legislation or rules should be curtailed, especially where the information is particularly sensitive, they include matters relating to a child's gender affirming care, and where the child might experience emotional harm as a result of the disclosure?

The Court determined that while it has the authority to order the production of records under Rule 19(11) of the *Family Law Rules*, the father did not have an unqualified right to access the specific records that he sought.

Justice Finlayson declined to order production of E's records regarding their gender identity and treatment. While a parent has a legitimate interest in the child's gender identity and treatment, before ordering production a court will consider the nature of the relationship between the parent and the child. The Court also considered the child's privacy interests, as E did not want the records produced. In this case, Justice Finlayson determined that due to the problematic nature of the relationship between E and the father and E's strong privacy interests in the medical records, those records were protected by a "case-by-case" privilege.

Under s. 2(1) of the *PHIPA*, an individual is capable of consenting to the collection, use or disclosure of their personal health information if they are "able to understand the information that is relevant to deciding whether to consent to the collection, use or disclosure" and where they are able to "reasonably foresee consequences of giving, not giving, withholding or withdrawing the consent." The concept of capacity is fluid and the determination of capacity falls to the health information custodian (individual who has care and control of a person's records). Section 23(1)(2) allows a "parent" to have access to a child under the age of 16's records. "Parent" in this context refers solely to the parent(s) with decision-making authority, not a parent who only has the "right of access". Further to this, where a child has the capacity to consent, the child's decision will prevail over a parent's right.

The Court determined that the *CLRA* and the *PHIPA* co-exist just as the *CLRA* and *Health Care Consent Act ("HCCA")* have previously been determined to. Section 20(5) of the *CLRA* does not operate alone, and it is not absolute. Similarly, the *PHIPA* is also not absolute; in some instances the *PHIPA* will prevail over the right in s. 20(5), but be subordinate in other instances. The Context of each individual case is key.

In this case, the Court determined that in this case s. 20(5) of the *CLRA* and/or the *Family Law Rules* were the controlling legislation. The Court noted however that courts have jurisdiction to consider decisions made under the *PHIPA*, just as the Information and Privacy Commissioner can consider the best interests of the child.

The Court determined that it would not be in the children's best interests for to make a broad disclosure order under s. 20(5) for the entire counselling files. In making this finding the Court considered (1) the fact that the mother had primary care and supported the children's position for non-disclosure; (2) Neither child wanted to see their father and the Court noted the non-existent parent-children relationship; (3) the Court was concerned based on the children's statements to the OCL about family violence; and that (4) even if the children lacked capacity and because the father did not have decision-making authority, he would not be entitled to disclosure under the *PHIPA*.

Family Law Rule 19(11)

Family Law Rule 19(11) provides a mechanism for parties to obtain documents that are in a non-party's control. The Court considered: (1) the position of the parties; (2) whether the records were relevant to the material issue; (3) whether the records were privileged using the four-step test from *Wigmore*; and (4) if it would be unfair to continue without the records using the test set out in *Ontario (Attorney General) v Stavro* (1995), 26. O.R. (3d) 39 (C.A.).

Dr. F's Records

The Court determined that Dr. F's records were relevant as they likely would speak to the allegations of family violence against E, and broadly about whether there had been alienation or estrangement. The Court determined that these records would not be privileged. The children were no longer receiving reunification therapy. In addition, the father participated in and knew about what took place in some of the therapy sessions. Finally, the Court found that Dr. F would likely be called as a witness at trial so the details in the records would ultimately be heard at trial. The Court ordered the production of Dr. F's records pertaining to the reunification therapy.

CFSD's Records

With respect to the Catholic Family Services of Durham's records the Court only ordered limited production. First, the Court determined that because of the abrupt ending of the reunification therapy and the transition to individual therapy the contents of the individual counselling records would likely have some relevance to the material issues about the parent-child relationships in this case. Second, when considering whether the records were privileged the Court determined that the CFSD's records would only be produced in part, taking into account the privacy concerns of the children. The CFSD would provide a brief report detailing the start dates of the counselling, the general purpose, the frequency and written confirmation that the counselling still continued. This would not "trample" on the children's privacy or their other interests but could shed light onto the behaviour of the parents, their ability to co-parent and their relationship with each other. The OCL by providing the children's views about the dispute could fill in any gaps, so the specifics about what was discussed in these sessions were protected.

E's Medical Records

Moving to E's medical records the Court determined that the only way that these records would be relevant in this case were if there was a question raised about a parent's ability to support their child's gender journey, and there was not in this case. Given the potential harm the child could be faced with, the father should not be granted disclosure. This was further bolstered by the possible procedural concerns which might be raised given that the father did not have a specific pleading dealing with this issue before the Court. The Court was clear in its finding that this treatment and its details are privileged. Courts commonly recognize that children are among the most vulnerable members of the community. This coupled with the common discrimination and violence trans and gender nonconforming individuals experience mitigated against the disclosure. Additionally, the Court raised concerns about both parents' behaviour throughout this litigation. The father was too invested in the conflict with the mother to have proper perspective on how to understand these records and in turn appropriately support his children. The Court cautioned both parties that the misuse of such information could amount to family violence. The Court took it one step further to determine that even if these records were not privileged, balancing E's high privacy interests with the unfairness to the father led the Court against their disclosure.

Maisonneuve v. Clark, 2022 ONCA 113 — Limitation Periods and Arbitrations

Limitation Periods?
For Arbitrations??

You don't say?!

Courts? Jammed. Lists? Long. Court delays? Unacceptable. Arbitration? Increasingly popular.

Arbitration can be an excellent alternative to litigation. The flexibility it offers in speed, process, and scheduling will often more than overcome the cost of an arbitrator. Working with the arbitrator, the parties can design a process that works for them and the specific issues to be decided. It is clear now that the arbitration process need not mirror the court process: *Kroupis-Yanovski v. Yanovski*, 2012 CarswellOnt 11826 (S.C.J.); *Geary v. Geary* (2017), 94 R.F.L. (7th) 314 (B.C. S.C.); *Jirova v. Benincasa* (2018), 5 R.F.L. (8th) 317 (Ont. S.C.J.); *Petersoo v. Petersoo* (2019), 29 R.F.L. (8th) 309 (Ont. C.A.); *McLaren v. Casey*, 2016 CarswellBC 274 (S.C.); *Nolin v. Ramirez*, 2019 CarswellBC 1641 (S.C.). And parties can agree on an arbitral process that is proportional to the issues in dispute: *Jung v. Jung* (2015), 72 R.F.L. (7th) 175 (Ont. S.C.J.).

However, people often forget that an arbitration is a creature of both statute and contract. And when we think of contracts, we must consider limitation periods. This appeal dealt with the applicability of limitation periods to an arbitration agreement.

The case involved a dispute between cousins: Jean Maisonneuve and Christopher Clark. The cousins were in business together, and were shareholders of a company. Things went bad, and Mr. Clark started proceedings against Mr. Maisonneuve.

On September 26 and 27, 2016, the parties reached a settlement. They signed Minutes of Settlement and mutual releases. But one issue remained outstanding, that being payment of some expenses with respect to one of the businesses. The mutual release they had signed provided that this issue would be submitted to binding arbitration if they were unable to resolve it:

The undersigned agree and understand that there is one issue that is not covered by the Mutual Release and it is as set out in this paragraph (the “Excluded Issue”) . . . **If the parties are unable to resolve the Excluded Issue as between them, then the Excluded Issue shall be fully and finally referred to the Arbitrator for resolution.** The Arbitrator’s decision shall not be subject to any appeal, either of law, fact or mixed law and fact. [emphasis in original] (the “Arbitration Clause”).

In July 2017, Mr. Clark commenced an action to enforce the Minutes of Settlement. In his defence, Mr. Maisonneuve asserted that the parties had contemplated that any arbitration pursuant to the Arbitration Clause would take place within 90 days.

In January 2018, Mr. Maisonneuve’s lawyer sent Mr. Clark’s lawyer a settlement proposal, including a proposed mechanism to resolve the outstanding issue. Mr. Clark’s lawyer responded that there would be no negotiation.

In June 2019, Mr. Maisonneuve changed lawyers. He retracted his argument that the parties intended that an arbitration take place within 90 days — and he then requested arbitration. Of course, this time Mr. Clark refused arbitration on the basis that the arbitration was time-barred, and that it should have been completed 90 days from the date of the Minutes, or within two years of that date given the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24,

Sched B (the “Act”).

Mr. Maisonneuve asked the Court to appoint an arbitrator. He took the position that the Arbitration Clause required the parties to at least *try* to resolve the outstanding issue before arbitration. Absent such an attempt, the limitation period never started. And since Mr. Clark did not clearly communicate his refusal to negotiate a resolution of the issue until January 2018, the request to arbitrate was not time-barred.

The motion judge found that there was no agreement that the parties would conduct the arbitration within 90 days of the Minutes being signed. The Court also determined that the arbitration was not barred by the two-year limitation period in the *Act*. In Ontario, s. 5 of the Act provides:

A claim is discovered on the earliest day that the person with the claim knew, or reasonably ought to have known that:

1. the injury, loss or damage had occurred,
2. the injury, loss or damage was caused by or contributed to by an act or omission,
3. the act or omission was that of the person against whom the claim is made, and
4. having regard to the nature of the injury, loss or damage, a proceeding would be an **appropriate** means to seek to remedy it. [emphasis added]

The motion judge found that it was not clear that arbitration was “appropriate” until it was clear that the dispute could not be resolved through negotiations. The motion judge also determined that Mr. Maisonneuve should have known by January 31, 2018, that a negotiated settlement was not going to be possible, and on that basis, Mr. Maisonneuve had commenced his proceeding within the two-year limitation period.

At the Court of Appeal, Mr. Clark argued that the motion judge erred in not applying *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 CarswellOnt 4051 (C.A.), an insurance case, where the Court of Appeal held that negotiation was *not* a precondition to arbitration — and therefore, the limitation period did not start to run at the conclusion of unsuccessful negotiations. Below, the court had distinguished *Markel* because it involved the statutory interpretation of an arbitration clause in the *Insurance Act*, R.S.O. 1990, c. I.8, not an arbitration clause in an agreement.

Mr. Clark also argued that the decision below would create uncertainty about the application of limitation periods to arbitration clauses because it is very difficult to know when negotiations are “at an end.”

The Court of Appeal rejected both arguments, and found that the motion judge’s decision turned on the specific wording of the Arbitration Clause and the factual matrix of the negotiations:

[15] . . . Parties are free to agree to arbitration clauses that make no reference to the possibility of an informal agreement or that are more specific about the steps and timing leading to arbitration. In this case, as stated by the application judge, it was open to [Mr. Clark] to let [Mr. Maisonneuve] know at any time that no further negotiations would take place. Indeed, this is what occurred in January 2018, which the application judge found triggered the start of

the limitation period.

So what does this mean for provinces such as B.C., Alberta, and Ontario, for example, where arbitration is quite popular? Arbitration agreements should clearly set out timelines. An agreement to arbitrate has a shelf-life. If parties agree to submit an issue to arbitration “failing agreement,” at some point, it will become clear that agreement is not possible, and the clock will begin to tick. One party may strategically decide to make it clear early that negotiations will not be successful.

What is less clear, however, is what happens to an issue that is to be arbitrated, should the limitation period to arbitrate expire? The agreement to arbitrate will no longer be enforceable, but the parties, having agreed to arbitrate, are not likely able to just resubmit the matter to court. Just another thing for family lawyers to diarize. Caution please.

***M. v. F.*, 2022 ONSC 505 – Cross Examining on a Voice of the Child Report**

Sometimes there is just not enough time in the day.

This was a high-conflict parenting case. The question on the motion was whether the court should appoint a lawyer to represent the 13-year-old child, C., at the centre of the dispute, and if so, whether the court should ask that the Office of the Children’s Lawyer (the “OCL”) provide a legal representative, or otherwise approve the retainer of private counsel for C. The father was seeking increased decision-making responsibility and increased parenting time.

A clinician with the OCL had completed a Voice of the Child Report in August 2021. In the report, the clinician reported that C. was exercising independent thought and wanted to live with his mother. It was reported that C. wanted to set his own schedule and holiday schedule with his father.

On this motion, the mother asked to have the OCL appointed as C.’s legal representative. Furthermore, the father wanted to cross-examine the clinician on the Voice of the Child Report. He was of the view that C.’s stated views and preferences were the product of significant interference from the mother, and wanted to argue that the stated wishes of C. were not really his own. The father opposed the appointment of a legal representative, and the appointment of the OCL. Rather, he sought the appointment of private counsel for C.

This was a sad story. C. had been in the middle of his parents’ high-conflict custody litigation for most of his life. The parents were never married, and they separated before C. was born. The original custody trial in 2010 lasted for 34 days. [Of interest: in the appeal of that original trial decision, the Ontario Court of Appeal first approved of courts not using the "loaded" words of "custody" and "access" (*M. v. F.*, 2015 ONCA 277), and this was the precursor to the recent *Divorce Act* amendments.]

The father had been to court or arbitration half-a-dozen times since the original trial in an attempt to enforce the step-up parenting rights awarded to him at trial.

The Voice of the Child Report was produced by the OCL on August 19, 2021.

On November 24, 2021, the father’s counsel wrote to the OCL giving notice of his intention to cross-examine the clinician who had prepared the Report stating concern with respect to the “veracity” of the Report:

Admittedly, I do not agree with the contents of the report or its conclusions, but the veracity of the report and the weight to be given to it can be dealt with at trial after cross-examination of the clinician. My concerns with the Report are: (i) C. parrots the Applicant Mother’s position; (ii) his answers appear to be coached; and (iii) the views and preferences expressed by C. in the report were not freely given.

The mother argued that since the father was challenging C.’s expressed views and preferences by cross-examining the author of the Voice of the Child Report, C should have a legal representative. The father argued that appointing counsel for C. would place him squarely in the middle of the dispute.

On the variation application, the court would, of course, have to consider all factors relating to the best interests and circumstances of the child, including “the child’s views and preferences, giving due weight to the child’s age and maturity, unless they cannot be ascertained”: s.24(3)(e) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (“*CLRA*”). Section 64(1) of the *CLRA* provides that, “In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.” And then, of course, there is the United Nations Convention on the Rights of the Child, Can. T.S. 1992, No. 3, Article 12, of which Canada is a signatory. It specifically mandates that children who are capable of forming their own views have the right to express those views in all matters affecting them.

Of some concern to Justice Kristjanson was the fact that the cross-examination proposed by the father would be specifically focussed on the only evidence the court would have about C.’s views and preferences:

[15] As stated by the Honourable Donna J. Martinson & Caterina E. Tempesta in “Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation,” 31 Can. J. Fam. L. 151 (2018). at pp. 167-168:

In most cases, it is the fact of the conflict that is harmful, not the expression of the child's views. Even in the few true "parental alienation cases", efforts should be made to enable children to share their views, **although the court may have to determine the weight to be assigned to those views**. In addition, in many cases where alienation is alleged, children may have legitimate affinities for one parent over the other, or may have had experiences with the "alienated" parent that justify the estrangement. In such cases, **it would not be desirable to exclude the child’s perspective** from the decision-making process.

Even in cases where parents are careful to avoid influencing their children's views, it is inevitable that children will be influenced by the words and actions of those around them. **The possibility of parental influence on its own should not be a basis for excluding children's participation** nor for discounting their expressed views. **An approach that considers the extent to which the child's views are rooted in reality, or might reasonably be perceived as such by the child, is preferable, as it considers the situation from the child's perspective.** Reviewing the substance of a mature child's reasons where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child's views will be harmful is **unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to her views**. [emphasis added]

Stated alternatively, the views and preferences of an alienated child may be warped and misconceived - but they are nonetheless real to the child: *N.L. v. R.R.M.*, 2016 ONCA 915. Or as recently noted by Justice Mandane in *S.S. v. R.S.*, 2021 ONSC 2137 at para. 27, “[a] human rights-based approach to the new *Divorce Act* calls on courts to recognize, respect and reflect each child

as an individual distinct from their parents, and to empower children to be actors in their own destiny.”

There are, of course, opposing views. Some courts have suggested there is no point in getting the predictable views of a child that has been alienated: *Haywood v. Haywood*, 2010 CarswellOnt 7701; *L.(J.K.) v. S.(N.C.)*, 2008 CarswellOnt 5490; *M. B.-W. v. R.Q.*, 2015 NLCA 28; *Letourneau v. Letourneau*, 2014 ABCA 156; or that the court need not give any weight to the view of an alienated child: *Bouchard v. Sgovio*, 2021 ONCA 709.

Which view is preferable? Fortunately, we need not decide. On one hand, there is certainly something to be said for the futility of getting the views and preferences of a child that has been alienated. On the other hand, although those views may appear to be an artificial construct to others, to the child those views may be very real. On the other hand, if everyone just accepts the views of an alienated child, the relationship with the target parent may never be fixed. It seems we’ve run out of hands.

In this case, as considered by Justice Kristjanson, C. had an interest in the cross-examination of the author of the report, and the submissions that would later be made about his views and preferences. In the circumstances, her Honour found it to be in C.’s best interests to have a legal representative to ensure that the court had evidence and argument relevant to C.’s views and preferences on the variation application. Therefore, her Honour requested that the OCL provide a legal representative for C. If the OCL declined, then either parent was permitted to bring a motion to appoint private independent counsel

Her Honour also allowed for the cross-examination of the clinician that prepared the Voice of the Child Report. This is not something we have seen before. And whether you agree or disagree with it likely depends on which of the “other hands” you subscribe to above.

Ammar v. Perdelwitz, 2022 ONCA 425— Delay and Family Law

The pithy little soundbite from the Court of Appeal you were looking for in your factum.

There's not a whole lot to this very short endorsement from the Ontario Court of Appeal — save for one very good quote that may come in handy anytime a party is causing delay.

The parties had two young children. The father, Mr. Smith, wanted to appeal the April 29, **2021** judgment of the trial judge respecting parenting, child and spousal support, and property, following a five-day trial.

The father had been granted several extensions to perfect his appeal, but had still failed to do so. He was ultimately given a final extension until December 16, 2021, and this deadline was peremptory.

The father failed to meet the December 16th deadline, and sought a further extension.

Unfortunately for the father, this was the end of the road for his appeal. After several indulgences, he had failed to meet the very deadline that he, himself, proposed.

But here's the really good quote:

[6] . . . Delay in family proceedings is antithetical to the best interests of the children who require finality and peace.

That is a quote that is not only applicable to extensions of time for appeals — but is useful anytime one party appears to be delaying where children are concerned.

Ontario Securities Commission v. Camerlengo Holdings Inc., 2023 ONCA 93 – Creditors and Claims

Leaving No *Stone*
Unturned.

Astute readers will notice that this is not a family law case. But it could be very useful for family law litigants as creative counsel might consider using to further extend the reach of *Stone v. Stone*, 2001 CanLII 24110, wherein the Ontario Court of Appeal considered the applicability of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the “*FCA*”) where one spouse disposed of or transferred assets prior to separation and when his death was imminent.

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

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

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

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

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

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

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

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

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

Equalization of net family properties

Divorce, etc.

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

Death of spouse

(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (2).

Improvident depletion of spouse's net family property

(3) When spouses are cohabiting, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation. R.S.O. 1990, c. F.3, s. 5 (3).

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

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

[30] **Because Mr. Stone's death was known by all to be imminent, Mrs. Stone's claim to a right to equalization was also imminent** and would have been triggered by his death. One of the effects of s. 5(3) of the *Act* is to provide a remedy to a spouse in those circumstances where the other spouse seeks to divest himself or herself of his or her property in anticipation of death and in order to defeat the spouse's claim to equalization. **Had Mrs. Stone exercised that remedy by commencing an application, she would have been a "creditor or other"** of Mr. Stone within the meaning of s. 2 of the *Fraudulent Conveyances Act* on the date she commenced the application.

[31] The trial judge made the following finding on the issue:

It is clear to me that Mrs. Stone may well have resorted to this provision and was at least entitled to the chance but of course **Mr. Stone kept the full extent and nature of his dealings a secret from her.** [citation omitted]

[32] That finding is fully supported by the evidence including Mrs. Stone's stated intention to contest the will and, of course, by this litigation. I agree with the trial judge that **Mr. Stone and his children could not, by deliberate non-disclosure, deprive Mrs. Stone of her ability to establish the legal status of "creditor or other". Because she had the right to apply for equalization at the time of the transfers, but was deprived of her ability to exercise that right by the actions of Mr. Stone and his children, the parties to the transfers, she was a "creditor or other" within the meaning of the *Fraudulent Conveyances Act*.**

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

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

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

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

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

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

Section 2 of the Ontario *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the “FCA”), states:

Where conveyances void as against creditors

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud **creditors or others** of their just and lawful actions, suits, debts, accounts, damages,

penalties or forfeitures are void as against such persons and their assigns. [**emphasis added**]

The motion judge dismissed the motion, concluding that the plaintiff was not within the class of people contemplated by section 2 because it was not a “creditors or others” at the time of the transfer of the home in 1996. Relying on *Wilfert v. McCallum*, 2017 ONCA 895, the motion judge concluded that a fraudulent conveyance claim must include particulars such as details of the creditors at the time of the transfer and/or of an impending risky financial venture.

The Court of Appeal overturned the motion judge:

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

The Court of Appeal found that the OSC had plead sufficient “badges of fraud” to support an *inference* of an intention to defraud future creditors so as to allow the fraudulent conveyance Claim to at least continue to trial.

If the law is now “clear” that a claimant that was not a creditor at the time of a transfer can subsequently attack a transfer if the transfer was made with the intention to defraud creditors generally – *whether present or future* – might it now be possible to argue that a spouse in the position of Ms Stone would be “creditor or other” and able to move against the conveyance without having to resort to s.5(3)? In our opinion, that would make a great deal of sense. Time will tell.

***Ward-Lerch v. Lerch*, 2023 ONSC 1125 – Divorce and Collusion**

One of the 3(4?) C's

It's not often that we have the chance to consider the statutory bars to divorce – otherwise known as the “3 C’s”: collusion, connivance and condonation. These bars, tucked away in ss. 11(1)(a) and (c) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) (“*Divorce Act*”), may be from a bygone era, but they are still operative. And, in fact, if we consider s.11(1)(b), we could actually add a 4th “C” – reasonable arrangements for the support of the children.

In this case, Justice Leach was dealing with a somewhat standard application for a joint, uncontested divorce by two unrepresented parties. But the situation was not so standard. Something was amiss...

The matter had been before the Court once before, on October 22, 2022, at which time Justice Raikes made an endorsement noting:

- (a) that the parties had failed to indicate a precise separation date in the supporting affidavits;
- (b) that the parties instead had asked that they be granted a divorce simply on the basis of “irreconcilable differences”;
- (c) that the law required separation of the parties for one year or more before a divorce could be granted (on the basis of breakdown of the marriage by reason of separation for one year); and
- (d) that the parties’ request for a divorce on the basis of separation would be premature unless and until the parties had remained separated for one year or more, at which point their request for a divorce would be reconsidered.

The applicant then filed a supplementary affidavit swearing to the fact that the parties’ separated on February 1, 2022 -- more than one year ago.

His Honour decline to grant the divorce because he found reason to believe that the evidence in the supplementary affidavit may have been inappropriately “tailored” to expedite a divorce, by swearing to a date of separation that would allow for an immediate divorce.

For example, the (joint) Application signed by both parties in September 2022, indicated a date of separation of **April 2022**. Then, on the supplementary affidavit, the applicant had originally written that the parties had separated on “February 2nd, 2022”, before changing the “2nd” to the “1st”, so that the period of separation would clearly be at least one year.

Therefore, his Honour thought it inappropriate for the divorce order to be granted prior to May 1, 2023, at which time the parties would have been separated for more than a year according to their joint application.

When Parliament amended the provisions of the *Divorce Act* so as to enable spouses to obtain a divorce after remaining separate and apart for only one year (before that a 3-year separation was required), it represented a substantial change in Canada’s divorce law. It could have legislated a short period of separation, but there was a tension between the idea of “divorce on demand” and

the public policy of supporting reasonable attempts at reconciliation. Parliament did not opt to allow divorce on demand without a period of separation.

Justice Leach was of the view (the correct view, in our opinion) that the court should not grant a divorce where there is a clear question as to whether the parties have been separated for the requisite period – and the Application was adjourned to May 1, 2023.

While his Honour did not refer to s.11 of the *Divorce Act* explicitly, he was making oblique reference to the bar of collusion in s. 11(1)(a) and (4):

Duty of court — bars

11 (1) In a divorce proceeding, it is the duty of the court

(a) to satisfy itself that there has been no **collusion** in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;

(b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made; and

(c) where a divorce is sought in circumstances described in paragraph 8(2)(b), to satisfy itself that there has been no condonation or connivance on the part of the spouse bringing the proceeding, and to dismiss the application for a divorce if that spouse has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the divorce.

Condonation

(3) For the purposes of this section, a continuation or resumption of cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose shall not be considered to constitute condonation.

Definition of collusion

(4) In this section, **collusion means an agreement or conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court**, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the exercise of parenting time or decision-making responsibility.

J.N v. C.G, 2023 ONCA 77 – Vaccinations and Judicial Notice

Judge Not Lest Ye
Be Vaccinated

In the initial decision, the parties could not agree on whether to vaccinate their 10 and 12-year-old children against COVID-19. Pursuant to Minutes of Settlement, the children lived primarily with the Mother, and she had sole decision-making authority, except with respect to the issue of vaccination. The Father wanted the children vaccinated. The Mother did not. The parties' eldest child, who resided primarily with the Father, was vaccinated of his own volition. A more comprehensive summary of the facts can be found in our March 7, 2022 Newsletter.

The Father applied to the Court for sole decision-making authority on the issue of whether to vaccinate the parties' two young children. Each party attached to their affidavits information they say supported their position. The Father relied on information from Health Canada and the Canadian Paediatric Society which supported the vaccine's safety, effectiveness and the importance of children being vaccinated. The Mother relied on information from the internet published by individuals who questioned the safety of vaccines, as well as a Pfizer Fact Sheet setting out potential side effects, and several medical articles. Both parties consented to the Court below reviewing these unsworn materials.

A Voice of the Child Report, ("VOC Report"), was also prepared by a "well-respected" social worker confirming that neither child wanted the vaccine. The Father argued that the VOC Report should be given little weight because the children had been severely influenced by the Mother (which was not confirmed by the social worker in her report).

The Court below denied the Father's motion. In doing so, the Court refused to take judicial notice of the safety and efficacy of the vaccine because information on the vaccine was a "moving-target" and there was no "consensus or consistency" as to its safety and efficacy. Therefore, according to the Court below, the safety and efficacy of the vaccine was not properly the subject of judicial notice as set out by the Supreme Court of Canada in *R. v. Find*, [2001] 1 S.C.R. 863, as further clarified by the Court of Appeal for Ontario in *R v. J.M*, 2021 ONCA 150 at paragraph 31:

[31] Judicial notice applies to two kinds of facts: (a) those that are so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 71; *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at p. 128 ; *Sopinka*, at §19.18); and (b) those that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy (*Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R.61, at para. 238; *Sopinka*, at §19.16). The sources may include both large bodies of scientific literature and jurisprudence: *R. v. Paszczenko*, 2010 ONCA 615, 103 O.R. (3d) 424, at paras. 65-66. (at para 31 of *R v. J.M*).

Below, His Honour further commented that courts should be reluctant to take judicial notice that "the government is always right", citing Canada's bleak history of forced sterilization in Unity women, residential schools, Motherisk, Japanese internment camps during WWI and the

Thalidomide tragedy (somewhat taking judicial notice of all of these events without actually considering the test for judicial notice. Oops).

Notwithstanding his refusal to take judicial notice of the safety and efficacy of the vaccine, the Court below seemed to accept that the Mother's sources – her internet sources -- were "qualified and reputable", that the Mother "demonstrated a clear understanding of the science," and that she raised "legitimate concerns about the vaccine". He further found that the Mother's position, bolstered by her online information, was "reasonable and helpful". If only one could believe everything on the internet...

In the end, Justice Pazaratz granted the Mother sole decision-making authority over the issue of whether the younger children would be vaccinated (she had sole decision-making authority over other parenting decisions by virtue of the parties' Minutes of Settlement). His Honour was satisfied that the Mother was capable of making these types of decisions for the children based on her history of consistently making "excellent, informed and child-focused decisions". (But as we know from all those investment commercials – past performance is no guarantee of future success.)

The Appeal

The Father appealed the judgment to the Court of Appeal for Ontario, and argued that the Court below made four errors:

1. Accepting and relying on the Mother's online resources as "expert" and credible evidence;
2. Rejecting that the Father's information from health Canada was credible;
3. Giving significant weight to the VOC Report and finding that the children's views were independently held; and
4. Placing the onus on the Father to show why the children should be vaccinated.

The Court of Appeal found that the judge below made all of the above errors, set aside the decision below, and awarded the Father sole decision-making authority over the issue of the COVID-19 vaccine.

Improper Reliance on The Mother's "Expert" and Unreliable Evidence

On the first ground of appeal, the Court of Appeal readily concluded that the Court below erred in accepting and relying on the Mother's online resources as “expert evidence” questioning the safety and efficacy of the vaccine, but without applying or even *mentioning* the well-known threshold legal test for the admission of expert evidence set out by the Supreme Court of Canada in *R v. Mohan*, 1994 CanLII 80 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, and the Court of Appeal for Ontario in *R. v. Abbey*, 2009 ONCA 624 (Abbey #1), and *R. v. Abbey*, 2017 ONCA 640 (at para 48):

[48] Expert evidence is admissible when:

1. It meets the threshold requirements of admissibility, which are:

- a. The evidence must be logically relevant;
 - b. The evidence must be necessary to assist the trier of fact;
 - c. The evidence must not be subject to any other exclusionary rule;
 - d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
 - i. Impartial,
 - ii. Independent, and
 - iii. Unbiased.
 - e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose, and
2. The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:
- a. Legal relevance,
 - b. Necessity,
 - c. Reliability, and
 - d. Absence of bias.

Instead, His Honour had only applied the common law test for the admission of online materials as set out in *ITV Technologies Inc. v. WIC Television Ltd.*, 2003 FC 1056, 29 C.P.R. (4th) 182 (“*ITV*”) and *Sutton v. Sutton*, 2017 ONSC 3181 (“*Sutton*”). While these cases are certainly useful (and should be noted!) with respect to the admission of materials from the internet – that test does not apply to purported expert evidence. Rather, these cases stand for the proposition that information obtained from the internet *can* be admissible if accompanied by “indicia of reliability,” including, but not limited to:

- a) whether the information comes from an official website from a well-known organization;
- b) whether the information is capable of being verified; and
- c) whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

As the Court reminds us, the above test “is not a substitute for the admissibility of expert evidence” (at para 13), the analysis of which His Honour had failed to conduct. The Court of Appeal also concluded that the Court below had not even properly applied the internet admissibility criteria:

[13]...Few of the materials presented by the respondent even meet the criteria set out in the internet reliability cases cited by the motion judge. Indeed, the Federal Court in *ITV Technologies* stressed, at para. 18, that “little or no weight should be given” to information found online without “careful assessment of its sources, independent corroboration ... and assessment of the objectivity of the person placing the information on-line”. The motion judge did not adequately heed this warning.

[14] For example, among the documents filed by the respondent were articles from ‘Total Health’ and ‘Contagion Live’, both of which purport to be medical journals. One document is titled, “Are people getting full facts on COVID vaccine risks” which quotes one Dr. Robert Malone, who claims to have invented the mRNA vaccine. Dr. Malone is, in fact, quoted several times; the motion judge concluding that “[w]ith [Dr. Malone’s] credentials, he can hardly be dismissed as a crackpot or fringe author”. Other people cited in this article are described by the motion judge as “well known leaders in their fields” and as “qualified and reputable sources”. **The difficulty is, it is not entirely clear how anyone could conclude, from what the respondent filed, that Dr. Malone actually invented the mRNA vaccine or that any of those cited in the article are “well known leaders” in their respective fields. There was no basis to draw either of these conclusions.**

[15] As the appellant points out, one author in particular, Dr. Tess Lawrie, simply penned an open letter posted on a website called ‘The Evidence-Based Medicine Consultancy Ltd.’, which appears to be a self-publication. **The motion judge’s description of Dr. Malone, Dr. Lawrie and the other authors cited by the respondent – as leaders in their fields – seems to be based on nothing more than their ability to either create a website or be quoted in one. There is no apparent or verifiable expertise. [emphasis added]**

In sum, the Mother's evidence was not from a qualified, unbiased and independent expert, and did not meet the reliability criteria for the admission of online materials:

[17] In my view, the motion judge fell into error by not assessing whether each document presented by the respondent was reliable, independent, unbiased and authorized by someone with expertise in the area. Instead of engaging in an analysis of the evidence presented, he embarked on a lengthy discussion about whose materials were more thought-provoking, which has no bearing at all on whether the respondent’s materials were admissible and should be given any weight.

[18] The motion judge also ignored the fact that, notwithstanding the well-known side effects (which are detailed in the Pfizer Fact Sheet filed by the respondent), the vaccine has been approved for children ages 5 and older by all regulatory health agencies, including Health Canada and the Center for Disease Control and Prevention. The motion judge seemed to find justification for the respondent’s position that the children should not be vaccinated (either because the vaccine is unsafe, or because not enough is known about it) because of Pfizer’s knowledge about potential side effects, which it is required to disclose by law. By doing so the

motion judge treated the respondent as an expert in assessing pharmaceutical disclosure, while essentially dismissing those who are best positioned to interpret this information, public health authorities, who know how to factor the possibility of side effects into the approval process.

[19] The information relied upon by the respondent was nothing but something someone wrote and published on the Internet, without any independent indicia of reliability or expertise, which, even if admissible, should have been afforded no weight at all. This was a palpable and overriding error and I would, therefore, give effect to this ground of appeal.

No Meaningful Analysis of the Father's Material

On the next ground of appeal, the Court of Appeal concluded that the judge below made a palpable and overriding error by failing to conduct a meaningful analysis of the Father's material, which included information from Health Canada and the Canadian Paediatric Society. With respect to the information from Health Canada, the Court concluded that this should have been admitted under s.25 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, the statutory public documents exception to the hearsay rule (which is similar to the similar provisions of most provincial evidentiary statutes):

Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be published by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession with the Queen's dominions, shall be admitted in evidence to prove the contents thereof.

While this section only deals with admissibility, and not the weight, to be afforded to these materials, the Court below was obligated to at least explain why Health Canada's Information on the safety and efficacy of the vaccine was untrustworthy. Instead, he simply relied on stated historic misdeeds of the Canadian government to support the view that he should not take judicial notice of the fact that the "government is always right." But these "false equivalencies" were no substitute for a meaningful review of what would otherwise reliable information.

For those interested (and, we suppose for those *not* interested given you are stuck reading it), the Health Canada documents would also have been admissible under the common law public documents exception to the hearsay rule. As noted by the Ontario Court of Appeal in *R. v. P.(A.)* (1996), 1996 CanLII 871 (Ont. C.A.):

At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly." Sopinka et al. The Law of Evidence in Canada (1992), p.231. Public documents are admissible without proof because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be

present in court to prove them. Rand J. commented on the rationale for the public documents exception to the hearsay rule in *Finestone v. The Queen* (1953), 1953 CanLII 81 (SCC), 107 C.C.C. 93 at 95 (S.C.C.):

The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy.

A "public document" means "... a document that is made for the purpose of the public making use of it, and being able to refer to it." *Sturla v. Freccia* (1880), 5 App. Cas. 623 (H.L.) at 643. English and Canadian cases have generally prescribed four criteria for the admissibility of a public document without proof.

- (i) the document must have been made by a public official, that is a person on whom a duty has been imposed by the public;
- (ii) the public official must have made the document in the discharge of a public duty or function;
- (iii) the document must have been made with the intention that it serve as a permanent record, and
- (iv) the document must be available for public inspection. [**emphasis added**]

With respect to the information from the Canadian Pediatric Society, the Court of Appeal concluded that it clearly met the criteria set out in *ITV* and *Sutton* – it is a well-known organization, it is objective, its sources can be assessed, and the information in its documents is capable of verification. The motion judge should have addressed it and explained why he accepted the Mother's information instead.

In sum, the Court below erred in failing to conduct any meaningful review of the Father's materials -- or the laws of evidence -- and by simply accepting the Mother's "questionable and unreliable internet printouts with no independent indicia of reliability of expertise".

Voice of the Child Report

On the third ground of appeal, the Court of Appeal concluded that the motion judge erred by giving any weight to the purported views of the children as set out in the Voice of the Child Report. The Court of Appeal thought it "obvious" that those views had been influenced by the Mother.

The Court of Appeal first set out the applicable legal principles in considering the weight to attribute to a child's stated wishes:

[32] It is well settled that when determining how much weight to give a child's wishes, a court is to consider: 1) whether the parents are able to provide adequate care; 2) how clear and unambivalent the wishes are; 3) how informed the

expression is; 4) the age of the child; 5) the child's maturity level; 6) the strength of the wish; 7) how long they have expressed their preference; 8) the practicalities of the situation; 9) parental influence; 10) overall context; and 11) the circumstances of the preference from the child's point of view: *Decaen v. Decaen*, 2013 ONCA 218, 303 O.A.C. 261, at para. 42.

The Court of Appeal then went on to cite concerning statements the children made to the social worker:

[33] While the motion judge found that the children's views were "strongly held and independently formulated" – and while he noted the children's ages, the fact they lived with the respondent, and that both parties were good parents – he ignores some rather salient aspects of the report, such as the 12-year-old child indicating to the social worker that her "mother had advised that the [vaccine] is experimental" and had provided her with "research from scientists", and that the 10-year-old said to the social worker that "in every case the vaccine had been tested on animals the animals had died", that the vaccine "was just the test one and he did not want the test one", and that his mother had told him he could not be vaccinated without her permission. **In other words, the motion judge failed to consider how informed the expression was and, notwithstanding a conclusory finding that the children's views were "strongly held and independently formulated", he failed to even acknowledge, let alone factor into his analysis, the respondent's obvious influence.** [emphasis added]

In the Court's view – and to us -- these statements clearly demonstrated that the children had been influenced by their Mother. As a result, the Court of Appeal was of the opinion that the children's views should not have been given *any* weight. But while we certainly agree that the children's views had been influenced by the Mother, does it *necessarily* follow that those views should not be given any weight? What of *N.L. v. R.R.M.*, 2016 ONCA 915, an alienation case, where the Court of Appeal approved this line of thinking from the trial judge:

[34]...

The wishes of an alienated child may be warped and misconceived, but they are nonetheless real. The father says that the children's wishes should be disregarded, because they are not truly the children's own wishes. **At this point, does that really matter? The expressed wishes are strong, consistent, and long lasting,** and they have been acted on by the children in defiance of the authority of both parents, the arbitrator, the police, and this court's order...

In a similar vein, see *O.M.S. v. E.J.S.*, 2023 SKCA 8 Warped and influenced views matter with respect to the rejection of a parent but not on the question of vaccinations? We're not sure those positions are reconcilable. Here, however, it would not have made much of a difference.

Reverse Onus

On the final ground of appeal, the Court concluded that the motion judge erred by placing the onus on the Father to explain why the children *should be* vaccinated, instead of on the Mother to explain why the children *should not* be vaccinated.

In doing so, the motion judge departed from *numerous* decisions of the Superior Court of Justice related to the pandemic which accepted government recommendations at face value and placed the onus on the parent wishing to *depart* from these recommendations. For example, in relation to in-person school attendance, several courts concluded that the parent who did not want a child to attend in-person classes was required to explain why and offer evidence in support of their position: For example, see *Chase v. Chase*, 2020 ONSC 5083 and *Zinati v. Spence*, 2020 ONSC 5231. And in relation to travel, a parent wishing to travel with children against government recommendations was required to explain why the travel was necessary: For example, see *Yohannes v. Boni*, 2020 ONSC 4756 and *Gillespie v. Jones*, 2020 ONSC 2558.

In relating to vaccines, other judges have placed the onus on the objecting parent to establish why the child should not be vaccinated, not on the parent wishing to follow government recommendations: *A.C. v. L.L.*, 2021 ONSC 6530; *Saint-Phard v. Saint-Phard*, 2021 ONSC 6910; *A.S.N. v. K.E.K.* 2021 BCSC 2435; *VLM v. BSF*, 2022 NBQB 23.

While the motion judge was not bound by these authorities, he ought to have "cogently" explained why he was departing from decisions that had addressed health-related parenting decisions in the same or similar circumstances. His failure to properly explain this, and reversing this onus, was an error. In one of the most important conclusions of the reasons, the Court of Appeal has this to say:

[45] Stated otherwise, **judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness.** That being the case, **where one party seeks to have a child treated by a Health Canada-approved medication, the onus is on the objecting party to show why the child should not receive that medication.** The motion judge erred by reversing that onus.

[46] **The respondent, as the parent seeking not to have the children vaccinated, had the onus to establish that, despite Health Canada's opinion as to the vaccine's safety and effectiveness, they should not be.** That onus was not satisfied. [emphasis added]

Remedy

Rather than send the matter back for another hearing, the Court of Appeal granted the Father sole decision-making authority over the issue of whether to vaccinate the younger children.

Final Thoughtss

The one thing the Court of Appeal does not decide is the issue of judicial notice which attracted much attention in the pandemic. Some courts have taken judicial notice of the safety and efficacy of vaccines for children: *I.S. v. J.W.*, 2021 ONSC 1194; *A.B.S. v. S.S.*, 2022 ONSC 1368; *Warren v. Charlton*, 2022 ONSC 1088; *Campbell v. Heffern*, 2021 ONSC 5870; *O.M.S. v. E.J.S.* 2021 SKQB 243, rev'd 2023 SKCA 8; *P.R.v. S.R.*, 2022 PESC 7. Some courts have gone further and

taken judicial notice that being vaccinated against COVID-19 is in the best interests of a child, unless there is a compelling reason otherwise: *Dyquiangco Jr. v. Tipay*, 2022 ONSC 1441; *Rashid v. Ayanesov*, 2022 ONSC 3401; *Davies v. Todd*, 2022 ONCJ 178; *A.P. v. L.K.*, 2021 ONSC 1054.

Here, the Court of Appeal recognized the approaches taken in the caselaw, but it did not deal squarely with the issue of whether it is appropriate for courts to take judicial notice of such "facts":

[21] ... I need not decide whether judicial notice should be taken of the public health and government information adduced by the appellant, as the motion judge fell into error in other respects, including by treating government approval of the vaccine as irrelevant.

Alternatively, we could assume that, despite not addressing the issue head on, it is implicit in the Court of Appeal's decision that judicial notice may be taken that vaccines are safe and effective; the Court is clearly aware of lower court decisions in which such notice was taken, but did not engage with the issue. Given that judicial notice is the *one* exception to the general rule that cases must be decided on the evidence presented by the parties in open court [*R. v. Find*, 2001 SCC 32, [2001] 1 SCR 863 at para. 48; *R. v. J.M.*, 2021 ONCA 150 at para. 31] we might expect the Court to strongly caution lower courts against this practice if it was problematic.

The Court of Appeal does go so far as to say that judicial notice may be taken of regulatory approval -- which would then be a "strong indicator" of the safety and effectiveness of a vaccine. But the Court did not take the next step. That is, a court can take notice of regulatory approval, but it cannot then take notice that a vaccine is safe and effective based on that approval:

[43] In my view, this statement, while generally accurate, is inapposite in this case, where the "expert opinion" in question is the approval of medical treatment by Health Canada, the national body tasked with determining that treatment's safety and effectiveness. In *O.M.S v. E.J.S.*, 2023 SKCA 8, the Saskatchewan Court of Appeal, at para. 48, writes that:

[I]n a family dispute, it is both unnecessary and, in most cases, unhelpful, for the parties and court to look for more than the approval of a drug, such as the Pfizer vaccine, together with any medical advice that may reasonably be required as to the risks and benefits to the child at issue, as the basis to conclude that it is in the child's best interests to administer the drug. It is unnecessary because a parent is not obliged to prove, and a court is not obliged to consider or decide, that an approved drug is safe or efficacious when used in accordance with and to the extent specified in the approval – just as they need not consider whether medical advice from the family doctor meets that mark. In most cases at least, additional evidence is unhelpful because, absent sufficient evidence to the contrary, parents and courts are entitled to decide that a child should be treated with approved medications in accordance with the approval, subject, of course, to any child-specific medical concerns that may be in play, or other relevant factors.

[44] Recall the two primary rationales for the public documents exception to the hearsay rule: the impracticality of traditional modes of proof, and the expectation that public servants perform their duties with a degree of diligence and care. It is not the subject of dispute among reasonable people that Health Canada has, in the area of safety and efficacy of medical treatment, “special knowledge ... going beyond that of the trier of fact”: *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223, at p. 243. ***Requiring that opinion to be tendered viva voce in every case via live, human experts would be – especially in family court – unnecessarily burdensome.*** [emphasis added]

This is, respectfully, a distinction without a difference.

And there you have it. Some vaccination issues. Some judicial notice issues. And a semi-revival of the statutory and common law public documents exception to the hearsay rule. Told you it would be interesting.

***Stewart v. Demme*, 2022 ONSC 1790 (Div. Ct.) – Intrusion Upon Seclusion**

Confusion About
Intrusion on Seclusion

This is not a family law case, but in *Stewart*, the Ontario Divisional Court offers some clarification about the tort of Intrusion Upon Seclusion, first approved of in *Jones v. Tsige*, 2012 ONCA 32. In overturning an order granting certification of a class action based on this still relatively new privacy tort, the Divisional Court offered guidance as to what is supposed to be the narrow scope of the tort – here, with respect to unauthorized access to medical records.

The focus in this case for the Divisional Court was reaffirming the very high bar that a plaintiff must meet under the third leg of the test for Intrusion Upon Seclusion: “that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.”

In *Stewart*, the defendant (“Demme”), a nurse, stole drugs from the dispensing unit at a hospital. To do so, she had to access the “limited” medical information of over 10,000 patients over the course of a decade.

The class action was certified – although just barely -- by the Superior Court of Justice, and the defendant appealed the certification.

The question for the Divisional Court was focussed on the third leg of the test: that a reasonable person would regard the invasion as “highly offensive causing distress, humiliation or anguish.” [The first two parts of the test are that (a) the defendant’s conduct was intentional; and (b) the defendant invaded, without lawful justification, the plaintiff’s private affairs.]

In finding that the class action should not have been certified, the Divisional Court offered the following comments.

- Not every intrusion amounts to a basis to sue for the tort of intrusion upon seclusion. The particular intrusion must be “highly offensive” when viewed objectively having regard to all the circumstances.
- If the case does not “cry out for a remedy”, it is a signal that the high standard for this tort may not be met. Even though the phrase “cry out for a remedy” is not part of the test, it informs the purpose of the tort -- to remedy *serious intrusions of privacy*.
- The “highly offensive” standard is an objective one, which conjures the the spectre of the reasonable person.
- Plaintiffs must show that intrusions into their private affairs are serious and significant, not just that the accessed information was sensitive.

The Divisional Court found that intrusions sufficient to ground the tort cannot be “fleeting,” even if the accessed information is highly sensitive (such as personal health information).

Here, the Divisional Court determined the intrusions, in fact, to be “fleeting.” The Court also determined that the information accessed was not “particularly sensitive” within the realm of

health information. It also determined it relevant that the defendant was not “after the information itself” which information was available to a number of other hospital employees and that there was, consequently, “no discernible effect on the patients.” Therefore, a reasonable person informed of all the circumstances would not find the intrusion “highly offensive.”

While we understand the Divisional Court was concerned about “the floodgates” as cautioned by the Court of Appeal in *Jones v. Tsige*, we do have to wonder if the “reasonable person” would not find the access of private health information “highly offensive.” One would think that the unauthorized access of private health information would be at least as offensive as the unauthorized access of private banking information, which was the foundation for the tort in *Jones*. Perhaps, therefore, the key is that, in this case, the access information was only a means to an end and not the end unto itself.

***Tovmasyan v. Petrosian*, 2022 ONCA 583 – Staying a Parenting Motion on Appeal**

Yo-Yo's and Turning Tables in the Court of Appeal

The parties had twins together, who were almost nine years old by the time of the motion before Justice Brown.

The parties separated in 2018. After separation, the children lived primarily and spent the vast majority of their time with the mother. The father had some, albeit limited, parenting time, much of which

had to be supervised due to concerns of family violence.

In June 2022, after a five-day trial in the Superior Court, Justice O'Brien allowed the mother to relocate to California with the children pursuant to the relocation provisions of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "CLRA"). In her decision, she made the following findings of fact:

- It would be in the children's best interests to be able to relocate to California with the mother;
- The children had a stronger bond with the mother than the father;
- The father had only had limited unsupervised parenting time since separation, and there was a history of family violence;
- The children would be "devastated" if their mother stopped being their primary caregiver;
- The move to California would have a positive impact on the children; and
- The mother's plan to move to California was reasonable, and included significant parenting time for the father.

After the trial decision was released, the mother moved to California without the children so she could start the process of obtaining citizenship in the United States, while the children temporarily remained in Ontario with the father.

The father appealed Justice O'Brien's Order to the Ontario Court of Appeal, and challenged the trial judge's findings of fact and mixed fact and law. He did not, however, allege that the trial judge had made any legal errors, or take steps to expedite his appeal to ensure it would be heard as quickly as possible.

The father also brought a motion for a stay pending his appeal to try to prevent the mother from moving the children to California until the appeal had been decided.

The three-part test for a stay of a parenting Order pending an appeal is well-known. As Justice van Rensburg recently explained in *D.C. v. T.B.*, 2021 CarswellOnt 11173 (C.A.):

[9] Custody and access orders remain in effect pending an appeal to this court unless the court has ordered otherwise. In determining whether to stay an order involving the parenting of a child, the courts must consider: (1) **whether, on a preliminary assessment, the appeal raises a serious question** (recognizing that this is a low threshold); [(2)] **whether the child will**

suffer irreparable harm if a stay is refused; and (3) the **balance of convenience: namely whether there would be greater harm from the granting or refusal of a stay** pending a decision on the merits of the appeal. **The overriding consideration, again, is the best interests of the child.** In other words, the court must be satisfied that it is in the child’s best interests to grant a stay: *K.K. v. M.M.*, 2021 ONCA 407, at para. 17 and *Lefebvre v. Lefebvre*, 167 O.A.C. 85 (C.A.), at para. 6. [**emphasis added**]

The “serious question” part of the test for a stay is usually stated to be a “low threshold” that only requires the moving party to show that the appeal has *some* merit — that it is not frivolous or vexatious. However, primarily drawing on non-family cases where a stay pending appeal is sought, Justice Brown notes that where, as in this case, “as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, this court may give significantly more weight to the strength of the merits of the appeal: *Toronto (City) v. Ontario (Attorney General)*, 2018 CarswellOnt 15251 (C.A.), at para. 10.” (See also *Samama v. Gaskovski* (2021), 63 R.F.L. (8th) 370 (Ont. S.C.J.), where Justice Monahan applied the higher threshold established in *Toronto (City) v. Ontario (Attorney General)* in the family law context.)

In our view, this is a proper and appropriate consideration. Granting a stay would have meant that the children would have remained in Toronto pending the appeal. In many relocation cases, this would be a strong factor weighing in favour of granting a stay on the theory that it is best to limit the number of times the children may have to move, and that allowing the move pending the appeal and then requiring the children to return if the appeal is granted would only make an already difficult situation even worse. (For further discussion about this issue, see “A Tale of Two Stays . . . Well . . . Sort of . . . “ in the 2021-47 (December 6, 2021) edition of *TWFL*.)

Justice Brown, however, found that in this particular case, the more important consideration was the fact that the mother had been the children’s primary caregiver for many years. As a stay would have interfered with the children’s ability to remain in their mother’s primary care, and would have made their father their primary caregiver for the foreseeable future while the appeal process played out, the relief sought by the father would have resulted in a “radical change to the children’s living arrangements.” Of course, this assumed that the mother would remain in California.

Although not noted by Justice Brown, many cases have also commented on the fact that children are “resilient” and that the possibility of a move and then move back (the “yo-yo effect”) is but one consideration: *S. (C.L.) v. S. (B.R.)* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.); *G. (E.) v. Alberta (Director of Child and Family Services)*, 2014 CarswellAlta 1183 (C.A.).

Given the impact that a stay would have on the rights of the parties (and the best interests of the children), Justice Brown determined it would be appropriate in this case “to require the father to demonstrate, through trial-based evidence, that his appeal has more merit than simply not being frivolous or vexatious.” How the tables were turned. This created a significant problem for the father, who filed only a very short Affidavit for the motion that “paints a different picture of family life over the past number of years from that found by the trial judge in her detailed reasons,” but did not refer to any evidence from the trial to explain how he could overcome the highly deferential standard of review that appellate Courts apply to appeals from parenting Orders (see *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.); see also our discussion of *B.J.T. v. J.D.*, 2022 CarswellPEI 31 (S.C.C.) in the 2022-21 (June 13, 2022) edition of *TWFL*).

Given the trial judge's lengthy and meticulously organised reasons, Justice Brown determined that the father's "bald assertion in his notice of appeal that the trial judge committed errors, along with further assertions in his affidavit that the facts of the parties' family life were different than those found by the trial judge" were inadequate to show that there was a serious issue for the appeal. Based on Justice Brown's description of the father's evidence, we also suspect that the father's bald allegations of factual errors would not even have been sufficient to establish that the appeal was not frivolous or vexatious.

Justice Brown was also not persuaded that the children would suffer irreparable harm if a stay was not granted. The trial judge had granted the father significant parenting time in Toronto and additional time in California. The trial judge had also found the relocation would be in the children's best interest, and the father had not led adequate evidence to suggest she had made any palpable and overriding errors that would warrant appellate intervention.

Having found that the father had not established a serious issue or irreparable harm, Justice Brown had no difficulty finding that the balance of convenience weighed in favour of the mother. Removing the children from the mother's primary care pending the appeal, which would likely take months or more to be heard and decided, was not be in the children's best interests.

As a result, Justice Brown dismissed the father's motion for a stay.

The lesson here? Do not take for granted the "serious issue" stage of the test for a stay pending appeal. In the materials, the party moving for a stay should address the trial evidence, the alleged errors and how a permitted move is actually not in the best interests of the children.



Law Society
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TAB 3A

17th Family Law Summit

Criminal Issues for Family Lawyers (PowerPoint)

Jody Berkes, C.S.
Berkes Law

March 28, 2023



Criminal Issues for Family Lawyers

Jody Berkes

Berkes Law

jberkes@berkeslaw.ca

24 Hour 416-738-4639



The police called my client what should I do?

The police will tell your client a lie to get them to come to the station, so they do not have to drive out and arrest them.

- The police do not want “your client’s side of the story”
- The police are not having your client come to the station to “ask them some questions”

If the police call your client only three things are relevant:

1. Do they have grounds to arrest your client?;
2. If the answer to question #1 is “yes,” question #2 is the intention to release your client from the station or hold them for a bail or “show cause” hearing?
3. If the answer to question #1 is “no” your reply is that “My client does not want to come in at this time. If you intend to arrest him please let me know and we will arrange a surrender at that time.”

Question #2: two types of release after arrest

Undertaking to a Peace Officer

- Client is released from the scene or from the police station
- No hearing client does not have counsel present (though they are permitted to consult over telephone)
- Minimal input on the conditions
- If the client signs the conditions, they are to be released

Bail Hearing before a Justice

- Client appears in court either in person or via video
- Formal hearing where client will have counsel present
- Extensive input on conditions
- Justice decides whether to release on conditions or detain in custody

Comparison of two types of release

Release from the Police Station on Undertaking to an Officer

- Can be changed with the Crown's consent out of court without Justice's approval.
- Can be changed after a contested hearing in Provincial Court. No notice period. No affidavits required. Onus on Crown to justify any conditions.
- Bottom line, client should sign and we can change later.

Release post bail or "show cause hearing"

- Can be changed with the Crown's consent out of court must be approved by a Justice.
- Can be changed after a contested hearing in Superior Court. Minimal three days notice. Must file transcripts and affidavits. Onus on defence to show error in imposing conditions or change in circumstances.
- Bottom line, client needs a criminal lawyer at a bail hearing.

No contact provisions and exceptions

No contact provisions exist in criminal releases to ensure that defendants do not have an opportunity to intimidate or collude a complainant into changing their testimony. They are often worded as follows:

- Do not contact communicate or associate directly or indirectly (i.e. through a third party) with the named complainant in the matter.

Area restrictions exist in criminal releases to ensure the complainant's safety and that the defendant cannot harass them. They are often worded as follows

- Remain 100 meters away from the complainant's residence, place of employment, education, worship or anywhere you know them to be.

Exceptions to the no contact and area restrictions

The exceptions to the non-communication order are generally limited in purpose to child custody and access or matrimonial proceedings:

- a. Through counsel for the purpose of matrimonial proceedings.
- b. Through a mutually agreed upon adult third party for the purpose of arranging access to the children.
- c. In some cases, via email, text message, our family law wizard, parent briefing book or any form of communication reduced to writing for the purpose of custody and access to the children.

The exceptions to the non-communication order are generally limited in purpose to child custody and access or matrimonial proceedings:

- a. In the presence of Counsel or mediator for the sole purpose of Family Court proceedings or for criminal proceedings;
- b. In the presence of your surety or adult third party designated in writing by your surety for the purposes of effecting child access, attendance at school, or attendance at extracurricular activities.
- c. Pursuant to and in accordance with the terms of any separation agreement signed by both parties.
- d. Pursuant to and in accordance with the terms of any Family court order dated after today's date.

Tips for drafting family court orders

The exceptions to the contact and area restrictions include the phrase “pursuant to and in accordance with the terms of...” Therefore, the more specific you can make it, the better:

- Less specific: Father will pick up children from mother’s house.
- More specific: Father will attend at mother’s house and pick up children from the front door.
- Less specific: Access handover will be in parking lot of McDonalds.
- More specific: Father will pick up children from mother’s vehicle and walk them back to his vehicle.
- Less specific: Both parents are entitled to attend school activities.
- More specific: During school activities, parents shall sit on opposite sides of the event space or a minimum of 5 feet from each other, when possible.

Peace Bonds: Why do criminal lawyers like them?

- A Peace Bond is not a finding of guilt nor by entering into it does the client admit any kind of criminal activity.
- Once the client enters into the peace bond, the criminal charge is withdrawn.
- As the client has been presumed innocent throughout the process, a withdrawal of the charge has the same effect as a judge finding the client not guilty after trial.
- If matter goes to trial, the outcome is uncertain (depending on the judge even the strongest case can end up in a conviction), while a peace bond means the charges are withdrawn.
- Even if the matter proceeds to trial and the client is acquitted, the judge can still order a peace bond.

Specifics of a Peace Bond

- The terms or conditions of a bond usually mimic the terms of bail. They are meant to ensure the complainant is not contacted by the client (subject to exceptions for child access and family law matters).
- An 810 peace bond (s. 810 of the Criminal Code) lasts a maximum of 1 year. If the client follows the terms of the bond it will expire after that time and the conditions will be over. If the client breaches the terms of the bond, they can be charged with a further criminal offence, as well as being made to forfeit up to \$500 (or whatever other sum is set).
- A common law peace bond is not limited by any time period (though an indefinite term would not be permitted). Otherwise it is the same as an 810 Peace Bond in terms of expiry or breach of terms.

Legal findings in relation to a peace bond

810 Peace Bond

The Court must have evidence that:

1. Due a past occurrence
2. The complainant fears the defendant will cause personal injury to them, their intimate partner, their child or damage their property; and
3. The fear is reasonable

The Court may order the defendant to enter into the bond and if they refuse may jail them for a period not exceeding 1 year.

Common Law Peace Bond

The court must have some evidence that:

1. Due to the past conduct of the defendant
2. It is reasonable to infer that there may a prospective breach of the peace.

The Court may order the defendant to enter into the bond which can last however long the court orders.

Police Record Checks Reform Act, 2015, S.O. 2015, c. 30

Both 810 and Common Law Peace Bonds are considered Court Orders. Disclosure is governed by the above statute and is as follows:

Item	Column 1 Type of Information	Column 2 Criminal record check	Column 3 Criminal record and judicial matters check	Column 4 Vulnerable sector check
6.	Every court order made against the individual.	Do not disclose.	Disclose. However, do not disclose court orders made under the <i>Mental Health Act</i> or under Part XX.1 of the <i>Criminal Code</i> (Canada). Do not disclose court orders made in relation to a charge that has been withdrawn. Do not disclose restraining orders made against the individual under the <i>Family Law Act</i> , the <i>Children's Law Reform Act</i> or the <i>Child, Youth and Family Services Act, 2017</i> .	Disclose. However, do not disclose court orders made under the <i>Mental Health Act</i> or under Part XX.1 of the <i>Criminal Code</i> (Canada). Do not disclose court orders made in relation to a charge that has been withdrawn. Do not disclose restraining orders made against the individual under the <i>Family Law Act</i> , the <i>Children's Law Reform Act</i> or the <i>Child, Youth and Family Services Act, 2017</i> .

Can I threaten the other side with criminal proceedings to leverage a settlement?

Rules of Professional Conduct

Threatening Criminal Proceedings

3.2-5

A lawyer shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

- (a) to initiate or proceed with a charge for an offence, including an offence under
 - (i) the *Criminal Code* or any other statute of Canada;
 - (ii) a statute of a province or territory of Canada; or
 - (iii) a municipal by-law; or
- (b) to make a complaint to a regulatory authority.

Commentary

[2] It is not improper, however, to notify the appropriate authority of conduct that may attract penal or regulatory consequences while also taking steps through the civil system.... The impropriety stems from threatening to use penal or regulatory proceedings for unintended purposes. (emphasis added)

The other side asks if they agree to the terms of settlement can we make the criminal charge go away?

Rules of Professional Conduct 5.1 – 2(n)

When acting as an advocate, a lawyer shall not
(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge,
(emphasis added)

You can and should discuss resolution.

Rules of Professional Conduct

Encouraging Compromise or Settlement

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis....

Commentary [1.1] In criminal, quasi-criminal or regulatory complaint proceedings, it is not improper for a lawyer for an accused or potential accused to communicate with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. (emphasis added)

Things clients do that are criminal offences:
Intercepting telephone calls

In Canada it is a criminal offence to intercept someone else's private communications. See s. 184 Criminal Code:

184 (1) Every person who, by means of any electro-magnetic, acoustic, mechanical or other device, knowingly intercepts a private communication is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

However, it is not a criminal offence to tape your telephone call with another party without disclosing you are taping it. See s. 184(2)(a)

(2) Subsection (1) does not apply to

(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it

Things clients do that are criminal offences: Intercepting emails, keylogging, hacking passwords...

342.1 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, fraudulently and without colour of right,

(a) obtains, directly or indirectly, any computer service;

(b) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system;

(c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or under section 430 in relation to computer data or a computer system; or

(d) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (a), (b) or (c).

2) In this section,

computer data means representations, including signs, signals or symbols, that are in a form suitable for processing in a computer system; (*données informatiques*)

computer password means any computer data by which a computer service or computer system is capable of being obtained or used; (*mot de passe*)

computer program means computer data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function; (*programme d'ordinateur*)

computer service includes data processing and the storage or retrieval of computer data; (*service d'ordinateur*)

computer system means a device that, or a group of interconnected or related devices one or more of which,
(a) contains computer programs or other computer data, and
(b) by means of computer programs,
(i) performs logic and control, and
(ii) may perform any other function; (*ordinateur*)

electro-magnetic, acoustic, mechanical or other device means any device or apparatus that is used or is capable of being used to intercept any function of a computer system, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing; (*dispositif électromagnétique, acoustique, mécanique ou autre*)

function includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer system; (*fonction*)

intercept includes listen to or record a function of a computer system, or acquire the substance, meaning or purport thereof; (*intercepter*)

traffic means, in respect of a computer password, to sell, export from or import into Canada, distribute or deal with in any other way. (*trafic*)

Things clients do that are criminal offences: Air-tagging or tracking a spouse's vehicle

While it is not illegal to put a tracking device on a vehicle for which the client is the registered owner, surreptitiously tracking someone else's vehicle may constitute "mischief to property" under s. 430 (1) (c) or (d) of the Criminal Code:

430 (1) Every one commits mischief who wilfully

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

Police must apply for a warrant to install a tracking device on a vehicle pursuant to s. 492.1 and there is no section authorizing a private citizen to do so

Why do I care if only the client if only the client breaks the law?

LSO Rules of Professional Conduct

Rule 5.1-2 When acting as an advocate, a lawyer shall not:

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(e)..., or otherwise assisting in any fraud, crime, or illegal conduct,



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TAB 3B

17th Family Law Summit

Family Law and It's Intersection with
Immigration Law (PowerPoint)

Shalini Konanur, Executive Director
South Asian Legal Clinic of Ontario (SALCO)

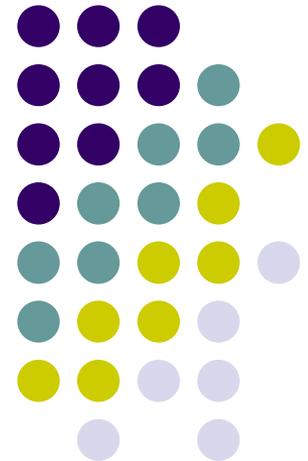
March 28, 2023



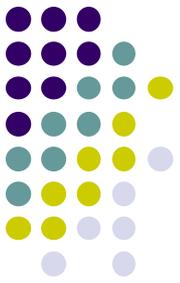
FAMILY LAW AND ITS INTERSECTION WITH IMMIGRATION LAW

Presented by:
Shalini Konanur, South Asian Legal Clinic of Ontario

March 2023

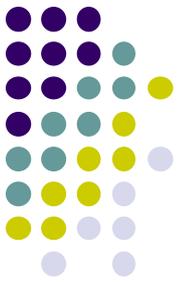


Disclaimer



- This presentation is NOT a stand-alone document. It was prepared for use as part of an oral presentation.
- Content and materials displayed on this presentation are for educational purposes only, and should not be interpreted as legal advice.

Overview



1. Working with clients with precarious or no immigration status
2. Spousal Support
3. Decision-making / Parenting time
4. Family Law and Removals (Support from the family court for applications for permanent residence)
5. Issues in family court around travel and ability to apply for a child's passport
6. Conclusion

Precarious or No Immigration Status



- The intersection of family law and immigration is common in Ontario, which holds Canada's largest population of people with "precarious" or no immigration status.
- Precarious status can include, visitors, foreign workers, international students, and refugee claimants
- Ontario also has a large population of people without immigration status
- Immigration law has programs to try in regularize someone's immigration status to make it legally temporary or permanent.
- Some immigration status is predicated on being with a partner. When things fall apart the security of immigration status becomes tricky for the person who has either precarious or no immigration status
- Ideally to is best practice to link clients to immigration practitioners to determine what the best path forward is in terms of immigration, which will help to support the arguments that are made within the family court context



Spousal Support

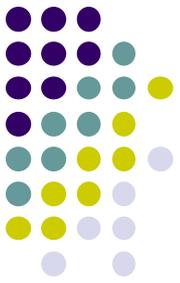
- One interesting feature of family class sponsorship in immigration is a requirement for sponsors to sign an immigration undertaking to provide financial support for the sponsored person for a period of 3 years from the date of landing.
- In cases where the relationship breaks down (marriage or common law) that undertaking may be used as part of the argument for spousal support in family court. There are cases where the court has considered the undertaking in the determination of on-going or lump sum payments of spousal support in addition to the duration of spousal support.



Decision-Making / Parenting Time

- Lack of immigration status has no effect the right to decision-making and parenting time
- If the court thinks that a parent may have to leave Canada (an immigration removal process) it can make decision on decision-making and parenting that would support the client in submissions to Immigration, Refugees, and Citizenship Canada that they be allowed to say (where a family court assesses that the best interests of a child require both parents to be in Ontario that can be used as part of the application to gain either temporary or permanent immigration status in Canada)

Decision-Making / Parenting Time



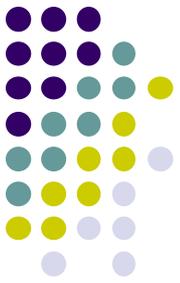
- Ontario's family courts won't be able to stop a deportation order.
- However, it is possible for a removal or deportation to be delayed until a final decision-making / parenting time order is made:
 - If a final "custody" order has not yet been made;
 - Arguments are still being made before the court; and
 - The client and the other parent are in a genuine custody dispute over who can best care for the child.



Family Court and Immigration Removals

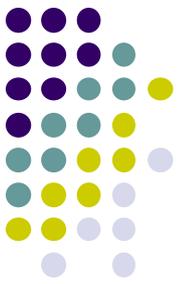
- If a client does not have legal immigration status in Canada, starting a family proceeding could potentially put them at risk of removal / deportation
- If family court documents include contact information for an applicant or respondent it would be passed on or used by immigration authorities to find a client and commence a removal process
- It is important to assess the ways in which more immigration “security” can be achieved so that no removal / deportation is potentially triggered

Other issues



- Orders that consider travel
- Orders pertaining to the ability to apply for a Canadian passport when the other parent will not consent (ex: in cases of family violence)

Conclusion – Don't let the immigration issue slide



- Family and Immigration law can and do intersect
- It is important for people to seek legal advice as quickly as they can to ensure that their immigration status is protected and that they are safe from immigration enforcement mechanisms
- Legal Aid Ontario has expanded its Domestic Violence coverage during COVID-19 and people can also reach out to certain legal clinics for support
- Many legal clinics can support low-income clients with immigration issues to assess and determine the best path forward to secure immigration status
- <https://www.legalaid.on.ca/>



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TAB 3C

17th Family Law Summit

The Intersection of Real Estate and Family Law

Schedule A – Condominium Abstract

Schedule B – Freehold Abstract

Tannis Waugh, C.S.
Waugh & Co

March 28, 2023



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The Intersection of Real Estate and Family Law

*Paper presented for Law Society of Ontario Family Law Summit, March 28, 2023
Author: Tannis A. Waugh, C.S.*

Introduction

Real estate issues can form an integral part of a family law file, whether it be the negotiation of a separation agreement, property issues in the context of litigation and/or strategies when preparing to separate.

In this paper, my goal is threefold: a) to explain real estate concepts that will be useful for family lawyers; b) provide some practical tips when dealing with real property issues; and c) discuss different options available to preserve property.

Part I – Reviewing and Abstract

Examining an Abstract

Property abstracts are also known as parcel registers, PINs, PIN pages and abstracts. What they are not is a title search. The property abstract forms one part of a title search that a real estate solicitor will examine as part of a search review. Notwithstanding that, in family law matters there is often no need for a full title search and a property abstract is sufficient.

Included in Schedules A and B are abstracts for a condominium and freehold property. Each section on the abstract is labeled to explain what it is and why it is important.

1. PIN Property Identification Number (1)

This is a unique number assigned to each property and is significantly more important than the municipal address. It is easier to search a property by its PIN and is important identifying information required in an order to be registered on title.

2. Legal Description (6)

It is here that you will be able to tell if you are reviewing a condominium unit or a freehold property. For a condominium unit, you will find a reference to a condominium plan. If there is no plan referenced in the legal description, it is a freehold property. A condominium unit is also identifiable by its reference to a unit and level number.

Note that most modern condominiums in Toronto are separately deeded so if there is a unit with a parking spot and a locker, there will be three PINs. This becomes important when describing property for court orders.

The legal description can contain other useful information. At times, writs can attach to properties and will form part of the legal description. Unless the writ is attributable to an owner, these are easily removed through an application to the Land Registry Office.

The legal description will also reference easements or other title qualifications and these tend to be referenced in additional documents registered on title. For example, an easement might appear as follows:

s/t an easement in AT345573 and t/w an easement in AT125773.

This means that the property is “subject to” and “together with” an easement referenced in both of the documents AT345573 and AT125773.

3. Capacity (4)

The manner in which the owners have taken title is noted in this section. For one owner, the common reference is “ROWN” standing for “registered owner.” For two or more parties as joint tenants, the capacity will be noted as, “JTEN” and “TCOM” for tenants-in-common, respectively. If this area is blank and there are two or more persons noted on title, there was an error somewhere and the parties are deemed too be tenants-in-common. This may be something that needs to be corrected.

4. Instruments listed on the abstract

The highlighted notations are the instruments listed on title. Each instrument has a registration number, date, type of instrument, consideration (if any) and parties to and from.

Instruments to watch out for:

- Transfer (will include joint tenancy severances – a transfer from one titleholder to themselves)
- Charge
- Certificate of Pending Litigation
- Caution
- Designation of Matrimonial Home
- S. 118 restriction(s) under *the Land Titles Act*

5. Deleted Instruments

When reviewing an abstract, it is prudent to review all deleted instruments as well as they assist by providing a more complete picture of what has happened with the property.

Part II – Practical Tips

The Two-Lawyer Rule In Real Estate Transfers

Real estate lawyers are subject to the two-lawyer rule in real estate transactions which requires two lawyers unless the transaction falls within certain enumerated exceptions. One of those exceptions is for related parties and separated spouses fall within this group.

There is no prohibition against one lawyer acting for both spouses in a title transfer pursuant to a separation agreement but there are many opportunities for conflicts to arise such as: financing, an additional party going on title, the interpretation of the separation agreement, issues of power

imbalances between the parties and domestic violence. Parties are safest being represented by their own counsel but the determination of whether to act on a joint retainer will vary from real estate lawyer to real estate lawyer (i.e. some will not act in these transactions) or the specifics of the matter.

Mortgage Assignments vs. Refinances

Assignments occur less frequently because they are not as lucrative for lenders, they require specialized knowledge at the bank-level and not all parties will qualify for an assignment, particularly in the current lending environment. An assignment of a mortgage occurs when two parties are mortgagors and the bank consents to removing one mortgagor, with the remaining party assuming the obligations of the mortgage.

In theory, the legal fees for this kind of transaction should be lower, the lender costs should be less and it should be a simpler process but this is not often the case. Mortgage assignments are less common so bankers may not understand the process. Furthermore, real estate lawyers may not have experience with assignments which can also create complications. Because of the mortgagor's exposure in being released from the bank, these kinds of transactions should not be on a joint retainer.

The benefit of the assignment is that the client's legal fees for the real estate component will likely be lower, the transferor gets to keep the terms of their existing mortgage, which could be more favourable than terms obtained on a refinance.

A refinance can be more routine. The solicitor representing the transferor will provide an undertaking to discharge the mortgage(s)/secured line(s) of credit to the solicitor acting for the transferee in the normal course (in the case of two lawyers), as would occur in a standard real estate transaction. Private mortgages need to be paid off and discharged contemporaneously with the transfer.¹

Land Transfer Tax

Transactions pursuant to a written separation agreement where the parties agree to live separate and apart are exempt from land transfer tax (LTT).²

Note that regulation 696 of *The Land Transfer Tax Act*, which addresses interspousal transfers, only requires that the separation agreement be in writing and contain language to the effect that the parties agree to live separate and apart:

s.1(b) It is determined that the Act was not intended to apply on the tender for registration of any conveyance where the transferor is the spouse or former spouse of the transferee and where sufficient information is provided to enable the Minister or any collector to whom the conveyance is tendered for registration to determine that one of the following conditions is satisfied:

...

¹ *Real Estate Practice Guide* 2010 Law Society of Upper Canada online:
<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491160>.

² *Land Transfer Tax Act* RSO 1990 c L.6, s.13.1(8)(b).

(b) the conveyance is in compliance with the terms of a written agreement pursuant to which the parties have agreed to live separate and apart.⁶

The result is that an informal separation agreement (i.e. one drafted by the parties themselves) and/or a partial separation agreement are sufficient to comply with the *Land Transfer Tax Act* and regulations.

In the absence of a separation agreement, spouses may transfer property to each other under the terms of a different exemption; however, if the parties have separated and there is no separation agreement in place, a prudent real estate solicitor will decline such a retainer due to the exposure.

Partial agreements may be a workable solution when there is an immediate need to transfer the property but not all issues between the parties have been resolved.

A court order or judgment ordering the transfer of real property from one spouse to the other will also be sufficient to take advantage of the land transfer tax exemption.³

Parties who have been co-habiting for less than three years and do not have children will be subject to land transfer tax upon a transfer of real property for consideration because they do not meet the definition of a spouse.

Registering Court Orders on Title

It is important to ensure that the property is properly described. Ideally, property should be described with three elements: the PIN, legal description and municipal address:

PIN 12345 6789, The property known municipally as 123 Main St., described as Pt lot 1, Plan 1234, Municipality of Toronto.

Court orders registered on title can generally only be removed by a further court order directed to the Land Registrar to remove the original court order.⁴ From a cost perspective, this does not make a lot of sense when the parties are agreeing to the removal of the court order on consent. There is, however, language that you can insert in your order in an attempt to have it removed on application without obtaining a second order for its removal when the removal is on consent or some other condition has been satisfied.

In Schedule C, there is language that can be used in court orders to allow for deletion from title on consent and/or the expiry of a statutory condition without a further court order. This kind of language will save the client time and the cost of obtaining another court order to remove the first one.

³ *Ibid.*

⁴ *Electronic Registration Procedures Guide* 2011, online:
https://www.teranetexpress.ca/content/tvuser/customer/resources/manual/V5_ProGuide.pdf
Ontario Land Registration Bulletin 92005 June 1, 1992.

Language In Separation Agreements Regarding the Transfer of Property

From the perspective of the real estate lawyer handling a property transfer pursuant to a separation agreement, there are elements that make this process more seamless:

1. When acting for the transferor, it is helpful to both reference the possibility of a refinance or an assignment of the mortgage. This provides added flexibility of a refinance is contemplated from the outset but an assignment is more beneficial to the transferor or vice versa;
2. Inserting the PIN and legal description when referring to the property is recommended;
3. Deadlines set forth in the separation agreement for the title transfer and payout (if applicable) can potentially be problematic depending on the financing arrangements of the transferor. Ensure that the transferor has arranged and been pre-approved for their financing in advance of the execution of the agreement and before choosing any dates for the transaction to occur. The challenge with this, however, is that sometimes the lenders will not approve the financing without an executed separation agreement. In these scenarios, the party can try and get an approval based on an un-executed agreement. It is also best practice to review the deadlines with the lawyer who will be handling the real estate component if the timeframe is short and particularly if the matter is complex to ensure the deadline is realistic;
4. Address the costs of the transaction, particularly if the parties are retaining separate lawyers. Separation agreements often include clauses that indicate that one party is responsible for legal fees for the transfer. If there are two lawyers involved, disagreements can occur regarding the separate representation fees. The easy way to avoid this dispute is indicate that the parties bear their own costs; and
5. It may be beneficial to consult with a real estate lawyer during the drafting phase of the separation agreement if the property transfer is in any way unusual to assist with the language in the agreement.

New Construction in the Context of Separation

New construction transactions operate in a completely different fashion than resale. Typically, the purchaser pays a deposit before the project has even started. Depending on when the purchaser pays the deposit, there could be a delay of months or years before the transaction closes or before occupancy occurs in the case of a new construction condominium.

If a separation occurs in the interim, this property may cause some complications in the negotiation. Below are some practical considerations when dealing with new construction properties:

1. New construction contracts will usually have a series of clauses relating to adjustments that will increase the price of the property significantly. This may not be relevant if one party is going to continue with the transaction and the other is released. It could be relevant, however, if the parties plan to continue with the purchase together despite the separation. The other difficulty is the purchase price. The exact amount will not be known until a few weeks before closing. Adjustments are substantial and there is the added complication of the HST rebate which will also affect the purchase price.

2. Closing dates are much more flexible than in a resale transaction in favour of the vendor. Typically, there are clauses in the agreements allowing the vendor to move up or extend the occupancy or closing dates with certain restrictions.
3. Additional costs may be levied by the vendor against the purchaser(s) in the event the parties have agreed that one party will be released from the agreement and the other will continue with the transaction. These costs can be canvassed in advance and consent is required from the vendor under the agreement.
4. If both parties are not in a position to continue with the contract because they are unable or unwilling, an assignment of the contract to an arm's length (or potentially non-arm's length) purchaser may be possible. The costs and ability of this assignment, however, will be dependent on whether the original purchasers negotiated a right of assignment when they originally executed the agreement or consent can be obtained from the builder after the fact.

Part III: Preservation of Real Property

**Note: my primary purpose in this section of the paper is to show the differences and similarities between the different mechanisms for preserving property. This paper is not intended to be a full discussion of any of the topics.*

There are a variety of mechanisms at our disposal to assist with the preservation of real property. Some of these options are inexpensive and quick but serve a limited purpose or are limited in time; whereas others have more ability to prevent future dealings when that is the ultimate concern.

Joint Tenancy Severance

Murdoch v. Barry gives a succinct definition of joint tenancy:

The two principal features of a joint tenancy are the right of survivorship and the "four unities". The four unities of a joint tenancy are the unities of title, possession, interest and time which are defined as follows:

1. Unity of title, that is, all joint tenants must take under the same instrument;
2. Unity of interest, that is, the interest of each joint tenant must be identical in nature, extent and duration;
3. Unity of possession, that is, each joint tenant is entitled to undivided seisin or possession of the whole of the property and none holds any part separately to the exclusion of the others, and
4. Unity of time, that is, at common law the interest of each joint tenant must vest at the same time.⁵

The severance of a joint tenancy will convert the ownership of the property from joint tenants to tenants-in-common such that each individual's share in the property will form part of their estate instead of transferring to the other titleholder by right of survivorship.

⁵ *Murdoch v. Barry* [1975] 10 Ont. S.C. OR (2d) 626 at para. 14.

¹¹ *Horne v. Horne Estate* [1987] 60 O.R. (2d) 1.

Since no notice is required to the other titleholders, the process involves the registration of a transfer from one owner to him/herself for the purpose of severing the joint tenancy and does not contravene the prohibition of alienation of property under the *Family Law Act*.¹¹

A severance may be recommended if a protracted negotiation is expected or if the party looking to sever is ill.

Mortgages

A mortgage defined under the under the *Mortgages Act*. includes “any charge on any property for securing money or money’s worth; “mortgage money” means money or money’s worth secured by a mortgage”.⁶

Consent of the titleholder (and spouse if a matrimonial home) is required to affect the registration of a charge against land. A mortgage can be a useful tool in settlements as a way to secure future obligations but it has the added benefit of preserving property in the sense that any disposition of the property will require notice to the mortgagee.

Mortgages can be used to secure the ongoing financial responsibilities of one party or used as security to prevent or encourage certain action(s) to occur in the future when both parties are agreeable to the registration.

The best way to affect this kind of obligation (especially if the registration is conditional on certain events occurring) is to have the mortgagor execute an acknowledgement and direction agreeing to the mortgage terms while binding the party by contract for automatic registration without further consent upon specified events occurring/not occurring.

When acting for the mortgagor, it will be important to canvas whether there is an intention to obtain institutional financing because the bar against secondary financing discussed below.

Under the *Land Titles Act*, registered charges against property require certain elements. The first is a principal amount.⁷ Consequently, a charge that is silent on principal will not be valid – in fact, it can’t even be registered in the electronic registration system.

A registered mortgage can be with or without interest and with or without a power of sale.¹⁴ Registration gives the mortgagee an interest in the land⁸ subject only to its own qualifications and any previous encumbrances.⁹

If a settlement results in the registration of a mortgage against title, institutional lenders generally will not agree to be subject to one of these mortgages.

If the parties are contemplating a private mortgage to secure a future obligation, this should only be done when there is no institutional financing in place or contemplated.

⁶ *Mortgages Act*, RSO 1990 c M.40, s. 1.

⁷ *Land Titles Act*, RSO 1990, c L.5, s. 90(2).

⁸ *Land Titles Act*, RSO 1990, c L.5, s. 90(1).

⁹ *Land Titles Act*, RSO 1990, c L.5, s. 90(4).

Matrimonial Home Designation

Under s. 20 of the *Family Law Act* either both spouses or one spouse can unilaterally designate a home as a matrimonial home.¹⁰ The effect puts a third-party purchaser on notice of the spousal interest. Under ss. 20(6), the removal of a matrimonial home designation can occur upon one of the following events:

1. a cancellation, executed by the person or persons who made the original designation, in the form prescribed by the regulations made under this Act;
2. a decree absolute of divorce or judgment of nullity;
3. an order under clause 23 (e) cancelling the designation; or
4. proof of death of one of the spouses.¹¹

Matrimonial home designations do not require a court order to remove and are simple applications that can be registered on title with little delay. This makes them attractive from an expediency perspective. Their removal can be affected by the party who had the designation registered in the first place or upon other enumerated events as listed above.

Certificates of Pending Litigation

Unlike some other mechanisms to preserve real property, obtaining a Certificate of Pending Litigation (CPL) will require the applicant/moving party to show that they have interest in the land pursuant to s. 103(1) of the *Courts of Justice Act*:

The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).¹²

In the context of family law, this includes resulting or constructive trust.¹³ Possession, however, is not considered an interest in land.¹⁴

A CPL is the most onerous mechanism to preserve real property. It can only be obtained by court order and can only be discharged by court order.¹⁵ Since a court order is required for registration, more time and cost will be involved.

CPLs are not without risk if they are registered improperly. Under s. 103(4) of the *Courts of Justice Act*, a party who has registered a CPL improperly is liable to the titleholder(s) for any damages that may result. Conversely, they are not subject to the tort of slander of title since obtaining a CPL is a court sanctioned process.¹⁶

¹⁰ *Supra* note 7, s. 20.

¹¹ *Supra* note 7, s. 20(6).

¹² *Courts of Justice Act*, RSO 1990 c. C.43, s. 103(1).

¹³ *Oliver v. Oliver* [1990] CarswellOnt 484 37 E.T.R. 271, 72 O.R. (2d) 275.

¹⁴ *Zita v. Zita* [1999] CarswellOnt 4245.

¹⁵ *Supra* note 18 s. 103(1) and s. 103(6).

¹⁶ *Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd.* (1985), 5 C.P.C. (2d) 97 at para. 16.

Cautions and Notices

The purpose of a Caution is to provide a short-term option to prevent property from being transferred or encumbered in a limited number of scenarios. This short-term protection is a stopgap for the registrant to get a court order or CPL and is not meant to be used as an alternative.

Unlike CPLs, Cautions can be registered immediately without a court order and can be removed with relative ease. This ease of registration makes them an attractive option when there's an urgent need to preserve property but it also means that they can be used improperly causing challenges for the landowner.

There are two kinds of Cautions: those which fall under s. 71 of the *Land Titles Act (LTA)*, and those which fall under s. 128 of the *LTA*. Cautions under s. 71 can be further broken down into Cautions under ss. 71(1) and ss. 71(1.1).

Subsection 71(1) Cautions

Cautions under ss. 71(1) are time-limited to 60 days, cannot be renewed¹⁷ and the registration must contain a statement that it will be deleted in 60 days.¹⁸ Ss. 71(1) Cautions are only appropriate in limited circumstances. Examples include:

- a) a claim by an execution creditor that a property has been conveyed with the intention to defeat creditors, but this can only be registered after the transfer and not before;¹⁹ and
- b) A claim by the registered owner that a power of sale proceeding is improper because the registered owner has redeemed the property prior to sale.²⁰

Furthermore, ss. 71(1) Cautions, other than those particular examples expressly discussed in Bulletin 2002-2, require the prior approval of the Director of Titles²¹ which limits their utility since the pre-approval process will create a registration delay.

S. 71 Notices

S. 71 allows both for the registration of a Caution (discussed above) and a Notice. Notices are not Cautions but they can also be used to tie up land.

Notices can be for many different purposes because the initial language in ss. 71(1) is broad:

“Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired by any act of the registered owner by entering on the register such notices, cautions, inhibitions or other restrictions but is constrained by the balance of the section, “...as are authorized by this Act or by the Director of Titles.”

¹⁷ *Ontario Land Registry Bulletin* 2002-2, July 21, 2000.

¹⁸ Electronic Registration Guide, Vol 12. December, 2017.

¹⁹ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

²⁰ *Ontario Land Registry Bulletin* 2002-2, July 21, 2000.

²¹ Ian Speers “Uncertified Instruments on Closing and Common Reasons the LRO Bounces Your Instruments”, presented for “Safeguarding Real Estate Transactions, 2019” for the Law Society of Ontario, November 19, 2019.

In the appendices to the *Land Registry Bulletin 96001* are a list of documents that will be approved by the LRO but this list is outdated and there are many documents not listed that have been approved and some on the list that will not be.²²

These Notices can be a problem. They can be used to tie up property where no legitimate grounds exist because no evidence is required for their registration under current LRO policies. This means a party can register an improper s. 71 Notice as an alternative to a Caution when they do not have the grounds and/or want the instrument to tie up the land for longer than 60 days.

The deleterious effects of Notices without grounds are compounded by the fact that such s. 71 Notices do not require any evidence. While most s. 71 Notices do incorporate the relevant agreement, all that is technically required for a s. 71 Notice is the declaration that the applicant has an “unregistered estate, right, interest or equity” in the relevant PINs. These s. 71 Notices without evidence have been referred to as “no-notice Notices” because it is impossible to determine what the exact interest in the land might be, making it harder for the landowner to satisfy or remove the encumbrance. The Director of Titles has publicly announced that Bulletin 96001 will be amended in 2023 to abolish the ability to register such “no-notice Notices”.²³

Notwithstanding that, currently, a “no-notice Notice” can still be registered on title, the Director of Titles has the authority to demand registrants of such Notices to explain the claim being asserted and, where the alleged “unregistered estate, right, interest or equity” is prima facie not an appropriate claim that can be protected by a s. 71 Notice, the “no-notice Notice” can be summarily deleted from title by the Land Registrar.²⁴

Furthermore, all s. 71 Notices have an indeterminate period of registration, leaving the owner with only the removal options of:

1. obtaining the consent of the registrant for removal; or
2. a court order.

At the time of writing, this problem is further aggravated by the current backlog in the courts and the time that it takes to get a court order.

Section 128 Cautions

Unlike s. 71 Cautions, s. 128 Cautions can prevent future dealings with land:

A person claiming to have an interest in registered land or in a registered charge of which the person is not the registered owner may apply to the Director of Titles for the registration of a Caution to the effect that no dealing with the land or charge be had on the part of the registered owner or other person named in the Caution without the consent of the Cautioner.²⁵

²² Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

²³ Comments by Jeffrey W. Lem, Director of Titles, November 13, 2022.

²⁴ *ibid.*

²⁵ *Land Titles Act*, R.S.O. 1990, c L.5, ss. 128(1).

Note that the language is different than s. 71 of the *LTA* such that an interest in land is required. The Land Registry Office interprets this “interest” as being a proprietary interest that would allow the applicant to call for a transfer of the property.

Cautions under s. 128 of the *LTA* are also time-limited for 60 days and cannot be renewed but a further registration may be permitted by the Director of Titles.²⁶ The further registration is discretionary, and you must get that permission in advance of registration and before the expiration of the initial sixty days.²⁷

Historically, second registrations have been extremely rare. They were, however, approved *en masse* at the beginning of the COVID-19 shutdowns, but this discretion was only exercised because it was impossible for registrants to obtain their court order/CPL due to the closure of the courts.

If a s. 128 Caution is registered improperly, is subsequently returned by the LRO and you register a new Caution, you will not get the benefit of a further 60 days of registration. The time on title for the first improper Caution will be deducted from the second registration by the LRO so intentionally registering an improper Caution to stretch out the time is not going to be effective.²⁸

The *Land Registry Bulletin 2000-2* sets out some examples of when a Caution under s. 128 can be registered:

1. the interest of a beneficiary under a trust agreement where the beneficiary claims to be entitled to and to have called for a transfer of lands or charge to him/her from the trustee;
2. the interest of an optionee under an option to purchase when the optionee has exercised the option;
3. an interest that may be protected by way of a Caution pursuant to any Act of Ontario or Canada.²⁹

This is a non-exhaustive list but the key is to establish a proprietary sort of interest.

While Bulletin 2002-02 refers to a “trust agreement”, a s. 128 Caution is available for almost all conceivable situations where a trust is being asserted by a beneficiary, including constructive trusts or other situations where the registered owner does not agree that he/she is a trustee at all.

Lastly, be aware that Cautions under s. 128 must be served on the registered owner of the land and any other persons having an interest in the land or charge although there does not appear to be any reported cases regarding a failure to serve a Caution on a registered owner so the consequences of non-service are unknown.³⁰

²⁶ *Land Titles Act*, R.S.O. 1990, c L.5, ss. 128(4).

²⁷ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

²⁸ Comments by Jeffrey W. Lem, the Director of Titles, April 12, 2021.

²⁹ *Ontario Land Registry Bulletin 2000-2*, July 21, 2000.

³⁰ *Land Titles Act*, R.S.O. 1990 c. L.5, ss. 129(2).

Removing Cautions from the Parcel Register

A Caution does not require a court order for registration or deletion from title, making it a more attractive than obtaining a CPL in the short term if the registering party requires a registration on an emergency basis.

To remove a Caution from the parcel register, the registering party may withdraw it or any party with an interest in the land may request its removal 60 days after closing in an agreement of purchase and sale or 60 days after its registration.³¹

Damages for Improper Registrations

Cautions, both under s. 71 and s. 128 are also subject to potential liability for their misuse under s. 132 of the *LTA*:

A person who registers a Caution without reasonable cause is liable to make to any person who may sustain damage by its registration such compensation as is just, and the compensation shall be deemed to be a debt due from the person who has registered the Caution to the person who has sustained damage.³²

Improperly registered Cautions also run the risk of damages arising from slander of title but the bar is high as the plaintiff will need to prove malice to be successful with such a claim.³³

A recent case considered the misuse of Cautions and Notices under s. 71. *Hornstein v. Kats* dealt with the issue of inappropriate registrations in the context of a trust claim being advanced by the Plaintiff that was ultimately unsuccessful. The Plaintiff's Caution was eventually removed.

Despite the removal of the first Caution, the Plaintiff proceeded to register two S. 71 Notices: one with an expiry date and one for an indeterminate period and the court determined that both notices were "unauthorized and improperly registered."³⁴

This case is interesting not only for its discussion of damages but also because it is a clear example of a plaintiff using a s. 71 indeterminate Notice to inappropriately tie up a property after a Caution expired/was removed.

Firstly, slander of title and damages under s. 132 of the *LTA* are distinct. Malice is required to be successful with slander of title whereas s. 132 of the *LTA* does not.³⁵ Furthermore, s. 132 damages are only available for an improperly registered Caution but not for a Notice.³⁶

In another twist in this case, the party advancing both the claims for s. 132 damages and slander of title was not the owner of the property and was unsuccessful on both grounds. The trial court did determine that the third party was entitled to punitive damages for the improperly registered notices³⁷ but the Court of Appeal allowed the appeal on that issue:

³¹ *Land Titles Act*, R.S.O. 1990 c. L.5, para. 129(7)(b).

³² *Land Titles Act*, R.S.O. 1990 c. L.5, s. 132.

³³ *Ryan v. Kaukab* (2011) CarswellOnt 12853.

³⁴ *Hornstein v. Kats et al.*, 2020 ONSC 870 para 218.

³⁵ *Hornstein v. Kats et al.*, 2020 ONSC 870, para 233.

³⁶ *Hornstein v. Kats et al.*, 2020 ONSC 870, para 247.

³⁷ *Hornstein v. Kats et al.*, 2020 ONSC 870, para 254.

It is well established that there is no basis for an award of punitive damages in the absence of an independent actionable wrong: *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. Punitive damages cannot be awarded simply on the basis of a party's misconduct. Given that the trial judge did not identify an independent actionable wrong, the award of punitive damages cannot stand.³⁸

While the case discusses the potential for damage recovery for a third party – a remote consideration for the solicitor registering a Caution or a Notice – the Court's comments regarding damages for improper registrations are illustrative of the potential exposure for the registrant and potentially their solicitor.

It is unfortunate that S. 132 damages are not available to the owner when a s. 71 Notice has been registered improperly. These notices are easy to register, potentially have no time limit, there is no oversight of the registration, and it has the potential to create significant and negative consequences for the landowner, including the costs associated with obtaining a court order to remove the Notice.

In another recent case, *Mendes v. Mendes*, the court was unequivocal that a debt claimed against a landowner does not create a right to register a Caution on title.³⁹ And be forewarned: when a Caution is registered to gain leverage in a claim for a debt, the strategy may backfire and the registrant may be subject to both damages and costs.

S. 118 Restrictions under *The Land Titles Act*

Unlike a Designation of a Matrimonial Home, Caution or a Joint Tenancy Severance, s. 118 restrictions are registered with consent of the title holder(s) and restrict the transfer or charge of land on certain conditions. They can be a creative tool in preserving property in the future by attaching restrictions on the transfer or charge of the property which can be removed on the consent of the parties; however, the Land Registrar has the discretion to refuse the registration of the restrictions.⁴⁰ As a result, one would seek approval from the Land Registrar prior to making the registration of restrictions a contractual term to an agreement.

S. 118 can be used to restrict one party's ability to sever a joint tenancy, register an encumbrance or add an additional title holder, to name a few examples.

Conclusion

At times, matters involving the Land Registry Office (LRO) can be daunting, confusing and slow, particularly if the matter is complex. If you know you are going to have an issue involving real property that will require intervention from the LRO in the form of a pre-approval or certification, it is essential to give yourself enough time to be able to get the guidance required in advance with the assistance of experienced real estate counsel, particularly with court orders or unusual registrations.

³⁸ *Hornstein v. Kats*, 2021 ONCA 293.

³⁹ *Mendes v. Mendes*, 2020 ONSC 5205.

⁴⁰ *Supra* note 23, s. 118(3).

³⁵ *Supra* note 5, s. 34(1)(k).

Schedule A – Condominium Abstract

LAND

PAGE 1 OF 4 [7]

REGISTRY

PREPARED FOR SarahFis

OFFICE #66 [2]

[1]

11932-0475 (LT)

ON 2020/02/03 AT 12:05:30

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: [6] UNIT 19, LEVEL F, METROPOLITAN TORONTO CONDOMINIUM PLAN NO. 932 ; PT LT 3 PL 699E; PT LTS 1 & 2 S/S WELLINGTON ST AND PT LTS 4, 5 & 6 W/S YORK ST PL 86; PT BACK RD CLOSED BY ES55295 & CT974508, PT BACK RD (NOT DEDICATED), PTS 1, 2, 4, 5, 6 & 7 66R16010, AS IN SCHEDULE 'A' OF DECLARATION D224621 ; TORONTO , CITY OF TORONTO

PROPERTY REMARKS:

ESTATE/QUALIFIER:

FEE SIMPLE [3]
ABSOLUTE

RECENTLY:

FIRST CONVERSION FROM BOOK

PIN CREATION DATE:

1995/01/23

OWNERS' NAMES

[4]

CAPACITY SHARE

[5]

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
EFFECTIVE 2000/07/29 THE NOTATION OF THE "BLOCK IMPLEMENTATION DATE" OF 1995/01/23 ON THIS PIN						
WAS REPLACED WITH THE "PIN CREATION DATE" OF 1995/01/23						
** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 1995/01/20 **						
63BA490	1973/10/29	PLAN BOUNDRIES ACT				C
REMARKS: CT28695						
CT554649	1982/10/14	AGREEMENT			THE CORPORATION OF THE CITY OF TORONTO	C
CT885682	1987/07/14	NOTICE				C
REMARKS: ARTICLES OF AMENDMENT						
CT925297	1988/01/20	AGREEMENT			THE CORPORATION OF THE CITY OF TORONTO	C
CT925298	1988/01/20	AGREEMENT			THE CORPORATION OF THE CITY OF TORONTO	C
CT949643	1988/05/19	AGREEMENT			THE CORPORATION OF THE CITY OF TORONTO	C
CT969721	1988/08/05	ASSIGNMENT GENERAL				C
REMARKS: LEASES CARRIED FORWARD IN ERROR MORTGAGE DELETED BY C920713 DELETED ON 06/10/06 BY H. GERBER						
CT974337	1988/08/29	ORDER				C
CT974920	1988/08/30	AGREEMENT			THE CORPORATION OF THE CITY OF TORONTO	C
CT984999	1988/10/18	AGREEMENT			THE CORPORATION OF THE CITY OF TORONTO	C
C670369	1990/09/14	NOTICE				C
C670370	1990/09/14	NOTICE				C

*** COMPLETELY DELETED *** [8]

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
C681284	1990/11/16	NOTICE			THE CORPORATION OF THE CITY OF TORONTO	C
C681285	1990/11/16	NOTICE			THE CORPORATION OF THE CITY OF TORONTO	C
C681969	1990/11/22	ORDER				C
D224621	1990/11/28	DECLARATION CONDO	[9]		EMPIRE PLAZA ENTERPRISES INC. [10]	C
D227310	1990/12/13	BYLAW				C
	REMARKS: NO. 1					
D227311	1990/12/13	BYLAW				C
	REMARKS: NO. 2					
D227312	1990/12/13	BYLAW				C
	REMARKS: NO. 3					
D227313	1990/12/13	BYLAW				C
	REMARKS: NO. 4					
D227314	1990/12/13	BYLAW				C
	REMARKS: NO. 5					
D227315	1990/12/13	BYLAW				C
	REMARKS: NO. 6					
D227316	1990/12/13	BYLAW				C
	REMARKS: NO. 7					
D227317	1990/12/13	BYLAW				C
	REMARKS: NO. 8					
D227318	1990/12/13	NOTICE				C
D331209	1992/06/18	TRANSFER		*** COMPLETELY DELETED ***	GOLDEN LINKAGE INVESTMENTS INC.	
D331216	1992/06/18	CHARGE		*** COMPLETELY DELETED ***	HONGKONG BANK OF CANADA	
D331217	1992/06/18	NOTICE		*** COMPLETELY DELETED ***		

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
D560476	1997/07/08	DISCH OF CHARGE		*** COMPLETELY DELETED *** HONGKONG BANK OF CANADA		
D600147	1998/04/14	CHARGE		*** COMPLETELY DELETED *** GOLDEN LINKAGE INVESTMENTS INC.	THE TORONTO-DOMINION BANK	
AT835333	2005/06/20	TRANSFER		*** COMPLETELY DELETED *** GOLDEN LINKAGE INVESTMENTS INC.	██████████	
AT835334	2005/06/20	CHARGE		*** COMPLETELY DELETED *** ██████████	THE TORONTO-DOMINION BANK	
AT1017735	2005/12/21	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
AT2081833	2009/05/29	NOTICE OF LEASE		METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 932	ROGERS COMMUNICATIONS INC.	C
AT2813804	2011/09/15	APL (GENERAL)		METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 932	ROGERS COMMUNICATIONS INC.	C
AT3694720	2014/09/22	TRANSFER		*** COMPLETELY DELETED *** ██████████	██████████	
AT3694721	2014/09/22	CHARGE		*** COMPLETELY DELETED *** ██████████	ROYAL BANK OF CANADA	
AT3723844	2014/10/28	DISCH OF CHARGE		*** COMPLETELY DELETED *** THE TORONTO-DOMINION BANK		
AT4172352	2016/03/21	TRANSFER	[11] \$455,000	██████████	██████████	C
AT4172353	2016/03/21	CHARGE	[12] \$227,500	██████████	COMPUTERSHARE TRUST COMPANY OF CANADA	C
AT4201183	2016/04/25	DISCH OF CHARGE	[13]	*** COMPLETELY DELETED *** ROYAL BANK OF CANADA		

11932-0475 (LT)

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/ CHKD
AT4493785	2017/02/23	APL (GENERAL) <i>REMARKS: NOTICE OF LEASE EXTENSION</i>	<i>AT2081833, AT2813804</i>	METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 932	ROGERS COMMUNICATIONS INC.	C
AT5120584	2019/04/25	NO CHNG ADDR INST <i>REMARKS: AT4172353.</i>	[14]	COMPUTERSHARE TRUST COMPANY OF CANADA		C

Schedule B – Freehold Abstract

LAND
REGISTRY
OFFICE #66 [2]

[1] 21256-0555 (LT)

PAGE 1 OF 1
PREPARED FOR SARAHFIS
ON 2020/01/08 AT 16:23:26

* CERTIFIED IN ACCORDANCE WITH THE LAND TITLES ACT * SUBJECT TO RESERVATIONS IN CROWN GRANT *

PROPERTY DESCRIPTION: LT C, 6 PL 1240 TORONTO S/T & T/W CA454387; CITY OF TORONTO [6]

PROPERTY REMARKS:

ESTATE/QUALIFIER:
FEE SIMPLE
LT CONVERSION QUALIFIED [3]

RECENTLY:
FIRST CONVERSION FROM BOOK

PIN CREATION DATE:
2002/10/28

OWNERS' NAMES [4]
[REDACTED]

CAPACITY SHARE
JTEN [5]
JTEN

REG. NUM.	DATE	INSTRUMENT TYPE	AMOUNT	PARTIES FROM	PARTIES TO	CERT/CHKD
<p>** PRINTOUT INCLUDES ALL DOCUMENT TYPES AND DELETED INSTRUMENTS SINCE 2002/10/25 **</p> <p>**SUBJECT, ON FIRST REGISTRATION UNDER THE LAND TITLES ACT, TO:</p> <p>** SUBSECTION 44(1) OF THE LAND TITLES ACT, EXCEPT PARAGRAPH 11, PARAGRAPH 14, PROVINCIAL SUCCESSION DUTIES * AND ESCHEATS OR FORFEITURE TO THE CROWN.</p> <p>** THE RIGHTS OF ANY PERSON WHO WOULD, BUT FOR THE LAND TITLES ACT, BE ENTITLED TO THE LAND OR ANY PART OF IT THROUGH LENGTH OF ADVERSE POSSESSION, PRESCRIPTION, MISDESCRIPTION OR BOUNDARIES SETTLED BY CONVENTION.</p> <p>** ANY LEASE TO WHICH THE SUBSECTION 70(2) OF THE REGISTRY ACT APPLIES.</p> <p>**DATE OF CONVERSION TO LAND TITLES: 2002/10/28 ** [7]</p>						
CA202436	1992/08/13	CHARGE	\$135,000		UNIVERSITIES AND COLLEGES CREDIT UNION (TORONTO) LTD.	C
CA454387	1997/02/17	TRANSFER	\$205,000		[REDACTED]	C
CA454388	1997/02/17	CHARGE	\$100,000		METRO CREDIT UNION LTD.	C

NOTE: ADJOINING PROPERTIES SHOULD BE INVESTIGATED TO ASCERTAIN DESCRIPTIVE INCONSISTENCIES, IF ANY, WITH DESCRIPTION REPRESENTED FOR THIS PROPERTY.
NOTE: ENSURE THAT YOUR PRINTOUT STATES THE TOTAL NUMBER OF PAGES AND THAT YOU HAVE PICKED THEM ALL UP.

Schedule C – Draft language for deletion of orders by the Land Registrar on Application

Example 1

THIS COURT ORDERS that the *Director of Titles* shall delete this Court Order upon an Application to delete the Court Order which contains a statement that all terms of the Order have been complied with.

Example 2

THIS COURT ORDERS that the *Director of Titles* shall delete this Court Order upon an Application to delete the Court Order which contains one of the following law statements:

- a) The Solicitors and Clients have agreed that this Court Order shall be deleted; or
- b) [a reference to a statutory expiry period] (this is optional)

Example 3

THIS COURT ORDERS that the *Director of Titles* is authorized to delete this Order from title to [the Property] when Instrument No. [NUMBER] is deleted.



Law Society
of Ontario

Barreau
de l'Ontario

TAB 3D

17th Family Law Summit

Intersection of Corporate Law and
Family Law (PowerPoint)

Jennifer Allen

Allen McDonald Swartz LLP

March 28, 2023



Intersection of Corporate Law and Family Law

Jennifer R. Allen



ALLEN MCDONALD SWARTZ LLP
Business Lawyers

Examples of the Intersection of Corporate Law and Family Law

- Proposed publicly accessible registry of beneficial owners of federal (CBCA) corporations
- Provisions in shareholders agreements whereby a “Family Law Event” triggers a sale of shares
- Sale of businesses in connection with division of property

Ontario Corporations Must Maintain a Register of Individuals with Significant Control

- Took effect January 1, 2023
- Private corporations only
- Similar legislation: CBCA (since June 2019) and in British Columbia, Saskatchewan, Manitoba, Québec, Nova Scotia, PEI, and Newfoundland and Labrador
- Legislation is intended to :
 - protect Canadians against money laundering and terrorist financing
 - deter tax evasion and tax avoidance
 - ensure Canada is an attractive place to conduct business.



Ontario Corporations Must Maintain a Register of Individuals with Significant Control

- Access to register:
 - certain law enforcement agencies
 - taxation authorities
 - regulatory bodies

- Penalties for non-compliance are severe
 - Corporation – max fine of \$5,000
 - Upon conviction, a director, officer or shareholder:
 - max fine of \$200,000, or
 - imprisonment for a max of 6 months, or
 - both

New Legislation Tabled to Create Beneficial Ownership Registry for CBCA Corporations

- Last year, amendments to the CBCA were introduced
 - requiring most federally incorporated businesses to proactively submit information on their beneficial owners to Corporations Canada
 - on an annual basis, or
 - when a change in control occurs
 - Allowing Corporations Canada to disclose all or part of that information received from corporations to investigative bodies, and the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)
- These amendments are not yet in force



New Legislation Tabled to Create Beneficial Ownership Registry for CBCA Corporations

- On March 22nd, the Minister of Innovation, Science and Industry, introduced proposed legislation in Parliament
 - part of the government's commitment to incorporate transparency and the implementation of a free, publicly accessible and scalable beneficial ownership registry of CBCA corporations
- This legislation proposes amendments to the CBCA, and amendments to other statutes:
 - requiring Corporations Canada to make public some information regarding the beneficial owners of CBCA corporations.

Shareholder Agreements

- A Shareholder shall be deemed to have irrevocably offered to sell all the Shares owned by them to the Corporation or the other Shareholders for the price and in the manner set out in the Shareholders Agreement on the day on which:
- such Shareholder “becomes subject to a claim or proceeding commenced by their spouse (including any former or future spouse) under the ***Family Law Act (Ontario)*** for support or maintenance or to determine the entitlement of the spouse to their net family property and the Shareholder does not produce evidence satisfactory to the other Shareholders within 30 days of the date of commencement of such claim or proceeding that the financial claims of their spouse to such entitlement can be settled without in any way directly or indirectly affecting, creating an encumbrance upon or interfering with the holding of shares of the Corporation by the Shareholder, or Confidential Information is required to be disclosed to the spouse or former spouse of the Shareholder in connection with such claim or proceeding”



Purchase and Sale of Businesses

- If the Shareholder Agreement requires a sale of shares due to a claim commenced by their spouse under the *Family Law Act (Ontario)* for support or maintenance or to determine the entitlement of the spouse to their net family property
- If the spouses own a business together and it must be sold by one spouse to the other or to a third party in connection with the division of net family property

Questions?

Jennifer Allen

Partner

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ALLEN McDONALD SWARTZ LLP
Business Lawyers



Law Society
of Ontario

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TAB 4

17th Family Law Summit

Torts and Family Law (PowerPoint)

Mary-Jo Maur, Assistant Professor Faculty of Law
Queen's University

March 28, 2023

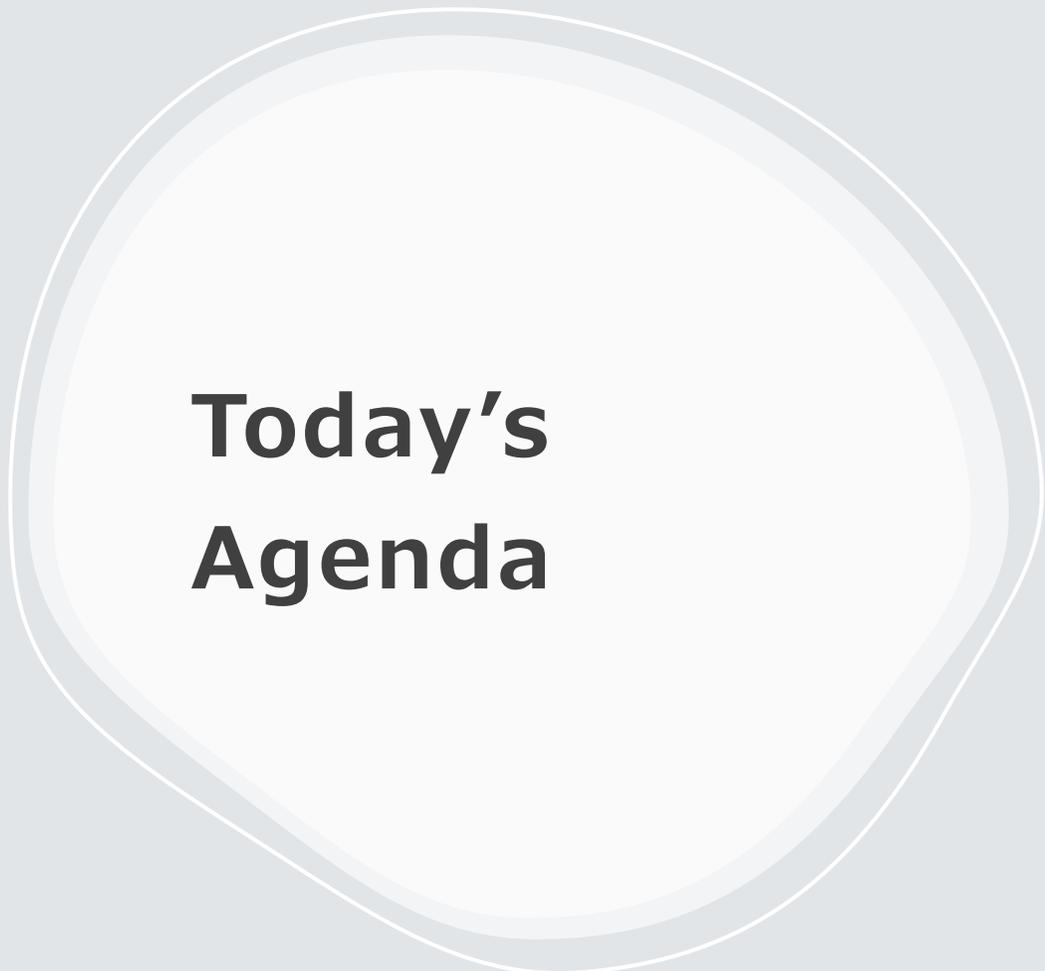


Torts and Family Law

Mary-Jo Maur

Assistant Professor

Queen's University Faculty of Law –
Family Law Summit, March 28 – 29,
2023



Today's Agenda

Basic Tort Stuff

Procedural Issues

Damages Review

Classic Claims

New Tort of Family Violence

Reputation and Privacy Claims

A Few Oddballs

Conclusions

Basic Tort Stuff

Torts has two main branches:

- *Intentional Tort*
- *Negligence*

Focus today is on intentional torts and family law claims

Intentional Torts

Traditionally includes:

- *Battery*
- *Assault*
- *Intentional Infliction of Mental Suffering*
- *Reputation and Privacy Claims*

Plaintiff's Burden is Lower for Intentional Torts

Plaintiff must prove the act was done, and the court will presume intention

Plaintiff does not have to prove damage

Defendant must then prove:

- *They didn't do it*
- *They didn't intend to do it*
- *They have no capacity to do it*
- *Plaintiff consented*

Purpose of Intentional Tort

Emphasis on discouraging violent or
anti-social behaviour

And compensation



Negligence

Is about carelessness

There is no claim for negligence without damage

Plaintiff has a bigger burden, and must prove:

- *Damage*
- *Duty owed*
- *Drop in Standard*
- *Causation*

Most Family Law Related Claims are for Intentional Tort

Limited scope for negligence claims to be joined with family claims

Intentional tort claims are easier to make, and simpler to defend



Procedural Issues

There are a few...

Avoiding a Multiplicity of Proceedings

Everyone agrees it is a good idea to join claims where it “makes sense”, to avoid inconsistent findings of fact out of the same transactions. (s 138 *Courts of Justice Act*)

BUT

Family Rules may differ from Civil Rules (i.e., no juries in family cases – see Perrell, J in *P v D*, 2016 ONSC 258, aff’d 2017 ONCA 180).



AND there is some confusion about whether you can add a tort claim without leave

FLR 12(5) states that if it would be more convenient to hear two or more cases, claims or issues together...the court may **on motion order accordingly**.

So must you bring a motion to add a tort claim to your application?

If one party has brought a civil claim already, *Bledin v Bledin*, 2021 ONSC 2674 says yes – they can be combined.

But can you just add a tort claim in your initial pleading? Or must you bring a motion *off the top*?

Why it's a good idea to just plead it

Family Rules tend to have more conferences and opportunities to settle, which may permit setting off a tort claim against an equalization, for example.

Important to consider what your client may want procedurally.



Frame v Smith

A 1987 decision of the SCC in which Wilson, J held in dissent that bringing tort claims in the midst of parenting claims was not a good idea.

She, and the majority, were careful to limit the holding to parenting claims.

She did not say that you could *never* bring a tort claim within a family law claim.

She did say there should be no claims for IIMS or conspiracy in parenting cases, if those claims are related to the parenting issues.

**Some recent
decisions do
not get this
right**

Some recent decisions have disallowed tort claims of any kind in the context of family proceedings, even if there is no parenting issue.

This is incorrect.



Limitation Periods

When does time begin to toll?

Most tort claims are covered by the basic LP in each province

We're used to thinking about LPs for property claims only

But if you add a tort claim, you have to consider when time began to toll.

If the relationship is characterized by many incidents of abuse, only the ones within the LP are permitted *if the limitation defence is raised*.*

*If you are defending, don't forget to raise it – see *Holden v Gagne*, 2013 ONSC 1423

But some tort actions have no LP

See, for example, Ontario's *Limitations Act, 2002*, s. 16(1)(h.2):

No LP for claims of *sexual assault*

No LP for claims of *assault* if the parties "had an intimate relationship" or plaintiff was "financially emotionally, physically or otherwise dependent on the other person".

NB: "assault" includes "battery" – see *Barker v Barker*, 2019 ONSC 3015 – not a family case, but "assault" = "battery" for LP purposes.

Some tort claims
that appear in
family cases
have a LP

IIMS

Privacy torts

False
imprisonment

**Keep an eye
on this**



Damages

A little review

There are four main kinds of damages in civil cases

Damages for general pain and suffering/non pecuniary damages

These compensate a victim for the pain of the tort and of the recovery from it. The cap in Canada hovers around \$480,000

Special/Pecuniary Damages

Out of pocket expenses

Aggravated Damages

These “bump up” general damage awards if there are aggravating factors (i.e., humiliation)

Punitive Damages

A punishment, in addition to all other damages

Pleading tort damages

You do not have to plead **aggravated damages** separately. The court may increase the general pain and suffering award if the evidence reveals humiliation, for example.

You must plead **punitive damages separately** if you want them.

Ditto **pecuniary damages**.

Classic Claims

What are the most
commonly occurring?



Battery

“Battery” is not the same thing as “assault” in tort world.

“Battery” is a non-trivial, unconsented to touching of the body.

“Assault” is a threat to a person’s body that could be carried out immediately, and that a reasonable person would perceive as frightening in all the circumstances.

**Domestic
“battery”
will almost
always
result in
aggravated
damages**

For a list of aggravating factors that will increase the damage award if the claim is battery, see Blishen, J, *Shaw v Shaw*, 2012 ONSC 590 at para 45-46.

Battery claims have been common in family litigation for some time. Awards began at the low end 25 years ago, and have steadily increased, especially since *Shaw v Shaw*.

See my chart

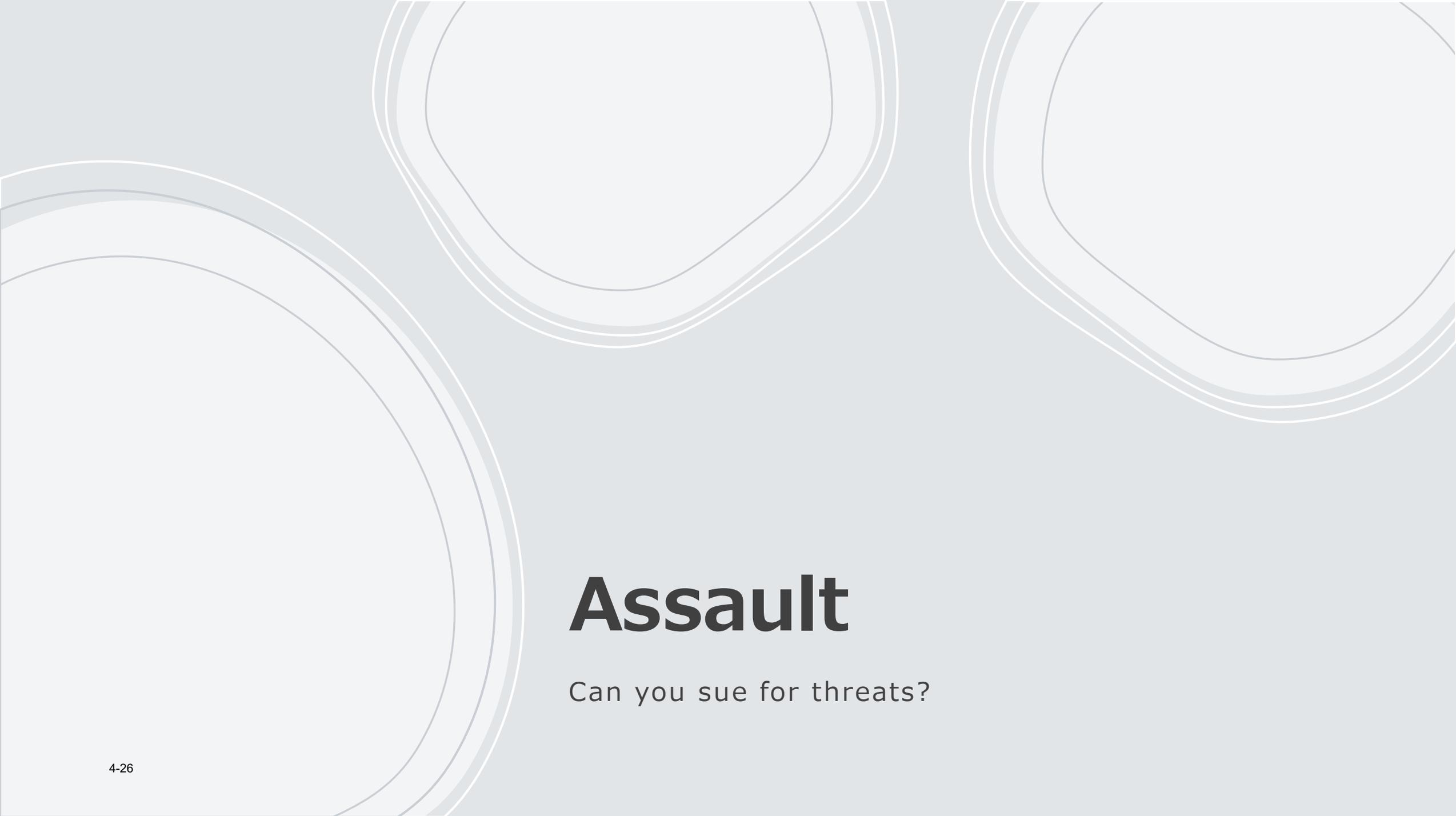
Special note: the effect of a criminal finding of guilt

If the defendant has been found guilty of “assault” (“battery” in tort language), the finding is a fact in the civil proceeding.

To hold otherwise would be an abuse of process because of the higher standard of proof in the criminal court.

OTOH, a finding of “not guilty” in criminal court does not bind a civil judge. The standard is lower in civil court, leaving it open for the plaintiff to re-litigate the issue.

Lesson? It may be worth bringing the tort claim in civil court even if the defendant was found not guilty in criminal court.
Consider the evidence.



Assault

Can you sue for threats?

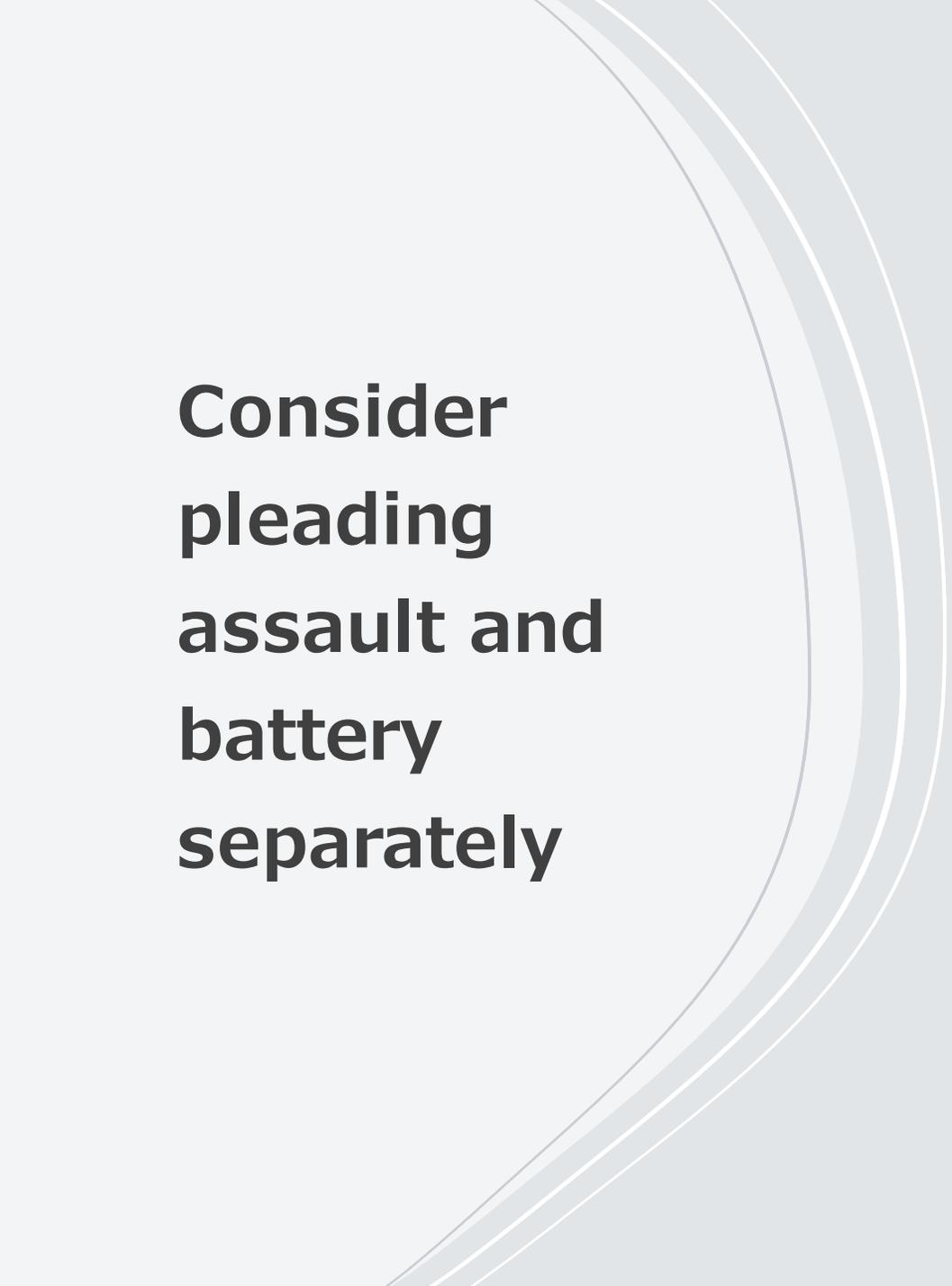
Yes. But.

Remember the LP – caught by the basic LP in most jurisdictions (not sexual assault or battery).

Unless the threat happened within the LP, likely statute barred

UNLESS

You can argue it is part of a pattern of coercive control, and therefore covered by Mandane J's tort of family violence.



**Consider
pleading
assault and
battery
separately**

Until recently, judges and lawyers have lumped threats in with batteries.

But a threat is a separate head of damage -> greater recovery for the victim.



Sexual battery

The law is no different than for any other kind of battery.

The plaintiff must prove the act happened. Full stop. Intention will be presumed.

The defendant must then prove a lack of intention, OR consent.

I repeat: the plaintiff has no obligation to prove a lack of consent, although she may have to answer the defendant's evidence about consent. **IT IS THE DEFENDANT'S BURDEN.**

See *Non-Marine Underwriters v Scalera*, 2000 SCC 24.

**Often, there
is no
limitation
period – s.
16(1)(h.2)
Ontario Act**

BUT the degradation of evidence over time may affect the plaintiff's claim. Sooner is better, if possible.

Credibility is key – and challenging.
NB *OOE v AOE*, 2019 SKQB 48.
Excellent analysis, although low damages

Intentional Infliction of Mental Suffering

Aka “Intentional Infliction of Emotional Abuse”, “Intentional Infliction of Psychiatric Harm”, or just “Psychological Damage”.

The conduct must be “flagrant or outrageous, calculated to produce harm that results in visible and provable illness.”

But the proof of illness has been relaxed considerably by the SCC decisions in *Mustapha* and *Sadaati v Moorhead*. No expert required, no diagnosed illness required.

**IMS tends to
be
consequential
to other tort
claims**

It is not available in parenting cases. But it is available in cases of domestic violence – *Frame v Smith*.

It IS available in cases of breach of privacy (discussed later).

The tort is evolving. Family Court Judges are creating more expansive definitions of psychological harm.

What might create psychological harm in the family context?

Unwarranted calls to authorities

Surreptitious recordings

Insults, criticism about parenting

Failing to care for children appropriately

See Justice Chappel's decision in *Armstrong v Coupland*, 2021 ONSC 8186



New tort of domestic violence

First articulated by Justice Mandhane in *A v A*, 2022 ONSC 1303

Is effectively a tort of “coercive control”. At least, that’s what I hope it becomes

Compensates for the “true harms” associated with family violence arising out of a pattern



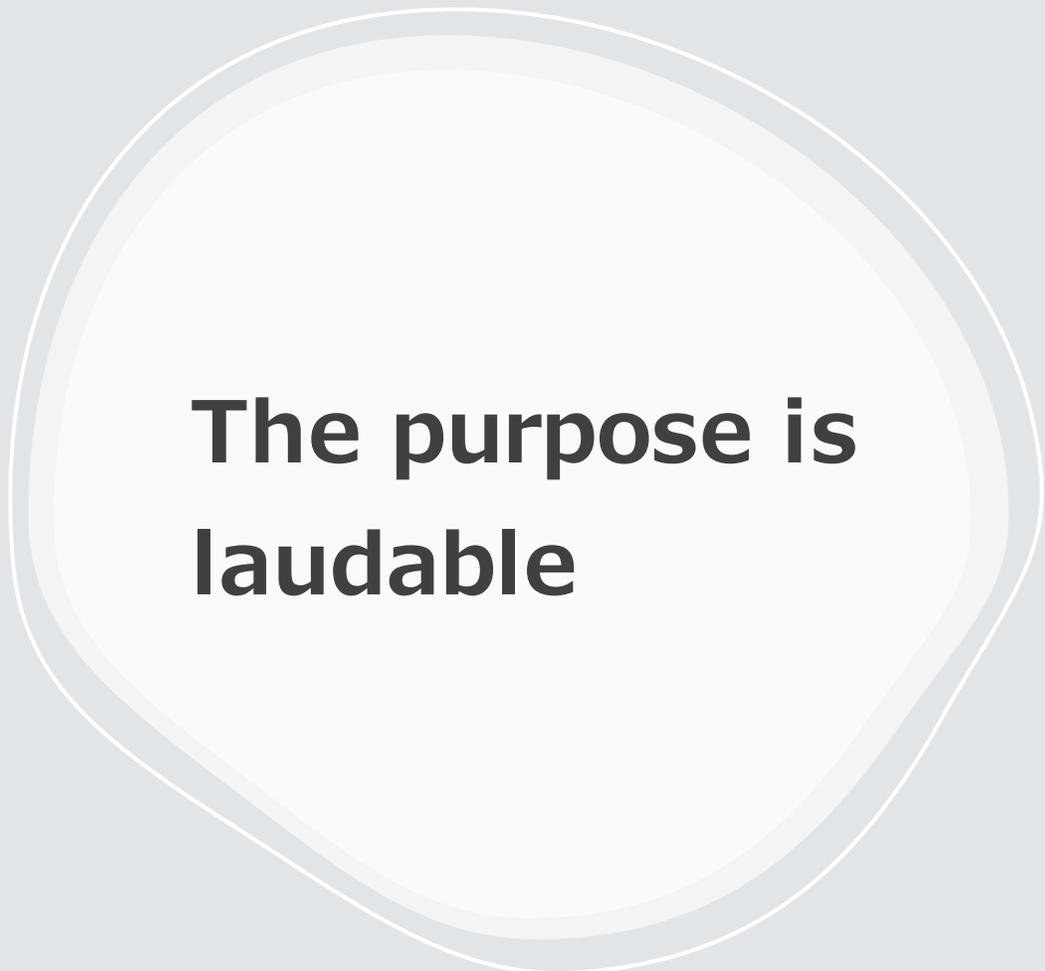
What do you need to claim it?

A pattern of abusive conduct

Including more than one incident

Of physical abuse, forcible confinement, sexual abuse, threats, harassment, stalking, failure to provide the necessities of life, psychological abuse, financial abuse, killing or harming an animal, or intentionally damaging property

(the indicators of family violence in the *Divorce Act*)



**The purpose is
laudable**

To lift women out of the financial constraints that kept them in the abusive relationship

As is consistent with tort law, to compensate victims and prevent future violence

Is this a suitcase, or an extra carry-on?

Are all the other torts included in this claim, so that if you also bring a claim for, say, battery, and “family violence” you are “double dipping”?

Or is a claim of family violence really just a claim for damages for coercive control, and not about the other actions?

What about mental suffering? Mandhane, J says IIMS is an “included tort” in the new tort of family violence – but is it? And what does that mean?



We don't know yet.

So far, not a lot of uptake on this tort. We're waiting for the ONCA. As of this morning, cited in only 4 cases cross the country.

We need to think about whether “coercive control” is a separate “bad action” that requires compensation, in addition to the things that make up coercive control.



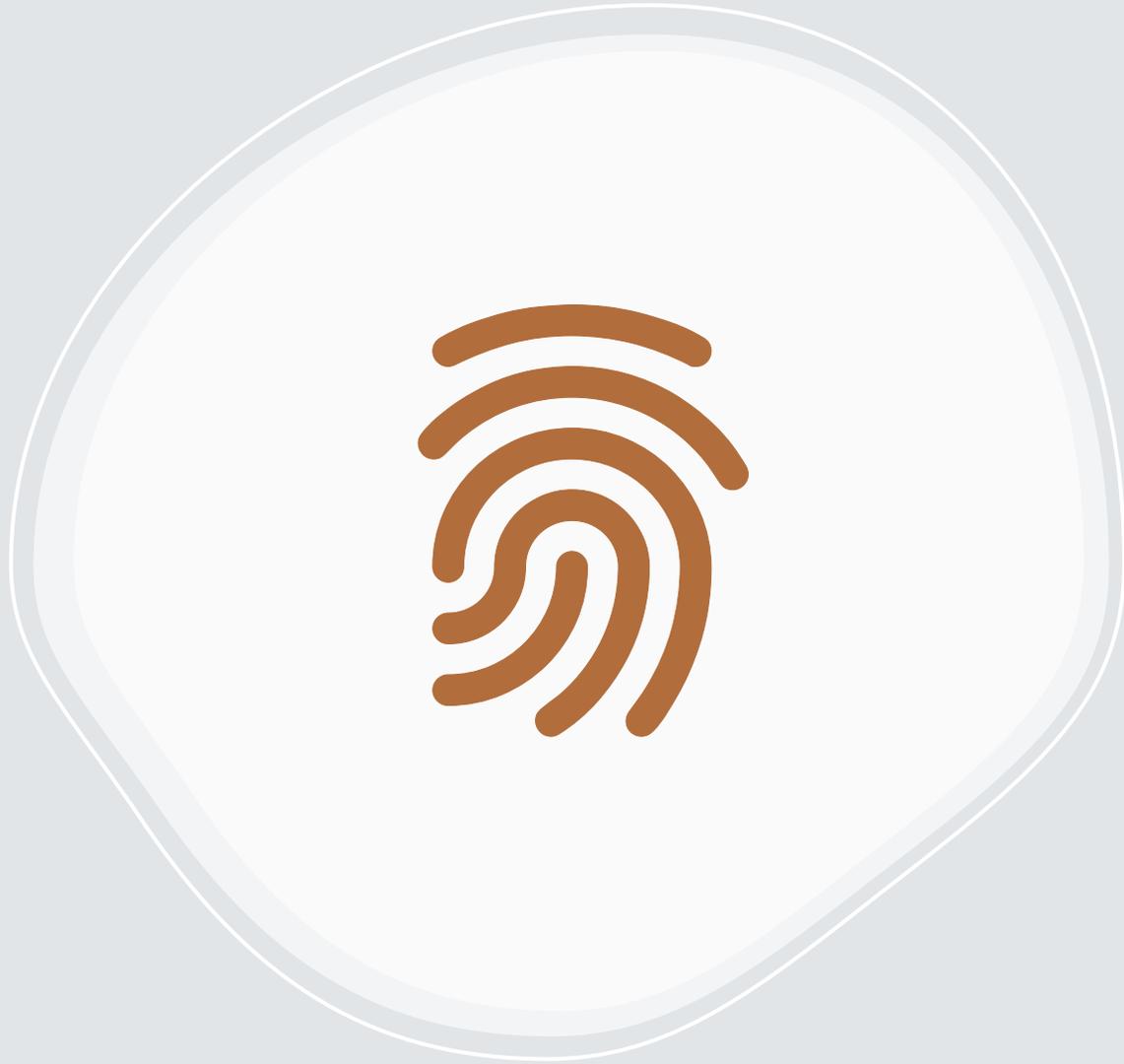
My hope

The Court of Appeal will recognize the ***pattern itself*** as a separate tort, ***in addition to other specific incidents of tortious behaviour.***

The factual elements should include the kinds of behaviours that are aimed at reducing a victim's agency but are not currently actionable

Things like:

- *Social isolation*
- *Control of everyday activities*
- *Financial control*



Reputation and Privacy Claims

What are they? What are they worth?

Defamation

Frequently arises in family cases,
especially if social media is involved

But defamation cases usually involve
a jury, unless the parties agree
otherwise

And yet, defamation claims are
frequently added to family law claims
– *Huismans v Black* (2000), 99 ACWS
(3d) 289 (Ont SCJ)

Consider *res judicata*

There are a few cases in which Canadian judges have held that if you *don't* bring the defamation claim with the family law claim, it may be *res judicata* – cause of action estoppel

Reasonably “should have” been brought at the same time as the other claims arising out of the same set of facts

Other issues with defamation claims

There are complex defences:

Was the material “published”?

Is it true? Defensible as privileged? Qualified privilege? Fair comment? Innocent dissemination (re-tweeting or sharing)?

And there is, understandably, a ton of non-family related law about the defences

A family law claim has a lot going already

Third parties can be drawn in

Damages tend to be fairly low for defamation

**Other privacy/reputation claims
may be more appropriate and
easier to prove**

Intrusion upon seclusion

Public disclosure of private facts

False light claims



Intrusion upon seclusion

Tort articulated by Justice Robert Sharpe, Ontario Court of Appeal in *Jones v Tsigie*, 2012 ONCA 32

He leaned on the American Restatement of Tort (Second), which identifies four main privacy claims:

- *Intrusion upon seclusion*
- *Public disclosure of private facts*
- *False light claims*
- *Appropriate for money of the plaintiff's name or likeness*

What's the test?

Defendant must intentionally intrude

On the seclusion of another's private affairs

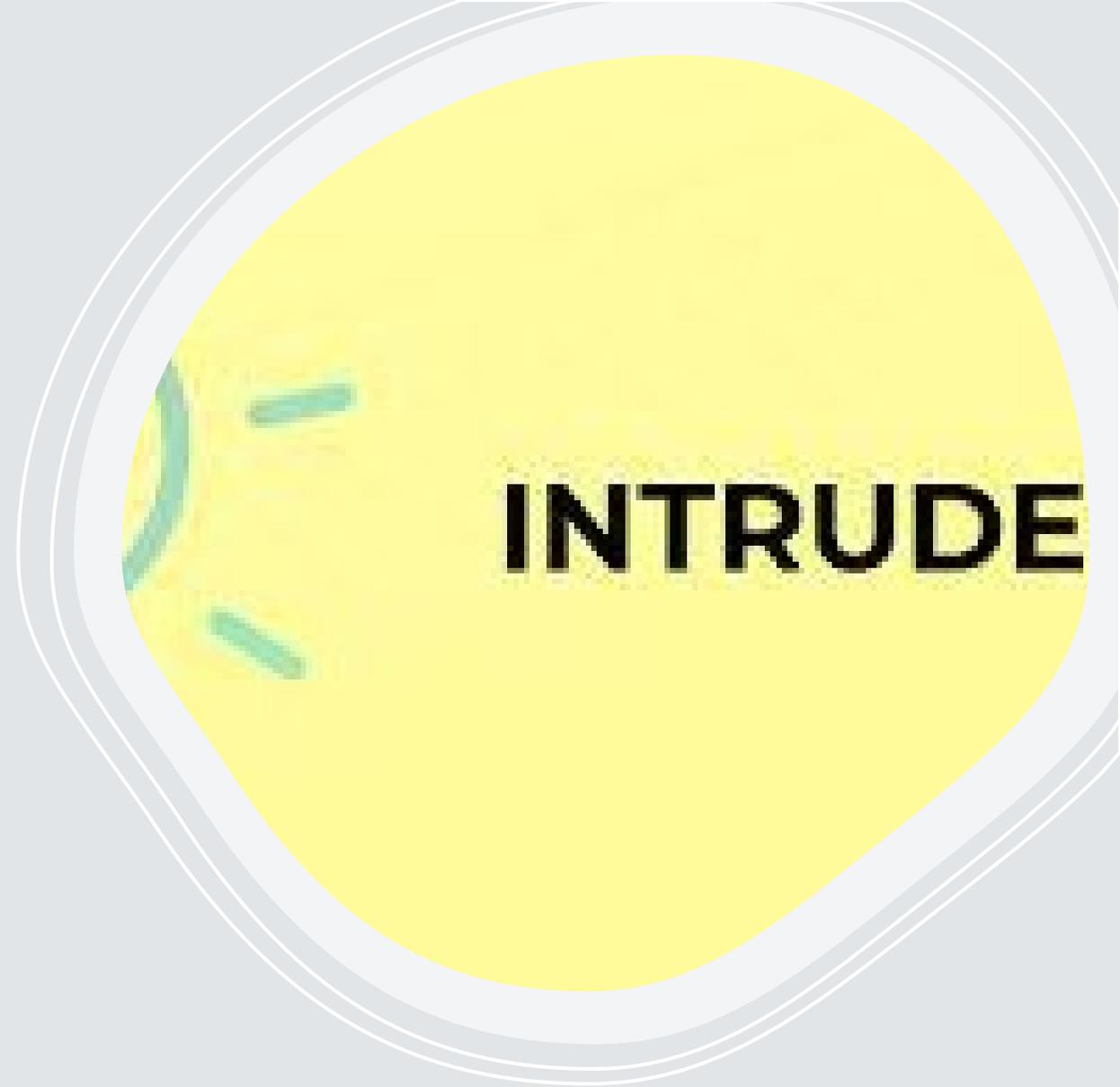
Invasion must be "highly offensive" to a reasonable person

Invasion must be intentional, which can include reckless

Not necessary to prove any economic harm

Minimal proof of distress required

No further publication/sharing of the information required to prove the tort



Damages are limited to nominal



YOU HAVE TO REALLY WANT TO DO
THIS



DAMAGES ARE USUALLY AROUND
\$10,000 - \$20,000



AND ARE TO CONDEMN THE
SNOOPING ONLY – NOT THE
CONSEQUENCES OF SNOOPING

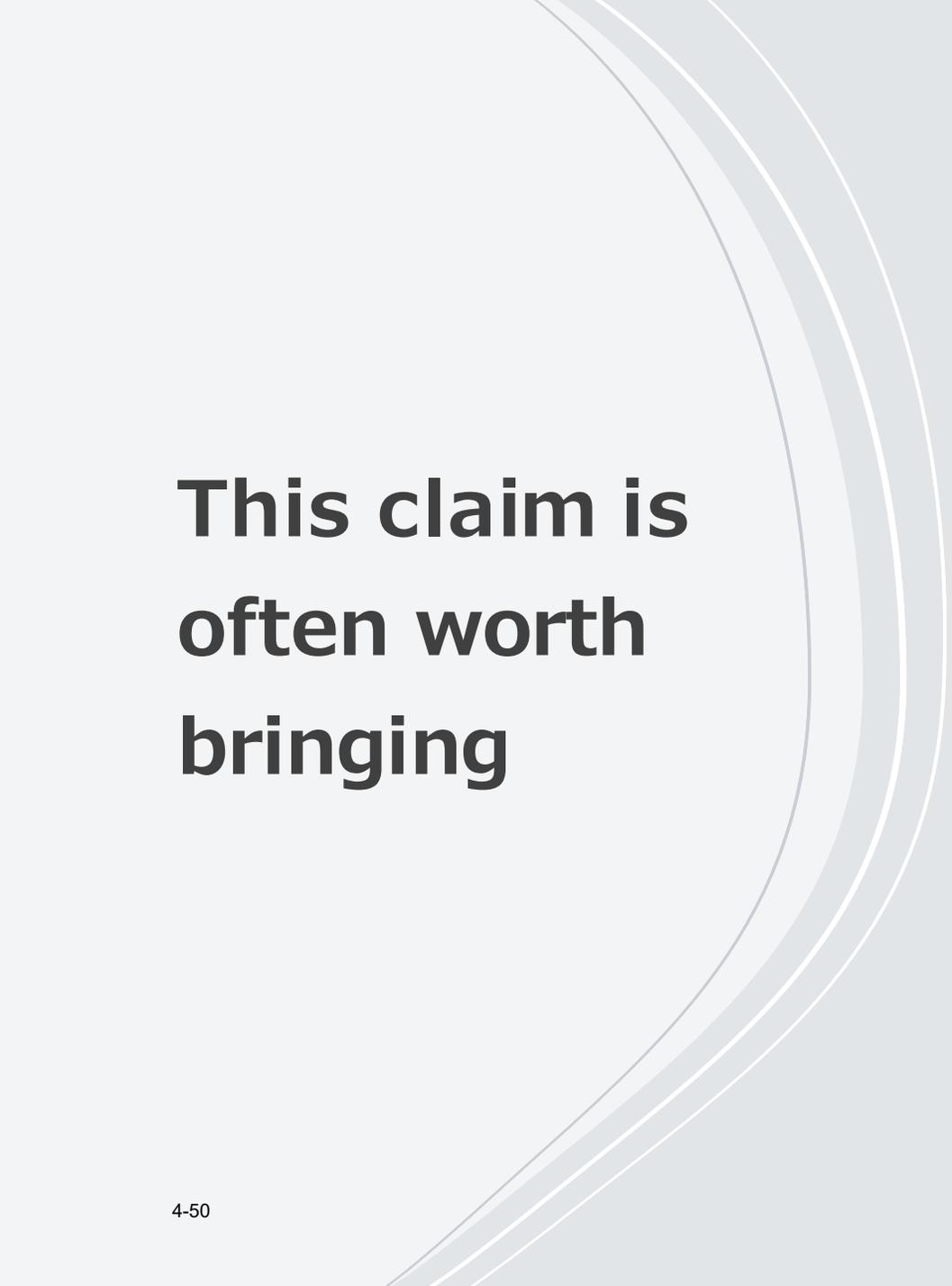
Public disclosure of private facts

One step beyond intrusion upon seclusion – snooping plus exposure

Truth is no defence – the issue is whether the “public” has any legitimate interest in knowing the information

Often occurs in “revenge porn” cases – posting intimate images meant to be private





This claim is often worth bringing

Damages can be high, although the foundational cases in Ontario have been default judgments

See especially *Jane Doe v Morgan*, 2018 ONSC 6607, damages of \$120,000 against the offending boyfriend, including punitive damages of \$25,000

Not family cases, but “relationship” cases.

Nova Scotia's legislation

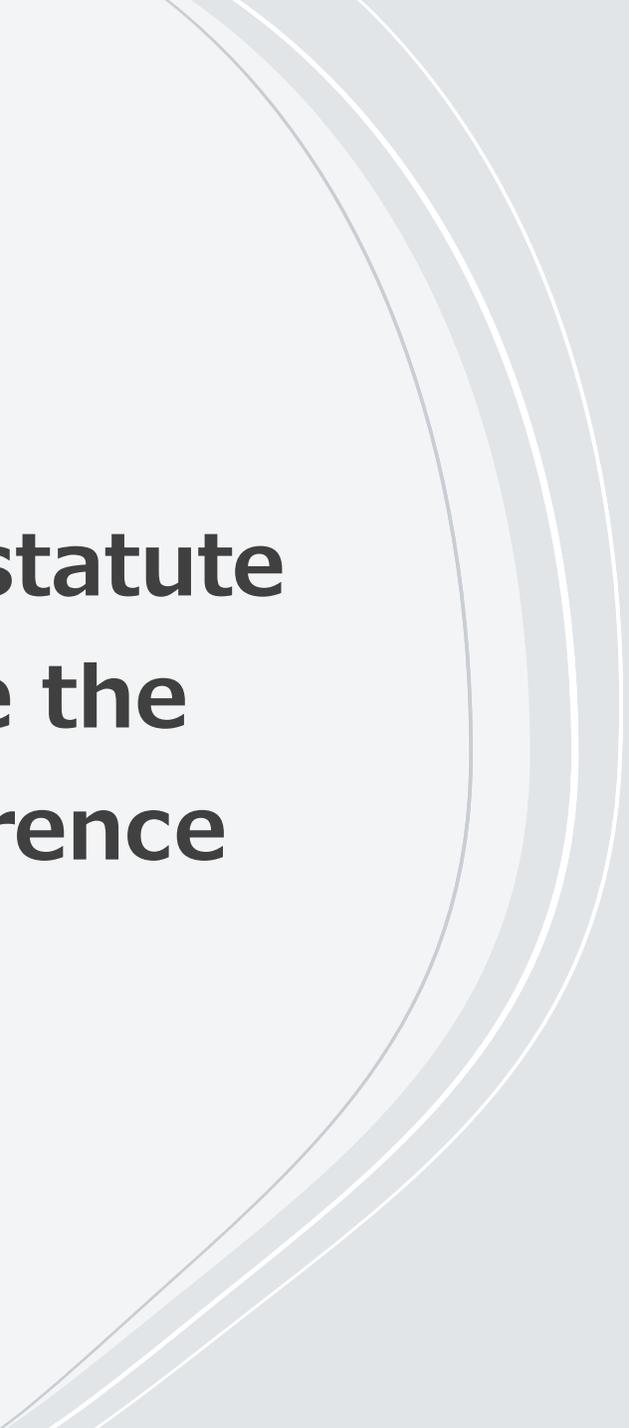
Nova Scotia has legislation that allows civil damages for publication of intimate images and cyber bullying: *Intimate Images and Cyber-Protection Act*.

Some great cases using this legislation

See especially *Candelora v Feser*, 2020 NSSC 177

Not about intimate images, but a true case of cyber bullying and intimidation in a family law case, with father attempting to bully mother into dropping her parenting claim.





The statute made the difference

Unlikely this case would have had much traction otherwise.

Statutory reform across the country would simplify claims.

False light claims – *Yenovkian v Gulian*

A case of outrageous bullying by the father

He created a YouTube channel about the mother, included the mother in the material, started a Go Fund Me campaign for his allegedly autistic daughter.

Most of the allegations were patently false. Some were just private matters that were of no interest to the public.

Father ignored every previous order prohibiting him from continuing with internet posting

The tort claims

Mother sued for intrusion upon seclusion, IIMS, and “invasion of privacy”

Kristjanson, J held that the facts fit IIMS, but also false light:

- *The information must be false*
- *The defendant must have had knowledge of, or have acted with reckless disregard to, the falsity of the information*
- *The false light would be highly offensive to a reasonable person*

Helpful quote

“The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person’s privacy right to control the way they present themselves to the world” (at para 171)

Damages were high

\$50,000 for IIMS

\$100,000 for false light and public disclosure of private facts

\$150,000 in punitive damages



Takeaways from this important case

More than one tort and head of damage out of the same set of facts

While intrusion upon seclusion attracts lower damage awards, FL and PDPF attracts higher awards

Punitive damages can be high if the defendant persistently disobeys order



A few oddballs

Internet harassment, false imprisonment, conspiracy

Internet harassment

Caplan v Atas, 2021 ONSC 670

Non-family case about “cyberstalking”, with a defendant who enjoyed the pain she inflicted – and was also penniless

Remedies are *mandamus* or injunction, not money

Good for cases in which the responding party has nothing to lose financially

Not widely applied in family cases yet

False imprisonment/Forcible confinement

Often serious and a regular feature in abusive relationships

See *Bobel v Humecka*, 2021 ONSC 852, aff'd 2021 ONCA 757:

- *Must be total deprivation of liberty*
- *Against the will of the plaintiff*
- *Caused by the defendant*

Traditionally, psychological confinement = false imprisonment

**Most
interesting
case –
*Hollingshead
v O'Reilly***

2020 ABQB 538

Man battered and confined woman

Man convicted of forcible
confinement and did not defend civil
claim

Court awarded \$493,650 for false
imprisonment, assault, battery,
IIMS, pecuniary damages

An important trial level decision
about this tort

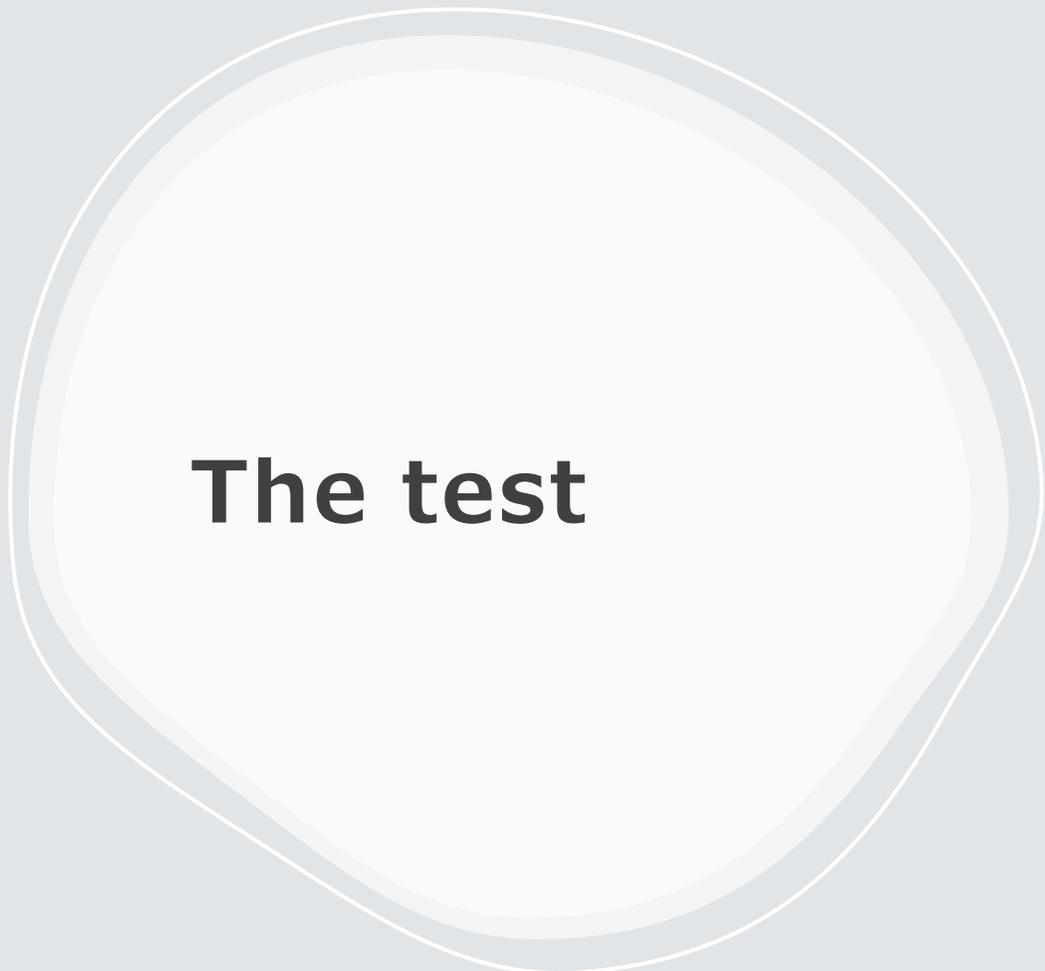
Conspiracy – *Leitch v Novac*

2020 ONCA 257

Fact heavy, lots of money involved,
case was about economic loss

Allegation was husband conspired to
reduce his income for **spousal support
purposes**

Motions judge held it would be
inappropriate to allow conspiracy
claims where the issue is spousal
support, because you can always
impute income



The test

Predominant purpose of
defendants' conduct is to cause
injury to plaintiff

Plaintiff must suffer injury

Conduct may be lawful or unlawful

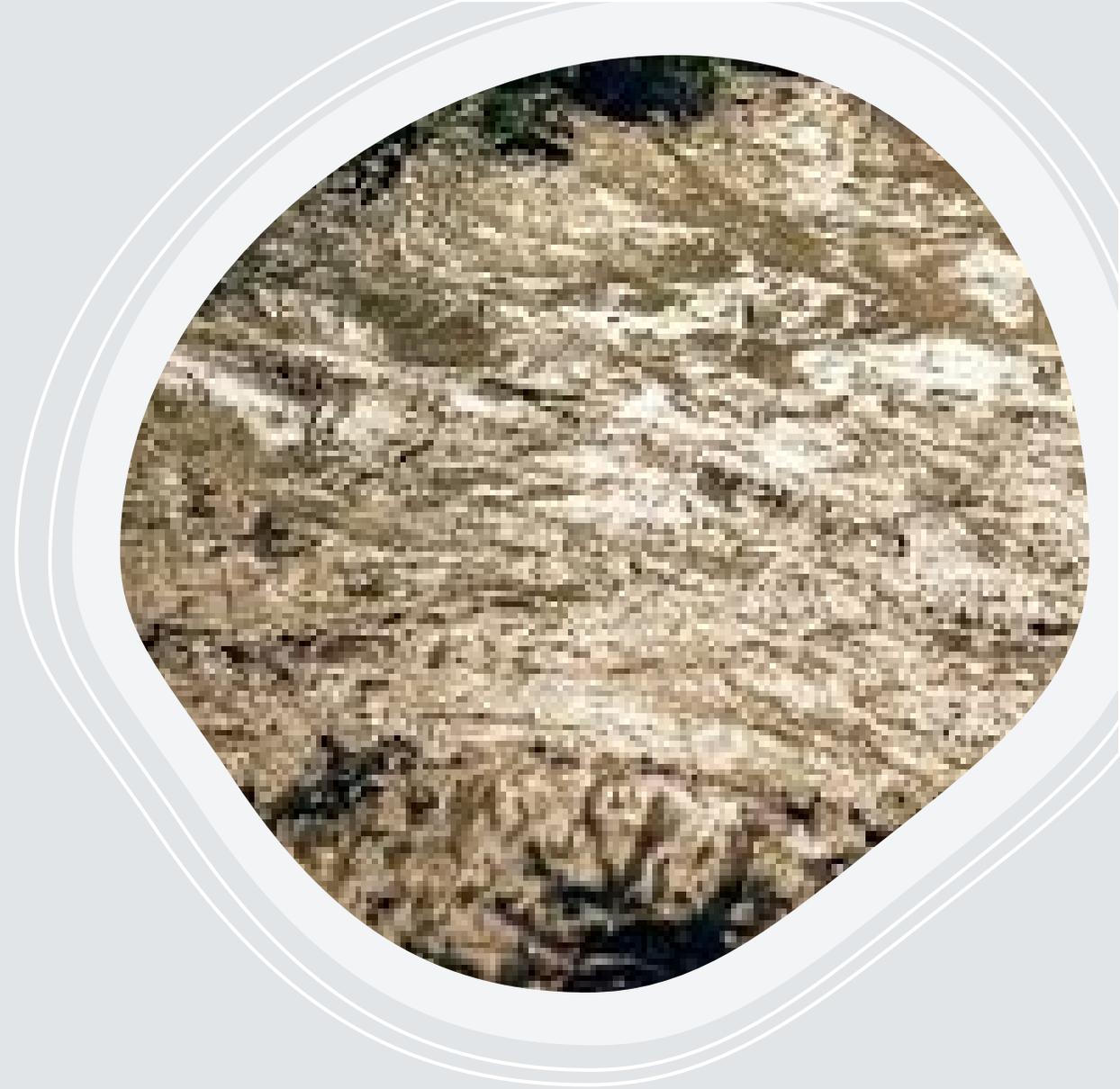
ONCA said bring the claim

Conspiracy often involves TPs (“invisible litigants”, like parents, business partners), and the easiest way to get disclosure is to make them parties

BUT

The claim can muddy the waters and add extra costs in support cases. If imputing works, use that

Unless the claim is about property – then conspiracy may be useful



A hand is shown writing the word "Conclusion" on a whiteboard. The word is written in a simple, black, sans-serif font and is underlined with a single horizontal line. The hand is positioned to the right of the word, with the index finger pointing towards the end of the underline. The entire scene is set against a plain white background.

Conclusion

Conclusions

Overall...

Is it worth it?

Yes, in many cases:

- *Extreme cyberbullying*
- *Battery*
- *False imprisonment if facts are extreme*
- ***On-going pattern of coercive control***

Why do it?

We often focus on the main family law issues, and miss the opportunity to provide justice, especially for women

Tort claims offer that opportunity

But be mindful of the added cost

**Statutory
intervention
would be
helpful**

Like Nova Scotia's

That allow for civil privacy claims
and specify the legal test



There are other areas to consider

Negligence claims against child protection agencies

Refining the new tort of family violence

Consider other torts (intimidation, breach of fiduciary duty)

THANK YOU

This has been a wonderful opportunity for me to explore this topic





Law Society
of Ontario

Barreau
de l'Ontario

TAB 5A

17th Family Law Summit

Submitting Accounts to Legal Aid Ontario
(PowerPoint)

Lisa Bernstein, Director, External Relations Strategy & Public Affairs
Legal Aid Ontario

March 28, 2023



Submitting Accounts to **Legal Aid Ontario**

Communicating with Legal Aid Ontario: The Portal



Read the messages

Contact the District Office using the Certificate Tab – “Certificate Amendment/Authorization” link for requests relating to:

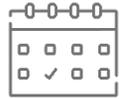
- Opinion letters and supporting materials
- Additional hours and coverage, including travel
- Mid-level case management
- Certificate extension
- Certificate backdate
- Any documents destined for the District Office

Communicating with Legal Aid Ontario: The Portal

Contact Lawyer Services and Payments using the Communication Tab – “Submit documents electronically to LAO” link for requests relating to:

- Discretion
- Retroactive discretion or for a review of the settlement of your account
- Disbursement authorization
- Billing deadline extension
- Expedited payment
- Any other correspondence destined for the Lawyer Services and Payments department including invoices, dockets, private accounts, and cost and settlements

CHECK & DIARIZE – BE AWARE OF KEY DATES



Issue/effective date of the certificate:

Bill services up to 30 days prior to effective date, except when there is a prior private retainer

Certificate termination:

3 years from issue date (may obtain extension if matter ongoing through DO)

Certificate cancellation:

Account should be submitted within 6 months of cancellation date for services provided prior to the cancellation date

Submit accounts on time:

Account submitted past the billing deadline may result in non payment. The billing deadline is 6 months after the anniversary date of the certificate (*Legal Aid Services Rules s. 64(4)*)

Review of account settlement:

Requests for retroactive discretion or for a review of the settlement of an account to be made within 60 days of the payment date, otherwise the settlement of the account is considered final (*Legal Aid Services Rules s. 74*)

Make sure that all authorizations are sought prior to submitting an account

- **Seek additional tariff authorizations:** make request/provide opinion to District Office. List of authorizations can be found in the *Legal Aid Services Rules*, Schedule 2, Table 9
- **Seek all disbursement authorizations:** when these are not inherent or when these exceed the inherent amounts. Requests are made to Lawyer Services and Payments. *Disbursement Handbook* contains information available regarding disbursement authorizations and LAO rates for third-party service providers



Sending request to the wrong location will result in a delayed response

NOTES ON DISBURSEMENTS

Legal Aid Ontario authorizes lawyers acting on certificates to incur disbursements that are reasonably necessary to support the services authorized, keeping in mind the costs and expenses that a reasonable client of modest means would likely approve

- Regular disbursements such as faxes, in-office photocopies, process servers, postage, etc. do not require authorization (inherent)
- If disbursement will exceed the pre-authorized limit, or requires prior authorization, ensure that an authorization is obtained before incurring the expense
- Counsel for a legally-aided client is responsible for disbursements incurred without authorization, or for which authorization has been denied. Counsel is responsible for all third-party service providers and the contract is between the lawyer and the service provider
- Disbursement invoices must include the following information from the service provider: name, address, phone number, breakdown of fees, dates, times and details of service
- Please attach invoices to online accounts. You may be asked to provide verification and will prevent further delays in processing your accounts

DOCKETS

Ensure that your docket complies with *Legal Aid Services Rules*



- Dockets must be attached to online accounts billed on the hourly tariff



- Services must be itemized in chronological date order and include times of day for all services of 0.5 of an hour or greater



- Provide detailed description of services for both preparation and attendance. Briefly describe the services provided. Insufficient details or vague descriptions may result in services being disallowed

Legal Aid Service Rules, s. 58 and 63 and the *Tariff and Billing Handbook*, Chapter 2: s. 2.5.1 Supporting documentation/detailed accounts

Case Conferences & Settlement Conferences

Case conferences and settlement conferences in family matters (domestic violence) and CYFSA matters are billed in a similar manner in the online account. There are two fields: “# of Extra Days” field or “Hours in Court”

First pre-trial conference	Second court conference	Third and subsequent case or settlement conferences
Both preparation and attendance for the first pre-trial conference, case conference or settlement conference is covered by the initial authorization – enter nothing	For second court conference, enter only the number of hours in court as the two hours of preparation are included in the authorization	For third and subsequent case or settlement conferences, enter the number of extra days and number of hours in court (for that account only – do not re-enter previously entered conferences)

Case Conferences & Settlement Conferences

Case conferences and settlement conferences in family matters (no domestic violence) are limited to two conferences, a legal aid settlement conference, plus a trial management conference

- Both preparation and attendance for the first pre-trial conference, case conference or settlement conference are covered by the initial authorization
- For the second pre-trial conference, there is no “# of Extra Days” field, enter only the number of hours in court as the two hours of preparation are included in the authorization
- The authorizations for the legal aid settlement conference plus a trial management conference are billed in the same way as the second pre-trial conference

FAMILY CASE MANAGEMENT

A roster member who acknowledges a certificate for a family law or CYFSA proceeding may apply for a budget for the proceeding if all of the following apply:

- total amount of fees and disbursements:
 - is likely to exceed **\$8,000**, in the case of a proceeding under the *Child, Youth and Family Services Act, 2017*, other than for a supervision order
 - is likely to exceed **\$12,000**, in the case of a family law proceeding
- total amount of fees and disbursements for the proceeding is likely to exceed available tariff
- proceeding is exceptionally complex

Legal Aid Services Rules s. 62(2)

CHECK & DIARIZE – BE AWARE OF KEY DATES



Apply

Apply using a case management assessment form



Case manager review

An LAO case manager reviews assessment form, contacts counsel to discuss case, and sets budget, comprised of tariff authorizations and blocks of hours



Authorization

Case management hours and tariff authorizations are added to the certificate



Account submission

Counsel completes the work and submits the account (the automated system pays the case management blocks in the same way as the other tariff authorizations added to the certificate)



Request an increase

Discretion is not available for case managed certificates. If counsel expects to exceed the budget they must contact the case manager and request an increase to the budget prior to expending the additional time

Discretion Requests

- Legal aid tariff reflects the fees customarily paid by a client of modest means and except in exceptional circumstances, the legal aid tariff normally applies
- In exceptional circumstances, LAO may consider a discretionary increase. The onus is on the lawyer to provide sufficient details and explanation as to how the matter meets the exceptional circumstances test



Before LAO can consider a discretion request, counsel must seek and obtain all available authorizations on a certificate before billing

Discretion Requests

- Discretion Request Form helps to focus the request to address the guidelines
- A discretionary increase request is attached to the account and it should include:
 - A brief narrative of the nature of the case including the issues involved
 - The exceptional circumstances of the case which justify an increase in fees, including the clarified discretion criteria relied on and how they apply to the circumstances of the case and/or any other special difficulties or complications
 - The progress of the case resulting from the work billed, the purpose and outcome of any court attendances

Legal Aid Services Rules, s. 70 and Tariff and Billing Handbook, chapter 2, s. 2.8

Protecting LAO's statutory interest in costs and settlements

Costs: *Legal Aid Services Act, 2020, section 12, Legal Aid Services Rules, pars. 115-118*

- Costs awarded to a legally aided client are the property of LAO
- Keep any costs collected in trust and enter costs ordered and received on account
- Provide issued costs order along with assignment of costs and information about judgment debtor form
- NO FRO enforcement, director does not recognize assignments made to LAO

Settlements: *Legal Aid Services Act, 2020, section 13, Legal Aid Services Rules, pars. 111-114*

- Ensure that the funds are paid to you in trust and advise Lawyer Services and Payments
- Enter settlement amount and amount in trust on account
- LSP can authorize the release of some funds without compromising the client's eligibility to legal aid services, however the release of a large settlement amount to the client will result in the certificate being cancelled
- Net cost of legal aid (amount owing to LAO) is calculated when the final account is submitted and remaining funds then go to the client – contact Lawyer Services Payments for details

Private Retainers



Any private retainer, payment or other benefit is prohibited for services or disbursements connected to a proceeding authorized under a certificate or for a related or ancillary proceeding where legal aid services are provided



Private retainers existing prior to the certificate being issued must be declared on the first account. Attach the docket for LAO services, the docket(s) for private retainer services and client trust ledger



If any funds remain from the private retainer, please keep these in trust and instructions will be provided to apply these funds the LAO account



This policy applies from the effective date of the certificate onwards (not the acknowledgement date). A client may pay a private retainer for services rendered after the cancellation date of the certificate (a final account does not mean the certificate is cancelled) *Legal Aid Services Act*, at s. 44 and the *Legal Aid Services Rules*, s. 68

Essential Reference Materials

Keep the following references in your “favourites” or on your computer desktop:



- *Legal Aid Services Act, 2020*, S.O. 2020, c. 11, Schedule 15
- *Legal Aid Services Rules*, Rule 2022/1
- *Legal Aid Services Act, 2020*, Policies



- *Tariff and Billing Handbook*
- *Disbursements Handbook*



- Legal Aid Ontario’s website has a *Roster Resources* section under the tab “*For Legal Professionals*” that has extensive information including latest updates, forms and billing information



**If you have any billing questions, please contact the
Lawyer Service Centre at**

(416) 979-9934

**or toll free
at 1-866-979-9934**

Thank You!



Law Society
of Ontario

Barreau
de l'Ontario

TAB 5B

17th Family Law Summit

Alternative Billing Models

Shuchanna Swaby
Barrister & Solicitor

March 28, 2023



ALTERNATIVE BILLING MODELS

FAMILY LAW SUMMIT

March 28, 2023

Shuchanna Swaby, Barrister & Solicitor

The best billing systems should accomplish the following:¹

1. Accurately reflects the time spent on the task and the value of the work performed
2. Keeps your record-keeping accurate and your firm's finances organized
3. Client-focussed, easy to understand, easy payment options, and improves the overall client experience
4. LSO Compliant and automated, preferably with a time-tracking feature, to save you time and money
5. Aligns with your working style and meets your business needs.

The best billing systems should not: cause inefficiencies, financial losses or make clients lose confidence in you and damage your reputation.

There are various ways that Family Lawyers may bill clients to accomplish the above goals. The Law Society gives us guidance:

Billing Methods and Arrangements – Guidance from the Law Society ²

Fees may be billed in various ways. Lawyers and paralegals should select a billing method that best suits the circumstances and the client. Common billing methods include charging clients:

- (a) an hourly rate for the time spent on the matter

¹ The Comprehensive Guide to Legal Billing, February 14, 2023, National Law Review, Volume XIII, Number 45

² Law Society of Upper Canada – Practice Management Supports – Money – Fees & Disbursements

- (b) fees for each stage or step in the matter, or
- (c) a block, fixed, or flat fee for performing a particular task(s), regardless of how much time is spent.

Fair and Reasonable Fees and Disbursements³

Lawyers and paralegals are permitted to charge clients for legal fees and disbursements provided the amount charged is fair, reasonable, and has been disclosed to the client in a timely manner. What is fair and reasonable will depend on factors such as:

- the time and effort required and spent on the matter
- the difficulty of the matter
- the importance of the matter to the client
- whether special skill or service has been required and provided
- the amount involved or the value of the subject matter
- the results obtained for the client
- fees authorized by statute or regulation
- special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency of the matter
- the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's or paralegal's inability to accept other retainers
- any relevant agreement between the lawyer or paralegal and the client
- the experience and ability of the lawyer or paralegal
- any estimate or range of fees given by the lawyer or paralegal to the client, and
- the client's prior consent to the fee.

³ *Ibid.*

There are many billing models that lawyers use to support their remuneration goals. Here is a sample:

HOURLY BILLING

This is by far the most typical model used by the legal profession. An hourly rate is charged, and the client is billed in 1/10 hour increments over the course of an hour for the time a lawyer spends researching, drafting documents, attending court, and communicating with clients.

Throughout the history of lawyering, hourly billing is a fairly recent phenomenon.⁴ Lawyers would retrospectively devise their remuneration paid by clients based on the outcome achieved and via a set fee or for certain services, annual retainers and fees on a contingency basis. The payment was made on a lump sum basis after the services were completed. In the 1940s Bar Associations set the fees for legal services threatening discipline should the price be undervalued.

In the 1920s and 1930s, a Harvard graduate named Reginald Heber Smith created a more systematic approach to legal accounting and record keeping by using timesheets to track the work done by lawyers.⁵ His approach incorporated more efficient management practices to better serve his legal aid clients who could not afford the opaque billing practices of private counsel. Smith measured his efficiency with time sheets that broke down each hour into 10 six-minute units. This became known as the “billable hour”. It was fair, transparent and improved budgeting and efficiency.⁶ Tracking time became fair, logical, transparent, and indisputable. It became an internal metric for organization planning. It afforded access to justice for those of modest means.

⁴ “The Billable Hour is Dead – Long Live the Billable Hour” by Paul Fruitman The Advocates’ Journal, Vol. 35, No. 1

⁵ “Slice of History: Reginald Heber Smith and the Birth of the Billable Hour”, Wilmer Cutler Pickering Hale and Dorr LLP, August 9, 2010.

⁶ “The Billable Hour is Dead – Long Live the Billable Hour”

In the 1950s, lawyers became concerned that their incomes were not keeping pace with other professions such as doctors and dentists.⁷ The billable hour was touted as a way for lawyers to keep records of the time spent on cases and to make more money. Clients were able to see what was billed and the time it took to complete the task. Firms could set financial targets and measure the performance of associates.

However, those targets grew to over 2000 hours per year and the billable hour has come under scrutiny for encouraging inefficiency and not differentiating the value of the work done. This has led to discounting the bills to avoid client complaints about the account.⁸ However, it remains the standard as it is objective and may be seen as a more appropriate billing method for more complex Family Law issues and more capable of remunerating lawyers given the unpredictability of family law cases. To support this model of billing, it is recommended that lawyers use time-tracking software to capture all of their time. There are many programs, including passive time-capture systems, that can capture time spent working on a computer or email or while on a telephone call.⁹

ALTERNATIVES TO THE TRADITIONAL HOURLY BILLING MODEL

Clients are seeking more affordable options for legal services and more certainty¹⁰. Lawyers are seeking alternatives to the hourly billing model that scales their practice and remunerates them fairly for the work, effort and outcomes achieved. Here are a few options:

CONTINGENCY FEES

This billing model is usually expressed “if we don’t win, you don’t pay”. The lawyer is paid according to results achieved. Payment is based on a percentage of the recovery, settlement or amount of money

⁷ Ibid.

⁸ “A Brief History of Billing” by Jim Calloway Oklahoma Bar Journal October 2021 – Vol. 92. No. 8;

⁹ Examples include Chrometa, Time Sparrow, and Wise Time

¹⁰ “A Brief History of Billing”

saved. It is a common model used in Personal Injury Law. Because it allows people to pursue their civil rights regardless of their socio-economic status, it is considered a way to increase access to Justice. However, it is impermissible to use contingency fees in Family Law as a way to bill Family Law clients.

Contingency Fees and Contingency Fee Agreements

Section 3.6-2 of the *Rules of Professional Conduct* states “Subject to rule 3.6-1, except in family law, Criminal Code (Canada) or any other criminal or quasi-criminal matters, a lawyer may enter into a contingency fee agreement in accordance with the Solicitors Act and the regulations made under it”.¹¹

Solicitors Act¹²

28.1 (1) A solicitor may enter into a contingency fee agreement with a client in accordance with this section. 2002, c. 24, Sched. A, s. 4.

No contingency fees in certain matters

(3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,

(a) a proceeding under the Criminal Code (Canada) or any other criminal or quasi-criminal proceeding; or

(b) a family law matter. 2002, c. 24, Sched. A, s. 4.

The Courts have also weighed in on this issue.

Jackson v. Stephen Durbin and Associates 2018 ONCA 424 (CanLII)¹³

In the case of *Jackson v. Stephen Durbin and Associates*, Madam Justice Benotto for the Ontario Court of Appeal expressed the concerns about Family Lawyers engaging in contingency fees in this way:

¹¹ Section 3.6-2 of the *Rules of Professional Conduct*

¹² Section 28.1(3)(b) of the *Solicitors Act*, R.S.O. 1990, c. S.15

¹³ *Jackson v. Stephen Durbin and Associates* 2018 ONCA 424 (CanLII) at pp. 44 to 48

[44] I do not accept the appellant's submission that the public policy concerns regarding contingency fee agreements in family law matters do not apply where the agreement is contingent only on success, and not tied to a specific monetary result.

[45] Family law litigation is fundamentally different from civil litigation. One of the unique aspects of family law is that monetary recovery does not occur in the same way in family law litigation as it does in civil litigation. Instead the family finances – which are depleted daily by litigation costs – are divided. No outside funds are injected into the recovery. In these circumstances, it is inappropriate for a lawyer's fee to be contingent on the monetary result.

[46] It is also inappropriate for a lawyer's fees to be contingent on success. In family law litigation, the emphasis is "on resolution, mediation and ways to save time and expense in proportion to the complexity of the issues": *Frick v. Frick*, 132 O.R. (3d) 321, at para. 11. A fee based on success risks detracting from, and indeed undermining, this emphasis.

[47] When the primary issue is custody, a fee based in whole or in part on results achieved is even less appropriate. There are no "winners" and "losers". A custody decision by the court involves a determination of a child's best interests. It cannot be scrutinized to determine which parent had the more "successful disposition".

[48] The legislature excluded family law matters from contingency fee agreements on public policy grounds under s. 28.1(3)(b) of the Act. There is no reason to limit that exclusion to only agreements tied to monetary results.

Saroli v. Grette, 2022 ONSC 3560 (CanLII)¹⁴

The father's bill of costs included a \$10,000.00 "enhancement for excellent result as allowed by LSO." The Court, relying on *Jackson*, supra, stated that this was in fact a contingency fee equivalent to a bonus based on a successful outcome, and thus was prohibited by s. 28.1(3)(b) of the *Solicitor's Act* and the *Rules of Professional Conduct*.

SUBSCRIPTION FEES

When the term "subscription" is used, "Netflix" or a Gym Membership comes to mind. "Our Family Wizard" is another well-known subscription model service. This billing model has been frequently adopted in other areas of law where a client needs a recurring service such as small business/corporate/IP contracts or other services clients may need on an ongoing basis. In this model, clients pay a monthly fee to the lawyer in exchange for certain legal services per month from the lawyer or firm in exchange for the payments.¹⁵

On the surface, Family Law does not appear to lend itself to this model. However, some firms and businesses have employed this approach by being innovative and creative. Traditional Family Law services are offered alongside "DIY" online divorce services that offer subscriptions to use their platforms. Some firms that use this approach have well-developed brands and sell books or do speaking engagements to supplement their business. Other firms offer advice options at a fixed monthly rate. Many firms "bundle" subscription services with other billing models such as hourly billing or flat fees.

¹⁴ *Saroli v. Grette*, 2022 ONSC 3560 (CanLII)

¹⁵ "Law Firm Subscription Models: A Potential Solution to an Age-Old Problem" LexisNexis Insights, March 13, 2019; The Hidden Risk of Providing Legal Subscription Services, by Ali Katz, New Law Business Model, January 28, 2020,

This approach frequently evolves and is finessed over time, and one must be careful to clearly delineate the subscription plan's limits and balance the price and what is offered with your ability to make a profit from the service. For example, it may not be feasible to offer "unlimited" phone calls for a low price each month. Using this model requires a solid knowledge of the costs of the services to be offered, consideration of any ethical issues, and being unafraid of legal tech. The benefit of having a predictable and steady influx of funds every month makes this an attractive option to explore. One may think of this approach as a different way to do business.

This option may be appropriate for an innovative lawyer who is able to "think outside the box", leverage new technologies, and be a disrupter of the traditional approach to providing legal services in Family Law. Do your homework before embarking.

FIXED/FLAT FEES

Fixed fees or Flat fees are quite popular as it introduces more certainty into the process for both the client and the lawyer. Uncontested Divorces and Consultation Fees are examples of services that Family Law lawyers are able to easily scale and offer on a flat fee basis. With flat fee billing, the focus is on value rather than billable hours.¹⁶ This is a plus for clients. Lawyers benefit from completing a service for a set price that has the value of the work done built in and they do not have to track and bill in 1/10 of an hour. Increments. One may also provide limited services for a trial or coaching for a trial for a fixed fee. Most lawyers are familiar with the costs of each component of a trial, such as the cost of preparing a trial brief, or an Opening Statement or how many hours per day the lawyer will be arguing (multiplied by the number of days the trial is scheduled for) and can even factor in the amount of time that may be taken for "preliminaries" at the start of a trial. This level of "flat fee" pricing is very helpful for the client as all of the

¹⁶ "5 Benefits of Lawyer Flat Fee & Other Types of AFAs" By AltFee August 23, 2022

costs can be broken down and the client can see the budget for the trial and have a good idea of the work involved and how long it generally takes to complete discrete aspects of a trial. The client can make an informed decision and conduct a cost-benefit analysis of whether resolving their case via a trial is the most feasible option.

The disadvantage of flat fee billing is underestimating the amount of work involved in a case. Once the lawyer and client agree on a fixed price, one cannot resile from the amount agreed to unless it is built into the contract that any issues that arise will be resolved based on the lawyer's hourly rate. For example, if the case takes longer than expected, the lawyer may end up doing more work on the file than the value paid for the service. For some clients, it is challenging to know the exact value of the service being offered, and he or she may not trust the amount being quoted and may seek to negotiate the cost of the service downwards. It is very important for the lawyer to understand the value of their services and their costs before creating a flat fee for a particular service. Complex issues (e.g., Trusts) are not well-suited to flat fee billings, especially if unexpected evidence is introduced. In such scenarios the hourly fee is a more appropriate option.

UNBUNDLED LEGAL SERVICES – LIMITED SCOPE SERVICES ¹⁷¹⁸

There has been a significant increase in the number of self-represented family litigants, with one or both parties now appearing in court without a lawyer in over half of family law cases. This can result in negative outcomes for a litigant who is unfamiliar with the Family Court process, the Family Law Rules, and the law.

Many litigants feel that hiring a lawyer for their entire case is cost-prohibitive and is a disincentive to seeking full representation, leading them to be self-represent. Enlisting the help of a lawyer who offers

¹⁷ "The Need For Alternative Legal Services Delivery" Ontario Family Law Limited Scope Services Project 2020

¹⁸ I am indebted to Helena Birt, Barrister & Solicitor, for her assistance in this section and thankful for her support for this paper.

unbundled legal services is a great option that achieves the goals of both the client and the lawyer entering into this form of solicitor-client relationship.

In Ontario the Family Law Limited Scope Project assists to fill this gap between full legal representation and no legal representation. Its aim is to improve access to family justice for middle-income Ontarians by increasing the use of limited scope retainers, legal coaching and summary legal counsel in family law cases. The project supports real access to justice for families.

The Project facilitates access to and use of these services through the creation of a website which hosts a province-wide roster of trained lawyers willing and able to provide such services. Prospective clients are able to search this website by location, type of service and service provider. In family law, unbundled legal services under a limited scope retainer create a way for a lawyer to offer individualized services to clients depending on their needs. When providing unbundled services, a lawyer will only complete specific tasks as requested by the client and negotiated with the lawyer, as opposed to retaining a lawyer to handle all aspects of the case from beginning to end.

Unbundled family law services tend to include a range of essential services that can provide major assistance to clients who need them. These services often consist of drafting agreements, reviewing documents, preparing exhibits, preparing clients to appear in court on their own, and offering legal guidance and opinions when requested. The lawyer offering unbundled legal services may not even make a court appearance. It all depends on the services requested by the client.

For clients using unbundled legal services, the lawyer is retained to manage certain aspects of the case and the client continues to deal with all other aspects on their own, such as First Appearance Court. With fewer services being performed by the lawyer, the client usually has a less expensive bill to pay at the end. Lawyers may provide coaching / advice services, drafting services or may appear at a Conference or Motion or assist in any combination of the above. Lawyers who are assisting clients on Limited Scope

retainers must advise the Court and opposing Counsel of the limited nature of their retainer. The Family Law Limited Scope Project provides training for lawyers and support to ensure that the lawyer can provide the service appropriately and safely. Once training has been completed, lawyers can join the roster that prospective clients may choose from. This model provides a viable and affordable alternative to the traditional service delivery model but it is flexible enough accommodate the traditional hourly rate approach or a flat fee approach.

CONCLUSION

These and other approaches are available for lawyers to use to achieve their business goals as well as provide access to justice for those clients. The best options may be to be innovative and combine traditional and alternative models in your practice to achieve your goals, and your preferred practice model. Work-life balance, resiliency and sustainability will always be key considerations when determining and defining success in your practice.



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TAB 6A

17th Family Law Summit

Enforcing Support Orders – Private Enforcement
Under the *Family Law Rules*

Georgette Makhoul
Hogarth Hermiston Severs LLP

March 28, 2023



ENFORCING SUPPORT ORDERS – Private Enforcement Under the *Family Law Rules*

17th Family Law Summit, March 28th, 2023

Georgette Makhoul, *Hogarth Hermiston Severs LLP*

Acronyms to keep in mind:

- *FRSAEA* = *Family Responsibility and Support Arrears Enforcement Act*
- *FLR* = *Family Law Rules*

FRO is the go-to	
Exclusive right to enforce support orders under <i>FRSAEA</i>	<p>6(7) Subject to section 4*, no person other than the Director shall enforce a support order that is filed in the Director’s office.</p> <p>*section 4 is assignment of Director’s powers.</p> <p>9(1) Every support order made by an Ontario court, other than a provisional order, shall state in its operative part that unless the order is withdrawn from the Director’s office, it shall be enforced by the Director and that amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed.</p>

But, if FRO can do it, so can you...well, mostly.

PRECONDITION: WITHDRAW FROM FRO

First thing's first, the **support order must be withdrawn from FRO**. If the support order is filed with FRO and has not been withdrawn, then the support recipient is prohibited from enforcement ([*Schmidt v. Schmidt*](#), 2017 CarswellOnt 8161, 2017 ONSC 3040 (Ont. S.C.J.)).

FRO withdrawal	
Two scenarios under <i>FRSAEA</i>	<p>16 (1) A support order or support deduction order filed in the office of the Director may be withdrawn at any time, as described in subsection (1.1), unless the support order states that it and the related support deduction order cannot be withdrawn from the Director's office.</p> <p>(1.1) Withdrawal is effected by a written notice signed by,</p> <ul style="list-style-type: none">(a) the recipient and the payor, if the payor is in compliance as defined in the regulations; or(b) the recipient, if the payor is not in compliance as defined in the regulations. <p>(2) A support order and related support deduction order, if any, that have been assigned to an agency referred to in subsection 14 (1) may not be withdrawn under subsection (1) except by the agency or with the consent of the agency so long as the orders are under assignment.</p> <p>(3) The Director shall cease enforcement of an order upon its withdrawal from the Director's office.</p>
Definition of compliance per <i>O. Reg. 167/97: GENERAL</i>	<p>8.1 A payor is in compliance for the purposes of subsection 16 (1.1) of the Act if, during the 12 months before the month in which the written notice of withdrawal is received by the Director,</p> <ul style="list-style-type: none">(a) all support payments and all required arrears payments have been made consistently and in full; and(b) the amount owing never exceeds the support payable for one month by more than \$50.

RULE 26: ENFORCEMENT OF ORDERS

Rule 26 of the *FLR* is your starting point. As Justice Lang wrote in [Trick v. Trick](#) (2006), 2006 CarswellOnt 4139, 31 R.F.L. (6th) 237 (Ont. C.A.)¹:

24 The *FLR*, which set out the procedures available for the enforcement of a support order, apply whether the order is made under the *FLA* or under the *DA*. Rule 26 sets out the enforcement mechanisms available, including garnishment, seizure and sale, equitable receivership under s. 101 of the *CJA*, and, finally, by registration against land under the *FRSAEA*. A vesting order under s. 100 of the *CJA*, however, is not included among Rule 26 enforcement methods.

Enforcement highlights of Rule 26, <i>FLR</i>	
Where	<p>26 (1) The place for enforcement of an order is governed by subrules 5(5)*, (6), (7) and (7.1) (place for starting enforcement).</p> <p style="text-align: center;">*subrule 5(5) All steps in enforcement of a payment order, including a motion to suspend a support deduction order, shall take place,</p> <p style="text-align: center;">(a) in the municipality where the recipient resides; (b) if the recipient does not reside in Ontario, in the municipality where the order is filed with the court for enforcement; (c) if the person enforcing the order so chooses, in the municipality where the payor resides; or (d) in a motion under section 26 (income source dispute) of the <i>Family Responsibility and Support Arrears Enforcement Act, 1996</i>, in the municipality where the income source resides.</p> <hr/> <p>(15) If a person wants to enforce an order for support made outside Ontario under the <i>Divorce Act</i> (Canada), the order shall be registered in a court, as defined in subsection 20 (1) of that Act, as follows:</p> <ol style="list-style-type: none">1. If the recipient resides in Ontario, in the municipality where the recipient resides.2. If the recipient does not reside in Ontario, in the municipality where the payor resides.3. If neither the recipient nor the payor resides in Ontario, in the municipality where any property owned by the payor is located or, if the payor doesn't have any property, in any municipality.

¹ Leave to appeal refused: [2007 CarswellOnt 575 \(S.C.C.\)](#).

	(17) The person requesting the registration shall send to the court a certified copy of the order and a written request that the order be registered under paragraph 20 (3) (a) of the <i>Divorce Act</i> (Canada).
How	(2) An order that has not been obeyed may, in addition to any other method of enforcement provided by law, be enforced as provided by subrules (3) and (4).
What	<p>NOTE: Subrule (3) is enforcement of “payment orders” and subrule (4) is enforcement of other orders.</p> <p>Rule 2 provides that a “payment order means a temporary or final order, but not a provisional order, requiring a person to pay money to another person, including,</p> <ul style="list-style-type: none"> (a) an order to pay an amount under Part I or II of the <i>Family Law Act</i> or the corresponding provisions of a predecessor Act, (b) a support order, (c) a support deduction order, (d) an order under section 108 or subsection 213 (2) of the <i>Child, Youth and Family Services Act, 2017</i>, or under the corresponding provision of a predecessor Act, (e) a payment order made under rules 26 to 32 (enforcement measures) or under section 41 of the <i>Family Responsibility and Support Arrears Enforcement Act, 1996</i>, (f) a fine for contempt of court, (g) an order of forfeiture of a bond or recognizance, (h) an order requiring a party to pay the fees and expenses of, <ul style="list-style-type: none"> (i) an assessor, mediator or other expert named by the court, or (ii) a person conducting a blood test to help determine a child’s parentage, and (i) the costs and disbursements in a case;
Enforcement Options	<p>(3) A payment order may be enforced by,</p> <ul style="list-style-type: none"> (a) a request for a financial statement (subrule 27 (1)); (b) a request for disclosure from an income source (subrule 27 (7)); (c) a financial examination (subrule 27 (11)); (d) seizure and sale (rule 28); (e) garnishment (rule 29);

	<p>(f) a default hearing (rule 30), if the order is a support order;</p> <p>(g) the appointment of a receiver under section 101 of the <i>Courts of Justice Act</i>; and</p> <p>(h) registration under section 42* of the Family Responsibility and Support Arrears Enforcement Act, 1996.</p> <p style="text-align: center;">* s. 42 of <i>FRSAEA</i> is registration against land.</p>
<p>Form</p>	<p>(5) A statement of money owed shall be in Form 26, with a copy of the order that is in default attached.</p> <p>(6) Despite subrule (5),</p> <p style="padding-left: 40px;">(a) if the <i>Family Responsibility and Support Arrears Enforcement Act, 1996</i> applies, a statement of arrears in the form used by the Director may be used instead of Form 26;</p> <p style="padding-left: 40px;">(b) if the Interjurisdictional Support Orders Act, 2002 applies, a document receivable under section 49 of that Act may be used instead of Form 26.</p>
<p>Costs</p>	<p>(7) Unless the court orders otherwise, the recipient or the Director is entitled to the costs,</p> <p style="padding-left: 40px;">(a) of carrying out a financial examination; and</p> <p style="padding-left: 40px;">(b) of issuing, serving, filing and enforcing a writ of seizure and sale, a writ of temporary seizure and a notice of garnishment and of changing them by statutory declaration.</p> <p>(8) For the purpose of subrule (7), the recipient or the Director may collect under a writ of seizure and sale, a notice of garnishment or a statutory declaration changing either of them,</p> <p style="padding-left: 40px;">(a) the amounts set out in the regulations under the Administration of Justice Act and awarded under rule 24 (costs) for filing and renewing with the sheriff a writ of seizure and sale or a writ of temporary seizure;</p> <p style="padding-left: 40px;">(b) payments made to a sheriff, clerk, official examiner, authorized court transcriptionist or other public officer in accordance with the regulations under the <i>Administration of Justice Act</i> and awarded under rule 24 (costs), on filing with the sheriff or clerk a copy of a receipt for each payment or an affidavit setting out the payments made; and</p>

	(c) the actual expense for carrying out a financial examination , or any other costs to which the recipient or the Director is entitled under subrule (7), on filing with the sheriff or clerk an affidavit (Form 26A) setting out the items of expense in detail.
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Rule 17(12) provides that a case **conference**, settlement conference or trial management conference is **not required** in enforcement of orders, but may be held at a party's request or judge's discretion.

Not all options available to FRO are available to a support recipient for private enforcement, such as suspension of payor's driver's license or passport.

Contempt under r. 31 is available for enforcement of an order other than a payment order (r. 26(4) and r. 31(1)). Contempt is not available for orders requiring "payment of money" as per the Court of Appeal in [Forrest v. Lacroix Estate](#) (2000), 48 O.R. (3d) 619. This was also addressed by the Supreme Court of Canada in [Dickie v. Dickie](#), [2007] 1 S.C.R. 346. The support payor in *Dickie* had a long history of defaulting. Justice Greer ordered the support payor to *secure* his support obligations by providing an irrevocable letter of credit and to post security for costs. The payor did not. Justice Stewart then found the payor in contempt (see (2004), 1 R.F.L. (6th) 167 (Ont. S.C.J.)). The Ontario Court of Appeal overturned the decision. The Supreme Court of Canada reversed the OCA's decision as Justice Greer's order was not for "payment of money" and subject to contempt.

See **Rule 32** for **bonds** and **warrants**, where applicable.

RULE 27: REQUIRING FINANCIAL INFORMATION

It may be prudent to collect financial information before undertaking more onerous options, like a default hearing.

Three main tools under r. 27:

1. Request for a financial statement – r. 27(1)
2. Request for disclosure from an income source – r. 27(7)
3. Financial examination – r. 27(11).

1. Financial Statement from Support Payor	
Request	27. (1) If a payment order is in default, a recipient may serve a request for a financial statement (Form 27) on the payor.
Support payor’s obligations under r. 13	(4) If a party is required under this rule to give a financial statement, the following subrules apply with necessary changes: <div style="margin-left: 40px;"> 13 (6) (full disclosure) 13 (7) or (7.1) (income tax documents) 13 (11) (insufficient financial information) 13 (12) (updating financial statement) 13 (15) (correcting and updating) 13 (16) (order to file statement). </div>
Frequency of request	(3) A recipient may request a financial statement only once in a six-month period, unless the court gives the recipient permission to do so more often.

The benefits of requesting a financial statement:

- a. Gather information on income and assets for other enforcement mechanisms, like garnishment or seizure/sale.
- b. If support payor fails to provide a financial statement, mechanism to pursue imprisonment. See below.

Due	(2) Within 15 days after being served with the request, the payor shall send a completed financial statement (Form 13) to the recipient by mail, fax or email.
If fails to do so, then	(5) The court may, on motion, order a payor to serve and file a financial statement.

If fails again, then	(6) If the payor does not serve and file a financial statement within 10 days after being served with the order , the court may, on motion with special service (subrule 6 (3)), order that the payor be imprisoned continuously or intermittently for not more than 40 days .

2. Disclosure From an Income Source	
Request	27. (7) If a payment order is in default, the recipient may serve a request for a statement of income (Form 27A) on an income source of the payor, requiring the income source to prepare and send to the recipient, by mail, fax or email, a statement of income (Form 27B).
Frequency of request	(8) A recipient may request a statement of income from an income source only once in a six-month period, unless the court gives the recipient permission to do so more often.

The benefit is to gather income information from known income sources or undisclosed income sources.

Due	Form 27A : 10 days of being served w. the Request.
If fails to do so, then	(9) The court may, on the recipient's motion, order an income source to serve and file a statement of income.
If fails again, then	(10) If the income source does not serve and file a statement of income within 10 days after being served with the order, the court may, on the recipient's motion, order the income source to post a bond (Form 32).

3. Financial Examination	
Payor or 3rd party	27. (11) If a payment order is in default, the recipient may serve on the payor, by special service (subrule 6 (3)), an appointment for a financial examination (Form 27C), requiring the payor to, <ul style="list-style-type: none"> (a) come to a financial examination; (b) bring to the examination any document or thing named in the appointment that is in the payor's control or available to the payor on request, relevant to the enforcement of the order, and not protected by a legal privilege; and

	<p>(c) serve a financial statement (Form 13) on the recipient, not later than seven days before the date of the examination.</p> <p>(12) If a payment order is in default and a person other than the payor may know about the matters listed in subrule (17), the recipient may require that person to come to a financial examination by serving a summons to witness (Form 23) and the witness fee (subrule 23 (4)) on the person by special service (subrules 6 (3) and (4)).</p>
Frequency	(22) A recipient may conduct only one financial examination of a payor and one financial examination of any other person in a six-month period, or more often with the court's permission.
Notice	(15) A payor who is served with an appointment or a person who is served with a summons for a financial examination shall have at least 10 days' notice of the time and place of the examination.

See subrules 27(13), (14) and (16) re place, method of recording, other rules, etc.

Benefits are again information gathering and a mechanism for imprisonment should the payor or 3rd party fail to comply.

Scope of examination	<p>(17) On a financial examination, the payor or other person may be questioned about,</p> <ul style="list-style-type: none"> (a) the reason for the payor's default; (b) the payor's income and property; (c) the debts owed to and by the payor; (d) the disposal of any property by the payor either before or after the making of the order that is in default; (e) the payor's past, present and future ability to pay under the order; (f) whether the payor intends to obey the order, and any reason for not doing so; and (g) any other matter relevant to the enforcement of the order.
Non-compliance scenarios	<p>(18) Subrule (19) applies if a payor who is served with an appointment or a person who is served with a summons for a financial examination,</p> <ul style="list-style-type: none"> (a) does not come to the examination as required by the appointment or summons;

	<p>(b) does not serve on the recipient a financial statement as required by the appointment;</p> <p>(c) comes to the examination, but does not bring a document or thing named in the appointment or summons; or</p> <p>(d) comes to the examination, but refuses to take an oath or affirm or to answer a question.</p>
Then	<p>(19) The court may, on motion, make an order and give directions for another financial examination of the payor or other person and may in addition require the payor or person to post a bond (Form 32).</p> <p>Also, w.r.t. 3rd parties, subrule 23(7) re failure to obey summons apply:</p> <p>27 (14) Subrules 19 (4), (5) and (8) (documents protected by legal privilege, use of privileged documents, documents omitted from affidavit) and 23 (7) (failure to obey summons) apply to a financial examination, with necessary changes.</p>
If fails again, then	<p>(20) If a payor or other person, without sufficient excuse, fails to obey an order or direction made under subrule (19), the court may, on motion with special service (subrule 6 (3)), order that the payor or person be imprisoned continuously or intermittently for not more than 40 days.</p> <p>(21) The court may exercise its power under subrule (20) in addition to or instead of its power of forfeiture under rule 32 (bonds, recognizances and warrants).</p>

RULE 28: SEIZURE AND SALE

Seizure and sale, formerly referred to as a “writ of execution”, directs the sheriff to... that’s right... seize and sell property owned by the defaulting payor. The sale proceeds are paid to the support recipient.

A writ does not avail the support recipient an interest in the property itself ([Salter v. Salter Estate](#) (2009), 2009 CarswellOnt 1272, 49 E.T.R. (3d) 139 (Ont. S.C.J.)).

The property that can be seized and sold are land and personal property.

A. Land

- Can include the principle residence of a debtor if the value of the residence exceeds the prescribed amount under the regulation (ss. 2(2), (3) of the [Execution Act](#)²). The max value under the [regulation](#)³ for a principle residence is \$10,783 (s. 1(2) of the reg.) The debtor is reimbursed the max value.
- A writ can also be registered against a jointly owned matrimonial home in which execution of the writ is against the debtor’s one-half interest. In [Hobbs v. Topping](#), 2016 CarswellOnt 16491, 2016 ONSC 2132 (Ont. S.C.J.) where FRO collected the debt from the net sale proceeds “off the top”. However, before the sale proceeds were disbursed, the Court required the payor to reimburse the recipient 50% of the debt collected by FRO. Otherwise, the recipient would be paying 50% of her own arrears.

B. Personal property

- Exemptions to personal property are listed at s. 2(1) of the [Execution Act](#). But, if the value of the property is greater than what is listed in the regulation, the exemption to the sale is lost. The debtor is reimbursed the max value. The exemptions and max values are:
 1. Necessary clothing of the debtor and the debtor’s dependants.
(Value max: N/A)
 2. Household furnishings and appliances that are of a value not exceeding the prescribed amount.
(Value max: \$14,180)
 3. Tools and other personal property of the debtor, not exceeding the prescribed amount in value, that are used by the debtor to earn income from the debtor’s occupation.

² R.S.O. 1990, c. E.24.

³ O. Reg. 657/05.

(Value max: (i) in the case of a debtor engaged solely in the tillage of the soil or farming, \$31,379 for livestock, fowl, bees, books, tools and implements and other chattels ordinarily used by the debtor in the debtor's occupation, or (ii) in any other case, \$14,405.)

4. One motor vehicle that is of a value not exceeding the prescribed amount.
(Value max: \$7,117)
5. Personal property prescribed by the regulations that is of a value not exceeding the prescribed amount.

Process		
Method of filing w. Clerk	In person	Electronic
Available to	All, including support recipient as a self-represented litigant.	28 (11) The electronic filing and issuance of documents under this rule is only available for, (a) lawyers; (b) the Director of the Family Responsibility Office; and (c) Ministers or bodies acting under the authority of an Act of Canada or Ontario.
Forms	28 (1) The clerk shall issue a writ of seizure and sale (Form 28) if a recipient files, (a) a request for a writ of seizure and sale (Form 28A); and (b) a statement of money* owed (subrules 26 (5) and (6)). * Form 26	Only requires a request for a writ of seizure and sale (Form 28A). (1.2) Subject to subrule (11), a recipient may file a request for a writ of seizure and sale electronically, in which case, (a) clause (1) (b) does not apply to the request; (b) the writ shall be issued electronically; and (c) the issued writ shall automatically be filed electronically with the sheriff specified in the writ. However,

		(6.4) In order to confirm whether a writ of seizure and sale filed with a sheriff electronically has been properly issued and filed, the sheriff may require the recipient to provide to the sheriff, in the manner and within the time the sheriff specifies, a statement of money owed (subrule 26 (5) or (6))
File w. sheriff	In person, or electronic filing available (1.1) Subject to subrule (11), a writ of seizure and sale issued under subrule (1) may be filed with a sheriff electronically	Automatically filed with sheriff – see above.

Previously, a writ of seizure and sale expired after six years. Now, a **writ continues in effect** until the writ is withdrawn or a court orders otherwise. This includes writs issued prior to the *FLR* (r. 28(5)). Also see [Khan v. Subhani](#), 2017 CarswellOnt 4337, 2017 ONSC 246 (Ont. S.C.J.).

28(4) Writ of Seizure and Sale Continues Until		
(a) Withdrawn	<p>28 (6.5) The sheriff may withdraw an electronically filed writ of seizure and sale if,</p> <p style="padding-left: 40px;">(a) the sheriff determines that the writ was improperly issued or filed; or</p> <p style="padding-left: 40px;">(b) the recipient fails to comply with subrule (6.4)*.</p> <p style="padding-left: 80px;">* fail to provide statement of money if writ electronically filed</p> <p>(6.6) A writ may be withdrawn under subrule (6.5) at any time during its enforcement.</p>	<p>28 (7) The person who obtained a writ to enforce an order shall immediately withdraw it from every sheriff’s office where it has been filed if,</p> <p style="padding-left: 40px;">(a) the person no longer wants to enforce the order by a writ;</p> <p style="padding-left: 40px;">(b) in the case of a payment order, the payor’s obligation to make periodic payments under the order has ended and all other amounts owing under it have been paid; or</p> <p style="padding-left: 40px;">(c) in the case of any other order, the person against whom the writ was issued has obeyed the order.</p>

By	(6.8) The sheriff shall give notice of a withdrawal under subrule (6.5) or a correction under subrule (6.7) to the recipient	(7.1) A writ may be withdrawn under subrule (7) by, (a) giving written notice to the sheriff that the writ should be withdrawn; or (b) subject to subrule (11), filing notice of a withdrawal of writ electronically.
(b) Court orders otherwise	(8) The court may, on motion, make an order changing the terms of a writ, withdrawing it or temporarily suspending it, even if the writ was issued by another court in Ontario.	
Must serve Order	<p>(9) The person making the motion, or another person named by the court, shall serve a copy of the order on,</p> <p>(a) every sheriff in whose office the writ has been filed; and (b) if the writ was issued by the court in another place, or by another court, on the clerk of the court in the other place or the clerk of the other court.</p> <p>(9.1) If the court makes an order under subrule (8) making any of the following changes to a writ that has been filed with a sheriff, the person required to serve a copy of the order under subrule (9) may, subject to subrule (11), file the changes to the writ with the sheriff electronically instead of serving a copy of the order on the sheriff under clause (9) (a):</p> <ol style="list-style-type: none"> 1. The name of a party. 2. The recipient’s lawyer or other representative. 3. The amount owing under the writ. 	

Updating, Correcting, Changing or Temporarily Suspending Writ	
If payment received	<p>28. (6) If a writ of seizure and sale has been filed with a sheriff,</p> <p>(a) the recipient shall, on the sheriff’s request, provide a statutory declaration setting out details of all payments received by or on behalf of the recipient; and (b) the sheriff shall update the writ accordingly.</p>

If payment order changed	(3) If a court changes a payment order that is being enforced by a writ of seizure and sale, a statutory declaration to sheriff (Form 28B) may be filed with the sheriff and once filed, it has the same effect as a declaration mentioned in subrule (2).
Error in writ electronically filed	(6.7) If the sheriff makes a determination that a writ of seizure and sale filed with the sheriff electronically was properly issued or filed but contains an error or otherwise differs from the order to which the writ relates, the sheriff may correct the writ to make it consistent with the order.
Court Order changing or temporarily suspending⁴ writ	<p>(8) The court may, on motion, make an order changing the terms of a writ, withdrawing it or temporarily suspending it, even if the writ was issued by another court in Ontario.</p> <p>(9) The person making the motion, or another person named by the court, shall serve a copy of the order on,</p> <p style="padding-left: 40px;">(a) every sheriff in whose office the writ has been filed; and</p> <p style="padding-left: 40px;">(b) if the writ was issued by the court in another place, or by another court, on the clerk of the court in the other place or the clerk of the other court.</p> <p>(9.1) If the court makes an order under subrule (8) making any of the following changes to a writ that has been filed with a sheriff, the person required to serve a copy of the order under subrule (9) may, subject to subrule (11), file the changes to the writ with the sheriff electronically instead of serving a copy of the order on the sheriff under clause (9) (a):</p> <ol style="list-style-type: none"> 1. The name of a party. 2. The recipient’s lawyer or other representative. 3. The amount owing under the writ.

Also available is a **writ of temporary seizure** of property under r. 28(10):

(10) The court may, on motion with special service (subrule 6 (3)), give permission to issue a writ of temporary seizure ([Form 28C](#)) directing the sheriff to take possession of and **hold all or part of the land and other property** of a person against whom an order has been made and to hold **any income from the property** until the writ is withdrawn or the court orders otherwise.

⁴ See [Fisher v. Fisher](#) (2003), 2003 CarswellOnt 785, 37 R.F.L. (5th) 108 (Ont. S.C.J.).

RULE 29: GARNISHMENT

Potentially the most effective remedy under the *FLR*. A debt/payment owed to the support payor is intercepted before it's paid to the support payor and diverted to the support recipient.

Process	
Notice is Issued	<p>29. (1) The clerk shall issue as many notices of garnishment (Form 29A or 29B) as a recipient requests if the recipient files,</p> <p style="padding-left: 40px;">(a) a request for garnishment (Form 29) or an extra-provincial garnishment process referred to in section 50 of the <i>Family Responsibility and Support Arrears Enforcement Act, 1996</i>⁵; and</p> <p style="padding-left: 40px;">(b) a statement of money owed (subrules 26 (5) and (6)).</p> <hr/> <p>Note: Change in garnishment amount as a result of indexed support does not require new notice</p> <p style="padding-left: 40px;">(14) If a notice of garnishment enforces a support order that indexes periodic payments for inflation, the recipient may serve on the garnishee and on the payor a statutory declaration of indexed support (Form 29D) setting out the new amount to be paid under the order, and file the declaration with the court.</p> <p style="padding-left: 40px;">(15) A statutory declaration of indexed support requires the garnishee to pay the new amount set out in the declaration from the time it is served on the garnishee.</p>
Service	<p>(3) The notice of garnishment shall be served on the payor and on the garnishee but the payor shall, in addition, be served with the documents filed under subrule (1).</p> <hr/> <p>(6) If the garnishee is a financial institution, the notice of garnishment and all further notices required to be served under this rule shall be served at the branch of the institution where the debt to the payor is payable, unless subrule (6.1) applies.</p> <hr/> <p>(6.1) If the garnishee is a financial institution to which the Bank Act (Canada), the Cooperative Credit Associations Act (Canada) or the Trust and Loan Companies</p>

⁵ For an example of an extra-provincial garnishment see [Snead v. Snead](#), [2003] O.J. No. 4226 (Ont. C.J.).

	<p>Act (Canada) applies and the garnishment enforces a support order, the notice of garnishment and all further notices required to be served under this rule,</p> <p>(a) shall be served at the designated office of the institution established for this purpose; and</p> <p>(b) shall be accompanied by a statement to garnishee financial institution re support (Form 29J).</p>
<p>Paid to</p>	<p>(11) A garnishee who has been served with a notice of garnishment shall make the required payments to,</p> <p>(a) the Director, if the notice of garnishment relates to an order being enforced by the Director;</p> <p>(b) the clerk, if the notice of garnishment does not relate to an order being enforced by the Director.</p>
	<p>Then</p> <p>(12) On receiving money under a notice of garnishment, the Director or clerk shall, even if a dispute has been filed, but subject to subrules (9) and (13), immediately pay,</p> <p>(a) to the recipient, any part of the money that comes within the priority created by subsection 2 (3)* of the Creditors' Relief Act, 2010; and</p> <p>(b) to the sheriff, any part of the money that exceeds that priority.</p> <p>* Section 2(3) of the <i>Creditors' Relief Act, 2010</i>⁶:</p> <p>(3) A support or maintenance order has the following priority over other judgment debts, other than debts owing to the Crown in right of Canada, regardless of when an enforcement process is issued or served⁷:</p> <ol style="list-style-type: none"> 1. If the maintenance or support order requires periodic payments, the order has priority to the extent of all arrears owing under the order at the time of seizure or attachment.

⁶ Also see [Hillock v. Hillock Estate](#) (2001), 2001 CarswellOnt 3458, 21 R.F.L. (5th) 295 (Ont. S.C.J.).

⁷ Also see [Herman v. Rathbone](#) (2000), 2000 CarswellOnt 195, 46 O.R. (3d) 678, additional reasons at (2000), 2000 CarswellOnt 2193, 9 R.F.L. (5th) 64 (Ont. S.C.J.).

	<p>2. If the support or maintenance order requires the payment of a lump sum, the order has priority to the extent of any portion of the lump sum that has not been paid.</p> <p>Also note s. 2(4) of the <i>Creditors' Relief Act, 2010</i>: (4) Support and maintenance orders rank equally with one another.⁸</p> <p>Exceptions to r. 29(12):</p> <ul style="list-style-type: none"> - Joint debt (subrule (9)) - Discretion of the court (subrule (13)) – i.e., require motion and interim order that money be held pending hearing of dispute. Otherwise, will be paid out to recipient. See DeRose v. DeRose, 2017 ONSC 2852, 2017 CarswellOnt 8499 (Ont. S.C.J.), and Ontario (Director of Support & Custody Enforcement) v. Ott (1988), 1988 CarswellOnt 305, 17 R.F.L. (3d) 166 (Ont. Prov. Ct.).
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Effect and Duration	
Attaches to	<p>29. (4) A notice of garnishment attaches,</p> <p style="padding-left: 40px;">(a) every debt that is payable by the garnishee to the payor at the time the notice is served; and</p> <p style="padding-left: 40px;">(b) every debt that is payable by the garnishee to the payor,</p> <p style="padding-left: 80px;">(i) after the notice is served, or</p> <p style="padding-left: 80px;">(ii) on the fulfilment of a condition after the notice is served.</p> <hr/> <p>(10) A notice of garnishment continues to attach future periodic payments even though the total amount owed when it was served is fully paid up.</p> <ul style="list-style-type: none"> - In combination with subrule 29(5), if a payor has paid the arrears and wishes to discharge the notice of garnishment, the payor ought to file a dispute. The payor would still have to convince the Court to discharge the garnishment. See Ontario (Director of Support & Custody Enforcement) v. Boyko (1989), 1989 CarswellOnt 3212 (Ont. Dist. Ct.).

⁸ Equally not rateably. See ss. 4(7), 11(1)(7) and 12(7)(8). Also, [Borland v. Rowley](#) (1990), 1990 CarswellOnt 250, 26 R.F.L. (3d) 160 (Ont. Prov. Ct.).

Duration	(5) The notice of garnishment continues in effect from the time of service on the garnishee until it is withdrawn or stopped under this rule or until the court orders otherwise under this rule.
	(31) The recipient shall immediately send a notice to stop garnishment (Form 29I), by mail, fax or email, to the garnishee and payor and file it with the clerk if, <ul style="list-style-type: none"> (a) the recipient no longer wants to enforce the order by garnishment; or (b) the requirement to make periodic payments under the order has ended and all other amounts owing under the order have been paid.

Changes – via Motion	
Generally	29. (20) The court may also use the powers listed in subrule (19), on motion or on its own initiative, even if the notice of garnishment was issued by another court, <ul style="list-style-type: none"> (a) on a motion under section 7 of the Wages Act; (b) if the court replaces a temporary payment order with a final payment order; (c) if the court indexes or changes a payment order; or (d) if the court allows an appeal.
Ability to Pay	(21) If there has been a material change in the payor’s circumstances affecting the payor’s ability to pay, the court may, on motion, use the powers listed in subrule (19).

Changes – via Notice	
All changes below require notice	29. (27) A notice referred to in subrule (23), (24), (25) or (26) shall be sent to the clerk, and to the recipient or the Director (depending on who is enforcing the order), by mail or email.
Payor not working or receiving money	(23) Within 10 days after a payor stops working for or is no longer receiving any money from a garnishee, the garnishee shall send a notice as subrule (27) requires, <ul style="list-style-type: none"> (a) saying that the payor is no longer working for or is no longer receiving any money from the garnishee;

	<p>(b) giving the date on which the payor stopped working for or receiving money from the garnishee and the date of the last payment to the payor from the garnishee; and</p> <p>(c) giving the name and address of any other income source of the payor, if known.</p>
<p>Payor working or receiving money again</p>	<p>(24) Within 10 days after the payor returns to work for or starts to receive money again from the garnishee, the garnishee shall send another notice as subrule (27) requires, saying that the payor has returned to work for or started to receive money again from the garnishee.</p> <p>and</p> <p>(25) Within 10 days after returning to work for or starting to receive money again from the garnishee, the payor shall send a notice as subrule (27) requires, saying that the payor has returned to work for or started to receive money again from the garnishee</p>
<p>New income source</p>	<p>(26) Within 10 days after starting to work for or receive money from a new income source, the payor shall send a notice as subrule (27) requires, saying that the payor has started to work for or to receive money from the new income source.</p> <p>In addition to service of notice requirement under subrule 29(27), if a new income source is available:</p> <p>(28) When the clerk receives a notice under subrule (26), the clerk shall immediately notify the recipient or the Director (depending on who is enforcing the order) by mail or email.</p> <p>(29) If no written objection is received within 10 days of the clerk notifying the recipient or the Director that a notice under subrule (26) was received, the clerk shall,</p> <p>(a) issue a new notice of garnishment directed to the new garnishee, requiring the same deductions as were required to be made, under the previous notice of garnishment or statutory declaration of indexed support, on the day that the notice under subrule (26) was received; and</p> <p>(b) send a copy of the new notice of garnishment to the payor and the new garnishee, by mail or email.</p>

	(30) Issuing a new notice of garnishment under clause (29) (a) does not cancel any previous notice of garnishment or statutory declaration of indexed support.
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Garnishment under rule 29 is administrative in nature in that a Court Order is not required. However, if a dispute to the garnishment is filed, the process becomes subject to judicial intervention (see [Snead v. Snead](#) (2003), 2003 CarswellOnt 4304 (Ont. C.J.)). A **garnishment hearing** is then required.

Garnishment Hearing	
Dispute notice	29. (16) Within 10 days after being served with a notice of garnishment or a statutory declaration of indexed support, a payor, garnishee or co-owner of a debt may serve on the other parties and file a dispute (Form 29E , 29F or 29G).
Notice of hearing	(17) The clerk shall, on request, issue a notice of garnishment hearing (Form 29H), (a) within 10 days after a dispute is served and filed; or (b) if the recipient says that the garnishee has not paid any money or has not paid enough money.
	(18) The clerk shall serve and file the notice not later than 10 days before the hearing.
Court Orders available	(19) At a garnishment hearing, the court may make one or more of the following temporary or final orders: 1. An order dismissing the dispute. 2. An order that changes how much is being garnished on account of a periodic payment order . The court may make an order under this paragraph even if it does not have the authority to change the payment order itself. 2.1 An order that changes how much is being garnished on account of a periodic payment order and that, at the same time , changes the payment order itself. The court may make an order under this paragraph only if, i. the payment order is one that the court has the authority to change, and ii. the parties to the payment order agree to the change, or one of those parties has served and filed notice of a motion to have the change made.

	<p>3. An order changing how much is being garnished on account of a non-periodic payment order.</p> <p>4. An order suspending the garnishment or any term of it, while the hearing is adjourned or until the court orders otherwise.</p> <p>5. An order setting aside the notice of garnishment or any statutory declaration of indexed support.</p> <p>6. An order that garnished money held or received by the clerk, Director or sheriff be held in court.</p> <p>7. An order that garnished money that has been paid out in error to the recipient be paid into and held in court, returned to the garnishee or sent to the payor or to the co-owner of the debt.</p> <p>8. An order that garnished money held in court be returned to the garnishee or be sent to the payor, the co-owner of the debt, the sheriff, the clerk or the Director.</p> <p>9. An order deciding how much remains owing under a payment order that is being enforced by garnishment against the payor or garnishee.</p> <p>10. If the garnishee has not paid what was required by the notice of garnishment or statutory declaration of indexed support, an order that the garnishee pay all or part of what was required.</p> <p>11. An order deciding who is entitled to the costs of the garnishment hearing and setting the amount of the costs.</p>
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Subrule 29(19)(2.1) allows for a **change to a payment order during a garnishment hearing** on certain conditions. This, however, has to be tempered with the strong words of Justice Leach in [Wall v. Wall](#), 2013 CarswellOnt 2351, 2013 ONSC 1353 (Ont. S.C.J.):

21 It certainly is not an opportunity for a wide-ranging expansion of the underlying merits dispute, in order to obtain an effective variation or expansion of the original substantive order.

22 This is emphasized by [Snead v. Snead](#), [2003] O.J. No. 4226 (Ont. C.J.), and the authorities cited therein, which confirm that, despite broad wording which might suggest otherwise, the jurisdiction and powers of a court dealing with a garnishment hearing pursuant to Rule 29(19) actually are somewhat limited, and must be exercised within relatively narrow confines.

23 In particular, the court must not, through the "veneer" of a garnishment hearing or any ancillary exercise in purported "interpretation", effectively embark on variation of the underlying substantive order on which the garnishment is based.

The payor in *Wall* decided to raise new issues (such as the state of the matrimonial home upon the support recipient leaving the home) during cost submissions at trial. When the trial judge denied addressing the new issues, the payor tried again in the context of a garnishment hearing. The payor was not successful.

As for what **defences** are available to a payor at a garnishment hearing, Justice Reinhardt at para. 25 in [Snead v. Snead](#), [2003] O.J. No. 4226 (Ont. C.J.) (a must-read) aptly wrote:

25 In theory, rule 29 of the *Family Law Rules* should be a complete "code" that sets out the law of garnishment fully. [...]

Nevertheless, there is one glaring void in the code that the Family Rules Committee left in rule 29. It is completely silent on what are legitimate "defences" or grounds to dispute a notice of garnishment. Fortunately, a list of such grounds is not that difficult to draw up if one maintains a clear and rational focus on the debt and on the garnishment process itself. In fact, Provincial Judge James did precisely that in [Ontario \(Director of Support & Custody Enforcement\) v. Galea](#), 1990 CarswellOnt 441, [1990] O.J. No. 2411 (Ont. Prov. Div.), a garnishment hearing for non-payment of support. The payor (or "debtor" as this party was called under the older rules of court) disputed the garnishment on the ground that the support order was suspended when he was refused access to the children's educational records in violation of the support order. Judge James stated:

The debtor alleges that in April of 1989, he made a written demand under paragraph 4 of the order, but that he was not provided with the consents until late September of that year. He therefore maintains that no support should have been payable subsequent to the date of the demand, or at least between the date of the demand and the date of receipt of the consents in September 1989.

It is my view that, regardless of how true these allegations may be, the debtor is raising improper grounds to dispute the garnishment. **A garnishment hearing or any other enforcement remedy proceeds on the assumption that the order being enforced is still in full force and effect unless there is something on the face of the text of the order that indicates that it is no longer operating or that it is or has been temporarily suspended.** There is nothing on the face of Justice Potts' order that gives any such indication and I have no mandate at this or any other enforcement proceeding to go behind the order to determine whether it has been suspended or otherwise terminated.

The boundary between variation and enforcement is, at times, difficult to ascertain but, in this case, the debtor is inviting this court to suspend, retroactively, the operation of Justice Potts' order or to find on the evidence that it was suspended by its own terms indefinitely or for a period of several months. "Suspension" of an order, however, is an aspect of the power to vary an order. In describing a court's power to modify a support order, subsection 37(2) of the *Family Law Act, 1986*, S.O. 1986, c. 4, provides:

If the court is satisfied that there has been a material change in the defendant's or respondent's circumstances or that evidence not available on the previous hearing has become available, the court may discharge, vary or suspend a term of the order, prospectively or retroactively, relieve the respondent from payment of part or all of the arrears or any interest due on them and make any order under section 34 that the court considers appropriate in the circumstances referred to in section 33.

There is no application before me to vary this order and, if there was, it would be dismissed for having been brought before the wrong court. Only the Ontario Court (General Division) can entertain any request for "variation".

The **grounds for a dispute** to a garnishment are **fairly limited**. Grounds would include:

1. That, at the time the **notice of garnishment** was **served**, the **debtor did not owe money** to the creditor, either,
 - (a) because the amounts claimed to be in arrears were paid; or
 - (b) because the amounts claimed to be in arrears had accrued under an order that, on its face, is suspended or no longer operative or that has been suspended or found to be inoperative in a proceeding before a court of competent jurisdiction.

2. That, at the time the **notice of garnishment** was **served**, the **debtor owed a lesser sum** than that claimed by the creditor in the notice of garnishment, either,
 - (a) because some of the amount claimed to be in arrears was paid; or
 - (b) because some of the amount claimed to be in arrears had accrued under an order that, on its face, is suspended or no longer operative or that has been suspended or found to be inoperative in a proceeding before a court of competent jurisdiction.

3. That, at the time the notice of garnishment was served, the garnishee did not owe, does not now owe and will not owe the debtor any money that is payable

to the debtor within the time prescribed in rule 83⁹, but if any such money becomes payable after the expiry of the time prescribed in rule 83, the reason for this deferred payment must be disclosed in the dispute.

4. That the garnishee owes or will owe money to the debtor that is payable to the debtor, but that this **money is not attachable or garnishable** on account of a **legal exemption**, the details of which must be set out in the dispute.

5. That the **garnishee** has a **right of set-off against the debtor**, the details of which must be set out in the dispute.

6. That the amount sought to be deducted by the notice of garnishment **exceeds** the **percentage** or the **amount** of the deduction allowed,

(a) under the provisions of section 7 of the [Wages Act](#), R.S.O. 1980, c. 526, as amended;

(b) in a court order made under section 7 of the *Wages Act*,

(c) in a court order made under section 68 of the federal [Bankruptcy Act](#), R.S.C. 1985, c. B-3; or

(d) by any other provision in law, the precise details of which must be set out in the dispute.

7. In light of paragraph 2 of rule 86*b*, that the amount of the deduction sought in the notice of garnishment from the non-wage payments to the debtor imposes an **urgent financial hardship** on the debtor. (In the case of excessive hardship because of amount deducted from wage payments by the notice of garnishment, the debtor should not file a dispute but make a motion under section 2 of the *Wages Act*.)

A few cases to consider re defences:

- **No debt owed to payor:** [Borges v. Santos](#), 2017 ONCJ 651, 2017 CarswellOnt 15176, 11 C.P.C. (8th) 191, 30 E.T.R. (4th) 148, 100 R.F.L. (7th) 483 (Ont. C.J.), additional reasons 2018 CarswellOnt 3099, 2 R.F.L. (8th) 492 (Ont. C.J.) addressed garnishment against a Henson trust. The Court found that the trust was truly discretionary and not a sham. Therefore, no debt was owed to the payor and child support could not be enforced against the trustees. However, “the money can be garnished or subject to execution once they come into Antonio’s hands” (para. 64). As an aside, Justice Kurz’s opening paragraph is apropos:

⁹ Rule 83 of old rules that were revoked in 1999: [Rules of the Ontario Court \(Provincial Division\) in Family Law Proceedings](#).

1 There is a maxim, going all the way back to Roman law, which holds that for every wrong, the law provides a remedy. Sadly, when applied to the non-payment of child support, this adage often falls short. It may be more accurate to say that the law cannot solve all of life's challenges. This case illustrates that truism.

- **No arrears owing:** In [Gundersen v. Gundersen](#), 2018 ONSC 6009, 2018 CarswellOnt 16706 (Ont. S.C.J.), the Order required the payor to pay \$16,100 upon receipt of his income tax refund. Recipient garnished payor's bank account and employer, but before the triggering event, i.e., receipt of the income tax refund. Therefore, the "garnishment was premature" (para. 12) and the garnished funds were returned to the payor. As an aside, the payor sought an apology as relief. That request was denied.
- **No arrears owing:** In [Ontario \(Director of Support & Custody Enforcement\) v. Craven](#), 1988 CarswellOnt 2382 (Ont. Fam. Ct.), the Order required the father to pay child support so long as the child resided with the mother and "while undergoing full-time education [...] and is attaining passing grades in full-time education". The mother was required to keep the father informed. The child was not in full-time education nor was she passing. The mother did not keep the father informed (non-compliance w. the Order). Therefore, there were no arrears owing to the mother and the garnishment notice was vacated.
- **No arrears owing** of section 7 expenses: Expenses did not crystalize (including failure of recipient to calculate the s. 7 contribution) at time of garnishment - [Hathaway v. Hathaway](#), 2015 CarswellOnt 2313, 60 R.F.L. (7th) 189, 2015 ONSC 212 (Ont. S.C.J.), additional reasons 2015 CarswellOnt 5994, 60 R.F.L. (7th) 197, 2015 ONSC 2383 (Ont. S.C.J.).
- **Set-off:** In [Ontario \(Director of Support & Custody Enforcement\) v. Banoub](#), 1989 CarswellOnt 2759 (Ont. Fam. Ct.), the support payor was a real estate agent. Re/Max owed the realtor money for commissions earned but the payor owed Re/Max administrative fees, which exceeded his commissions. Justice King provided that:

8 If I accept that a set-off by Re/Max is allowable then there is no debt owing to the debtor. The Supreme Court of Canada dealt with the issue of set-off in [Telford et al v. Holt et al](#), 41 D.L.R. 4th 385. The Court discussed **three types of set-offs - by agreement, by law and in equity**. I am satisfied that in this case there is a set-off by agreement. It is clear from paragraphs 7, 9 and 31 of the agreement that Re/Max and the debtor expressly agreed to create a right of set-off. As well, although not necessary for me to find, I am satisfied that according to the test set out in *Telford* there is a set-off by law. In this case both the obligation of Re/Max to pay the commission and the obligation of the debtor to pay Re/Max for the various charges are debts. As well both debts are mutual cross obligations - "debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading".

Given this right of set-off it is apparent that Re/Max owes no debt to the debtor, to the contrary, the debtor owes Re/Max money.

Accordingly, Re/Max owed nothing to the debtor. The dispute was allowed and the garnishment was discharged.

Joint Debts Subject to Garnishment	
Joint debts	29. (7) Subrules (4) and (5) also apply to debts owed to the payor and another person jointly.
Procedure	(8) If a garnishee has been served with a notice of garnishment and the garnishee owes a debt to which subrules (4) and (5) apply to the payor and another person jointly, <ul style="list-style-type: none"> (a) the garnishee shall pay, in accordance with subrule (11), half of the debt, or the larger or smaller amount that the court orders; (b) the garnishee shall immediately send the other person a notice to co-owner of debt (Form 29C) by mail, fax or email, to the person’s address in the garnishee’s records; and (c) the garnishee shall immediately serve the notice to co-owner of debt on the recipient or the Director, depending on who is enforcing the order, and on the sheriff or clerk if the sheriff or clerk is to receive the money under subrule (11) or (12).
Money to be held	(9) Despite subrule (12), if served with notice under clause (8) (c), the sheriff, clerk or Director shall hold the money received for 30 days, and may pay it out when the 30 days expire, unless the other person serves and files a dispute within the 30 days.

Garnishment against, includes:

A. Wages – governed by section 7 of the <u>Wages Act</u>, R.S.O. 1990, c. W.1:	
Include	7 (1) For the purposes of this section, <p style="text-align: center;">“wages” does not include an amount that an employer is required by law to deduct from wages.</p> <p>Note: Deductions made to employee’s wages pursuant to a private loan do not constitute an amount “required by law to deduct”. The garnishment had priority</p>

	<p>over a loan agreement (see Desjarlais v. Desjarlais, 1985 CarswellOnt 327, 48 R.F.L. (2d) 412, 52 O.R. (2d) 796, 5 C.P.C. (2d) 217 (Ont. S.C.).)</p>
	<p>7 (1.1) For the purposes of this section, payments from an insurance or indemnity scheme that are intended to replace income lost because of disability shall be deemed to be wages, whether the scheme is administered by the employer or another person.</p>
	<p>Tips or gratuities – Jantunen v. Ross, 1991 CarswellOnt 463, 5 O.R. (3d) 433, 85 D.L.R. (4th) 461, 39 C.C.E.L. 93 (Ont. Div. Ct.).</p>
	<p>Real estate commissions - Cram v. Rideau Group Realty Ltd., 1991 CarswellOnt 923, (Cram v. Bellman) 2 O.R. (3d) 607, 35 C.C.E.L. 268 (Ont. Gen. Div.).</p>
<p>50% of net wages exempt</p>	<p>7 (3) Fifty per cent of a person’s wages are exempt from seizure or garnishment in the enforcement of an order for support or maintenance enforceable in Ontario.</p>
	<p>Judicial discretion to:</p> <p>(4) A judge of the court in which a writ of execution or notice of garnishment enforceable against a person’s wages is issued may, on motion by the creditor on notice to the person, order that the exemption set out in subsection (2) or (3) be decreased, if the judge is satisfied that it is just to do so, having regard to the nature of the debt owed to the creditor, the person’s financial circumstances and any other matter the judge considers relevant.</p> <p>(5) A judge of the court in which a writ of execution or notice of garnishment enforceable against a person’s wages is issued may, on motion by the person on notice to the creditor, order that the exemption set out in subsection (2) or (3) be increased, if the judge is satisfied that it is just to do so, having regard to the person’s financial circumstances and any other matter the judge considers relevant.</p>
	<p>A few great cases re exemption and priority:</p> <ul style="list-style-type: none"> - Harper v. Harper, 2002 CarswellOnt 3714 (Ont. S.C.J.) - Jonas v. Jonas, 2003 CarswellOnt 3830, 45 R.F.L. (5th) 360 (Ont. S.C.J.). - Jonas v. Da Silva, [2003] O.J. No. 5106, 2003 CanLII 38129 (Ont. S.C.J.). - Canadian Pacific Forest Products Ltd. v. Bjorklund, 1993 CarswellOnt 385, 12 O.R. (3d) 596, 15 C.P.C. (3d) 155 (Ont. Gen. Div.).

	<ul style="list-style-type: none"> - Pucaru aka Vacaru v. Purcaru, 2019 ONSC 1205, 2019 CarswellOnt 2457 (Ont. S.C.J.)
Federal Crown employees	<p>Civil servant, a Member of Parliament, a federally appointed judge, a senator, a member of the Canadian Armed Forces, etc.</p> <ul style="list-style-type: none"> - Recipient/creditor can invoke Garnishment, Attachment and Pension Diversion Act - See: Frangeskaki v. Ontario (Director of Support & Custody Enforcement), 1990 CarswellOnt 335, 31 R.F.L. (3d) 110 (Ont. Gen. Div.).
Restructuring share capital	<p>Garnishment failed as two weeks after payor served w. a Notice of Garnishment, family company no longer paid wages. But Court attributed previous year's gross income to payor. Harrington v. Harrington, 1994 CarswellOnt 1990 (Ont. Prov. Div.).</p>

B. Bank Accounts	
Even after garnishment of wages?	<p>Swami v. Swami, 1988 CarswellOnt 219, 13 R.F.L. (3d) 161, 26 C.P.C. (2d) 294 (Ont. Dist. Ct.), reversing (1987), 1987 CarswellOnt 232, 10 R.F.L. (3d) 92, 23 C.P.C. (2d) 141 (Ont. Prov. Ct.). Recipient garnished net wages, then filed w. FRO. FRO enforced further by garnishing payor's bank account, even though bank account balance was remainder of payor's wages. Total garnishment was 96.5% of net income. Argument was that only 50% of his wages in total should be garnished. FRO entitled to seize bank account as "the moneys have now taken on a different characterization than wages" (para. 10).</p> <p>However, Justice McGarry at para. 12 stated that:</p> <p style="padding-left: 40px;">when considering all the facts in this case and the intent of the Wages Act, s. 7(1) and (3) in particular, which state that a debtor is entitled to retain 50 per cent of his wages, should the director be entitled to recover all the funds that he is technically entitled to? I think not.</p>
No new accounts	<p>FLR</p> <p>29. (6.2) Subrules (4) and (5) do not apply to money in an account opened after a notice of garnishment is served as described in subrule (6) or (6.1).</p>

C. Money Payable Under a Pension Plan

Generally

Money payable under a pension plan is subject to s. 66(4) of the [Pension Benefits Act](#) (provincial legislation):

66. (4) Despite subsection (1), **payments under a pension plan** or that result from a purchase or transfer under the following provisions are subject to **execution, seizure or attachment** in satisfaction of an **order for support** enforceable in Ontario to a **maximum of one-half the money payable**.

The exemption of 50% in s. 66(4) applies to support orders “enforceable in Ontario”, which includes support orders made under the *Family Law Act* and the *Divorce Act*. [Trick v. Trick](#), 2006 CarswellOnt 4139, 81 O.R. (3d) 241, 83 O.R. (3d) 55, 31 R.F.L. (6th) 237 (Ont. C.A.).

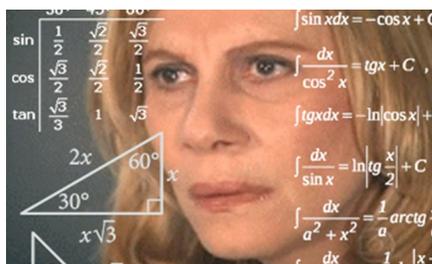
The 50% garnishment maximum is a hardline. In *Trick*, the Court noted that under ss. 7(2) and (3) of the *Wages Act* (provincial legislation), the Court has the discretion to increase or decrease the exemption for the garnishment of wages. The same discretion is not available for pensions under the provincial *PBA*.

Trick is a must read.¹⁰ OCA overturned motions judge when he vested 100% of payor’s pension to the wife. Wife entitled to only garnish 50% and she was not entitled to a vesting order for the other 50% as doing so contravened s. 66(1) (i.e., cannot assign a pension). The original support order was made under the *Divorce Act* and not under the *FLA* (see s. 34(1) of *FLA*). Declined equitable relief that runs directly counter to prescribed legislative scheme.

Also see:

- [Cutillas v. Proulx](#), 2001 CarswellOnt 2526, 19 R.F.L. (5th) 36 (Ont. S.C.J.)

¹⁰ If you read *Trick*, don’t fret if you feel like this afterwards:



<p>“Payments under a pension plan”</p>	<p>In Ontario (Director of Family Support Plan) v. Rame, 1 R.F.L. (4th) 39, 1 C.C.P.B. 318 (Ont. Prov. Div.), the payor could elect to take part of his pension as a lump sum or defer it as income at 65. Another portion was legally required to be paid as a lump sum with interest. The Court ruled that payment as a lump sum was no longer a “payment under a pension plan” but rather, “merely refunds of contributions out of the pension plan and, accordingly, in my view, are subject to <i>full</i> execution, seizure, or attachment by the Director in satisfaction of the accumulated arrears of child support” (para. 9). The exemption of 50% was lost.</p>
<p>“Money Payable”</p>	<p>The definition of “money payable” was addressed in Ontario (Municipal Employees Retirement Board) v. Perkins, 1982 CarswellOnt 358, 32 R.F.L. (2d) 97 (Ont. Co. Ct.).</p> <p>The Court adopted the definition of “payable” from Black’s Law Dictionary, i.e., “capable of being paid” and noted that the “definition does not imply that moneys might be payable upon a future contingency” (para. 24).</p> <p>The payor had an OMERS pension. He retired before the age of 65 and elected to receive a deferred income at age 65. Therefore, he only had a contingent interest in the plan and was not entitled to receive payment until 65, there was no money “payable” to garnish.</p> <p>Also, in Langeman v. Langeman, 2020 ONSC 5751, 2020 CarswellOnt 15193, wife brought motion requesting order converting periodic support payments into a <i>lump sum</i> for the <i>upcoming</i> year and requested the sum be garnished from a RRSP LIRA. Court declined. Section 34(1)(c) (i.e., powers of the Court in an application for support) of the <i>FLA</i> provides the Court w. the jurisdiction to transfer or vest property to the support recipient to meet the payor’s support obligation. The <i>Divorce Act</i> does not have the same provision and the support order in this case was made under the <i>Divorce Act</i>. Payor’s LIRA was not in pay. If LIRA was in pay, then subject to garnishment at max of 50%.</p>
<p>Subject to monetary limits</p>	<p>A Retirement Life Income Fund (RLIF) was subject to s. 66(4) of the Pension Benefits Act. It was subject to garnishment up to 50%, but the money payable to the payor is subject to the Income Tax Act, which imposed a maximum withdrawal amount. Court ordered garnishment of 50% of the max net amount. Dembeck v. Wright, 2015 CarswellOnt 17213, 69 R.F.L. (7th) 54, 2015 ONSC 6894 (Ont. S.C.J.).</p>
<p>A retirement compensation agreement (RCA)</p>	<p>A retirement compensation agreement (RCA) was not a protected pension as defined by the Pension Benefits Act and subject to garnishment. Viric v. Blair, 2017 CarswellOnt 4129, 2017 ONSC 1766 (Ont. S.C.J.), affirmed 2017 ONCA 849, 2017 CarswellOnt 17005, 3 R.F.L. (8th) 395 (Ont. C.A.).</p>

Federal pension	In <i>Malerba v. Marleba</i> , 2007 CarswellOnt 3157, 38 R.F.L. (6th) 426 (Ont. S.C.J.), issue was enforcement of \$180,000 lump sum spousal support award made under the <i>Divorce Act</i> against an Air Canada pension. Federal pension governed by the <i>Pension Benefits Standard Act</i> . <i>PBSA</i> does not appear to deal w. enforcement of support orders like the provincial <i>Pension Benefits Act</i> . Garnishment precluded by s. 18(1) of the federal <i>Pension Benefits Standard Act</i> , 1985.
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D. Federal Money	
Generally	Part II of the <i>Family Orders and Agreements Enforcement Assistance Act</i> - Including CPP, OAS, E.I, income tax refunds, GIS
CPP, OAS	50% maximum garnishment – see paragraphs 70 to 91 of <i>Trick v. Trick</i> , 2006 CarswellOnt 4139, 81 O.R. (3d) 241 (Ont. C.A.). The Court ultimately relied on s. 23(1) of <i>FRSAEA</i> , which caps garnishment at 50% of payor’s “income source”, which is defined in s. 1 as including “disability, retirement or other pension”.

E. Worker’s Compensation Benefits	
Wages Act applies	<p><u><i>Workplace Safety and Insurance Act</i></u></p> <p>65 (1) This section applies if a person is entitled to payments under the insurance plan and his or her spouse (as defined in Part III of the <i>Family Law Act</i>), children or dependants are entitled to support or maintenance under a court order. 1997, c. 16, Sched. A, s. 65 (1); 1999, c. 6, s. 67 (28); 2005, c. 5, s. 73 (27).</p> <p>(2) The Board shall pay all or part of the amount owing to the person under the insurance plan,</p> <p style="padding-left: 40px;">(a) in accordance with a garnishment notice issued by a court in Ontario; or (b) in accordance with a notice of a support deduction order served upon the Board by the Director of the Family Responsibility Office.</p> <p>(3) Garnishment of payments is subject to the limits and procedures set out in subsections 7 (1) and (5) of the <i>Wages Act</i>. Amounts payable under the insurance plan (other than amounts set aside under section 45 (loss of retirement income)) shall be deemed to be wages for the purposes of the <i>Wages Act</i>.</p>

Charter challenge failed under WCA	See Heidekamp v. Ontario (Director of Support & Custody Enforcement) , 1989 CarswellOnt 257, 21 R.F.L. (3d) 107, 69 O.R. (2d) 607, 42 C.R.R. 313 (Ont. U.F.C.) where 100% of the payor's benefits were intercepted and paid to recipient. No maximum imposed in the <i>Worker's Compensation Act</i> at that time. WCA repealed on Jan. 1 st , 1998.

One case for fun – a scheme that was uncovered like an Inspector Poirot novel: [Tomsone v. Tomsone](#), 2005 CarswellOnt 8088 (Ont. S.C.J.), appeal dismissed (2006), 2006 CarswellOnt 901 (Ont. C.A.) affirming 2005 CarswellOnt 8088, [2006] W.D.F.L. 1897, [2006] W.D.F.L. 1914.

RULE 30: DEFAULT HEARING

A default hearing provides the support payor an opportunity to explain the default. However, if the reason is not valid, the consequences can be dire for the payor.

Note: s. 41(2) of *FRSEAE* allows support recipient ability to proceed with a default hearing under that Act:

41 (2) When a support order that is not filed in the Director’s office is in default, the recipient may file a request with the court, together with a statement of arrears, and, on such filing, the clerk of the court shall, by notice served on the payor together with the statement of arrears, require the payor to file a financial statement and appear before the court to explain the default.

Rule 30 of *FLR* can work in conjunction w. s. 41 of *FRSEAE*.

Process – <i>FLR</i>	
Notice issued	30. (1) The clerk shall issue a notice of default hearing (Form 30), <div style="padding-left: 40px;">(a) if the support order is being enforced by the recipient, when the recipient files a request for a default hearing (Form 30A) and a statement of money owed (subrule 26 (5));</div> <div style="padding-left: 40px;">(b) if it is being enforced by the Director, when the Director files a statement of money owed.</div>
Service	(2) The notice of default hearing shall be served on the payor by special service in accordance with subrule 6 (4) and filed.
Payor’s dispute	(3) Within 10 days after being served with the notice, the payor shall serve on the recipient and file, <div style="padding-left: 40px;">(a) a financial statement (Form 13); and</div> <div style="padding-left: 40px;">(b) a default dispute (Form 30B).</div>
New statement of money	(4) The recipient shall serve and file a new statement of money owed (subrule 26 (5)) not more than seven days before the default hearing.
Presumption	(6) The payor is presumed to admit that the recipient’s statement of money owed is correct, unless the payor has filed a default dispute stating that the statement of money owed is not correct and giving detailed reasons .

	<ul style="list-style-type: none"> - FRO Director is only entitled to presumption that statement of arrears is correct per s. 41(9) of <i>FRSAEA</i>. Support recipient's entitled to prepare either a statement of money owed or statement of arrears. Whichever form is prepared, recipient must still prove it to be correct. Rubatto v. Sandoval, 2017 ONCJ 921, 2017 CarswellOnt 21388 (Ont. C.J.). Also see: Plunkett v. Astudillo, 2019 ONCJ 9, 2019 CarswellOnt 347 (Ont. C.J.).
At hearing	(7) At the default hearing, the court may decide and enforce the amount owing as of the date of the hearing.

In [Vetro v. Vetro](#), 2015 CarswellOnt 7897, 2015 ONCJ 287 (Ont. C.J.), the Court addressed who bears the **onus** during a hearing:

40 In a default hearing, the burden or onus of proof is upon the **support payor**. Pursuant to section 41 (9) of the Act, unless the contrary is shown, **two legal presumptions apply**. Section 41(9) reads as follows:

s. 41(9) At the default hearing, unless the contrary is shown, the payor shall be **presumed to have the ability to pay** the arrears and to make subsequent payments under the order, and the statement of **arrears** prepared and served by the Director shall be **presumed to be correct** as to arrears accruing while the order is filed in the Director's office.

41 These presumptions are not absolute, rather they are **rebuttable presumptions**. However, the onus or burden of disproving the presumptions rests squarely with the support payor. In relation to the ability to pay the arrears and to make subsequent payments under the order, the support payor must prove, on a balance of probabilities, through admissible evidence, that he does not have the ability to pay.

A few cases in which the presumption was not rebutted (the following cases were enforced by FRO, but the principles remain sound):

- Payor had means to comply w. support orders but was "**indifferent** to their mandatory nature". [Pey v. Pey](#), 2017 ONSC 6033, 2017 CarswellOnt 18360 (Ont. S.C.J.), additional reasons 2018 CarswellOnt 774 (Ont. S.C.J.), affirmed 2018 ONCA 284, 2018 CarswellOnt 4394 (Ont. C.A.).
- Payor previously incarcerated, but had ability to pay when not incarcerated. Payor had access to **trust funds**. [Ontario \(Director, Family Responsibility Office\) v. Garrick](#), 2017 ONCJ 546, 2017 CarswellOnt 12345, 98 R.F.L. (7th) 200 (Ont. C.J.).

- If **no change** since the support order, any reason raised during the determination of the support order cannot be relied upon. Payor lost her job before support order made and could not rely on the loss of her job as a reason for her default. [Ontario \(Director, Family Support Plan\) v. Pitcher](#), 1992 CarswellOnt 1488 (Ont. Prov. Div.).
- Must be a **valid reason** for the inability to pay per s. 41(1) of *FRSAEA*. A “valid reason” being:

44 [...] an event over which the payor has no control which renders the payor totally without assets or income with which to meet his or her obligations, such as disabling illness or involuntary unemployment. See: [Ontario \(Director, Family Responsibility Office\) v. Carney](#), 2004 ONCJ 11 (Ont. C.J.). The payor must also show that he or she has accepted their responsibilities and placed the child's interests over their own and has provided frank disclosure to the court. See: [Labrash v. Labrash](#), 2002 CarswellOnt 90 (Ont. C.J.)” [Elia v. Waller](#), 2015 CarswellOnt 17842, 73 R.F.L. (7th) 497, 2015 ONCJ 656 (Ont. C.J.).

A few in which the presumption was rebutted:

- **Medical evidence** was substantial, including testimony of payor’s psychiatrist. ODSP application was also approved. [Ontario \(Director, Family Responsibility Office\) v. De Francesco](#), 2012 ONCJ 819, [2012] O.J. No. 6338 (Ont. C.J.).
- Payor **met** all of the **children’s needs** by paying “in kind” or directly to the children or on their behalf. [Ontario \(Director, Family Support Plan\) v. Kopyto](#), 1996 CarswellOnt 2478, [1996] O.J. No. 2095 (Ont. Prov. Div.).
- Payor was **only able to find part-time jobs or menial work**. [Lucero v. Lucero](#), 1988 CarswellOnt 326, 18 R.F.L. (3d) 379 (Ont. Fam. Ct.).

Imprisonment	
Conditional Imprisonment	<p>30. (8) The court may make an order under clause 41 (10) (h) or (i)* of the <i>Family Responsibility and Support Arrears Enforcement Act, 1996</i>, suspending the payor’s imprisonment on appropriate conditions.</p> <p>* FRSAEA: 41 (10) The court may, unless it is satisfied that the payor is unable for valid reasons to pay the arrears or to make subsequent payments under the order, order that the payor,</p> <p>(h) be imprisoned continuously or intermittently until the period specified in the order, which shall not be more than 180 days, has expired, or until the arrears are paid, whichever is sooner; and</p>

	(i) on default in any payment ordered under this subsection, be imprisoned continuously or intermittently until the period specified in the order, which shall not be more than 180 days, has expired, or until the payment is made, whichever is sooner.
Warrant of committal	<p>(9) If the recipient, on a motion with special service in accordance with subrule 6 (4) on the payor, states by affidavit (or by oral evidence, with the court's permission) that the payor has not obeyed a condition that was imposed under subrule (8), the court may issue a warrant of committal against the payor, subject to subsection 41 (15)* (power to change order) of the <i>Family Responsibility and Support Arrears Enforcement Act, 1996</i>.</p> <p>* FRSAEA: 41 (15) The court that made an order under subsection (10) or (12) may change the order on motion if there is a material change in the payor's or other person's circumstances, as the case may be.</p>

The Court in [McGraw v. Samra](#), 2008 CarswellOnt 5777, 59 R.F.L. (6th) 219, 66 R.F.L. (6th) 167, 2008 ONCJ 465 (Ont. C.J.), specified that the **court's discretion** in motions to obtain a **warrant of committal** is to be guided by the procedure set out in [Ontario \(Director of Support & Custody Enforcement\) v. Levenson](#), 1990 CarswellOnt 3521, 4 O.F.L.R. 87, [1990] O.J. No. 2410 (Ont. Prov. Div.).

The **steps in Levenson** are outlined at paragraph 9:

1. The court should have before it an **affidavit**¹¹ in support of the motion. As the court cannot take judicial notice of the debtor's default, there must be evidence on the record to justify the issue of any warrant of committal. The affidavit should include:
 - (a) a copy of the committal order, in order that the exact terms of deferred payment can be examined by the judge hearing the motion;
 - (b) a statement that the date set for payment in the committal order has passed and that the debtor has failed, in whole or in part, to make the necessary payments;
 - (c) a statement of the exact amount due and unpaid under the committal order as of the date of the affidavit, with an indication of how that figure was attained;
 - (d) if any interest is being claimed, a statement of the method of computation (whether simple or compound) and if compound, the authority for it; the rate of interest and a disclosure of where that rate originates; and the sum of money claimed as interest with

¹¹ See [Form 32C](#).

an indication of how that sum was calculated;

- (e) a statement indicating whether the debtor was in attendance when the committal order was made and, if not, proof that the committal order was served upon him.
2. There must also be **proof of service** — preferably personal service — of the notice of motion and of the supporting affidavit on the debtor.
 3. Since this is a motion, the **debtor should file an affidavit** unless the debtor obtains the court's permission under rule 18 of the Family Rules of the Ontario Court (Provincial Division) ... to present oral evidence at the motion. When oral or in an affidavit, the debtor's response should include:
 - (a) a statement whether the debtor disputes the claim for non-payment, and if so, the debtor's position as to the amount due and unpaid, if any, along with a clear indication of how the debtor arrives at that figure;
 - (b) if the debtor admits to money due and unpaid, in whole or in part, a statement of the debtor's reasons for failure to pay;
 - (c) a fresh financial statement which will be accepted and may be of assistance to the court.
 4. In respect of item 3(b) above, the **debtor's reasons for failure** to pay must be limited to matters or events arising **after** the date of the **default order** or the date of the **hearing** of any subsequent motion for committal, whichever date is most recent. The court may be persuaded to admit reasonably unforeseeable consequences of events or matters predating the default order or the subsequent motion for committal. What ought not to be allowed is an attempt to submit reasons for non-payment that were already submitted or that, with due diligence, could have been submitted before the judge who made the order for committal or who heard any subsequent motion of committal. The motion for committal is never a default hearing *de novo*.

RULE 26(3)(g): APPOINTMENT OF A RECEIVER UNDER S. 101 OF THE COURTS OF JUSTICE ACT

Section 101, <i>Courts of Justice Act</i>	
Receiver ordered	101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. (2) An order under subsection (1) may include such terms as are considered just.

Receivership seems to be a **rarity**. In [Renard v. Renard](#), 2019 CarswellOnt 12949, 30 R.F.L. (8th) 459, 2019 ONSC 4732 (Ont. S.C.J.), Justice Jain states at paragraph 13:

13 Generally, having regard for the words of [section 101 of the *Courts of Justice Act*](#), the court has discretion to appoint a Receiver/Manager if it is just or convenient to make such an order. This remedy will only be granted in cases where **special circumstances exist**. There are many cases that outline the special circumstances under which a Receiver/Manager will be appointed. An order appointing a Receiver/Manager may be properly made if there are **no means of legal execution available to the creditor, or if the creditor demonstrates to the court that it is "practically very difficult, if not impossible, to obtain the fruit of his judgement" through legal execution**. See [Sengmueller v. Sengmueller](#), [1996] O.J. No. 1942 (Ont. Gen. Div.), and [Goldschmidt v. Oberrheinische Metallwerke](#), [1906] 1 K.B. 373 (Eng. C.A.).

The Court in [Anderson v. Hunking](#), 2010 CarswellOnt 5191, 2010 ONSC 4008, [2010] O.J. No. 3042 (Ont. S.C.J.) (at para. 15) outlined the **principles** of ordering a receiver:

Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver by interlocutory order “where it appears to a judge of the court to be just or convenient to do so.” The following principles govern motions of this kind:

- (a) the appointment of a receiver to preserve assets for the purposes of execution is extraordinary relief, which prejudices the conduct of a litigant, and should be granted **sparingly**: [Fisher Investments Ltd. v. Nusbaum](#) (1988), 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185 (Ont. H.C.);
- (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be **strong evidence** that the plaintiff’s right to **recovery is in serious jeopardy**: [Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. \(Trustee of\)](#), 16 C.P.C. (2d) 130, [1987] O.J. No. 2315 (H.C.);

(c) the appointment of a receiver is very intrusive and should only be used **sparingly**, with due consideration for the effect on the parties as well as consideration of the conduct of the parties: [1468121 Ontario Limited v. 663789 Ontario Ltd.](#), [2008] O.J. No. 5090, 2008 CanLII 66137 (S.C.J.), referring to [Royal Bank v. Chongsim Investments Ltd.](#), 1997 CanLII 12112 (ON SC), 32 O.R. (3d) 565, [1997] O.J. No. 1391 (Gen. Div.);

(d) in deciding whether to appoint a receiver, the court must have regard to **all the circumstances**, but in particular the **nature of the property** and the **rights and interests** of all parties in relation thereto: [Bank of Nova Scotia v. Freure Village of Clair Creek](#) (1996), 40 C.B.R. (3d) 274, 1996 CanLII 8258 (Ont. S.C.J.);¹²

(e) the **test** for the appointment of an interlocutory receiver is comparable to the test for **interlocutory injunctive relief**, as set out in [RJR-MacDonald Inc. v. Canada \(Attorney General\)](#), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at paras. 47-48, 62-64, 111 D.L.R. (4th) 385;

(i) a **preliminary assessment** must be made of the **merits** of the case to ensure that there is a serious issue to be tried;

(ii) it must be determined that the moving party would suffer **“irreparable harm”** if the motion is refused, and “irreparable” refers to the nature of the harm suffered rather than its magnitude—evidence of irreparable harm must be clear and not speculative: [Syntex Inc. v. Novopharm Ltd.](#) (1991), 36 C.P.R. (3d) 129, [1991] F.C.J. No. 424 (C.A.);

(iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits—that is, the **“balance of convenience”**: See [1754765 Ontario Inc. v. 2069380 Ontario Inc.](#) (2008), 2008 CanLII 67403 (ON SC), 49 C.B.R. (5th) 214 at paras. 7 and 11, [2008] O.J. No. 5172 (S.C.);

(f) where the plaintiff’s claim is based in **fraud**, a strong case of fraud, coupled with evidence that the plaintiff’s right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants’ assets: [Loblaws Brands Ltd. v. Thornton](#) (2009), 78 C.P.C. (6th) 189, [2009] O.J. No. 1228 (S.C.J.)

A **high onus** is on the party seeking a receiver. See [Kraner v. Kraner](#), 2012 CarswellOnt 10876, 98 C.B.R. (5th) 152, 2012 ONSC 4900 (Ont. S.C.J.). *Kraner* also addressed a receiver being removed if “the receiver is engaged in blatant intentional action contrary to the interest of one or more parties” (para. 25).

¹² See relevant factors set out in [Aly v. Nader Halal Meat Inc.](#), 2013 CarswellOnt 3241, 2013 ONSC 1314, 2013 ONSC 1313, 2013 ONSC 1315, [2013] O.J. No. 1329 (Ont. S.C.J.).

A few interesting cases:

- **Receiver premature** as payor had not disobeyed support order at that time. [Willi v. Chapple](#), 2009 CarswellOnt 5398, [2009] O.J. No. 3752 (Ont. S.C.J.).
- **Interim** receiver appointed. [Service v. Service](#), 2011 CarswellOnt 9035, 2011 ONSC 4900 (Ont. S.C.J.).
- **Interim** receiver not appointed. [Writer v. Peroff](#), 2006 CarswellOnt 6218 (Ont. C.A.), affirming (2006), 2006 CarswellOnt 6438 (Ont. S.C.J.).
- Wife appointed as receiver. Husband owed \$120,000 in arrears. **Foreign funds** held in trust by Canadian government. [Roshdy v. Sultan](#), 2001 CarswellOnt 1008, 200 D.L.R. (4th) 161 (Ont. C.A.).

**RULE 26(3)(h): REGISTERING SUPPORT ORDER AS A CHARGE UNDER
S. 42 OF FAMILY RESPONSIBILITY AND SUPPORT ARREARS ENFORCEMENT ACT (FRSAEA)**

Payor has land?	
FRSAEA	<p>42 (1) A support order may be registered in the proper land registry office against the payor’s land and on registration the obligation under the order becomes a charge on the property.</p> <p>(2) A charge created by subsection (1) may be enforced by sale of the property against which it is registered in the same manner as a sale to realize on a mortgage.</p> <p>(3) A court may order the discharge, in whole or in part, or the postponement, of a charge created by subsection (1), on such terms as to security or other matters as the court considers just.</p>

Registering a support order as a charge prevents the title holder from selling the property unless discharged¹³ by the Court or upon consent (for instance after payment of arrears). Further, if the payor defaults under the support order, the property can be sold.

A case that makes you really wonder about people... In [Zouganelis-Fobert v. Fobert](#), 2013 CarswellOnt 18063, 2013 ONSC 7909 (Ont. S.C.J.), the husband transferred title to the home to his father, the day before he married the wife. Then, on the same day, the father signed a deed transferring title back to the husband, but the second deed was never registered. Father and son claimed that the home was never the son’s but the second deed was for “estate planning”. That didn’t fly. The Court ruled that the husband was the legal owner of the home, which was then subject to equalization. The husband owed the wife an equalization payment and arrears for child support and section 7 expenses, totalling approximately \$109,000. The Court cited s. 34(1)(k) of the *FLA* to secure the support order and issued a charging order. The husband had 60 days to pay the lump sum, otherwise the matrimonial home was to be sold and the wife was to receive payment.

¹³ For discharging a support order as a charge, see [Kumar v. Kumar](#) (1988), 63 O.R. (2d) 572, 48 D.L.R. (4th) 559 (H.C.); reversed on other grounds on reconsideration (1988), 65 O.R. (2d) 55, 51 D.L.R. (4th) 480 (H.C.); and also [McMurter v. McMurter](#), 2018 CarswellOnt 7152, 2018 ONSC 2626 (Ont. S.C.J.).

TAB 6B

17th Family Law Summit

Enforcement of Support Orders by the
Family Responsibility Office (FRO)

What You Need to Know When Dealing with FRO

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March 28, 2023



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1. FRO's Enforcement Mandate

The Family Responsibility Office (FRO) is a statutory program within the Ministry of Children, Community and Social Services (MCCSS) mandated to enforce support orders for the benefit of support recipients. Pursuant to subsection 9 (1) of the *Family Responsibility and Support Arrears Enforcement Act (FRSAEA)* every support order made by an Ontario court, other than a provisional order, shall state in its operative part that..." *unless the order is withdrawn from the Director's office, it shall be enforced by the Director and that amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed.*" FRO is responsible for enforcing support orders and support deduction orders that are filed with it and for paying money collected to the person to whom it is owed pursuant to s. 5(1) of *FRSAEA*.

The Director has exclusive jurisdiction to enforce support orders filed with the office pursuant to s. 6(7) of the *FRSAEA*. The Director is not involved in determining the amount of support a payor is required to pay and is not a party to a motion to change the ongoing support amounts and/or the reduction/rescission of arrears of support.

2. Drafting an Enforceable Support Orders

(A) Support Orders

Ontario courts are required to send all support orders to FRO for enforcement; however, in order for FRO to be able to enforce a support order the support provision must meet the definition of a support order set out in the *FRSAEA*. For example, FRO will not enforce orders for the payor to make equalization payments or pay the mortgage on the home.

Subsection 1(1) of the *FRSAEA*, defines a support order as follows:

“support order” means a provision in an order made in or outside Ontario and enforceable in Ontario for the payment of money as support or maintenance, and includes a provision for,

- (a) the payment of an amount periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event,*
- (b) a lump sum to be paid or held in trust,*
- (c) payment of support or maintenance in respect of a period before the date of the order,*
- (d) payment to an agency of an amount in reimbursement for a benefit or assistance provided to a party under a statute, including a benefit or assistance provided before the date of the order,*
- (e) payment of expenses in respect of a child’s prenatal care and birth,*
- (e.1) payment of expenses in respect of DNA testing to establish parentage,*
- (f) the irrevocable designation, by a spouse who has a policy of life insurance or an interest in a benefit plan, of the other spouse or a child as the beneficiary, or*
- (g) interest or the payment of legal fees or other expenses arising in relation to support or maintenance, and includes such a provision in,*
- (h) a domestic contract that is enforceable under section 35 of the Family Law Act, or*
- (i) a notice of calculation that is enforceable under section 39 of the Family Law Act.*

(B) Support Deduction Orders (SDO)

An Ontario court that makes a support order, or varies a support order, is also required to make an SDO (s. 10(1) *FRSAEA*). Before making an SDO, the court must determine the names and addresses of each income source of the payor and the amounts paid to the payor by each income source (s. 11 (2) *FRSAEA*). The SDO and SDO Information Form (SDOIF) are prescribed forms under s. 7 of the *O. Reg. 167/97*. It is the obligation of the court to file the SDO, and the completed SDO Information Form, with FRO promptly upon signing even if the support order has not yet been issued and entered (s.12 *FRSAEA*). FRO can update their records and start to enforce support on the basis of the information on the SDOIF prior to receipt of the issued and entered support order.

Subsection 1(3) of the *FRSAEA* provides that the SDO is related to the support order on which it is based; however, s.11.1 of the *FRSAEA* provides that “in the event of a

conflict between a support order and the SDO made in relation to the support order, the support order prevails.” As the support order’s terms prevail over the information set out in the SDOIF, where there is conflicting wording, it is important that FRO also receive the support order as soon as possible once issued and entered by the court.

(C) Domestic Contracts

Support orders and SDOs are automatically sent to FRO by the court for enforcement. In order for a support obligation set out in a domestic contract to be enforced by FRO, the domestic contract must be filed with either the Ontario Court of Justice or the Superior Court of Justice (Family Court) with an “Affidavit In Support of Filing a Domestic Contract” (Form 26B, of the *Family Law Rules (FLR)*) pursuant to s. 35(1) and 2(a) of the *Family Law Act* and Rule 26 (9) of the *FLR*. The affidavit, stamped by the court to confirm it has been filed, and the domestic contract must be sent to FRO by one of the parties to the agreement to register it for enforcement.

Subsection 55(1) of the *Family Law Act* requires that all domestic contracts must be in writing, signed by the parties and witnessed to be enforceable.

(D) Recommended Standard Terms for Support Orders

The way in which a support order is drafted can affect the ability of FRO to enforce the support order. Ontario Regulation 454/07 under the *FRSAEA* sets out “Recommended Standard Terms for Support orders” (attached at Schedule A). The Regulation sets out recommended wording for child and spousal support, support arrears, costs, interest and termination of support provisions. Orders drafted using the recommended standard terms for support orders will be enforceable by FRO.

(E) Requirements for Support Orders to be Enforced by FRO

(i) A Debt is owed to the Recipient from the Payor

Support orders must clearly indicate the requirement for the payor to “pay” the recipient. A support order stating that the parties will “share” expenses or “maintain” benefits is unenforceable.

(ii) The Support Obligation is Clearly Defined on the Face of the Order

The amount of support to be paid must be stated in the support order. Orders that only state that support is to be paid in accordance with the Child Support Guidelines without specifying the amount to be paid cannot be enforced by the FRO. Support orders must set out the quantum of the obligation (s. 7(1)(b) *FRSAEA*).

Child Support Guideline (CSG) orders are expressed in global amounts. The order must also state the number of children and their names and dates of birth. Orders made under the CSG must meet the requirements set out in section 13 of the CSG set out below.

The frequency of the payment (weekly, monthly, or annually), and the duration of the obligation, including commencement and termination dates are to be included in the support order, if appropriate.

The income of the payor and the recipient must also be set out in the order if required to determine the amount of any s.7 expenses under the CSG.

In cases where there is shared residency of dependents, FRO can enforce a support order that provides a clear set-off child support obligation (i.e. one parent is the Payor and the other is the Recipient). If the order does not set out a set-off amount but indicates the amount of the child support obligation of each parent, FRO will create two FRO cases, one for each parent as a payor and recipient. Such support orders are enforceable provided that the support obligation of each parent is clearly defined on the face of the order.

(iii) Information Required by Section 13 of the Child Support Guidelines

13. An order for the support of a child must include,

- (a) the name and birth date of each child to whom the order relates;*
- (b) the income of any parent or spouse whose income is used to determine the amount of the order;*
- (c) the amount determined under clause 3 (1) (a) for the number of children to whom the order relates;*
- (d) the amount determined under clause 3 (2) (b) for a child the age of majority or over;*
- (e) the particulars of any expense described in subsection 7 (1), the child to whom the expense relates and the amount of the expense or, where that amount cannot be determined, the proportion to be paid in relation to the expense;*
- (f) the date on which the lump sum or first payment is payable and the day of the month or other time period on which all subsequent payments are to be made; and*
- (g) reference to the obligation under subsection 24.1 (1) to provide updated income information no later than 30 days after the anniversary of the date on which the order is made in every year in which the child is a child within the meaning of this Regulation, unless the parties agree that the obligation shall not apply, as provided for in that subsection.*

FRO cannot administratively amend drafting errors in support orders. If the support order as drafted does not accurately reflect the intent of the parties or the court, the parties can request the court to correct the error pursuant to Rule 25(19) of the *FLR*.

(iv) Operative Wording Per S. 9(1) of FRSAEA

Pursuant to s. 9(1) of the *FRSAEA*, every support order made by an Ontario court, other than a provisional order, shall state in its operative part that [...] “unless the order is withdrawn from the Director’s office, it shall be enforced by the Director and that amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed.”

(F) Recommendations for Drafting Support Orders that can be Enforced by FRO

(i) Support Adjustments when One Child’s Support is Ending

If you are aware that a child for whom support is payable pursuant to the CSG will no longer be entitled to support as of a future date, provide a specific provision in the support order to decrease support to a stated amount for the remaining child/children.

(ii) Clauses to Change Support Annually

As provided in s.7(1)(b) of the *FRSAEA* the FRO may find the order or agreement to be unenforceable if: “the amount of support cannot be determined on the face of the order because it is expressed as a percentage of the payor’s income or is dependent on another variable that does not appear on the face of the order”.

Clauses that state that the parties will exchange income tax returns or income information annually, and support will be payable in accordance with the new income amount, are not enforceable by FRO. The determination of the payor’s income must be set out in the support order. Under the *FRSAEA*, FRO cannot determine or quantify income for purposes of determining support. Even if the parties agree that the payor’s income has changed, the support order will need to be changed setting out the new quantum of support for FRO to be able to change its records and enforce the new amount.

(iii) Payments to Third Parties

FRO enforces support for the benefit of a support recipient only. FRO can only make payments to the person who is named as a party in the support order and appears in the title of proceedings as a party Recipient. Payments to a third party, for example, payments to the daycare provider, cannot be enforced. FRO cannot make payments to other people.

If the person paying support is also required to pay certain expenses directly to a third party, FRO will not enforce this payment unless the order states that in default of paying

the expense the payor must “reimburse” the recipient for the payor’s share of the expense and that such amounts may be claimed and enforced as child support. The recipient will need to file a Statement of Arrears with FRO setting out the total amount of the expense that was not paid.

(iv) *Canadian Currency*

Support orders must be stated in Canadian currency. (Section 12 of the federal *Currency Act*, R.S.C. 1985 C. 52)

(v) *Temporary Order*

When drafting a final order, if it is the intention of the parties that a term of a temporary order continues on a final basis, the term must be specifically incorporated into the final order. It is also advisable when drafting a final order to specifically include the amount of arrears, if any, that remain owing under the temporary order.

(vi) *Contingency Terms*

The quantum and frequency of support must be clearly specified in the order. If the determination of the amount of support is contingent on a factor not identified in the order, it is likely not enforceable.

If the court makes the commencement of support contingent on another event, for example, “Support will start when the matrimonial home is sold”, FRO will need more information to be provided in the order to be able to enforce this support obligation. Without a date setting out the when the support obligation commences, FRO has no way of knowing when the accruals of support should start. If the parties wish to start the support after an event occurs, then the order should identify who is responsible for advising FRO that the event has occurred and how FRO will be notified.

(viii) *Special or Extraordinary Expenses*

Special or extraordinary expenses ordered pursuant to s. 7 of the CSG should meet the requirements set out in s. 13 of the CSG. Specifically, the order should identify the particulars of the expense; the child to whom the expense relates; the frequency of payment; the commencement and termination dates of the payments; the amount of the expense or, where that amount cannot be determined, the proportion to be paid in relation to the expense.

If a support order provides that a payor shall pay a percentage of the special expense, the order should include sufficient detail about the expense to enable FRO to enforce the expense. The recipient would need to provide FRO with a statement of arrears indicating

the total amount of the expense and showing the calculation of the payor's contribution based on the percentage set out in the order to enable FRO to enforce the expense.

If an order requires the parties to agree on special expenses before they are incurred, FRO would require proof that both parties consent to the expense before it can be enforced.

If special or extraordinary expenses are ordered, both the quantum and the frequency of the expense will need to be set out in the order to enable FRO to add the expense to the Director's Statement of Arrears (DSOA) as a regular accrual. If the parties know how long the special expense will be operative, the commencement and end dates should also be listed in the order.

If the support order sets out the amount of the special expense and the frequency of the payment, but also requires the parties to provide receipts to each other, or provide other proof that the expense was actually incurred, FRO will not be able to add the special expense to the DSOA and accrue the expense amount on a regular basis. Instead, FRO will only be able to add any unpaid amounts to the DSOA if the recipient provides receipts to FRO, proving that the expenses were paid and receipts were provided to the payor, and sends FRO a sworn Statement of Arrears that calculates the amount that is owed by the payor. A copy of the Statement of Arrears, completed by the recipient, will be sent to the payor.

If educational expenses are ordered, a specific dollar amount is recommended. Instead of saying "pay the tuition fees", the order should state that, "The payor shall pay \$3,000.00 to the recipient for tuition fees, payable on the 1st day of September, commencing September 1, 2015 and last payable on September 1, 2018." Written this way FRO can add the expense to the DSOA.

(ix) Costs

Pursuant to section 1(1) (g) of the *FRSAEA*, FRO will only enforce court costs, ordered to be paid by the payor to the recipient, if the costs are in relation to a support issue before the court. For example, if an order deals with access, support and property issues, FRO can only enforce costs awarded to the recipient if the order identifies the quantum of costs that are related to the support issue. It is recommended to use the specific wording identified in s. 4 of *O. Reg. 454/07 "Recommended Standard Terms for Support Orders"* when drafting an order in relation to costs.

A costs award, that is enforceable as support, acquires the special status of a support order. It has priority over other civil debts (other than debts owed to the Crown in Right of Canada) pursuant to section 2(3) of the *Creditor's Relief Act*, and will survive the bankruptcy of the payor.

(x) Cost of Living Allowance (COLA)

Cost of Living Allowance (COLA) cannot be ordered on child support orders which are made under the CSG, therefore, FRO will not enforce such provisions. COLA will only be enforced on spousal support orders when it is ordered in accordance with ss. 34(5) of the *FLA* or in accordance with the *O. Reg. 176/98* and *O. Reg. 534/07* under the *FRSAEA* (ss. 7(4) to (8) *FRSAEA*).

O. Reg. 176/98 sets out the following manners of calculating COLA:

- (a) a calculation made by applying COLA factors derived from any part of the Consumer Price Index;*
- (b) a calculation made by applying either the greater or lesser of a percentage change in the SP's or SR's income, and a percentage change in the Consumer Price Index, as specified in the support order/SDO;*
- (c) a calculation made by applying a rate of increase or decrease specified in the support order/SDO;*
- (d) a calculation made in accordance with the methods specified in Quebec legislation dealing with COLA in support orders.*

Ontario Regulation 176/98 was amended on September 6, 2007 to allow FRO to enforce COLA that is calculated by applying the indexing factor applied by an income source to the payor's wages, salary, pension or other income (s. 1(5) of O. Reg. 534/07).

(xi) Interest

FRO does not automatically calculate interest on support orders filed with FRO. The recipient, however, may calculate interest on unpaid support and submit the calculation to FRO in a Statement of Arrears. Once the calculations are accepted, the interest becomes enforceable by FRO.

(xii) Avoid Variable Quantum Orders

Attempts to deal with changes to the payor's work situation with variable support amounts may result in FRO determining that the support order is "impractical and unreasonable" to enforce under section 7 of the *FRSAEA*. For example, orders that provide for different amounts of support to be paid if the payor is working, or in receipt of employment insurance benefits, or worker's compensation, or social assistance cannot be enforced by FRO if the order fails to establish a means to verify the payor's source of income. FRO may also refuse to enforce such orders if it results in continuous adjustments to their account.

(G) Varying Support Orders

(i) Generally

If a support order is changed or varied by a new order or agreement it is important to ensure that any terms that are intended to continue are specifically included in the new order or agreement, including, in particular, any termination provisions regarding support terms. If it is the intention of the parties to only change the quantum of the support payable under the original order, the changed order must be drafted carefully to indicate and that all other terms of the original order continue in effect.

(ii) Double Accruals

When varying a support order, to avoid double accruals of support due in the same month, the support obligation in both the original and varied orders should accrue on the same day of the month. If the order does not specify when support is supposed to be paid, the first payment will be due on the date of the order in accordance with Rule 25(18) of the *FLR*. For example, if the support under the original order accrued on the first day of the month and the varied order is made on May 4, 2016, without setting out the date that the support obligation commences, the support will accrue on May 4, 2016 and on the 4th day of every month thereafter. In this case, there will be a “double accrual” of the support in May 2016 on the 1st and 4th of the month.

(iii) Arrears of Support – Fix the Date

Rule 25(18) of the *FLR* also applies to the determination of arrears outstanding under a varied order. Unless the support order identifies a specific calendar date, arrears fixed in a court order are fixed as of the date of the order. This can be problematic when parties agree to the fixing of arrears by minutes of settlement and the order is issued at a later date. If the parties have not fixed the arrears as of a specific date the arrears will be fixed as of the date of the order. If the order is issued at a later date, the parties’ intention to fix the arrears as of the date the minutes of settlement were signed will not be reflected in the order. Depending upon whether or not support has continued under the varied order, this can result in confusion as to whether or not the arrears include support that accrued subsequent to the date the minutes of settlement were signed. For example, if the parties agreed on September 12, 2015 that the arrears are \$25,000, but did not include the date upon which the arrears were fixed, and the order is not issued until December 5, 2015, the order will be interpreted to read that the arrears are fixed in the amount of \$25,000 as of December 5, 2015. If the ongoing support obligation, as set out in the minutes of settlement, continued in the amount of \$2000 per month as of October 1, 2015, and the ongoing support was not paid, the October to December accruals of \$2000 per month will not be reflected in the arrears that were set at \$25,000 as of December 5, 2015.

(iv) Arrears of Support – Repayment Terms

If arrears are fixed in a support order and there are no payment terms that indicate the rate at which the arrears are to be repaid, FRO can use its discretion as to how it will enforce the entire quantum of arrears. However, if the court order states that the arrears are to be repaid at a specified rate, FRO is required to collect the arrears pursuant to the terms set out in the order. The parties should identify the commencement date for the payment of the arrears in the court order and preferably use the same accrual date as is used for the ongoing support. The arrears payment term may also include an escalation clause that provides that in the event the payor defaults in the repayment of the arrears the full amount of the outstanding arrears is immediately enforceable and no longer subject to the repayment schedule.

(v) Arrears of Support - Assignments

If the support order has been assigned to a social assignment delivery agency (assignee), Rule 15 (11) requires the assignee to be served with the motion to change. FRO is not the assignee. The identity of an assignee can be determined by faxing a Confirmation of Assignment form to the Ministry of Community and Social Services. If the assignee was not served with motion to change and subsequently the court rescinds all the arrears, FRO will adjust their records accordingly. FRO will also advise the assignee that the arrears in the case, including any arrears that were assigned, have been rescinded. The court may on motion by the assignee, set aside the changed order. The assignee is entitled to full recovery of its costs of the motion unless the court orders otherwise (Rule 15(13)).

If both the assignee and the recipient participate in a motion to change a support order, it is important to specify in the changed order the quantum for arrears owed to each party as of a specific date. If the changed order will also contain a repayment clause, it is important to note that FRO pays arrears first to the party who is owed the ongoing support at that time. For example, if the case is presently assigned to a social assistance delivery agency, FRO will pay the ongoing support, and the arrears payable to the assignee, to the assignee before any arrears are paid to the recipient. If the case is not presently subject to an assignment, but arrears remain owing to the assignee, FRO will pay the ongoing support, and the arrears payable to the recipient, to the recipient before the arrears are paid to the assignee. FRO is able to pay the arrears in a different order, if ordered to do so by the court.

(vi) Arrears of Support – Child and Spousal Support

Payments received by FRO for support owed pursuant to an order that contains both spousal and child support provisions, are not categorized by FRO as child support or spousal support. For example, if child support accrues at \$1000 per month and spousal

support at \$500 per month (for a total monthly obligation of \$1500 per month) and the payor pays \$800 per month, FRO will show arrears of \$700 per month, but cannot state that the arrears are spousal support or child support or a combination of both. Therefore, it is important when drafting a changed order to either fix the total amount of arrears, or to fix both the amount of spousal support and child support arrears. If an order fixes either one of child support or spousal support, but not the other, it is impossible for FRO to adjust the case. For example, if the arrears on a case were \$55,000 and the changed order fixes the arrears of child support at \$20,000, but does not fix the arrears of spousal support, FRO cannot adjust the case because there is no way of knowing how much of the arrears of \$55,000 are spousal support arrears and how much are child support arrears.

3. Enforcement of Support by FRO

(A) Registration of New Cases at FRO

As every case is unique, support enforcement actions taken by FRO are determined based on the specific facts of a case. Pursuant to s.6(1) of *FRSAEA*, the Director is required to carry out their duties in a manner that appears practical to the Director, including commencing enforcement actions.

All newly registered cases will be oriented through the FRO Welcome Centre and then after the onboarding process the case will be assigned to the appropriate area for continued monitoring and management and the process of collecting support payments from the payor and sending the payments to the recipient begins. Cases that are in arrears or that require more attention will be managed by case management officers. They will work with the clients and their support teams to determine the right course of action for the best possible outcome.

(B) Enforcement Tools

FRO has a variety of enforcement tools available to assist with enforcing a support order. They include, but not limited to the following, following:

- **Support Deductions Notices** - when the Support Deduction Order is received, in most cases the FRO sends a Support Deduction Notice (SDN) to the payor's employer or other income source(s).
- **Trace and Locate** - The FRO has tools which can be used to locate the payor and/or the payors assets. FRO can demand information about a payor from any person, entity or public body, pursuant to s. 56 of *FRSAEA*.

- **Voluntary Arrears Payment Schedule (VAPS)** - A VAPS is a written voluntary agreement that the payor enters into with FRO to make payments that pays both the ongoing support and an amount considered satisfactory to FRO to be paid towards arrears (i.e. allowing a payor to pay off the arrears over time). A satisfactory amount with respect to the latter is dependent about the facts of the case and the disclosure provided by the Payor.
- **Credit Bureau Reporting** - support payors who are in arrears may be reported to the credit bureau. This may make it difficult for them to obtain loans or other credit. The report will stay on the payor's credit rating for seven years.
- **Writs of Seizure and Sale** - The FRO can file a writ of seizure and sale against a payor's property. Writs can be filed in multiple jurisdictions where the payor has property.
- **Federal Licence and Passport Denial** - FRO may suspend passports and other federal licenses, such as a pilot's licence, pursuant to the federal Family Orders and Agreements Enforcement Assistance Act.
- **Bank or Lump Sum Garnishments** - The FRO can garnish individual and joint bank accounts.
- **Driver's Licence Suspensions** - FRO can suspend driver's licenses. Before the licence is suspended, the payor has the opportunity to pay off the arrears, enter into a repayment plan satisfactory to the Director or obtain a Refraining Order from the court.
- **Default Hearings** - A Notice of Default can be served on the payor. The payor is required to go to court to explain why support is not being paid. Default Orders made by the court can require the payor to pay ongoing support, and arrears, or be committed to jail for up to 180 days.
- **Warrant of Committal** - A Warrant of Committal to enforce an order of imprisonment for a maximum of 180 days can be issued by a court against a payor who does not comply with the payment terms in a Default Order.

(C) Collection of Monies and Commencement of Enforcement

FRO receives most support payments through a support deduction notice that is sent to the payor's income source, for example, their employer. This notice directs the income source to deduct support payments from the payor's income and send it to FRO. Where there is an employer, FRO will work within the employer's payroll schedule, as well as remittance schedule and method. Once the income source sends FRO the payments, the payment is sent to the recipient within two business days provided FRO has the correct banking information. Provided there are no complications with enforcing the payments, clients can expect to start receiving payments within 30 to 60 days of registration. If the payor is not making payments or if we do not know who their employer is, it may take longer to receive the first payment.

(D) FRO Online

FRO Online is a secure online tool that give clients access to their case information 24 hours a day, seven days a week. They can view their case status, financials (current obligations, any outstanding arrears and payments received), address on file, and enforcement summary. They can also send one-way communication messages to their case workers, view and print a Statement of Account (Schedule A) and upload documents.

(E) Assisting FRO to Enforce the Support Order

Recipients can assist FRO by advising of any changes to name, address, telephone number or banking information and new information about the payor, such as a new name, address, telephone number, job or financial situation (e.g. bankruptcy). Recipients should also advise FRO if the Payor has used or is using a different name from the one on the support order, including any nicknames, aliases or different spellings. Absent this information, FRO may not be able to collect the support owed from all possible sources. Further, the recipient should also inform FRO if they believe that the support obligation has ended.

Payors should inform FRO of any changes to their name, address or employer/source of income within 10 days to avoid file errors and possible enforcement action. Payors should also advise of any changes to their financial situation (e.g. loss of job) and if they believe that the support obligation has ended.

(F) Recipient Statement of Arrears (SOA) and FRO Online Calculator

A Statement of Arrears (SOA) is a sworn document completed by the recipient to claim additional amounts owing by a payor under the support order in the following circumstances:

- claims for pre-registration arrears
- claims for section 7 expenses for which receipts must be provided
- claims for court costs
- claims for interest

FRO recently created Statement of Arrears (SOA) digital calculator to assist recipients with completing their SOA form.¹ The new online calculator automatically calculates totals of arrears and interest using their inputted information. After the document has been commissioned, recipients can send it to FRO via FRO Online, by mail or fax where a FRO Financial Officer will review it within approximately 30 days.

These Statement of Arrears amounts, when entered on the Directors arrears records, will be recorded as a lump sum on the date of entry. The payor receives a mailed copy of the recipient's SOA. If a change order is made, FRO will adjust its records to reflect the change as based on the new order terms.

(G) How to Contact FRO²

Clients can speak to their FRO case contact by sending a one-way communication via FRO Online or by telephone at 416-326-1817 (Toronto) or 1-800-267-4330 (Toll-free) or 1-866-545-0083 (TTY - service for people who are Deaf, deafened or hard of hearing). Agents are available: Monday to Friday, 8:00 am to 5:00 pm and automated information about your case is available 24 hours a day.

Clients can serve FRO Legal Services Branch (LSB) with legal documents by mail, fax or email, as follows:

Mailing Address:

Legal Services Branch
Family Responsibility Office
Ministry of Children, Community and Social Services
7th Floor-125 Sir William Hearst Avenue

¹ <https://www.froforms.mcass.gov.on.ca/>

² [Paying and receiving child and spousal support | ontario.ca](https://www.ontario.ca/gov/services/paying-receiving-child-spousal-support)

North York, Ontario
M3M 0B5

Fax: 416-240-2402

Email: FROLegalService@ontario.ca

If clients wish to send in general correspondence to FRO, they can send the documents by mail or fax, as follows:

Mailing Address:

Family Responsibility Office
Ministry of Children, Community and Social Services
PO Box 200, STN A
Oshawa ON
L1H 0C5

Fax: 416-240-2401

(H) Administrative Fees

The Director can only charge certain administrative fees to a payor or recipient that are set out in the *O. Reg. 160/00 (Fees Charge by Director)* under *FRSAEA*. The main fees are as follows:

- Providing 2nd and additional Director's Statement of Arrears: \$25.00
- Adjusting arrears records because of a direct payment: \$100.00
- Step taken by FRO to enforce a support order (including any related support deduction order) in response to persistent or willful default of ss. 37, 41, 42, 45 of *FRSAEA*, r. 29 of the *FLR* and/or Part III of the *Family Orders and Agreements Enforcement Assistance Act (FOAEA)*: \$400.00
- Repeated filing of a support order or a support deduction order: \$50.00

Fees must be paid after all ongoing support and arrears are satisfied. *FRSAEA* gives the Director discretion to continue to enforce a support order or Support Deduction Order (SDO) to collect unpaid administrative fees.

4. Enforcement Relief Against Specific Enforcement Action

Where an order is sought with respect to a specific enforcement action, the motion relief should claim the available statutory remedy and provide supporting affidavit evidence,

including relevant financial records, and sworn financial statement. Such motions must be brought in the proper venue as required by r. 5(5)(a) *FLR* (i.e. in the municipality where the Recipient resides) and at the proper level court (i.e. in the court that made the support order or has the jurisdiction to change it or as otherwise directed by statute).

(A) Driver's License Suspension and Reinstatement

Part V (s.33 to 39) of the *FRSAEA* provides a complete statutory code for the suspension of driver's licenses where a support order filed in the Directors office is in arrears. Pursuant to s.34 of *FRSAEA*, the Director may serve a defaulting payor with a First Notice to Suspend Driver's Licence (First Notice), which advises that the Payor's driver license is at risk of suspension within 30 days, unless one of the three steps is successfully completed:

- a) make a satisfactory arrangement with the Director, complying with the terms of the support order and paying the arrears owing under the support order;*
- b) obtain a Refraining Order under s. 35(1); or,*
- c) pay all of the arrears owing under the support order.*

Pursuant to s.17.1 of O. Reg. 167/97 under the *FRSAEA*, service of a First Notice on a payor must be made by ordinary mail addressed to the payor at their most recent address shown in the records of the Director's office; and addressed to the payor at their most recent address as shown in the records of the Registrar of Motor Vehicles, if this address is different than the address in the records of the Director. The First Notice is deemed to have been received five days after it was mailed pursuant to r. 6(9) of *FLR*. The First Notice will state the exact date by which the payor must take action to avoid suspension of their driver's licence.

(i) Order to Refrain – S.35 of FRSAEA

The Director is the necessary (and only) responding party to a Refraining Motion as per s. 35(16) *FRSAEA* and must be served with the motion as required by the *FLR*. R. 8(6)(7) of the *FLR* provides for service of FRO at its place of business. Further, the motion for a refraining order must be brought within the context of a motion to change the operative support order. However, s. 35(4) provides that a motion for a refraining order may be made before the commencement of a variation proceeding on the undertaking of the payor, or the payor's solicitor, to commence the motion to change within 20 days after the date of the order to refrain, or without making a motion to change if the payor has started an appeal of the support order and the appeal has not yet been determined. It should be noted that a refraining motion may be brought before

the case conference pursuant to r. 14(6)(d) of the *FLR*. Further, where the support obligation is contained within a Domestic Contract, the refraining motion must be brought in the Ontario Court of Justice or the Superior Court of Justice (Family Court), as applicable, pursuant to s. 35(6)(a)(ii) *FRSAEA* and s. 35(2)(b) of the *FLA*.³

A refraining order must be obtained within the 30-day period set out in the First Notice [i.e. cannot be obtained outside the 30-day statutory limitation period per ss.35(10)(11)(12)(13)]. A refraining order terminates on the earliest of the enumerated scenarios under s.35(19) of *FRSAEA*, the longest period being 6 months after the refraining order is made. An extension of the termination date can be done by obtaining an order to extend for an additional 3 months, or in reciprocal variation scenarios 6 months. The motion to extend must be brought and determined by the court before the 6-month expiry date per s. 35(22) *FRSAEA*.

If the payor subsequently breaches either the ss. 34(a) negotiated payment plan, the refraining order payment terms, or the change order payment terms within 24 months of such order being made, a Final Notice to Suspend Driver's Licence (Final Notice) may be sent by the FRO which provides the payor 15 days to remedy the breach. There is no court-based remedy in respect to the Final Notice (i.e. no refraining motion possible).⁴

(ii) Reinstatement of a Suspended Driver's Licence

There is no jurisdiction for the court to order a driver's licence be reinstated that has been suspended under Part V of the *FRSAEA*.⁵ A Payor can only obtain reinstatement of their driver's licence through s. 38(1)(a) to (e) of the *FRSAEA*, as applicable.

(B) Writs of Seizure and Sale

On the payor's motion the court can make an order to change, withdraw, or suspend a writ of seizure and sale pursuant to Rule 28(8) of the *FLR*.

(C) Section 42 Charge Against Property

The court may order the discharge, in whole or in part, or the postponement of a charge on such terms as to security or other matters as the court considers just pursuant to s. 42(3) *FRSAEA*.

³ See *Alexander v FRO*, 2013 ONSC 755

⁴ See *Young v. Sherwood*, 2020 ONSC 2038

⁵ See *McLarty v. Ontario (Director, Family Responsibility Office)* [2001] 53 O.R. (3d) 161 (C.A.); *Adubofour v. Director, Family Responsibility Office* [2001] O.R. (3d) 171 (C.A.).

(D) Default Hearing

The support payor may seek an adjournment of the default hearing to monitor the progress, or await the outcome, of a motion to change.

The court hearing a default proceeding can stay the hearing (s.106 *CJA*). The Superior Court of Justice should not stay a default hearing already in progress in the Ontario Court of Justice.⁶

(E) Garnishment Hearing

In response to a notice of garnishment, a payor, garnishee, or co-owner of a debt can file a Dispute Form and request a hearing from the court under Rule 29(17)(a) of the *FLR*. At the Garnishment Hearing the court may make any of the orders set out in Rule 29(19)(1) to (11) of the *FLR* including: an order that changes how much is being garnished; an order suspending the garnishment; an order setting aside the notice of garnishment; an order that the garnished money be held; or an order dismissing the dispute.

5. Enforcement Relief and a Support Deduction Order

(A) The Support Deduction Notice

A Support Deduction Notice (SDN) is the notice of the Support Deduction Order (SDO) that the FRO sends to an income source seeking payment for support (s. 20(2) *FRSAEA*). The SDN sets out the amount of support, and any arrears, owed by the payor under the support order, as well as the amount that the income source is required to pay to the FRO (s. 20(3) *FRSAEA*).

An income source that receives an SDN from the FRO is required to deduct from the money it owes the payor the amount that is set out in the SDN, and pay that amount to the FRO (s. 22(1) *FRSAEA*). The total amount deducted and remitted to the FRO, however, cannot exceed 50% of the net amount owed by the income source to the payor (s.23 (1) *FRSAEA*).

(B) Effect of a Stay of Enforcement on an SDO

⁶ *Carrabs v. Carrabs* (1996), 21 RFL (4th) 93(Ont. Ct. (Gen. Div.))

An order staying the enforcement of a support order does not affect the operation and enforcement by an SDO unless the related support order is also stayed (s. 20(6) *FRSAEA*).

To stop the FRO from collecting the ongoing support obligation via an SDN to an income source, the payor must also obtain an order to stay or suspend the ongoing support obligation.

A request to stay the ongoing support obligation raises entitlement issues between the parties and requires service on the recipient who is the proper responding party.

(C) Reducing the Amount Deducted for Arrears by an SDN

A payor may bring a motion to reduce the amount that an income source is deducting under an SDO for arrears of support under a support order (s. 27(1)(c) *FRSAEA*). On a motion pursuant to s. 27(1)(c) the payor is presumed to have the ability to pay the amount being deducted for arrears. The court may only change the amount being deducted if it is satisfied that the payor is unable for valid reasons to pay that amount (s. 27(6) *FRSAEA*).

An order pursuant to s. 27(1)(c) should always name the income source in the body of the order, so as to avoid its application to all income sources, both present and future. For example, the payor may simply be concerned about their employer's income source deduction, and if the employer is referred to by name in the s. 27(1)(c) order, the Director's collection by federal support deduction order of employment insurance benefits would not be restricted.

The parties to a motion under s. 27(1)(c) are the payor and FRO. The payor is prohibited from disputing a recipient's entitlement to support pursuant to s. 27(3) *FRSAEA*.

(D) Alternative Payment Order

A motion for an Alternative Payment Order under s. 28(1) of *FRSAEA* is not a motion to restrict FRO's enforcement. Instead, s. 28 provides that a court that makes a Support Deduction Order may make an order requiring the payor to pay the support amounts owed directly to the FRO rather than pursuant to a Support Deduction Order to an income source. The order may be made on the consent of the parties, with a mandatory term requiring the payor to post four (4) months ongoing support accruals with the FRO

as security (s. 28(7) *FRSAEA*), or on the grounds of unconscionability. Section 28(6) of *FRSAEA* sets a very high threshold to meet to establish unconscionability and sets out explicitly what is *not* unconscionable. 3

If the payor fails to make the ongoing support payments directly to the FRO, the Alternative Payment Order is automatically terminated and FRO can enforce the support order by sending “notice of the SDO” (SDN) to an income source. The four months security for support are used to pay the ongoing support obligation in the interim.

The Director is not a party to a motion for an Alternative Payment Order, but, if the Director has deemed a Support Deduction Order under s. 21 of *FRSAEA*, FRO must be served with the motion and may be added as a party. Similarly, if a Social Service Assignee is owed arrears via an assignment of the support order under s. 14, they must also be served and may also be made a party. It is important to remember that an Alternative Payment Order does not change the support amount to be remitted to the FRO, nor does it affect the FRO’s enforcement of the order; rather, it simply changes the method of payment.

6. General Enforcement Relief

(A) Motion for a Stay of Enforcement

A stay of enforcement is interim relief within a payor’s motion to change, which provides for a “general” stay of enforcement pending the disposition of the action. If the payor is seeking a temporary order in a motion to change to stop all prospective collection pending adjudication of the motion to change, the temporary motion must claim relief (i) to stay or suspend the ongoing support accrual pursuant to s. 37(2)(a) or (2.1)(a) of the *FLA* or s. 17(1)(a) of the *Divorce Act (DA)*, as applicable, on notice to the recipient and to which the recipient responds and (ii) to stay enforcement of arrears on notice to the FRO and to which the FRO responds pursuant to its exclusive enforcement jurisdiction under s. 6(7) of the *FRSAEA*.

As set out in s. 20(6) of the *FRSAEA* a stay of enforcement order will not affect remittance or collection of support under a Support Deduction Order unless the support order (i.e. support accrual) is also stayed. The jurisdiction to stay enforcement of arrears lies under s. 106 of the *Courts of Justice Act*. A request to stay prospective enforcement

is in the nature of injunctive relief - which is an equitable remedy that is not available to the Ontario Court of Justice.⁷

Further, r. 14(6)(e) of the *FLR* provides that a motion to limit or stay a support order or the enforcement of arrears under a support order can be heard before a conference dealing with the substantive issues in the case has been completed.

The onus is on the payor to demonstrate grounds of (a) a *prima facie* case for variation exists and that (b) the payor comes to court with clean hands (i.e. has provided timely financial disclosure and financial statement and otherwise has honoured the support obligations for those periods where no allegations of inability to pay have been made or demonstrated).⁸

(B) Order to Hold Monies

A payor may bring a motion for the Director to hold support monies pending the disposition of a court proceeding pursuant to s. 56(2) of *FRSAEA*. Section 56(1) requires FRO to pay to the recipient any monies collected, despite the commencement of any proceeding, in the absence of a court order to the contrary under s. 56(2).

The parties to a motion for a hold payment order are the Payor, Recipient and Director, FRO.⁹ When seeking an order to hold monies, the onus is on the payor to demonstrate that all, or part of the funds, should be held pending the outcome of the proceeding dealing with the support obligation. In determining a payor's request, the court considers the following factors:

- a. The presumptive correctness of the existing support order;
- b. The strength of the payor's claim to the monies held;
- c. Whether there is a genuine dispute about entitlement requiring a trial to make a just determination;
- d. Whether the payor comes to court with clean hands;
- e. Any prejudice to the payor if all or part of the monies are released;
- f. Any prejudice to the recipient if all or part of the monies are not released;
- g. Any prejudice to the child(ren) if all or part of the monies are not released; and
- h. In assessing prejudice to the recipient or child in para (f) and (g) the court considers:
 - delay until final determination of entitlement;

⁷ See *McIntyre v Director, Support and Custody Orders Enforcement Office* [1989] W.D.F.L. 1251 (Ont. Prov. Ct. [Fam. Div.]) *Divile v Divile* [1996] W.D..F.L. 780 (Ont. Ct. (Prov.Div.)).

⁸ See *Soengkono v. Legal Services – Family Responsibility Office* 2013 ONSC 3105; *Yip v. Yip* (1988), 15 R.F.L. (3d) 211 (Ont.H.C.); *Garneau v Director, Family Responsibility Office* 2010 ONSC 2804.

⁹ See *Sivasubramaniam v. Chandrasekaram*, 2017 ONCJ 1

- Whether there is an ongoing support obligation; and
- Any immediate need for additional support.

7. Termination of Support

(A) Termination of the Support Obligation under s. 8 of *FRSAEA*

A terminating event is an event whose occurrence ends the Payor's ongoing support obligation. Section 8 of the *FRSAEA* provides for a complete statutory scheme for the Director to follow in every case to determine if the support obligation has terminated. In the absence of a set calendar date in the order or an order of the court terminating the order, the statutory procedure requires written confirmation from the Recipient acknowledging that the support obligation has terminated. If the support order has been assigned to a social service delivery agent (assignee) described in s. 33(3) of the *FLA*, as in the case of the Ministry of Children, Community and Social Services, the Director shall not cease enforcement without the agency's consent (s. 8(2) *FRSAEA*).

(i) *Payor Alleges Termination of the Support Obligation*

Pursuant to section 8.1(1) of *FRSAEA*, if a payor believes that a support obligation has terminated, they may complete and submit to FRO an Application to Discontinue Enforcement of Ongoing Support Form (ADEOS). FRO will contact the Recipient to respond to the inquiry. If the Recipient fails to respond within 20 days to the Director's inquiry the Director may exercise its' discretion to discontinue enforcement of the support order until such time as a response is provided. In circumstances where the Director has exercised its discretion and the Recipient subsequently responds the Director may reinstate enforcement of the support order.

(ii) *Section 8.4 FRSAEA Motion to Determine if Support has Terminated*

The Director's Office does not have the jurisdiction to determine issues of disputed entitlement and/or termination between the parties.¹⁰ In the event of a dispute between the parties as to whether the support obligation has terminated, section 8.4(1) of *FRSAEA* provides that the court shall determine the issue on a motion to the court. Section 8.4(7) of *FRSAEA* provides that pending receipt of a court order terminating the support obligation the Director shall continue to enforce the support obligation. Section 8.4(4) of *FRSAEA* provides that if the court finds that the

¹⁰ See *Lapchuk v Ontario* (Director of the Family Responsibility Office) 2005 CanLII 8194 (ON SC)

Recipient should have notified the Director of a termination date and failed to do so the court may order the Recipient to repay any monies received after the termination date. Section 8.4(6) of FRSAEA further provides that a repayment order is not a support order and is not enforceable by FRO.

(iii) Section 8.2(2) FRSAEA Director's Discretion to Enforce Lower Amount

Section 8.2 allows FRO to enforce a lower amount than is set out on the face of the order only in the following situation. The parties to the order are in agreement that a child is no longer entitled to support, but support remains payable for other dependent children and the support order was made pursuant to the CSG Tables, and contains the requisite information set out in s. 8.2(2) (i.e. the number of children; the payor's annual income and the support amount corresponds exactly to the CSG table amount payable for those children). In this situation FRO may exercise its discretion to enforce a lower amount (the CSG table amount owed for the remaining dependent children using the payor's annual income as stated in the original order).

(iv) Section 8.1.1 FRSAEA Director's Discretion to Discontinue Enforcement of Child Support for a Child over the Age of Majority

Section 8.1.1(1) of the FRSAEA provides that the Director has discretion to discontinue enforcement, or enforce a lesser amount of support, with respect to a dependent who has attained the age of majority, if (a) the Director serves on the Recipient a request for any information the Director considers necessary to establish that the enforcement of the support obligation should continue and (b) the Recipient does not respond in writing within 20 days after being served or the Director is of the opinion that the information provided by the Recipient does not meet the requirements in clause (a). Section 8.1.1(1) allows the Director to exercise their discretion to discontinue enforcement if they are not satisfied with the response provided by the Recipient. This provision does not allow the Director to make a factual determination of the date child support ended. The determination of when support terminated can only be made with the Recipient's consent or order of the court.

Schedule “A”

Family Responsibility and Support Arrears Enforcement Act, 1996

ONTARIO REGULATION 454/07

RECOMMENDED STANDARD TERMS FOR SUPPORT ORDERS

Consolidation Period: From June 6, 2008 to the e-Laws currency date.

Last amendment: O. Reg. 182/08.

This is the English version of a bilingual regulation.

Recommended standard terms

1. (1) This Regulation sets out, for the purposes of clause 63 (1) (p.2) of the Act, the standard terms that are recommended for support orders. O. Reg. 454/07, s. 1 (1).

(2) The standard terms set out in this Regulation are recommended to be used only if it is appropriate in the circumstances. O. Reg. 454/07, s. 1 (2).

(3) The standard terms set out in this Regulation may be used in English or in French. O. Reg. 182/08, s. 1.

Definitions

1.1 In this Regulation,

“payor” means a person who is required to pay support under a support order; (“payeur”)

“recipient” means a person entitled to support under a support order or the parent, other than the payor, of a child entitled to support under a support order. (“bénéficiaire”)
O. Reg. 182/08, s. 2.

Child support

2. (1) This section applies in respect of an order for child support. O. Reg. 454/07, s. 2 (1).

(2) In this section,

“special or extraordinary expenses” means expenses ordered under section 7 of the applicable child support guidelines; (“deepness spéciales ou extraordinaires”)

“table amount” means the amount of child support determined by reference to the applicable table set out in Schedule I of the applicable child support guidelines according to the number of children to whom an order for child support relates and the income of the parent or spouse against whom the order is sought. (“montant prévu dans la table”) O. Reg. 454/07, s. 2 (2); O. Reg. 182/08, s. 3 (1, 2).

(3) The following standard term is recommended to be used where child support for a child or children is the table amount:

[Insert name of payor] shall pay child support to *[insert name of recipient]* for the *[specify child or children]*, *[insert child or children’s name(s)]*, born on *[insert child or children’s date(s) of birth]* in the amount of \$*[insert amount]* per month, in accordance with the Tables under the child support guidelines based on *[insert name of payor]’s* annual income of \$*[insert amount]*, commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows.

O. Reg. 182/08, s. 3 (3).

(4) The following standard term is recommended to be used where child support for a child or children is an amount other than the table amount:

[Insert name of payor] shall pay child support to *[insert name of recipient]* for the *[specify child or children]*, *[insert child or children’s name(s)]*, born on *[insert child or children’s date(s) of birth]* in the amount of \$*[insert amount]* per month, commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows.

When support for *[insert number]* of the children ends, *[insert name of payor]* shall pay child support to *[insert name of recipient]* for the remaining *[insert number]* *[specify child or children]* in the amount of \$*[insert amount]* per month, commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows.

[Repeat and complete the second paragraph as needed until there remains only one child for whom child support is payable.]

O. Reg. 182/08, s. 3 (3).

(5) The following standard term is recommended to be added after the standard term set out in subsection (3) or (4), as the case may be, where the amount of child support includes an additional amount for special or extraordinary expenses,

(a) in the case of expenses that are known and fixed, for each child:

The annual income of *[insert name of payor]* is \$*[insert amount]*. The annual income of *[insert name of recipient]* is \$*[insert amount]*. *[Insert name of payor]* shall pay *[insert percentage]* per cent of the special or extraordinary expenses under section 7 of the

child support guidelines to *[insert name of recipient]* for *[insert item for which expenses are known and fixed]* for *[insert child's name]*, born on *[insert child's date of birth]*, in the amount of *[\$[insert amount]* per month, commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until *[insert date or event]*.

[Repeat and complete this paragraph as needed for each item for which known and fixed expenses are to be paid.]

(b) in the case of expenses that are irregular or change over time:

The annual income of *[insert name of payor]* is *[\$[insert amount]*. The annual income of *[insert name of recipient]* is *[\$[insert amount]*. *[Insert name of payor]* shall pay *[insert percentage]* per cent of the following special or extraordinary expenses under section 7 of the child support guidelines per month to *[insert name of recipient]* for the *[specify child or children]*, *[insert child or children's name(s)]*, born on *[insert child or children's date(s) of birth]*, commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until *[insert date or event]*: *[insert list of items for which expenses are irregular or change over time]*.

O. Reg. 182/08, s. 3 (3).

(6) The following standard term is recommended to be used in respect of a variation, under section 37 of the *Family Law Act* or section 17 of the *Divorce Act* (Canada), of an order for child support:

Paragraph *[insert paragraph number]* of the order of the Honourable *[insert Mr. Justice or Madam Justice and name of judge]* dated *[insert date]* is changed as follows:

[Insert and complete applicable recommended standard term or terms set out in subsections (3), (4) and (5).]

All other terms of the order of the Honourable *[insert Mr. Justice or Madam Justice and name of judge]* dated *[insert date]* remain in full force and effect.

O. Reg. 182/08, s. 3 (3).

(7) The following standard term is recommended to be used to require annual disclosure of income tax documents and, where applicable, proof of special or extraordinary expenses:

(a) in the case of an order for child support that does not include an additional amount for special or extraordinary expenses:

[Insert name of payor] shall, by *[insert month and day]* of each year in which child support is payable, deliver to *[insert name of recipient]* a copy of his or her notice of

assessment, notice of reassessment (if any) and income tax return for the previous year.

(b) in the case of an order for child support that includes an additional amount for special or extraordinary expenses:

[Insert name of payor] shall, by *[insert month and day]* of each year in which child support is payable, deliver to *[insert name of recipient]* a copy of his or her notice of assessment, notice of reassessment (if any) and income tax return for the previous year.

[Insert name of recipient] shall, by *[insert month and day]* of each year in which an amount for special or extraordinary expenses is payable, deliver to *[insert name of payor]*,

(a) a copy of his or her notice of assessment, notice of reassessment (if any) and income tax return for the previous year; and

(b) a receipt or other proof of payment for each special or extraordinary expense to which this order applies that was claimed by *[insert name of recipient]* in the 12 months preceding the date specified in this paragraph.

O. Reg. 182/08, s. 3 (3).

Spousal support

3. (1) This section applies in respect of an order for spousal support. O. Reg. 454/07, s. 3 (1).

(2) The following standard term is recommended to be used where spousal support is to be paid,

(a) in periodic payments for a fixed duration:

[Insert name of payor] shall pay spousal support to *[insert name of recipient]* in the amount of \$*[insert amount]* per month commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until *[insert date]*.

(b) indefinitely in periodic payments:

[Insert name of payor] shall pay spousal support to *[insert name of recipient]* in the amount of \$*[insert amount]* per month commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until a court orders otherwise.

(c) in a single payment:

[*Insert name of payor*] shall pay lump sum spousal support to [*insert name of recipient*] in the amount of \$[*insert amount*] on or before [*insert date*].

O. Reg. 182/08, s. 4 (1).

(3) The following standard term is recommended to be added after the standard term set out in clause (2) (b) where spousal support that is to be paid indefinitely in periodic payments is subject to future review:

The amount of the spousal support ordered shall be reviewed [*insert information regarding date, time period or interval for review*].

O. Reg. 454/07, s. 3 (3); O. Reg. 182/08, s. 4 (2).

(4) The following standard term is recommended to be used where the amount for spousal support is to be indexed,

(a) in accordance with subsections 34 (5) and (6) of the *Family Law Act*:

The spousal support shall be indexed and shall increase annually in accordance with the indexing calculation set out in subsections 34 (5) and (6) of the *Family Law Act*, effective [*insert date*] and on each anniversary of that date.

(b) by applying cost of living adjustment factors derived from any part of the Consumer Price Index:

The spousal support shall be indexed and shall increase annually in accordance with the Consumer Price Index for [*specify one of Canada, Toronto, Ottawa or Thunder Bay*] for the month of [*insert month*] of the [*specify current or previous*] year, effective [*insert date*] and on each anniversary of that date.

(c) by applying a fixed rate of increase or decrease:

The spousal support shall be indexed and shall [*specify increase or decrease*] annually by a factor of [*insert percentage*] per cent, effective [*insert date*] and on each anniversary of that date.

(d) by applying the indexing factor applied by an income source to the payor's wages, salary, pension or other income:

The spousal support shall be indexed and shall increase annually in accordance with the indexing factor(s) applied by [*insert name(s) of income source(s)*], the [*specify income source or income sources*] of the [*specify respondent or applicant*], effective [*insert date*] and on each anniversary of that date.

O. Reg. 454/07, s. 3 (4).

(5) The following standard term is recommended to be used in respect of a variation, under section 37 of the *Family Law Act* or section 17 of the *Divorce Act* (Canada), of an order for spousal support:

Paragraph *[insert paragraph number]* of the order of the Honourable *[insert Mr. Justice or Madam Justice and name of judge]* dated *[insert date]* is changed as follows:

[Insert and complete applicable recommended standard term or terms set out in subsections (2), (3) and (4).]

All other terms of the order of the Honourable *[insert Mr. Justice or Madam Justice and name of judge]* dated *[insert date]* remain in full force and effect.

O. Reg. 182/0, s. 4 (3).

Support Arrears

3.1 (1) In this section,

“assignee” means a person or agency to which an order for support is assigned under subsection 34 (3) of the *Family Law Act* or subsection 20.1 (1) of the *Divorce Act* (Canada). O. Reg. 182/08, s. 5.

(2) The following standard term is recommended to be used where support arrears are owed by the payor only to the recipient:

As of *[insert date]*, the support arrears owed to *[insert name of recipient]* by *[insert name of payor]* are fixed in the amount of \$*[insert amount]*.

[Insert name of payor] shall pay \$*[insert amount]* per month to *[insert name of recipient]* on account of the support arrears commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until the arrears are paid in full.

O. Reg. 182/08, s. 5.

(3) The following standard term is recommended to be used where support arrears are owed by the payor only to an assignee:

As of *[insert date]*, the support arrears owed to the *[insert name of assignee]* by *[insert name of payor]* are fixed in the amount of \$*[insert amount]*.

[Insert name of payor] shall pay \$*[insert amount]* per month to the *[insert name of assignee]* on account of the support arrears commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until the arrears are paid in full.

O. Reg. 182/08, s. 5.

(4) The following standard terms are recommended to be used where support arrears are owed by the payor to the recipient and to an assignee,

(a) in order to fix the amounts that are owed, and to whom:

As of *[insert date]*, the support arrears owed by *[insert name of payor]* are fixed in the total amount of \$*[insert amount]*, with \$*[insert amount]* owing to *[insert name of recipient]* and \$*[insert amount]* owing to the *[insert name of assignee]*.

(b) in order to set out the terms on which the arrears are to be paid,

(i) where the arrears owed to the recipient are to be paid in full before arrears owing to the assignee may be paid:

[Insert name of payor] shall pay \$*[insert amount]* per month to *[insert name of recipient]* on account of the support arrears owed to *[insert name of recipient]* commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until those arrears are paid in full.

Once the support arrears owed to *[insert name of recipient]* are paid in full, *[insert name of payor]* shall pay \$*[insert amount]* per month to the *[insert name of assignee]* on account of the support arrears owed to the *[insert name of assignee]* until those arrears are paid in full. *[Insert name of payor]* shall pay the arrears on the *[insert number]* day of each month, commencing in the first month after the month in which the arrears owed to *[insert name of recipient]* are paid in full.

(ii) where the arrears owed to the assignee are to be paid in full before arrears owing to the recipient may be paid:

[Insert name of payor] shall pay \$*[insert amount]* per month to the *[insert name of assignee]* on account of the support arrears owed to the *[insert name of assignee]* commencing *[insert date]* and continuing on the *[insert number]* day of each month that follows until those arrears are paid in full.

Once the support arrears owed to the *[insert name of assignee]* are paid in full, *[insert name of payor]* shall pay \$*[insert amount]* per month to the *[insert name of recipient]* on account of the support arrears owed to the *[insert name of recipient]* until those arrears are paid in full. *[Insert name of payor]* shall pay the arrears on the *[insert number]* day of each month, commencing in the first month after the month in which the arrears owed to the *[insert name of assignee]* are paid in full.

O. Reg. 182/08, s. 5.

Costs

4. The following standard term is recommended to be used in a support order where costs related to obtaining the support order are awarded:

Costs are fixed in the amount of \$[insert amount], of which \$[insert amount] is related to support and is enforceable as support by the Director, Family Responsibility Office.

O. Reg. 454/07, s. 4.

Interest

5. The following standard term is recommended to be used in a support order where post judgment interest is awarded under section 129 of the *Courts of Justice Act*:

This order bears interest at the post judgment interest rate of [insert rate] per cent per year effective from the date of this order. A payment in default bears interest only from the date of default.

O. Reg. 454/07, s. 5.

Enforcement

6. The following standard term is recommended to be used in a support order, other than a provisional order, so as to include the wording respecting the order and its enforcement that is required by subsection 9 (1) of the Act:

Unless the order is withdrawn from the office of the Director, Family Responsibility Office, it shall be enforced by the Director, and amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed.

O. Reg. 454/07, s. 6.

Termination of support obligation

7. The following standard term is recommended to be used in a support order where the obligation to provide support to a dependant is determined to have ended:

The support ordered in paragraph [insert paragraph number] of the order of the Honourable [insert Mr. Justice or Madam Justice and name of judge] dated [insert date] is terminated, effective [insert date].

O. Reg. 182/08, s. 6.

8. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 454/07, s. 8.

SCHEDULE B

Problematic Wording in Support Orders and Some Suggested Solutions

Problem Wording	Solution
<p>Variable Quantum</p> <p>“Payor to pay \$200 per month when employed; \$50 per month when unemployed.”</p>	<p>This type of order is awkward to enforce, but if such a term absolutely must be included, a disclosure term should be added: “Support will accrue at the employed rate until satisfactory proof of unemployment is provided to the Director of the Family Responsibility Office.”</p>
<p>Support Amount not Specified</p> <p>“Support payable in the amount set out the CSG” or “the amount set out in the Table under the CSG.”</p>	<p>The Director does not have access to the payor’s income information if it is not on the face of the order. Set out the actual dollar amount required to be paid: “Support to be paid in the amount of \$500 per month.”</p>
<p>Offset Civil Debt Against Support</p> <p>“The wife shall pay the husband for the computer, the amount of \$4,000. This sum shall be offset against the husband’s support payments for the child until fully satisfied.”</p>	<p>The FRO cannot set off payments for equalization or other obligations of the parties. Provisions such as these should be avoided.</p>
<p>No Commencement Date</p> <p>“Support to commence when the matrimonial home is sold.”</p>	<p>There is no commencement date for the support. The Director cannot know when the matrimonial house is sold. It may be better to draft such a provision to read “Support to commence on the first day of the month following the sale of the matrimonial home.” If possible, include a specified calendar date.</p> <p>Also include a disclosure order: “The recipient shall advise the Director in writing when the matrimonial home is sold.”</p>

<p>Commencement dates do not align</p> <p>First order, made on April 20, 2014, states: “The payor shall pay child support in the amount of \$1,000 per month commencing May 1, 2014.”</p> <p>Second order, made on May 15, 2015, states: “The payor shall pay child support in the amount of \$500 per month.”</p>	<p>No commencement date specified in the 2nd order; therefore support accrues as of the date of the second order. This may lead to overlapping support orders: if the original support order requires payments to be made on the first day of the month, and the second order, made on the 15th, does not specify a commencement date, it may result in a double accrual for that month. Specify the date the order is to commence.</p>
<p>Retroactive Commencement Date versus Fixing Arrears</p> <p>“Support to commence retroactively as of December 1, 2010.”</p>	<p>Not a problematic provision in itself, but if there are retroactive arrears, the process of enforcement will be simplified in the amount of arrears and any repayment schedules are written into the order: “Arrears are set at \$1,000 as of the date of this order, to be paid at the rate of \$100 per month.” Otherwise, FRO assumes there are no arrears owing, and cannot enforce them until a sworn Statement of Arrears is received from the recipient. A payment schedule would be beneficial to the payor, who will otherwise be responsible for the full amount of the arrears immediately.</p>
<p>Terminology that does not Indicate a Clear Obligation to Pay</p> <p>“The SP shall maintain the child in private school.”</p>	<p>Use the word ‘pay’, avoid terms such as ‘maintain’.</p>
<p>Payments made to Third Parties</p> <p>“The payor shall pay \$300 per month for expenses of post-secondary education directly to the child, John.”</p>	<p>Make the payments payable to the recipient. Avoid clauses requiring payments to third parties, such as a daycare provider or private school. An exception is if the order states that the recipient can make the payment to the third party and the order requires the payor to reimburse the recipient for the expense.</p>



Law Society
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Barreau
de l'Ontario

TAB 7

17th Family Law Summit

Rights of Appearance Family Law Pilot Project –
Polling Questions

March 28, 2023



17th Family Law Summit

Rights of Appearance Family Law Pilot Project – Polling Questions

1. Are you aware of the Rights of Appearance Family Law Pilot Project that came into effect on January 17, 2022?

- Yes
- No

2. If you answered yes to Question 1, have any candidates that you supervise appeared in court under this pilot project?

- Yes
- No



Law Society
of Ontario

Barreau
de l'Ontario

TAB 8

17th Family Law Summit

Judicial Panel – Working with Racialized Clients

The Honourable Justice Wiriranai Kapurura
Ontario Court of Justice

March 28, 2023



FAMILY LAW SUMMIT 2023: JUDICIAL PANEL

Justice W. Kapurura

“Working with racialized clients”

LEGISLATIVE PROVISIONS

CYFSA

Best interests of child

74 (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,

..

(b) in the case of a First Nations, Inuk or Métis child, consider the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child’s cultural identity and connection to community, in addition to the considerations under clauses (a) and (c); and

(c) consider any other circumstance of the case that the person considers relevant, including,

..

(iii) the child’s race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,

(iv) the child’s cultural and linguistic heritage,

Preamble to the CYFSA (diversity & systemic racism)

The Government of Ontario is committed to the following principles:

Services provided to children and families should respect their diversity and the principle of inclusion, consistent with the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

Systemic racism and the barriers it creates for children and families receiving services must continue to be addressed. All children should have the opportunity to meet their full potential. Awareness of systemic biases and racism and the need to address these barriers should inform the delivery of all services for children and families.

Preamble to the CYFSA (FNIM)

With respect to First Nations, Inuit and Métis children, the Government of Ontario acknowledges the following:

The Province of Ontario has unique and evolving relationships with First Nations, Inuit and Métis peoples.

First Nations, Inuit and Métis peoples are constitutionally recognized peoples in Canada, with their own laws, and distinct cultural, political and historical ties to the Province of Ontario.

Where a First Nations, Inuk or Métis child is otherwise eligible to receive a service under this Act, an inter-jurisdictional or intra-jurisdictional dispute should not prevent the timely provision of that service, in accordance with Jordan's Principle.

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the importance of belonging to a community or nation, in accordance with the traditions and customs of the community or nation concerned.

Further, the Government of Ontario believes the following:

First Nations, Inuit and Métis children should be happy, healthy, resilient, grounded in their cultures and languages and thriving as individuals and as members of their families, communities and nations.

Honouring the connection between First Nations, Inuit and Métis children and their distinct political and cultural communities is essential to helping them thrive and fostering their well-being.

Children's Law Reform Act

18(1) "decision-making responsibility" means responsibility for making significant decisions about a child's well-being, including with respect to,

- (a) health,
- (b) education,
- (c) culture, language, religion and spirituality, and
- (d) significant extra-curricular activities;

Best interests of the child

Primary consideration

(2) In determining the best interests of a child, the court shall consider all factors related to the circumstances of the child, and, in doing so, shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being. 2020, c. 25, Sched. 1, s. 6.

Factors

(3) Factors related to the circumstances of a child include,

..

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

CASE LAW

In General

R. v. Morris, 2021 ONCA 680

[123] Although we would not equate Black offenders with Indigenous offenders, for the purposes of s. 718.2(e), the *Gladue/Ipeelee* jurisprudence can inform the sentencing of Black offenders in several respects: see *Borde*, at para. 30. Just as with the discrimination suffered by Indigenous offenders, courts should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender's community, and the impact of that racism on the offender's background and circumstances. Similarly, in considering the restraint principle, courts should bear in mind well-established over-incarceration of Black offenders, particularly young male offenders. Finally, as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender's moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances.

R. v. Jackson 2018 CarswellOnt 6259

82. I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration.¹² While this does not in and of itself justify a different sentence, it is an important first step in providing the necessary context in which to understand the case-specific information in sentencing. I have come to this conclusion not simply because it provides substance to the principle of

restraint found in [s. 718.2\(e\)](#), but also because it is in keeping with the development of the doctrine of judicial notice and the legal recognition in the jurisprudence of the discrimination against African Canadians.

Domestic family cases

Van de Perre v. Edwards, 2001 SCC 60: The mother was a Caucasian Canadian citizen living in Vancouver. The father was an African American and was a professional basketball player. The mother was awarded full custody at trial, but the British Columbia Court of Appeal reversed this decision and awarded joint custody to the father and his wife, who were Black. The child's biracial identity, and the father and his wife's ability to support this cultural identity, factored heavily into the Court of Appeal decision. The Court of Appeal found that the trial judge erred in ignoring the racial aspects of the custody determination. The mother appealed to the Supreme Court of Canada.

The African Canadian Legal Clinic, the Association of Black Social Workers and the Jamaican Canadian Association intervened on the SCC appeal. The interveners submitted that race is a critical factor in custody and access cases.

The Supreme Court of Canada restored the trial judge's order, finding that there was no material error and that the Court of Appeal should not have intervened. With respect to racial identity, the SCC stated:

Para. 37 “...the importance of this factor will depend greatly on many factual considerations... the question is which parent will best be able to contribute to a healthy racial socialization and overall healthy development of the child. This question is one of fact to be determined by the courts on a case-by-case basis and weighed by the trial judge with other relevant factors”

Para. 40: “Race can be a factor in determining the best interests of the child because it is connected to the culture, identity and emotional well-being of the child...”

Carley v. Abbatino, 2012 ONCJ 192: The court had to determine who was in a better position to be the primary caregiver to a biracial child: the Caucasian non-biological father or the biracial biological maternal aunt – When the child was a toddler, the ‘father’ discovered he was not the biological parent of the child, as he was led to believe – Nevertheless, he sought custody of the child, after the mother was no longer able to care for the child due to her drug addiction – He still saw the child as his son – Maternal Aunt challenged custody and argued that the non-biological father would not foster child's black identity or heritage, but rather would be taught that he is white – The court rejected this argument and gave custody to non-biological father as the evidence demonstrated he was able to nurture and support the child's biracial identity – Further, Maternal Aunt's

access to child will also help to educate child on his background.

ERR v. PJS, 2021 ABQB 65: A mother with custody opposed an application by the father for full or shared custody of their biracial child in part because the father had on numerous occasions expressed offensive racist views towards Filipinos, Asians, and other immigrants. The court found that, given the father's persistent racist statements and lack of insight into how his views could negatively impact the child, he could not be trusted to support the "Filipino dimension of the child's life" (paras. 37 and 47). The court reinstated access on a staged basis, starting with supervised access. The judge wrote in para. 47:

I direct the father to refrain from expressing, in the presence or hearing of the child, any negative comments about immigrants, Filipinos, or Asians – in fact, about any of the world's peoples i.e. negative comments that generalize about any particular group and assign those generalizations to any given member(s) of the group – in other words, comments that deny any person their individuality and opportunity to be treated fairly, based on their own words and deeds

St. Pierre v. Brown, 2021 ABQB 28: In a mobility application by a white mother providing primary care to a biracial child, a Black father of Jamaican heritage argued that only he could provide the child with "the support and community connection necessary to ensure her best interests growing up as a biracial child, within her cultural and religious community" (para 7). The court found that the evidence of the unique support and guidance that might be provided by the father did not outweigh the evidence supporting the child remaining in the mother's care, noting that the mother was willing to facilitate generous access to the father. The court cited the SCC decision in *Van de Perre v Edwards*, stating that race is only one factor to be considered by the trial judge, and that its weight depends on the evidence and the circumstances of any given case: *Van de Perre v Edwards*, [2001 SCC 60](#) at para [38](#).

Child protection cases

Children's Aid Society of Brant v. S.M., 2021 ONCJ 566: The court held that when it applies the 'best interests of the child' test, it must take into consideration a child's race, colour and ethnic origin. In this particular case, it stressed its responsibility to ensure that the child had equal opportunity to learn both about their Black culture and heritage, as well as their Indigenous culture and traditions.

The court wrote:

[18] I must also consider the fact that S.J.M. and L.J. have Black heritage. Although the jurisprudence regarding the impact of systemic racism against Black people in

Canada is arguably more fulsome in the criminal context^[3], such considerations are also relevant to my analysis in these child protection proceedings. A research report entitled “One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians” sets out the overrepresentation of African Canadians in the child welfare system. The Executive Summary for this report notes that “the United Nation Committee on the Rights of the Child raised concerns about the significant overrepresentation of Indigenous and African Canadian children and youth in Canada’s child welfare system” in both the 2012 and 2016 reports.^[4]

[19] The best interests test set out at s. 74(3) of the CYSFA specifically directs courts to consider a child’s race, colour, and ethnic origin. Any decision regarding disposition must account for S.J.M. and L.J. having an equal opportunity to learn about and be exposed to their Black culture and heritage as well as their Indigenous culture and traditions.

Indigenous considerations

- **SMCYFS v. S.H.**, 2022 ONSC 1868: Judicial notice of the over representation of Indigenous people in the child welfare system.
- **Children’s Aid Society of the Niagara Region v. S.S.**, 2022 ONSC 744, the court ordered weekly access for Indigenous children, ages 7, 8 and 9. The court found that the children’s access with their mother, in particular, is their main link to their Indigenous identity and connections to an Indigenous community. Access with the mother will help ground them in their culture and fortify their connection to their heritage.
- **R. v. Ipeelee**, 2012 SCC 13 para. [60] “... courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered.
- See also the preamble to the federal Act - **An Act respecting First Nations, Inuit and Métis children, youth and families**, SC 2019, c 24

Crossover youths

- See report by Justice Scully and Dr. Finlay: *Crossover Youth Project: Navigating the quicksand*, September 2019
 - Page 150: “Indigenous youth were overrepresented in the YJ system because the current response lacks foresight and thoughtful planning that is appropriate to the needs of these young people”
 - Page 159 “Consistent with current literature, the COY Project found that racialized youth are overrepresented in the YJ system. Colonialism (explicit and implicit bias) played a devastating role in the disproportionately negative experiences and outcomes that Black cross-over youth had in the YJ system.
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