Law Society of Ontario | Barreau de l'Ontario

18th 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 20, 2024
March 21, 2024

CLE24-0030801-D-WEB

Law Society of Ontario | Barreau de l'Ontario

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

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March 20, 2024
March 21, 2024
9:00 a.m. to 4:00 p.m.
Total CPD Hours = 9 h Substantive + 2 h Professionalism
+ 1h EDI Professionalism

Donald Lamont Learning Centre
Law Society of Ontario
130 Queen St. W.
Toronto, ON

SKU CLE24-00308

Agenda

DAY 1: Wednesday, March 20

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.	**Keynote Address** **Promoting Change: Moving Challenging Personalities Forward (50 m P)**
Moderators:	Kelly D. Jordan, C.S., *Kelly D. Jordan Family Law Firm* Shawn Richard, TEP, *A. Shawn Richard Family and Estate Law*
Panelists:	Barbara Jo Fidler, Ph.D., C. Psych., Acc. F.M., Registered Psychologist Christine Kim, *Christine Kim Mediation*
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. – 11:10 a.m.	**Break**
11:10 a.m. – 11:40 a.m.	**Inclusion of Indigenous Law in Drafting Family Law Orders (30 m e)** The Honourable Justice Jessica Wolfe *Ontario Court of Justice* (Gore Bay) Hadley Friedland, PhD., Associate Professor, Faculty of Law, *University of Alberta* Scott Robertson, C.S., *Nahwegahbow Corbiere Genoodmagejig Barristers & Solicitors*

11:40 a.m. – 12:20 p.m.	**Completing Financial Statements (10 m(P))**
	Shmuel Stern, *Disclosure Clinic*
	Carla Lee Sutton, Family Law Clerk, *Disclosure Clinic/CLS Law Clerk Services*
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.	**A Step-by-Step Guide to Hague Convention Cases**
	William Abbott, *MacDonald & Partners LLP*
	Fareen Jamal, *Jamal Family Law Professional Corporation*
	Meghann Melito, *MacDonald & Partners LLP*
2:00 p.m. – 2:30 p.m.	**Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases**
	Professor Nick Bala, LSM, *Queen's University*
2:30 p.m. – 2:40 p.m.	**Question and Answer Session**
2:40 p.m. – 3:00 p.m.	**Break**
3:00 p.m. – 3:50 p.m.	**Judicial Panel- Hot Topics in Family Law**
	The Honourable Justice Suzanne Stevenson, Senior Family Judge, *Superior Court of Justice*

The Honourable Justice Sheilagh O'Connell, Senior Advisory Family Justice, *Ontario Court of Justice*

The Honourable Justice Faisal Mirza, *Superior Court of Justice* (Brampton)

The Honourable Justice Maria Sirivar, *Ontario Court of Justice* (Ottawa)

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.

Fact sheet
Family Law Rights of Appearance Pilot Project

Law Society of Ontario | Barreau de l'Ontario

Issued: September 2023

What is the Family Law Rights of Appearance Pilot Project?

- The Family Law Rights of Appearance Pilot Project allows eligible lawyer licensing candidates to appear in court on an increased number of matters related to family law cases without first needing advance permission of the court pursuant to Rule 4(1)(c) of the Family Law Rules.
- Rule 4 allows that a party may be represented in court by someone who is not a lawyer, but only if the court gives advance permission.
- In matters where advance permission is not required, candidates must have a lawyer with direct knowledge of the file on stand-by availability.

Why was the Family Law Rights of Appearance Pilot Project created?

- The pilot is a joint initiative of the Law Society of Ontario, the Superior Court of Justice and the Ontario Court of Justice.
- The pilot was launched in 2022 as an access to justice initiative to help increase access to family law services for Ontarians and provide additional learning opportunities for lawyer licensing candidates.

Who is eligible to participate in the pilot?

- Candidates who are eligible to participate in the pilot are referred to as Permitted Candidates. Permitted Candidates include:
    - lawyer licensing candidates
    - LPP/PPD students engaged in work placements and
    - Law students enrolled in an Integrated Practice Curriculum program at Lakehead University or Toronto Metropolitan University and who are engaged in a work placement.

How can candidates participate?

- Articling principals overseeing lawyer licensing placements and supervising lawyers who oversee LPP, PPD and IPC placements are responsible for determining which learning experiences are best suited to a candidate's learning goals and are encouraged to consider participating in the Family Law Rights of Appearance Pilot Project.
- Candidates are encouraged to speak to their articling principals and supervising lawyers to consider if they are eligible and what opportunities may be available.

Matters not requiring advance permission

These matters require candidates to have a lawyer with direct knowledge of the file on stand-by availability:

- First appearances.
- Preparing submissions and attendances to address costs.
- Appearances to settle disputed orders.
- Assignment court/audit court, to confirm a trial is ready to proceed.

- Rule 14B motions for consent orders or other procedural, uncomplicated, or unopposed matters, including requests regarding service and extension of timelines.
- Attending on refraining motions either for the Family Responsibility Office, Ontario Works, or the support payor.
- Case conferences (including conferences before Dispute Resolution Officers) and "to be spoken to" lists.
- Form 15D Consent Motions to Change Child Support.
- Any step in a Motion to Change related solely to child support with a T4 employee support payor – (except for discretionary claims pursuant to sections 3(2), 4, 7, 8, 9, or 10 of the Child Support Guidelines).
- Motions to appoint the Office of the Children's Lawyer, except for appointments under the *Child, Youth and Family Services Act (CYFSA).*
- Motions relating to questioning and undertakings.
- Attendances to speak to matters on consent, including consents to incorporate settlements reached through negotiation, mediation, and minutes of settlement.
- Support enforcement proceedings including steps relating to final disposition.
- Motions relating to financial disclosure.
- Contested adjournments.

What is considered stand-by availability?

- When a candidate speaks to a matter not requiring advance permission, a lawyer with direct responsibility for the file must be available on stand-by to speak to the judge, if required.
- Stand-by means that the lawyer is available to appear in court at the scheduled time, either virtually, by telephone, or in person, if required by the court.

Matters requiring advance permission and candidates be accompanied by a lawyer with direct knowledge of the file

- Any matter involving the *CYFSA*, Hague Convention on the Civil Aspects of International Child Abduction, or other concerns related to child abduction or wrongful retention.
- A settlement conference, trial scheduling conference, or trial management conference.
- Any case where a party on either side is under disability.
- Anything that finally disposes of a matter, including motions for summary judgment, except as otherwise provided above.
- Any case that includes an allegation of family violence.
- Focused hearings or trials.

What additional responsibilities are required of articling principals or supervising lawyers when candidates participate in the pilot?

In addition to following the General Guidelines for all Appearances, articling principals and supervising lawyers must ensure:

- candidates are adequately supervised, with ongoing training and monitoring with respect to their court representation and activities, in respect of both substantive and procedural family law.
- candidates are properly prepared and familiar with the client's file and
- the client has granted permission for the candidate to speak to the issues being addressed in the court appearance, including resolution of those issues on consent. If issues arise outside of those that were expected to be addressed by the court, the lawyer with direct responsibility for the file must be available to speak to the matter.

What additional responsibilities do candidates have when appearing in court under the pilot?

In addition to following the General Guidelines for all Appearances, candidates must:

- indicate to the court that they are appearing under the Family Law Rights of Appearance Pilot Project and are within the rights of appearance and
- confirm to the judge at the start of the proceeding that a lawyer with direct responsibility for the file is available on stand-by in matters where the candidate is speaking to a matter not requiring advance permission.

If the presiding judge decides a matter should not proceed, what steps should be taken by a candidate?

- The presiding judge retains discretion to permit or refuse a candidate's attendance.
- If the presiding judge decides the candidate should not proceed with the matter without a lawyer with direct knowledge of the file present, the candidate should ask that the matter be stood down briefly to enable that lawyer to address the matter.
- A lawyer with direct knowledge of the file should be on stand-by and ready to attend court. Where requested, the candidate shall notify the judge if the lawyer with direct knowledge of the file is not immediately available to attend in person and, if so, of the approximate amount of time it will take for them to be available in person.

The Law Society regulates lawyers and paralegals in Ontario in the public interest. The Law Society has a mandate to protect the public interest, to maintain and to advance the cause of justice and the rule of law, to facilitate access to justice for the people of Ontario and to act in a timely, open and efficient manner.

Media contact: Amy Lewis, Senior Communications Advisor, External Relations and Communications, amlewis@lso.ca. Follow us on LinkedIn, Instagram, Twitter and Facebook.

Fiche d'information :
Projet pilote sur les droits de comparution en droit de la famille

Law Society of Ontario | Barreau de l'Ontario

Publié en septembre 2023

Qu'est-ce que le projet pilote sur les droits de comparution en droit de la famille?

- Le projet pilote sur les droits de comparution en droit de la famille permet aux candidats et candidates du Processus d'accès à la profession d'avocat qui sont admissibles de comparaitre dans un plus grand nombre d'affaires portant sur le droit de la famille, sans avoir besoin de la permission préalable du tribunal aux termes de l'alinéa 4 (1) c) des *Règles en matière de droit de la famille*.
- La règle 4 permet à une partie d'être représentée au tribunal par une personne qui n'est pas un avocat, mais seulement avec la permission préalable du tribunal.
- Dans les cas où la permission préalable n'est pas requise, les candidat(e)s doivent avoir à leur disposition un avocat qui connait très bien le dossier.

Pourquoi le projet pilote sur les droits de comparution en droit de la famille a-t-il été créé?

- Le projet pilote est une initiative conjointe du Barreau de l'Ontario, de la Cour supérieure de justice et de la Cour de justice de l'Ontario.
- Le projet pilote a été lancé en 2022 en tant qu'initiative en matière d'accès à la justice dans le but d'augmenter l'accès aux services en droit de la famille pour la population de l'Ontario et d'offrir des occasions additionnelles d'apprentissage aux candidats et candidates à l'accès à la profession d'avocat.

Qui peut participer au projet pilote?

- Les candidats qui sont admissibles au projet sont appelés candidats autorisés et comprennent :
    - Les candidat(e)s au Processus d'accès à la profession d'avocat
    - Les étudiant(e)s du PPD/LPP qui font un stage
    - Les étudiant(e)s en droit inscrit(e)s à un programme de pratique intégrée à l'Université Lakehead ou à l'Université métropolitaine de Toronto et qui font un stage.

Comment peut-on y participer?

- Les maitres de stage et les avocats superviseurs qui sont responsables des stages du PPD, LPP et PPI déterminent l'expérience d'apprentissage convenant le mieux aux objectifs des candidats et sont encouragés à participer au projet pilote sur les droits de comparution en droit de la famille.
- Les candidat(e)s sont encouragé(e)s à discuter avec leur maitre de stage ou superviseur de leur admissibilité au projet et des possibilités d'apprentissage.

Fiche d'information :
Projet pilote sur les droits de comparution en droit de la famille

Law Society of Ontario | Barreau de l'Ontario

Affaires ne nécessitant pas de permission préalable

Les affaires suivantes requièrent que les candidats aient à leur disposition un avocat ayant une très bonne connaissance du dossier :

- Premières comparutions.
- Préparation des observations et des comparutions pour traiter des dépens.
- Requêtes en vertu de la règle 14B pour des ordonnances de consentement ou d'autres questions de procédure, non compliquées ou non opposées, y compris les demandes concernant la signification et la prolongation des délais.
- Comparutions pour des motions d'abstention soit pour le Bureau des obligations familiales, soit pour Ontario au travail, soit pour le payeur de la pension alimentaire.
- Les conférences relatives à la cause (y compris les conférences devant les agents de règlement des différends) et les listes de « personnes à qui parler ».
- Formulaire 15D Motion en modification des aliments pour les enfants sur consentement.
- Toute étape d'une requête en modification liée uniquement à une pension alimentaire pour enfants avec un payeur de pension alimentaire qui est un employé visé par le feuillet T4 (sauf pour les demandes discrétionnaires en vertu des articles 3 (2), 4, 7, 8, 9 ou 10 des *Lignes directrices sur les pensions alimentaires pour enfants*).
- Comparutions pour régler des ordonnances contestées.
- Audiences de mise au rôle/d'audit, pour confirmer qu'un procès est prêt à commencer.
- Motions visant à nommer le Bureau de l'avocat des enfants, à l'exception des nominations en vertu de la *Loi sur les services à l'enfance, à la jeunesse et à la famille* (LSEJF*).*
- Motions relatives aux interrogatoires et aux engagements.
- Comparutions pour parler d'affaires sur consentement, y compris les consentements pour incorporer des règlements obtenus par négociation, médiation, et les procès-verbaux de règlement.
- Procédures d'exécution des ordonnances alimentaires, y compris les étapes relatives à la décision définitive.
- Motions relatives à la divulgation financière.
- Ajournements contestés.

Qu'entend-on par disponibilité?

- Lorsqu'un candidat comparait pour une affaire qui ne nécessite pas une permission préalable, un avocat directement responsable du dossier doit être disponible et prêt à s'entretenir avec le juge au besoin.
- La disponibilité signifie que l'avocat est disponible pour se présenter au tribunal à l'heure qui a été fixée pour l'évènement, soit virtuellement, soit par téléphone, soit en personne, si le tribunal l'exige.

Affaires nécessitant une permission préalable et obligeant les candidat(e)s à être accompagné(e)s d'un(e) avocat(e) directement responsable du dossier :

- Toute question relative à la LSEJF, à la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants ou à d'autres préoccupations liées à l'enlèvement d'enfants ou au non-retour illicite.
- Une conférence en vue d'un règlement amiable, une conférence d'inscription au rôle des procès, ou une conférence de gestion du procès.
- Toute affaire dans laquelle l'une ou l'autre des parties a un handicap.
- Tout ce qui permet de régler définitivement une affaire, y compris les motions de jugement sommaire, sauf disposition contraire ci-dessus.
- Toute affaire qui comprend une allégation de violence familiale.
- Les audiences ou les procès ciblés.

Quelles autres responsabilités sont requises des maitres de stage ou des avocats superviseurs lorsque les candidats participent au projet pilote?

En plus de suivre les Lignes directrices pour toutes les comparutions, les maitres de stage et les avocats superviseurs doivent s'assurer de ce qui suit :

- Les candidat(e)s sont adéquatement supervisés, suivent une formation continue et sont surveillés dans le cadre de leur représentation et de leurs activités devant la cour, à l'égard du droit de fond et de procédure en droit de la famille.
- Les candidat(e)s sont bien préparés et connaissent le dossier du client à fond.
- Le client a donné sa permission pour que le candidat aborde les questions lors de la comparution, y compris la résolution de ces questions sur consentement. Si des questions se posent en dehors de celles qui devaient être traitées par le tribunal, l'avocat directement responsable du dossier doit être disponible pour en parler.

Quelles autres responsabilités ont les candidats lorsqu'ils comparaissent dans le cadre du projet pilote?

En plus de suivre les Lignes directrices pour toutes les comparutions, les candidat(e)s doivent faire ce qui suit :

- Indiquer au tribunal qu'ils comparaissent dans le cadre du projet pilote sur les droits de comparution en droit de la famille et qu'ils ont des droits de comparution.

- Confirmer au juge, en début d'instance, qu'un avocat directement responsable du dossier est disponible en permanence dans les cas où le candidat s'exprime sur une affaire ne nécessitant pas de permission préalable.

Si le juge s'oppose à l'instruction d'une affaire, quelles sont les mesures à prendre par le candidat?

- Le juge conserve le pouvoir discrétionnaire d'autoriser ou de refuser la présence d'un candidat.
- Si le juge décide que le candidat ne devrait pas intervenir dans l'affaire en l'absence d'un avocat connaissant très bien le dossier, le candidat doit demander que l'affaire soit suspendue brièvement pour permettre à cet avocat de s'exprimer.
- Un avocat connaissant très bien le dossier doit être prêt à se rendre à l'audience. Sur demande, le candidat informe le juge si l'avocat connaissant très bien le dossier ne peut pas être immédiatement présent en personne et, le cas échéant, du temps approximatif dont il aura besoin pour l'être.

This program qualifies for the 2025 LAWPRO Risk Management Credit

What is the LAWPRO Risk Management credit program?

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

Why has LAWPRO created the Risk Management Credit?

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

How do I qualify for the LAWPRO Risk Management Credit?

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

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

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

Where can I access a list of qualifying programs?

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

Whom do I contact for more information?

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

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

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18th Family Law Summit

March 20, 2024

SKU CLE24-00308

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Law Society of Ontario | Barreau de l'Ontario

TAB 1

18th Family Law Summit

Promoting Change: Moving Challenging Personalities Forward (PPT)

Barbara Jo Fidler, Ph.D., C. Psych., Acc. F.M., Registered Psychologist

Promoting Change: "There is Nothing Permanent Except Change" Heraclitus (PPT)

Christine Kim
Christine Kim Mediation

Signs of Conflict That Place Children at Risk of Emotional Harm in Separation & Divorce

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Triena McGuirk
familyfundamental.com

Ask the Experts: Ten Tips for Client Engagement

Bill Eddy, Chief Innovation Officer
High Conflict Institute
Originally appeared in a 2015 AFCC enewsletter and is republished with permission from the AFCC and the author.

Anger Iceberg

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creativeplaytherapist.com

Decisions in Parenting Arrangements

Parenting Plan Checklist for High Conflict Families

Barbara Jo Fidler, Ph.D., C. Psych., Acc. F.M., Registered Psychologist

March 20, 2024

Promoting Change:

Moving Challenging Personalities Forward

18th Family Law Summit
March 20, 2024
Barbara Fidler, PhD., AccFM, FDRP PC
Christine Kim (she/her), MSW, RSW., AccFM

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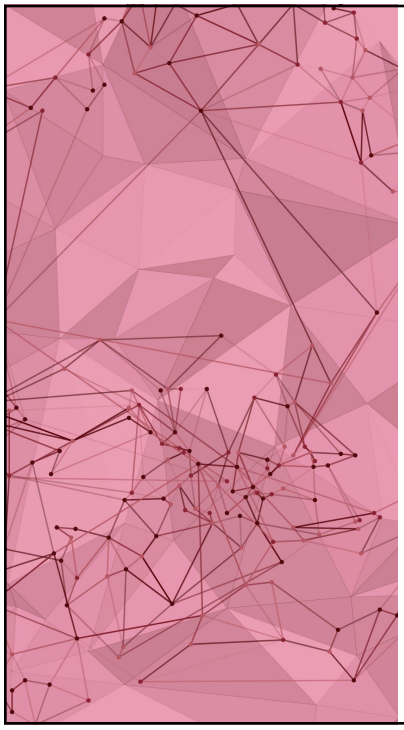

Part I:

High Conflict Characteristics & Personalities

Barbara Fidler, PhD., CPsych, AccFM, FDRP PC

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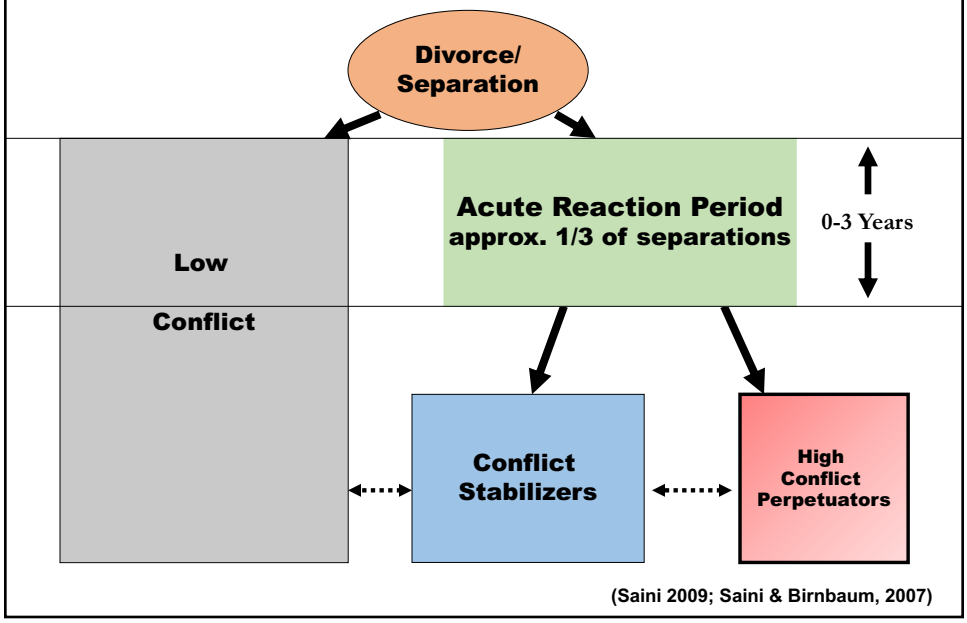
Separation Pathways



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Chocolates?

"High conflict coparenting is like a box of chocolates. You never know what you're going to get!"

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"High Conflict" Coparenting

- 20-25% of separation/divorcing population
- Varying degrees of mistrust and feelings of hatred
- Poor communication
- Ineffective or failed decision making
- Triangulation – of child, others, poor boundaries
- Mutual competing allegations
- Parents not necessarily equally responsible for conflict – one may be conflict engager, while other tries to disengage
    - 2/3 bilateral; 1/3 unilateral

Differentiating HC from CCV

Aggression/Abuse in High Conflict Coparenting	Coercive Controlling Violence (CCV)
Mutual	One-sided
Cycles of reaction/counter-reaction	Victim is fearful
Lacking fear, intimidation, 1-sided control	Repeated pattern of control, isolating, manipulation, intimidation, domination, humiliation, coercion
High hostility, verbal abuse though occasional, infrequent physical aggression – conflict initiated	Threats/violence control initiated
No pattern, does not persist	Perpetrator may have PD
Situational	Victim's mistrust grounded in reality
One or both may have PD	Perpetrator has unresolved feelings over partner's desire to separate; leads to efforts to control, abuse, intimate, punish by fighting over kids
Mutual mistrust/blaming due to refashioned narratives	Children fearful of exposure, distrustful – may or may not want contact
Unresolved feelings about failed relationship – channeled into fighting over kids	
Pressure on kids to take sides to meet parents' needs	

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Factors Related to High Conflict Coparenting

- Untreated mental illness
- Personality disorders
- Substance misuse
- Unresolved grieving, history of trauma, chronic stress
- Restraining orders, no contact orders
- Perceived lack of emotional safety
- Verbal abuse and intermittent physical aggression, situational- or conflict-instigated violence
- Allegations of IPV, child abuse/neglect, "alienation"
- "Tribal warfare", involvement of agencies and other professionals

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Common Features of High Conflict Behaviour & Personalities

- Rigid, uncompromising, inflexible, all or nothing thinking
- Cognitive distortions, negative attributions
- Self sabotaging behaviour – repeat failed strategies, resist changing strategies
- Poor insight; inability to reflect on own behaviour
- Difficulty accepting loss, unresolved grieving
- Negative emotions dominate thinking; unmanaged emotions
- Extreme behaviours
- Difficulty empathizing with others including separating own needs/interests from child's

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Common Features of High Conflict Behaviour & Personalities (2)

- Externalize blame for problem or responsibility for solution onto others (expect others to change) i.e., avoid taking responsibility for problem/solution
- Manipulative - easily hook others (who are uninformed fully) with their fear and anger; persuasively reel in negative advocates
- Hypersensitive to criticism, defensive
- Unresponsive to direction
- Disregard for rules/authority

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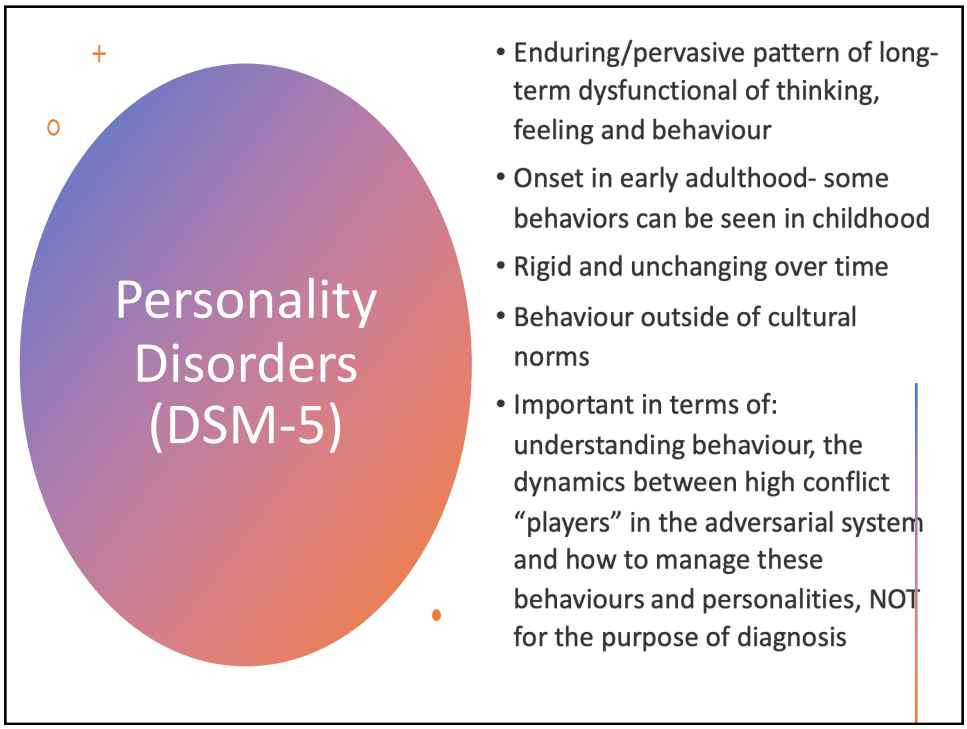

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Personality Disorders

- About 10-15% of divorcing population are considered high conflict
  - 15% of US general population has personality disorders (NIH, 2008)
  - **60% of HC divorced population** have psychiatric illness or personality disorders (Johnston et al. 2009)
- Main difference between PD and other mental disorders –those with PD do not recognize they have a problem and often do not benefit from medication
- May function adequately or even very well in other areas in life (technical v interpersonal skills)– e.g. good at their jobs.
- Other mental illness common (e.g., depression, substance abuse, anxiety, paranoia) [See Family Court Review, 54(1), 2016]

Clusters of Personality Disorders DSM-5

- Cluster A: (Avoid Conflict) appear odd or eccentric
  - **Paranoid (suspicious),** Schizoid (asocial), Schizotypal (eccentric)
- **Cluster B: (Engage Conflict -- MOST COMMON IN HIGH CONFLICT) appear dramatic, emotional or erratic**
  - **Borderline, Narcissistic, Antisocial & Histrionic**
- Cluster C: (Avoid Conflict) appear anxious or fearful
  - Avoidant (withdrawing), Dependent (submissive), Obsessive-Compulsive (conforming)

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Exhibit Irregularities or Dysfunction in 2 or More of These Areas

1. **Thinking**
   - distortions/errors, misattribution, misperception, misinterpretation, exaggeration
   - inflexible: all or nothing, idealization/devaluation
   - suspicious, paranoid
   - poor insight, unable to reflect on own behaviour
2. **Emotion**
   - negative emotions dominate thinking
   - mood instability, labile
   - **unresolved grieving, loss (to separation & earlier experiences)**

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Dysfunction Present In 2 Or More Of These Areas

3. **Interpersonal**
   - externalize blame, deny responsibility, projection
   - critical, hostile, disparaging, aggressive, attacking
   - difficulty empathizing with others
   - hypersensitivity to criticism (highly defensive)
   - can be very persuasive
4. **Behaviour**
   - extreme behaviours, manipulative
   - poor boundaries (with others, child - unable to separate own needs from child's needs)
   - acts on impulse/feelings vs facts
   - self sabotaging behavior – repeated failed strategies, resistant to changing coping behaviours
   - does not respond to direction; disregard for rules and authority

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5 High-Conflict Personality Types

Core Fear 1	Core Fear 2	Core Fear 3	Core Fear 4	Core Fear 5
FEAR OF FEELING INFERIOR	FEAR OF FEELING ABANDONED	FEAR OF FEELING IGNORED	FEAR OF FEELING DOMINATED	FEAR OF FEELING BETRAYED
Demanding Demeaning Self-absorbed Insulting	**Overly friendly Shifts to anger Mood swings**	**Superficial & helpless Exaggerates Attention-seeking**	**Breaks rules & laws Deceptive Enjoys hurting people**	**Suspicious Expects conspiracies Counter-attacks first**
NEEDS TO FEEL SUPERIOR	NEEDS TO FEEL ATTACHED & INCLUDED	NEEDS TO BE CENTER OF ATTENTION	NEEDS TO DOMINATE	NEEDS TO FEEL IN CONTROL
Always Superior	Always Attaching	Always Dramatic	Always Conning	Always Suspicious

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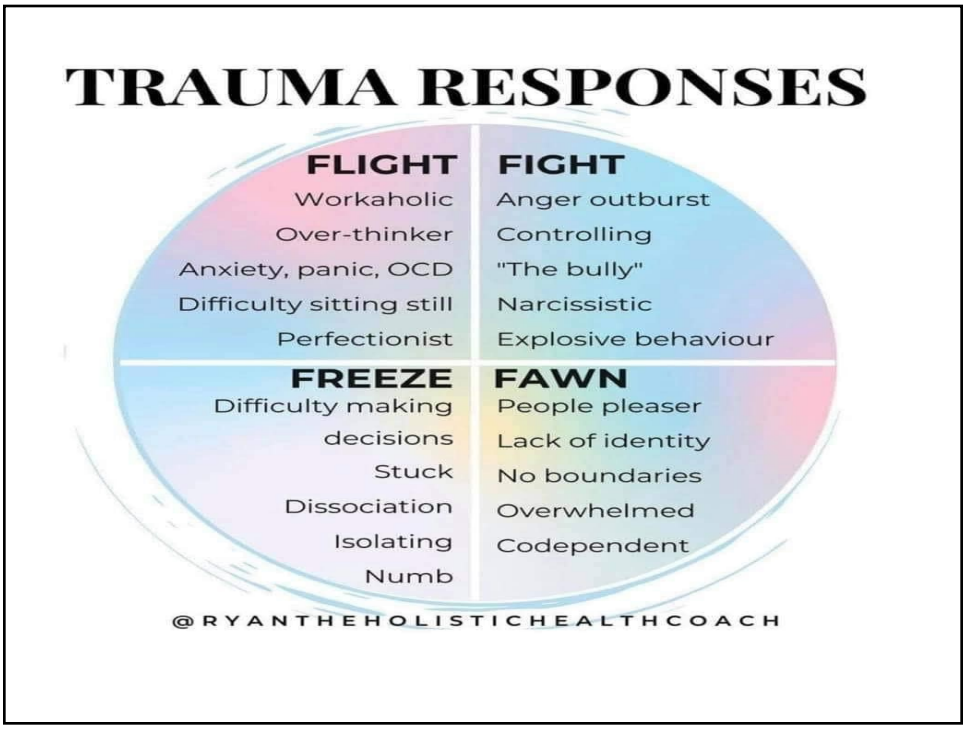

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Impact of Personality Disorders

- Diminished parenting capabilities
  - Emotional dysregulation
  - Inconsistency, unpredictable responses
  - Poor communication
  - Oscillation between intrusive behaviour and withdrawal
  - Role confusion
- Impacts on Child
  - Poorer outcomes (e.g., psychopathology, development, social, emotional, academic, interpersonal)
- Impact on Parent-Child relationship
  - Attachment security, nature of attachment
  - Communication
  - Closeness – too much; strained, enmeshment

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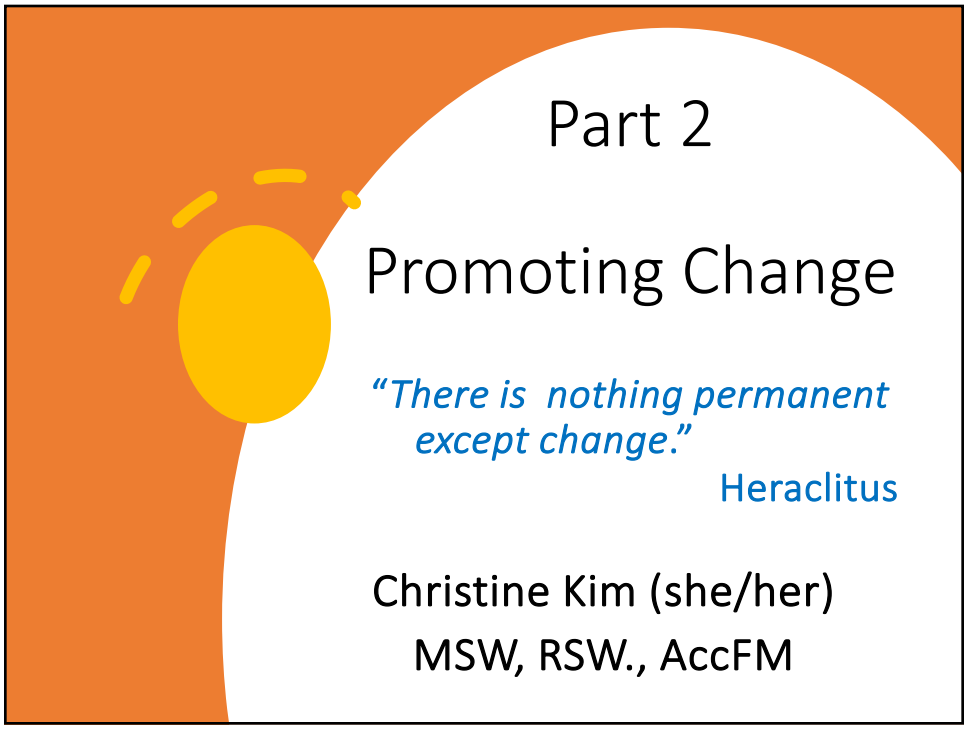

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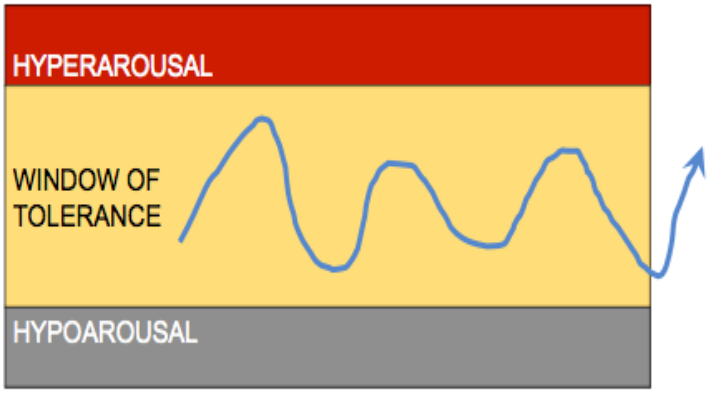
Window of Tolerance (Siegel, 1999)



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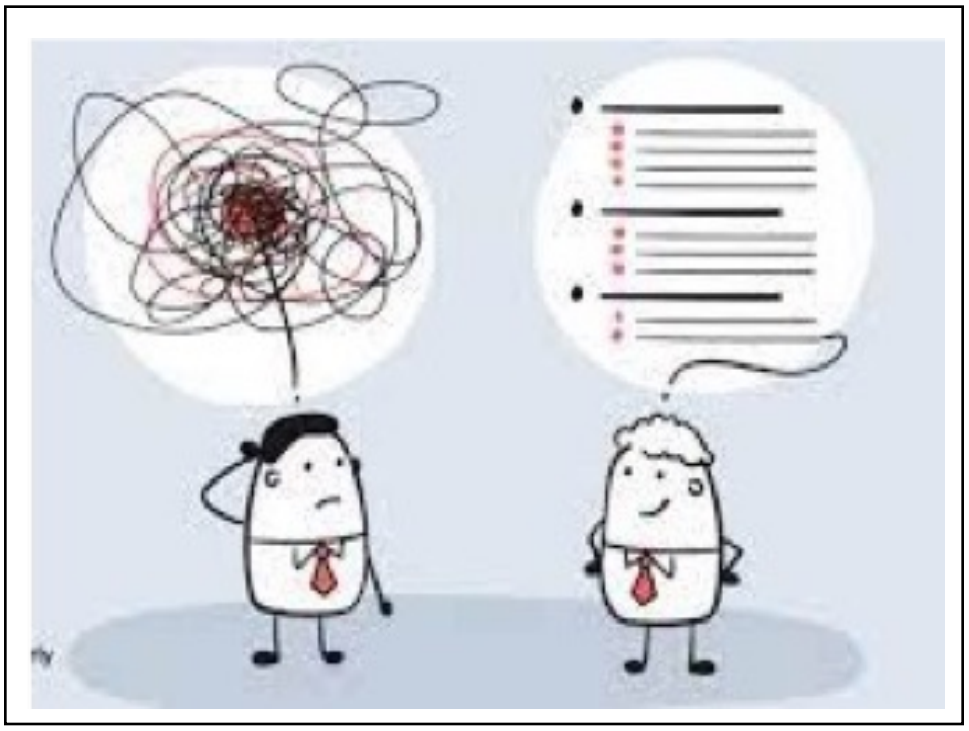

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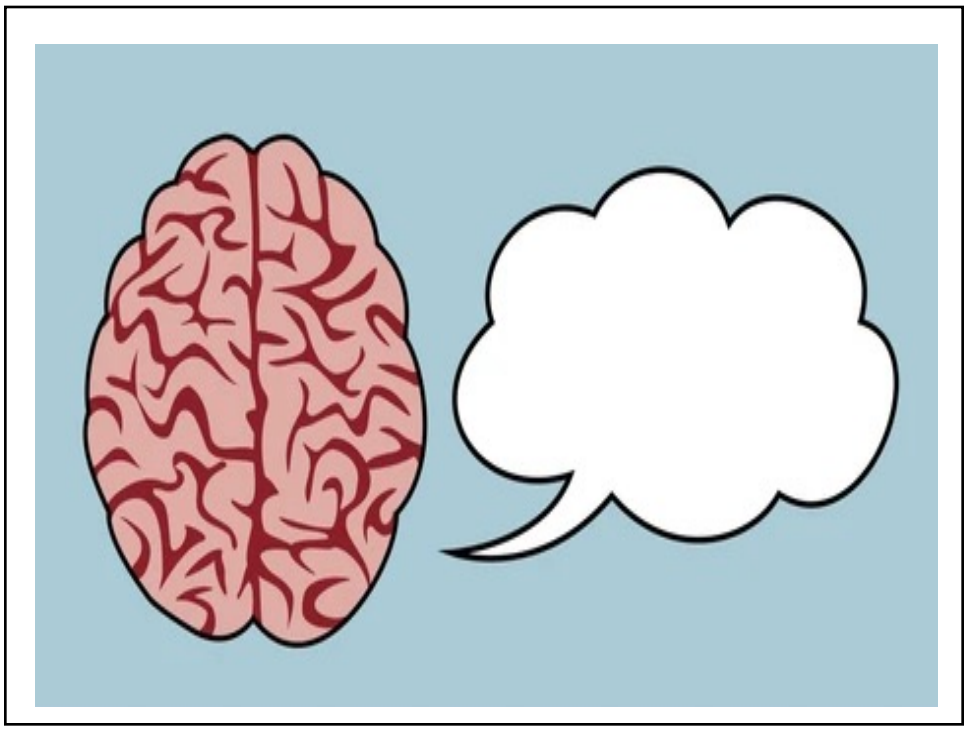

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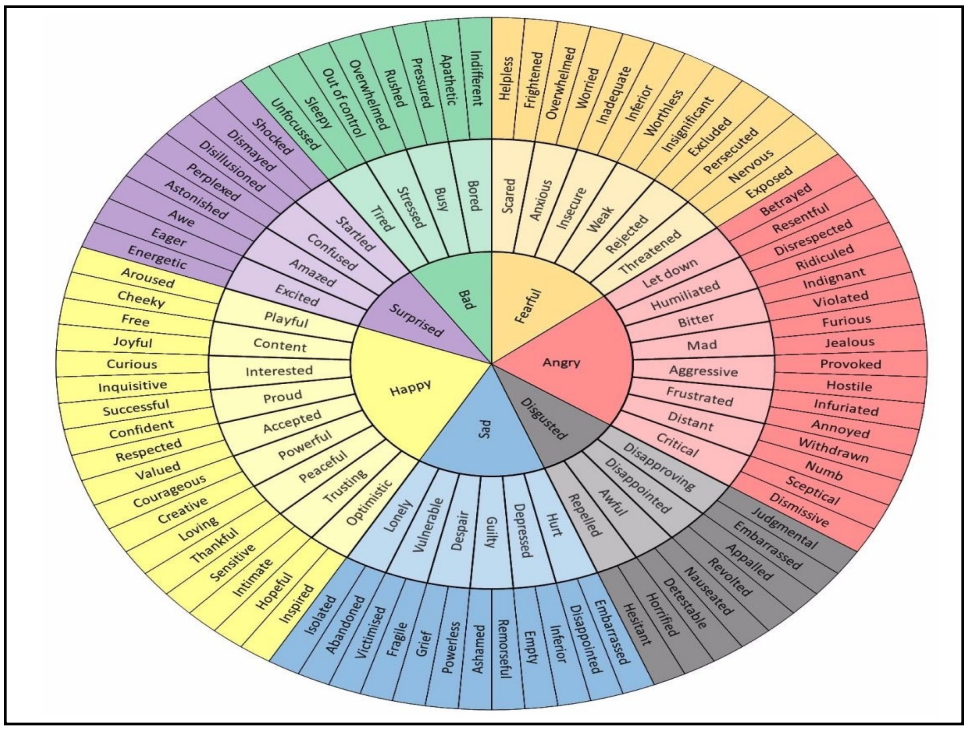
Happy
Surprised
Bad
Fearful
Angry
Disgusted
Bad
Bored
Busy
Stressed
Tired
Startled
Confused
Amazed
Excited
Playful
Content
Interested
Proud
Accepted
Powerful
Peaceful
Trusting
Optimistic
Lonely
Vulnerable
Despair
Guilty
Depressed
Hurt
Repelled
Awful
Disappointed
Disapproving
Critical
Distant
Frustrated
Aggressive
Mad
Bitter
Humiliated
Let down
Threatened
Rejected
Weak
Insecure
Anxious
Scared
Indifferent
Apathetic
Pressured
Rushed
Overwhelmed
Out of control
Sleepy
Unfocussed
Shocked
Dismayed
Disillusioned
Perplexed
Astonished
Awe
Eager
Energetic
Aroused
Cheeky
Free
Joyful
Curious
Inquisitive
Successful
Confident
Respected
Valued
Courageous
Creative
Loving
Thankful
Sensitive
Intimate
Hopeful
Inspired
Isolated
Abandoned
Victimised
Fragile
Grief
Powerless
Ashamed
Remorseful
Empty
Inferior
Disappointed
Embarrassed
Hesitant
Horrified
Detestable
Nauseated
Revolted
Appalled
Embarrassed
Judgmental
Dismissive
Sceptical
Numb
Withdrawn
Annoyed
Infuriated
Hostile
Provoked
Jealous
Furious
Violated
Indignant
Ridiculed
Disrespected
Resentful
Betrayed
Exposed
Nervous
Persecuted
Excluded
Insignificant
Worthless
Inferior
Inadequate
Worried
Overwhelmed
Frightened
Helpless

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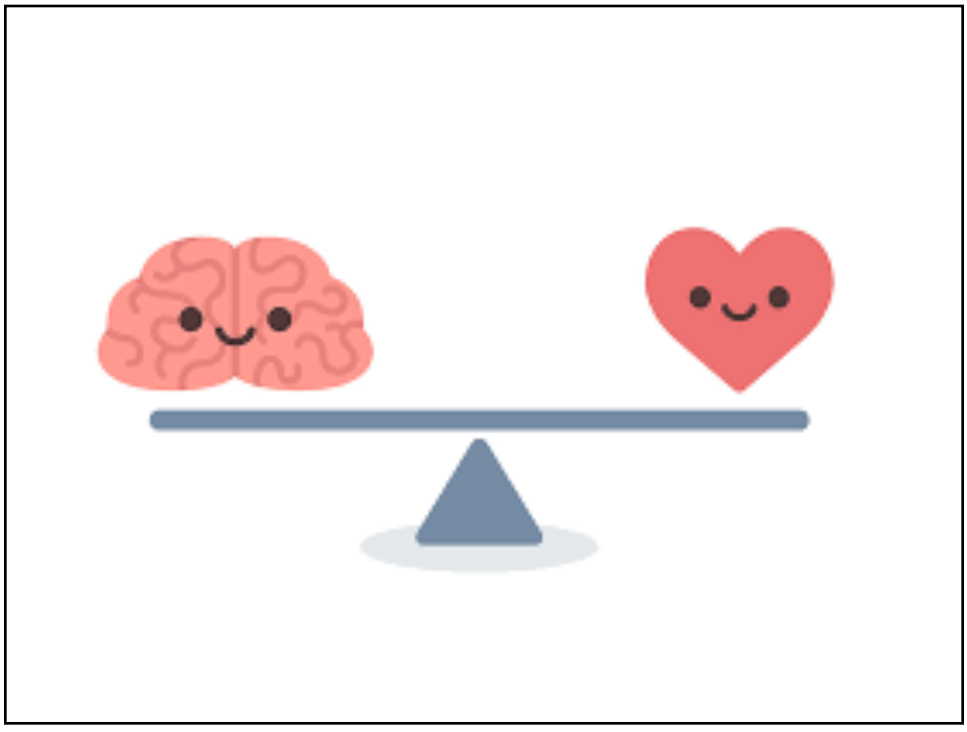

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Part 3:

Parenting Plans for High Conflict Coparenting

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COPARENTING AFTER DIVORCE

Hetherington & Kelly, 2002;
Maccoby & Mnookin, 1992

		Level of Engagement	
		LOW	HIGH
Level of Conflict	LOW	Parallel 40% →	Cooperative 25%
	HIGH	Mixed 15-20%	Conflicted 15-20%

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Models of Coparenting

- Cooperative
- Conflictual
- Disengaged

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Parallel & Disengaged Parenting

- Cooperative parenting is best for children
- Positive coparenting: low engagement – high engagement
- Children can do well with disengaged, parallel parenting
- > parental conflict > disengagement of parents required
- **Low engagement means low conflict**
- Initial goal to disengage parents, not necessarily improve communication—bonus if this happens
- More likely to become cooperative from place of disengagement than from place of conflict
- it takes time to separate – is a process

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Disengaged Parenting Require Detailed & Unambiguous Parenting Plans

- not a panacea but does go a good distance to minimizing conflict

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Boyan & Termini

Escalated Coparent	Neutral Coparent
Being right is top priority	Emotional regulation is top priority
Uncontained stress	Self-soothing, detachment
Accuses, blames, threatens	Takes responsibility for their behaviour
Withdraws from communication	Seeks clarification of issues
Black and white thinking	Uses relative terms such as "likely" and "may"
Overconfidence in own ideas	Assumes there is more to be known

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Tools For Parenting Plans

- AFCC-O (Parenting Plan Resource & Template) www.afccontario.ca
- AFCC: Planning for Shared Parenting: A Guide for Parents Living Apart (breaks down birth – 24 mos) www.afccnet.org
  - birth to 9 mos; 9-18 mos; 18-36 mos; 3-5 yrs; 6-9 yrs; 10-12 yrs; 13-15 yrs; 16-18 yrs.
- Info@ourfamilywizard.com

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SIGNS OF CONFLICT THAT PLACE CHILDREN AT RISK OF EMOTIONAL HARM IN SEPARATION & DIVORCE

Sending messages through the child.

Arguing in the presence of the child (phone, in person, text or email that child has access to. Also, children WILL seek out information).

Speaking negatively about other parents family or friends.

Speaking about adult content to, or in proximity to, children.(i.e. details of divorce, finances, court, conflict).

Interrupting time with the other parent (i.e. calling often, arranging special activities during other parents access time).

Making the child feel bad about enjoying time with the other parent, deterring child from talking about time with the other parent.

Asking the child to keep secrets from the other parent.

Blaming the other parent for the separation.

Sending written messages or other correspondence with the child.

Treating children (even teens) like an adult.

Oversharing your personal struggles with separation with the children.

Using guilt or pressure for children to chose between parents or have the same relationship with each parent.

Not permitting children to attend family functions with other parent, outside of access schedule (ie. Wedding, grandparents' birthday).

Appreciate that children now have two homes, not one.

Child refusing to see one parent, with clear reason why they do not want to.

Questioning children about the other parent, or their household. Asking children to spy.

Asking children where they want to live.

Parents speak badly about each other.

Ignoring the other parent during child's events (i.e School concerts, sports).

Ask the Experts
Ten Tips for Client Engagement

Bill Eddy, LCSW, JD, CFLS, San Diego, California

Clients today want to be positively engaged with their professionals and to play an important role, yet many of them tend towards negative engagement and many professionals are tempted to respond negatively as well—especially when they have "high conflict" clients. These tips can be used to help engage clients in thinking about problem-solving rather than reacting, whether you are a therapist or lawyer with an individual client, or a mediator with both parents. Judges and custody evaluators can use these principles to the extent possible, even when talking about past behavior problems. By focusing clients on these simple steps for future problem-solving, some become more engaged and less defensive.

1. Forget about insight. This is who they are and efforts to make them a better person with on-the-spot "constructive" feedback often creates more defensiveness and an unnecessary power struggle. Just focus on addressing what action steps to take now about the problems at hand.

2. Focus on the future. Talking about a client's past behavior triggers defensiveness and resistance to change. As much as possible, it's better to talk about desired future behavior rather than criticizing the past behavior.

3. Communicate in ways you want your client to mirror. Researchers say that we have neurons in our brains which "mirror" the behavior of others. So rather than mirroring their frustration, fear or anger, it's better for us to act in a way that we want our clients to mirror us—especially showing them empathy and educating them, rather than showing anger.

4. Teach clients to ask you questions. Rather than making brilliant decisions for our clients, we need to engage them in asking us questions as much as possible, to help them prepare to make proposals and decisions themselves.

5. Teach clients to set the agenda. Whether you are meeting individually, in mediation, in a group meeting or otherwise, teach clients to think about and list items for the agenda. The more they are thinking about what to do, the less they are thinking about blaming and complaining.

6. Educate clients about their choices and possible consequences. This approach keeps more responsibility on their shoulders and gets them thinking. Repeatedly remind them: "It's up to you."

7. Have clients make lots of little decisions. Whether we are providing mediation, counseling, advocacy or judging, we need to give clients practice in making as many decisions as possible (e.g., who goes first, changing topics, when to take breaks, etc.)

8. Teach clients to make proposals. Rather than taking the lead, we need to ask clients to form proposals and test them out on their lawyers, counselors or others, to prepare positively for negotiations, rather than focusing on negative arguments about the past. This includes who will do what, when and where.

9. Teach clients to ask questions about each other's proposals. Rather than quickly saying "No" to proposals, teach clients to ask questions to help them form their next proposals. This can turn an angry exchange into an analysis of what's important to each party.

10. Teach clients to reply to proposals by saying "Yes," "No" or "I'll think about it." This encourages clients to stay focused on thinking about proposals and making new proposals, rather than just reacting to proposals. If a client says "No" to a proposal, then it's their turn to make a new one.

Bill Eddy is a lawyer, therapist, mediator and the President of High Conflict Institute. He developed the High Conflict Personality Theory (HCP Theory) and has become an international expert on managing disputes involving high conflict personalities and personality disorders. He provides training on this subject to lawyers, judges, mediators, managers, human resource professionals, businesspersons, healthcare administrators, college administrators, homeowners' association managers, ombudspersons, law enforcement, therapists and others. He has been a speaker and trainer in over 25 states, several provinces in Canada, Australia, France and Sweden.

He is also the developer of the New Ways for Families method of managing potentially high conflict families in and out of family court. He is currently developing a method for managing potentially high conflict employees titled New Ways for Work.

Bill Eddy will present a full-day pre-conference institute on this topic titled, *Client Engagement Skills for High Conflict Families*, at the AFCC 52nd Annual Conference in New Orleans, May 27-30, 2015. He will also present a workshop with Marsha Kline Pruett and Lisa Matthews, *Two Program Models and Research on Parenting and Co-parenting Skills*. See the conference program brochure for full session descriptions and schedule.

Anger Iceberg

Icebergs are large pieces of ice found floating in the open ocean. What you can see from the surface can be misleading. Most of the iceberg is hidden below the water.

This is how anger works. Often when we are angry, there are other emotions hidden under the surface.

The Gottman Institute

Decisions in Parenting Arrangements

Decision Making

Day-to-Day Decisions

- Parental Communication
- Exchange of information
- Telephone contact
- Routine medical/dental
- Parenting/ Child Rearing activities
- Haircuts
- Clothing/belongings (transfer bag)
- Temporary schedule changes (minor illness, special events)

Significant Decisions (Parental Responsibility)

School/ Daycare Setting

School-Related Decisions

- Psychoeducational testing
- Remediation
- Enrichment
- Tutoring

- Practice of religious observance
- Formal education of religion

Medical/Health

Emergency

Non-Emergency

- Elective surgery
- Long-term medication
- Dental & orthodontal
- Immunization
- Therapy/counseling

and lessons

Parenting Time

Regular Schedule

Protocol (eg: driving, location)

Summer Schedule

Telephone Contact

Holiday and special days

PARENTING PLAN CHECKLIST FOR HIGH CONFLICT FAMILIES

Barbara Jo Fidler, Ph.D., C.Psych., Acc.FM.

Lawyers, mediators, assessors/evaluators and parenting coordinators may wish to structure their Parenting Plans for high-conflict families using the following headings. Examples of the specific areas that would typically fall under each heading are provided.

PARENTING GUIDELINES AND PRINCIPLES

- Various parenting guidelines, principles and aspirations relating to good parenting, promoting children's relationships with the other parent, supporting the parenting plan, not denigrating the other parent, not involving the children in conflict, respecting the other parent's privacy, not raising issues at transition times when children are present, etc.
- Relevant and appropriate child-rearing practices (e.g., degree of consistency regarding various routines such as bedtime, napping, dietary restrictions, homework, etc.).

PARENTAL COMMUNICATION

- Rules of engagement for the parents' communication and behaviour in and out of the children's presence.
- Detail regarding the parents' communication: how, when, where, how frequently, the required response time, etc.

REGULAR PARENTING TIME SCHEDULES

- Clearly delineated parenting time with each parent
- When does parenting time start and stop?
- What happens to the parenting time schedule when a child is ill?
- Who calls the school when a child is ill?
- When is time with the other parent forfeited because of illness?
- Exact pickup and drop-off days and times
- Rules for parental behaviour at transitions (i.e., no discussion of anything beyond cordial niceties)
- Location of transition?
- Who does the transportation?
- Punctuality rules

CHANGES TO PARENTING TIME SCHEDULES

- Rules relating to how the need for temporary changes to the parenting time will be addressed and resolved in the event of a dispute.
- How are temporary changes/requests handled?
- What is the agreed-upon response time for requests for changes?
- What is the policy regarding "make-up" time with the child/ren?

- Is there a right of first refusal? If so, what is the threshold of time allowed (e.g., four hours, eight hours, one overnight or more?)

HOLIDAYS, SPECIAL DAYS AND VACATIONS

- Specify *all* holidays clearly defined as to beginning and end of period, location of transitions, who provides transportation, etc.
- Agreement that these days take precedence over usual schedule
- How are summer vacation dates determined? Who gets first choice? How much notice is given?
- Is there a rule that the one-week holiday (seven days) must include a usually scheduled weekend?
- If not, what happens to the usual weekend rotation?
- Does the statutory day add to the seven days to make eight days?
- What happens to the usual schedule when the holiday schedule ends?
    - Does the usual rotation continue or change?
    - Does one parent get three weekends in row, or do the parents split one week and resume the usual alternation of weekends?
- What about professional development school days?
- Children's birthday parties:
    - Who pays?
    - Who attends?
    - How are the gifts divided?

CHILDREN'S CONTACT WITH NON-RESIDENT PARENT

- Is there unlimited telephone contact between the child and the non-resident parent, or are there rules (e.g., frequency of calls in a week, time of day, who initiates the call, etc.)?

EXTRACURRICULAR ACTIVITIES

- How are extracurricular activities decided upon?
- Is consent or notice only required when such activities overlap the other parent's time?
- Can both parents (and family members) attend all activities, only some (e.g., special final events), or none?

CHILDREN'S CLOTHING & BELONGINGS

- What are the rules around clothing: washing; returning; number of changes provided to the parent who pays child support; loss; breakage?
- Which are Section 7 expenses, and which come out of child support?

DAY-TO-DAY DECISIONS

- Who takes children to routine medical/dental appointments?
- Can both parents attend such appointments?
- What, how and when will child-related information be shared?
- Who is the librarian of documents: health card; immunization; etc.?
- Which parent attends at parent–teacher meetings?
- Which parent accompanies the child/ren on field trips?
- Which parent is responsible for the children's haircuts?

MAJOR DECISIONS (CHILDREN'S HEALTH/WELFARE, HEALTH, EDUCATION, & RELIGION)

- Precise protocol for how these are decided
- Exchange of information
- Details regarding the children's religious observance, if any (e.g., attendance at church, Sunday school, rituals, etc.)

TRAVEL

- Notice? Consent?
- Notarized letter (rules regarding response time; number of days in advance of travel; who pays)
- What is in the itinerary?
- Who holds the passports?
- Phone calls with the non-resident parent during travel with the resident parent?

RESIDENTIAL MOVES

- Number of days of notice required
- Geographic boundaries/limits, or distance from each other.

JURISDICTIONAL MOVES

- Agreed to mutually; otherwise by court order

CHANGE OF NAME

- Identify restrictions as per relevant/local law

FUTURE DISPUTE RESOLUTION

- Identify future dispute resolution mechanism/method (i.e., mediation, parenting coordination, mediation/arbitration, etc.)
- Identify professional to provide services
- Identify how fees will be paid

Law Society of Ontario | Barreau de l'Ontario

TAB 2

18th Family Law Summit

Mountain of Cases to "Summit"

Aaron Franks
Epstein Cole LLP

Adam Prewer
Epstein Cole LLP

March 20, 2024

cpd

A Mountain of Cases to "Summit" 

Aaron Franks and Adam Prewer of Epstein Cole LLP

Family Law Summit
March 20/21, 2024

Table of Cases

Parenting

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

One Small Step for Public School Education

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

h. King's Academy had smaller class sizes;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As we said, a very helpful list.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Est-Ce Possible???

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The mother did not speak French and would not be able to help the child with her school work (or, at the very least, it would be far more difficult).
- The mother was responsible for the majority of school pick-ups and drop-offs, and her other child attended the English school. Although it might not be impossible for her to get both kids to and from school given they were only five blocks away from each other, it would definitely be far more difficult to do two pick-ups and drop-offs at different locations instead of just one.
- As the father was the one asking to change the child's school, it was *his onus* to produce

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Interim Alienation Two-Step

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Reverse custody and place the child with the rejected parent;
c. Leave the child with the favoured parent and provide therapy; or
d. Provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.

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

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

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

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

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

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

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

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

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

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

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

We have all seen "those" final orders that start with: "This is a high conflict parenting situation. The case is seven years old and fills 52 bankers boxes, including 32 different court orders and 45 court attendances . . . " Want to avoid those situation? This is the way to do it — early, decisive court intervention with continued case management. The court simply ***must*** act early to prevent alienation: *Ene v. Ene* (2015), 56 R.F.L. (7th) 332 (Ont. S.C.J.); *Williamson v. Williamson* (2016), 74 R.F.L. (7th) 18 (B.C. C.A.); *A. (A.) v. A. (S.N.)* (2009), 66 R.F.L. (6th) 294 (B.C. S.C.); *Kwan v. Lai* (2016), 98 R.F.L. (7th) 437 (B.C. S.C.); *Hazelton v. Forchuk* (2017), 93 R.F.L. (7th) 254 (Ont. S.C.J.); *MacLeod v. MacLeod*, 2019 CarswellOnt 5172 (S.C.J.) (can make finding of alienation at interim stage); *Hajji v. Al-Jammou* (2020), 48 R.F.L. (8th) 401 (Ont. S.C.J.). And for those that say "the court does not have the resources for continued management of cases" — we point to the benefit of avoiding cases that fill 52 bankers boxes, etc . . .

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

And again, this time with Feeling

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [23] In my view the law has evolved to the point where the approach of deferring parenting changes to trial in highly conflicted cases characterized by family violence and/or child parent contact issues should be re-examined, along with the related approach of routinely deferring implementation of family assessments to trial. **A reconsidered process of active judicial case management and timely single judge decision making** may provide children more hope for better outcomes and at the same time provide procedural fairness to their parents. [**emphasis** added]

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

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

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

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

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

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

Orange Jumpsuit Anyone?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exception

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

Same

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

Allocation of decision-making responsibility

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

Allocation of parenting time

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

Parenting time, day-to-day decisions

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

Parenting plan

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

Right to ask for and receive information

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

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

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

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

a. Decision-making responsibility;

b. Time-sharing — regular and holiday schedules;

c. Contact with persons other than a parent;

d. Communication between parties;

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

f. Any other order the court considers necessary.

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

Custody during adjournment

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

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

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

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

Terms and conditions in order

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

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

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

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

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

Property

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Have Gun – Will Travel; Have Witness – Will Enforce

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The appeal was dismissed.

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

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

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

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

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

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

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

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

No reason for alarm. Move along everyone.

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

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

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

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

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

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

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

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

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

- When the motion judge made his order, he knew the Company was a creditor of the husband; and

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

This was the Company's appeal of that Order.

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

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

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

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

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

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

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

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

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

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

Ugh…the *Planning Act*.

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

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

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

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

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

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

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

What could be more clear than that?

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

So where does that leave us?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Justice Harvison Young dealt with the issue as follows:

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

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

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

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

A Slightly New Bent on Occupation Rent

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

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

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

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

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

No more, it would seem.

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

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

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

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

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

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

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

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

Leaving no *Stone* unturned.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court of Appeal overturned the motion judge:

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

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

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

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

Support

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

May the Courts be With You

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ponies for Everyone!!

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

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

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

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

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

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

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

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

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

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

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

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

> **Variation Order**
>
> 17(1) **A court of competent jurisdiction may make an order varying**, rescinding or suspending, retroactively or prospectively,
>
> > (a) **a support order or any provision of one**, on application by either or both former spouses; . . .
>
> . . . . .
>
> **Factors for child support order**
>
> 17(4) **Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines** has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> . . . . .
>
> ***Federal Child Support Guidelines*, SOR/97-175**
>
> **Circumstances for variation**
>
> 14 **For the purposes of subsection 17(4) of the *Act*, any one of the following constitutes a change of circumstances** that gives rise to the making of a variation order in respect of a child support order:
>
> > (a) **in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;**
> >
> > (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
> >
> > (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the *Act*, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997). [emphasis added]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If Harrison Ford Can work into His 80s…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disclosure Issues

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

Express Waiver of Privilege and Clint Eastwood.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ah…The Twin Warm Blankets of Relevance and Proportionality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

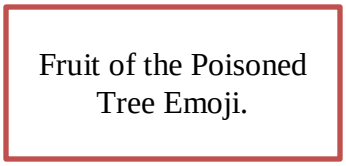
After considering the "*Laushway* critera", Associate Chief Justice O'Neil was not persuaded that further details about the husband's post-separation spending were relevant to the issues before the court, particularly when weighed against "the privacy interests of [the husband], the need for proportionality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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

Relevance

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

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

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

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

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

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

Exclusionary Rules

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

Judicial Discretion To Exclude Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The facts are not complicated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . . . .

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

. . . . .

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

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

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

iii. The extent of review of the privileged material;

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

v. The stage of the litigation; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

from their bad behaviour.

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

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

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

So let's all be careful out there.

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

Keep Your Laptop Out of My Zettabytes!

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

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

But to those engaged in family litigation, this represents a possible treasure trove of information. To some family litigants, the ability to access the private digital information of another proves just too tempting. (Not that this only applies to family litigants – see *2177546 Ontario Inc.* v. *2177545 Ontario Inc*., 2023 ONCA 694).

In this case, Justice Kraft had to decide what to do where a Wife was caught having surreptitiously accessed files on the Husband's computer. After being caught, it was agreed that the Wife had gained access to the Husband's private computer files, documents, e-mails and text messages by entering the matrimonial home and downloading his information onto her laptop. Specifically, the Wife accessed the Husband's files by making a backup of his hard drive through the Apple OS – and she was able to access all of this information simply by virtue of being connected to the matrimonial home's Wi-Fi. If that doesn't want to make you swear in a Newsletter…

At the motion, the Husband wanted to compel the Wife to deliver all computers she used to download his information so that a third-party forensic investigator could conduct a full audit of the electronic documents she took from the Husband and determine to whom those documents might have been distributed. (The Husband wanted to identify and inventory all the digital records the Wife had accessed.) The Husband further sought an order that he be permitted to choose the forensic investigator and that the Wife pay all the associated costs. And finally, he wanted an order restraining the Wife from distributing any of the documents/records/information she obtained from his computer and to disclose all of the third parties to whom she had sent any of the information.

The Wife had her own forensic investigator whom she proposed should handle the process of identifying and providing the electronic files and records.

Justice Kraft framed the issues before her as follows:

a. Which forensic investigator should be chosen to review the Wife's computer to determine the extent of what electronic documents she accessed surreptitiously and what is the nature and scope of review to be completed by this forensic investigator;

b. Who would pay for the cost of the forensic investigation;

c. Should the Wife be restrained from disseminating or distributing any information she obtained from the Husband's computer to any third parties; and

d. Should the Wife be required to produce a list of all third parties to which she had already sent the husband's electronic data to.

The parties did not dispute the background facts as to how the Wife had accessed the files. The Court did, however, highlight the fact that the Wife showed absolutely no remorse for her actions. Rather, she blamed the Husband for her having to take the steps she did to obtain the documents because of his persistent failure to provide timely disclosure. That's not quite the definition of chutzpah, but we're certainly in the area.

The parties also agreed as to how the Wife's actions had come to light. The Wife had attached documents as exhibits to an Affidavit; and had put documents to the Husband on Questioning, that he had not provided.

Then, during Questioning, the Wife admitted to having provided the Husband's documents to her lawyers and to her accountant and his team. However, she denied accessing any "privileged information," and when questioned she stated that she deleted the privileged documents without reviewing them. Well of course she did.

Justice Kraft first set out that the Husband was entitled to know what documents the Wife took from his computer, and what she reviewed, deleted and shared with her legal team. The Wife's counsel argued that the Wife did not "steal" the documents because a copy remained in the Husband's possession and that should be the end of it. A valiant try, but Justice Kraft made short work of this argument. The Wife copied and accessed the Husband's private and confidential information in such a way that he would not have known she had done so. He only realized it when she attached documents to her Affidavit.

While the Wife claimed that she had not accessed any privileged information, it was impossible for the Husband to know if that was true.

The legal test to decide the appropriate remedy where privileged information is accessed or received by an opposing party or its counsel is set out in *Celanese Canada Inc v. Murray Demoliton Corp*., 2006 SCC 36; *Continental Currency Exchange Canada Inc. v. Sprott,* 2023 ONCA 61; and *2177546 Ontario Inc. v. 2177545 Ontario Inc.,* 2023 ONCA 694. It is a three-part test as set out by Court of Appeal in *2177546*. Here it is in a nutshell:

a. At the first stage, the moving party (in this case, the Husband) must establish that the opposing party (in this case, the Wife) accessed relevant privileged material. In this case, the Wife acknowledged that she had accessed privileged documents, but said she deleted them. Without a forensic review of what was surreptitiously taken by the Wife, it would be impossible for the Husband to know the extent of privileged materials that she ahs obtained.

b. At the second stage, *the risk of significant prejudice is presumed.* The husband did not have to prove "the nature of the confidential information" disclosed: *Celanese*, at paras. 42 and 48. Rather, the Wife had the onus to rebut the presumed prejudice flowing from receipt of privileged information: *Celanese*, at para. 48.

The presumption of prejudice could have been rebutted by the Wife identifying "with some precision" that:

i. she did not review *any* of the privileged documents in their possession;

ii. she reviewed *some* documents, but they were not privileged; or

iii. the privileged documents reviewed were "not likely [to] be capable of creating prejudice": *Celanese*, at para. 53. The evidence had to be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at pp. 1260-63; see also, *Celanese*, at para. 42. Again, a *fortiori* undertakings and conclusory statements in affidavits, without more, will not suffice: *MacDonald Estate*, at p. 1263.

Where the precise extent of privileged information is unknown and possibly unknowable, the court should *infer* that confidential information was imparted unless the party solicitor has satisfied the court that no information was imparted which could be relevant: *MacDonald Estate*, at p. 1290. Here, the Husband could not assess what had been taken without a third-party review of the electronic records. Once a complete review of the computers was undertaken, and depending on the outcome of that review, the Husband could be entitled to seek a stay of proceedings or to seek to remove the wife's legal team.

As summarized in *Celanese*, at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the appellants in receipt of privileged information including:

i. Requiring the Husband whose privileged information had been disclosed or accessed to prove actual prejudice would require him to disclose further confidential or privileged materials;

ii. Placing the burden on the Wife who has access to the privileged information accorded with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and

iii. The Husband did not have to bear "the onus of clearing up the problem created by" the Wife's actions.

c. The third stage of the analysis is to fashion an appropriate remedy.

With that in place, Justice Kraft set out that only after there was a complete record of the extent of the surreptitiously obtained evidence could the three-part test be applied.

During the Wife's Questioning, she had refused to provide her laptop, but she agreed to make best efforts to produce a complete record of which of the Husband's she had copied from his computer. However, the Wife's counsel had taken the computer into their possession for safekeeping since the questioning to preserve the electronic records. The Wife proposed retaining independent e-discovery counsel to assist with the process of producing an electronic record of the documents

she removed from the Husband's network. The Wife attached an eDiscovery proposal from her proposed expert:

1. The expert would be given access to the Wife's computer. It would collect identified folders of documents and e-mail data.

2. The collected data would be put in a Data Room.

3. Both parties would be given access to the Data Room and database to review.

4. The neutral expert would review the database and identify privileged information and relevant information

5. The Wife would ultimately be provided with the non-privileged relevant information. The Husband would be provided with the entirety of the database.

The Husband, however, wanted to use his expert to take an image of the Wife's computer so that his forensic investigators could undertake a full review of her laptop to identify what records were taken. This would also preserve the metadata on these records.

Ultimately, the real difference between the two proposals was that the Wife's proposal would essentially rely on her to identify the folders on her computer where the documents resided. The Husband's methodology, however, would see all of the folders searched. The Wife argued that the Husband's proposal could violate her privacy. OK – now we're in chutzpah-ville.

Caught between these two extremes, Justice Kraft accepted the Wife's proposal as being appropriate, but expanded the scope of her expert to include the investigatory role that the Husband was seeking.

The Wife was ordered to pay the up front costs subject to reapportionment at trial.

Justice Kraft then considered whether the Wife should be restrained from sending any of the Husband's private records to any third parties. The Wife argued that the Husband was "overreaching" and that a restraining order was not necessary.

Justice Kraft determined that section 46(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 would permit this kind of restraining order. The Court set out that the purpose of an interim restraining order was to "permit both litigants the opportunity to conduct their litigation in as reason an atmosphere as possible" and to "provide the litigants with some element of order in the context of difficult and acrimonious litigation."

Justice Kraft disagreed with the Wife's claim that the Husband's request was "overreaching." The Wife had taken digital records from the Husband without his consent. And she had already shown she had no problems disseminating this information to third parties. Allowing her to continue to do so would not be fair to the Husband in these circumstances. The Husband was entitled to know, at least until the forensic audit was completed, that the Wife would be restrained from distributing any of his documents to third parties.

Finally, Justice Kraft determined it was reasonable to order the Wife to produce a list of all contacts, including their names and contact information, to whom she had sent the Husband's documents.

Computer-surfing can come with significant costs when the computer on which you are surfing is not your own.

Grab-bag

***Mitchell v. Mitchell*, 2023 ONSC 2341 - Obtaining A Significant Costs Award At A Settlement Conference**

Show up on time and ready to your conference…or pay the price..

In Ontario, Rule 17(18) of the *Family Law Rules*, O. Reg. 114/99 (the "*Rules*"), provides that, while parties will generally bear their own costs for Case Conferences, Settlement Conferences, and Trial Management Conferences, costs ***shall*** be awarded against a party if s/he was not adequately prepared for the attendance:

> 17(18) Costs **shall** not be awarded at a conference unless a party to the conference was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules, **in which case the judge shall**, despite subrule 24 (10),
>
> (a) **order the party to pay the costs of the conference immediately**;
>
> (b) decide the amount of the costs; and
>
> (c) give any directions that are needed. [emphasis added]

Even though Rule 17(18) is mandatory, historically, it has not been regularly invoked to sanction those that that are not prepared for a conference, especially a Settlement Conference.

Until now, perhaps.

In *Mitchell*, Justice Kraft relied on Rule 17(18) to send a clear message to the husband in the case, and other litigants, that not being prepared for court is simply unacceptable, and will not be tolerated.

Hopefully, instead of being an outlier, *Mitchell* will be the start of a trend. A wasted conference deprives other parties of court time that could be used to settle cases, and should rarely be tolerated.

The facts in *Mitchell* were straightforward. The husband was not prepared for a Settlement Conference that took place on March 29, 2023. Among other things, he had not complied with two disclosure orders (one of which was over a year old), and he did not comply with his obligations under the *Rules* to serve an updated sworn Financial Statement, a Net Family Property Statement, and his expert report(s) before the Settlement Conference. His previous Financial Statements were also clearly inaccurate as they omitted significant assets.

As a result of the husband's failure to comply with multiple court Orders and his obligations under the *Rules*, about an hour before the Conference started, the wife served a Bill of Costs. She then asked Justice Kraft to order costs against husband -- and her Honour agreed to receive submissions from both parties about the issue.

After the Conference, the wife served an updated Bill of Costs for $34,500 (rounded), which represented 60% of the costs she had incurred since the first disclosure order was made back in February 2022 (with which the husband had still not complied).

The husband conceded that the wife was entitled to costs, but argued that the costs she was seeking were excessive, and included a significant amount work that was unrelated to the Conference.

After reviewing the leading Ontario cases about costs in family law matters, including *Mattina v. Mattina*, 2018 ONCA 867 and *Beaver v. Hill*, 2018 ONCA 840, Justice Kraft concluded that Rule 17(18) allowed her to award costs not just for the time spent on the Conference itself, but also for work that was done in relation to "the [husband's] failure to provide disclosure in accordance with the *FLRs* and the court-ordered disclosure which are directly related to Rule 17(18)." In other words, she accepted the wife's argument that the Court could use Rule 17(18) to award the wife more than just her costs wasted at the actual Settlement Conference.

In the circumstances, Justice Kraft determined it would be fair and reasonable for the husband to pay the wife $18,000 in costs. And, she ordered that the costs be paid within 10 days. Not in 30 days; not as determined by a later Conference judge; but in *10 days*. If this does not encourage recalcitrant litigants to show up prepared and to comply with court orders, we do not know what will.

We hope to see more of these decisions, in appropriate circumstances. As noted, court time – especially at Conferences designed to settle matters and narrow issues – is a precious resource.

We also want to offer two suggestions for counsel when dealing with these types of situations. First, include the request for costs, and a Bill of Costs, in your Conference Brief, along with a list of everything that the other party has not done in your materials. That way, it will be clear to both the court and the other party exactly what you are seeking and why, and thus increase the chances that the presiding judge will be willing and able to fix the amount of costs at the conference (instead of having to give the other side a further opportunity to file written submissions, as happened in *Mitchell*).

Second, ask the conference judge to make it clear in his or her Endorsement that the costs Order is without prejudice to your client's right to seek further indemnification for any portion of the costs claimed but not awarded for the Conference at a later date. For example, in *Mitchell*, the wife's actual costs for the period in question totalled $57,500 (rounded). Since she only requested $34,500 (rounded) in costs on a partial recovery basis, and was only awarded $18,000, it should still be open to her to ask for some or all of the remaining $39,500 she actually incurred should circumstances warrant it, especially if the initial $18,000 award doesn't cause the husband to change his behaviour.

***Aroma Franchise Company Inc. et al*. v. *Aroma Espresso Bar Canada Inc. et al*., 2023 ONSC 1827 – Reasonable Apprehension of Bias in Arbitral Awards**

They Always Hide the Good Stuff in the Footnotes

Every few decades a case comes along that is a paradigm shift; a truly transformative case that changes or impacts the law as never before. Think *Hrniak* v. *Mauldin*, 2014 SCC 7.

This is not one of those cases.

One would not know that from the amount of chatter it has generated, but in our respectful view it is much ado about the obvious.

In *Aroma*, Justice Steele of the Ontario Superior Court of Justice set aside two arbitral awards on the basis that there was a reasonable apprehension of bias. This determination was based on the fact that the arbitrator accepted a new arbitration mandate on an unrelated file with one of the same counsel part-way through the Aroma arbitration – and the fact of the new mandate was not "disclosed" until it was accidentally discovered after the Aroma award was delivered.

Therefore, many have suggested that Aroma stands for the proposition that a failure to disclose past and current engagements, including engagements accepted by an arbitrator while in the midst of an existing arbitration, could lead to a finding of a reasonable apprehension of bias.

But, respectfully, we suggest that this overstates what happened in this case. We suggest that the result is entirely fact specific and that the same result, absent specific facts, would not likely be the result in a family arbitration. And here's why.

The Aroma case was about the alleged wrongful termination of a Franchise Agreement. Pursuant to that Franchise Agreement, such disputes were to be arbitrated – specifically by someone with "**no prior social, business or professional relationship with either party**." This requirement was clearly important to the parties. Not only was it specifically part of the Franchise Agreement, but *the parties rejected three potential arbitrators* on account of this clause before selecting one that had never previously acted as a mediator or arbitrator for either party or their lawyers.

The arbitration took place over two years, after which the arbitrator determined that the Franchise Agreement had been wrongfully terminated and awarded damages of $10 million.

When the arbitrator delivered the final award to counsel by email on January 12, 2022, the arbitrator accidentally copied another lawyer from the respondent's law firm that had not been involved in the arbitration. After further back-and-forth and correspondence, it turned out that the respondent's law firm had engaged the arbitrator for another arbitration 17 months after the Aroma arbitration began. (The lawyer that was accidentally copied was counsel on that second arbitration.) The second arbitration involved different parties but the same senior counsel.

As a result, the applicants moved to set aside the arbitration award based on a reasonable apprehension of bias.

The Court first specifically noted the importance to the parties of the neutrality of the arbitrator:

> [89] It comes down to context. As set out in *Dufferin* at para. 112, citing *Telesat*: "when considering bias, whether actual or the appearance of bias, **context matters**." **A significant factor** in this matter is the emphasis that was placed, in the pre-appointment correspondence, on **whether there had been any prior dealings with the chosen arbitrator by the parties, their lawyers or law firms. As set out in detail above, it was very important to both parties, but perhaps even more important to the applicants, who are not based in this country, that the selected arbitrator not have a professional or personal relationship with either party or their counsel.** After considerable correspondence and at least three proposed and rejected potential arbitrators, the parties ultimately selected an arbitrator that had not acted as a mediator or arbitrator previously for either party or their lawyers. **The "neutral" status of the arbitrator was clearly important to the parties in selecting the arbitrator.** ***It is not as though it would be less important while the arbitration was extant.*** [***emphasis*** added]

The importance of this factor to the parties cannot be overstated. The parties specifically bargained for an arbitrator that had no prior professional or personal relationship with either party or their counsel.

The Court then considered the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, (the "IBA Guidelines"). The Court accepted that even where not expressly adopted by the parties, the Guidelines are recognized as authoritative as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases.

The IBA Guidelines set out colour-coded lists of specific situations indicating whether they required disclosure or disqualification of an arbitrator. Notably, this includes potentially disclosing appointments of the arbitrator made by the same party or the same counsel while a case is ongoing. The applicants argued that, in these circumstances, the arbitrator should have disclosed the second arbitration mandate.

Within those Guidelines, the "Orange List" is a non-exhaustive list of specific situations that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. Therefore, the "Orange List" reflects situations that would suggest the arbitrator has a duty to disclose. Paragraph 3.1.3 on the "Orange List" calls for disclosure in the following situation:

> **3.1.3** The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

However, footnote 5 to paragraph 3.1.3 states:

> It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. **If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.** [**emphasis** added]

Given the relatively small arbitration bars in most provinces and territories, we would add family law arbitration to this list of areas where it is the practice to draw arbitrators from a smaller or specialised pool of individuals. To suggest that – absence a specific requirement to do so at the behest of the parties -- an arbitrator dealing with a family matter must disclose the fact that s/he had previously arbitrated for counsel involve in a case, means that such disclosure is likely going to have to be made in most cases. Counsel that arbitrate matters with clients know this to be true, and it is up to them to educate their clients. Ultimately, one of the advantages of arbitration is that you get to pick your arbitrator; so don't pick an arbitrator in whom you do not repose the trust and confident to adjudicate fairly.

If the use of arbitrators on multiple family law matters amounted to a reasonable apprehension of bias, then the pool of available family law arbitrators would be severely restricted. Fortunately, Justice Steele also emphasized the presumption of impartiality on the part of by an arbitrator is high – and the fact that an arbitrator accepts another unrelated arbitration from the same law firm does not in and of itself give rise to a reasonable apprehension of bias.

In *Aroma*, it was not difficult for Justice Steele to find a reasonable apprehension of bias:

- The importance to the party of the lack of a previous relationship with the parties or counsel was clear.

- The second mandate was not openly disclosed. Rather, it appears to have been hidden for over a year while the first arbitration was proceeding.

- The second mandate was only inadvertently discovered.

In all the circumstances, as determined by Justice Steele, a reasonable person would lose confidence in the fairness of the proceeding and, in particular, the equal treatment of the parties. That is, a fair-minded and informed person, considering the facts and circumstances of this matter, would conclude that circumstances existed that gave rise to a reasonable apprehension of bias. Considering the importance to the parties of an arbitrator that had no prior involvement with either party or counsel, this was a situation the Court could not permit to stand. The award was set aside. Places everyone – places. Two-year-long arbitration hearing: Take 2.

***Wu v. Di Iorio*, 2023 ONSC 3352 – Experts Attending Questionings/Cross-examinations**

Who wouldn't want some company on a questioning?

This motion argued before Justice Myers was about whether the wife had the right to have her financial expert attend the husband's cross-examination — or whether the husband could refuse to attend the cross-examination if an expert he objected to was present.

As part of the terms for an adjournment of the wife's disclosure motion in a complicated cryptocurrency matter, both parties agreed to undergo cross-examination on their motion material. The husband was scheduled to be questioned on May 18, 2023, and the wife was to be questioned on May 19, 2023. The issue arose when counsel for the wife communicated to the husband's counsel that her expert would be attending the husband's questioning for the purpose of assisting the wife's counsel with the technical issue of the use and tracing of cryptocurrencies.

The husband objected to the wife's expert attending. (In fact, he objected to the wife's expert acting as an expert.) His position was rooted in previous allegations that the wife's expert was in a conflict of interest and could not act as an impartial expert in the matter. The day before the examination, the husband stated that he would not attend the examination if the wife's expert was going to be there.

The husband then failed to show up for questioning (even though properly served with a Notice of Questioning) and counsel for the wife obtained a Certificate of Non-attendance.

The wife then brought an urgent motion seeking to compel the husband's attendance for questioning (so as to not put the cross-examination and motion date in jeopardy).

Justice Myers considered the issue of whether a party could refuse to attend questioning as a result of opposing counsel having an expert present.

First, his Honour noted that the examination was to be a cross-examination of affidavits, not an examination for discovery. While this was an important distinction, Justice Myers determined that the test for whether an expert can attend an examination to assist counsel is not different on a cross-examination or a discovery.

Justice Myers outlined that the "traditional" (read as: old) analysis on this point was set out in the case of *Al's Steak House & Tavern Inc. v. Deloitte & Touche*, 1998 CarswellOnt 5282 (Gen. Div.). In *Al's Steak House* Justice Binks held that, with limited exception, only the parties and their lawyers could attend a questioning in the nature of an examination for discovery. An exception could be an expert witness to advise and assist examining counsel when the technical complexity of the evidence was "of such a nature that the party attempting to justify his or her presence could not proceed or could proceed only with difficulty to a satisfactory examination." Notably, Justice Binks also stated that an expert assisting examining counsel *should not* be a witness at the subsequent trial.

Justice Myers determined that the traditional analysis set out in *Al's Steak House* had to be reconsidered in light of the changed litigation landscape. In the 25 years since *Al's Steak House*, litigation has gone through significant changes. Expert witnesses have become much more common — and much more important. *Stare decisis*, while a fundamental building block of our jurisprudential system, is not a straitjacket that condemns the law to stasis. Courts may reconsider

and reassess settled rulings of higher courts in two situations:

1. Where a new legal issue is raised; and

2. Where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."

[See: *Bedford v. Canada (Attorney General)*, 2013 CarswellOnt 17681 (S.C.C.), *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 CarswellOnt 18344 (C.A.) and *R. v. Sullivan*, 2022 CarswellOnt 6589 (S.C.C.)]

Justice Myers was of the view that 25 years of litigation developments — and especially the way in which family cases are conducted — have fundamentally shifted the parameters of the debate:

> [51] . . . It simply can no longer be the law that counsel needs leave every time she wishes to bring someone to help her at an examination. That would mean that in each — case, a motion that could take up to a year to be heard would be required every single time the party opposite objects to counsel bringing someone to an examination to help him or her.

In terms of the issue of the "examination" expert not being called as a witness, Justice Myers found:

> [53] In a day when the need for expert witnesses was exceptional and costs and delay were perhaps less an issue for civil litigants, the notion of hiring two experts — one for discovery and one for trial — may have been seen to be appropriate doctrinal purity. Today however, the idea borders on lunacy. [Justice Myers is known for calling it as he sees it.]

In an environment of increasingly complex and complicated files, counsel on an examination might need assistance managing all of the documents, and this may not be an expert but could be a junior or another individual hired to assist them. Justice Myers determined that it ought not be the examining party that has to bring a motion to allow for this. Instead, the Court ought to take the examining counsel at their word, and if they state they need assistance then it should be respected.

Justice Myers stated that the new test required the party being examined to bring forward a motion to exclude an expert (or assistant) that the questioning party proposes to have present at the examination. To exclude such individuals, the questioned party will need to establish prejudice. This, of course, means that counsel must provide reasonable notice of such a "guest" attending at the examination.

In the case at bar, there was no prejudice to the husband by the wife's expert being present, even if he was unable to testify as an expert at later stages. He was there to assist the wife's counsel with the technical aspects of the questioning.

Justice Myers ordered that the husband re-attend for questioning, noting that neither a party, *nor counsel*, have colour of right to simply ignore a properly served Notice of Questioning. And now there is a decision that counsel will have to address if they do.

***Casey v. Casey*, 2023 ONSC 2512 – Costs After a Settlement**

A claim for Costs in the Dark.

Costs after litigation is relatively straight forward. With some provincial variation, all Canadian provinces and territories have some form of "loser pays" system.

But how does one determine the "winner" and "loser" after a settlement? After a settlement, sometimes there is a clear "winner" and "loser"; but, sometimes — not so much.

In *Casey*, Justice Pazaratz found himself tasked with determining costs for two motions in which he was wholly uninvolved. Both motions were brought by the father. One was a "travel motion" which the parties were ultimately able to resolve on their own. The second was a motion about parenting time exchanges, which the parties were also able to resolve.

Of course, both sides claimed costs.

The mother claimed costs of $2,431 for the "travel" motion and $2,373 for the "exchanges" motion — both amounts being less than full indemnity which would have totalled something in the range of $7,000. The father claimed costs of $2,500 for each motion.

As noted by Justice Pazaratz, he had absolutely nothing to do with the resolution of these particular motions.

His Honour first noted that, where parties reach their own settlement, leaving only the issue of costs to be determined by the court, costs can be awarded to a party even on settlement, but the analysis regarding costs calls for a cautious approach in such circumstances.

Then, his Honour suggested that, in the case of costs after settlements, "there should generally be a compelling reason to justify costs." For example, see: *Davis v. Fell*, 2016 CarswellOnt 2115 (C.J.); *Muncan v. Muncan*, 2021 CarswellOnt 2843 (S.C.J.); *Krueger v. Krueger*, 2017 CarswellOnt 3169 (S.C.J.); *Frape v. Mastrokalos* (2017), 6 R.F.L. (8th) 486 (Ont. C.J.); *Witherspoon v. Witherspoon*, 2015 CarswellOnt 15823 (S.C.J.); *Cummings v. Cummings* (2022), 81 R.F.L. (8th) 214 (Ont. S.C.J.).

Obviously, the main concern here is the sufficiency (or insufficiency) of evidence to support any necessary findings regarding costs. Settlements usually involve a global resolution of multiple issues based on compromises and concessions. In turn, this makes it a challenge for the court to apply the factors relevant to a determination of costs. One party may have made a large compromise where the other made several smaller compromises. As there has been no final determination by the court, the usual cost rules about "beating" one's own offer are not really applicable. One party may have capitulated a reasonable position simply to avoid further litigation costs. Where there has been no adjudication, it becomes difficult — if not impossible — to apply the "touchstone" considerations of reasonableness and proportionality: *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.); *Ball v. Ball* (2014), 52 R.F.L. (7th) 244 (Ont. S.C.J.); *DeSantis v. Hood*, 2021 CarswellOnt 11528 (S.C.J.); *Goetschel v. Goetschel*, 2022 CarswellOnt 15607 (S.C.J.). You get the idea . . .

In fact, it can be such a challenge, that some courts have opined that to award costs after settlement is so fundamentally misconceived and inappropriate, it should not be done — even where Minutes of Settlement provide for it: *Talbot v. Talbot* (2016), 76 R.F.L. (7th) 370 (Ont. S.C.J.). However,

in our opinion, this overstates the case. While it can be challenging, sometimes costs after settlement are warranted, especially where the unreasonableness or intransigence of one party has run up costs. An unreasonable party should not be able to avoid responsibility for costs simply because they "have seen the light." If a party claims "everything" and ultimately agrees to receive "nothing", the determination of success should not be difficult.

That said, if parties place the issue of costs before the court after settlement, the parties must put sufficient evidence before the court about the case: *Gibeau v. Parker*, 2017 CarswellOnt 830 (S.C.J.); *Parkinson v. Parkinson*, 2019 CarswellOnt 19938 (S.C.J.).

As Justice Pazaratz noted, costs usually go to the successful party. But only knowing how a case ended, without knowing how the case was litigated, may make it hard for the court to get a clear sense of which party "won" and the extent to which the settlement represents divided success, capitulation or an end to unreasonable behaviour: *Hmoudou v. Semlali*, 2020 CarswellOnt 2980 (S.C.J.); *Moreno v. Tuey* (2019), 25 R.F.L. (8th) 424 (Ont. C.J.).

And once a matter has settled, the court should be reluctant to spend too much time investigating the background to the settlement in an effort to determine which party's position on each issue was most likely to have been accepted at trial; having a mini trial about who would have won a given issue had there been an actual trial? Ridiculous. [See, for example: *O'Brien v. O'Brien*, 2009 CarswellOnt 7194 (S.C.J.); *Upton v. Harris*, 2016 CarswellOnt 6721 (S.C.J.); and *Moreno v. Tuey* (2019), 25 R.F.L. (8th) 424 (Ont. C.J.).] That said, sometimes, as noted above, it is not hard to determine the (un)successful or (un)reasonable party.

Ultimately, Justice Pazaratz agreed that, while caution is required, a blanket refusal to award costs in settled matters is not appropriate and could, in fact, have unintended — and undesirable — consequences for both the parties and the administration of justice. To quote Justice Pazaratz:

> [8] . . . a. Our family court system consistently encourages parties to settle their cases, to avoid costs. So we must be careful not to undermine our messaging in case management, by imposing post-settlement costs orders which may inadvertently eliminate an incentive to settle: *Moreno v. Tuey*, 2019 ONCJ 418 (OCJ). If litigants do what we urge them to do — reach their own negotiated settlement — the court should carefully assess whether compelling reasons remain to award costs: *Shute v. Shute*, 2017 ONCJ 533 (OCJ).
>
> b. But equally, costs should not be a barrier to settlement. Sometimes after protracted litigation the parties can agree on everything except costs. It is in neither the parties' nor the court's interest to waste an opportunity to resolve substantive issues. Litigants should not be forced to go to trial and achieve success in order to recover disputed costs. Parties should have confidence that if they settle all other issues, any residual costs claim will be given fair consideration by the court, on the merits: *Wunsch v. Wunsch*, 2013 ONSC 5208 (SCJ); *Hassan v. Hassan*, 2019 ONSC 1199 (SCJ).
>
> c. A successful party who has behaved reasonably should not be precluded from pursuing their costs, simply because their opponent waited until the last moment to abandon a meritless or unreasonable position: *Atkinson v. Houpt*, 2017 ONCJ 316; *Moreno v. Tuey*, 2019 ONCJ 418 (OCJ).
>
> d. If a party eventually makes a good litigation choice by signing Minutes, that epiphany doesn't automatically wipe out any history of *bad litigation choices* which would otherwise

justify costs. Settling in the face of the inevitable may be little more than damage control. *Scipione v. Del Sordo*, 2015 ONSC 5982 (SCJ).

e. While there may be public policy reasons against costs orders in the face of negotiated resolutions, there are also public policy reasons to hold parties liable for needless expense they created during whatever period they maintained an unreasonable position: *Horowitz v. Duthie* 2021 ONSC 7902 (SCJ).

Here, Justice Pazaratz was concerned that he did not have sufficient evidence before him to apply the general rules and principles regarding costs. When counsel ultimately suggested that they might return at a later date to argue costs, the court was — understandably — not happy. Having booked a long motion (to deal with relatively small cost claims), the Court was of the view that the booked court time was to be used. This was their opportunity to argue their case for costs, knowing that judges dealing with costs claims in settled matters require an evidentiary foundation for their decision. And if they did not marshal the necessary evidence for the motion they booked, they should not be allowed to use still more court time later or at another court event.

Justice Pazaratz ultimately ordered the mother to pay the father costs of $1,500.

***Giann* v. *Giannopoulos*, 2023 ONSC 5412 – Affidavits and Advocacy**

You Spin Me Right Round Baby, Right Round like an Affidavit Right Round Round Round

This is not a family case, nor is it ground-breaking – in the words of Justice Myers, it is a "classic situation, seen every day in estates court." However, family law practitioners would be wise to take note of Justice Myers prudent comments about “evidence” vs. "spin".

The late Fortis Giannopoulos executed two wills, the first, executed in 2016, more or less divided his assets equally between his four children. He then executed a second will, in 2021, which was much the same, except he left the entirety of his business assets to only one child. Additionally, the new will stated that, should the majority beneficiary, Nick, die before his father, the business would be left to a non-family member, Panagiota Papastefanou. On one side, the respondent, and majority beneficiary, argued he was preferred by his late father as a reward for the extra effort he put into caring for him. On the other, the jilted applicant siblings asserted that the respondent took advantage of having their father's ear to influence his own entitlement.

To avoid all estates being subject to applications, the law implies a minimum evidentiary burden which must be met in order for an application to proceed. Here, Justice Myers was trying to determine whether there was sufficient evidence to raise a *prima facie* case for a challenge to the will. Justice Myers found that the concerns raised by the applicants were "just conjecture, assumption, and allegations, spun together to try to create a negative atmosphere based on distrust and suspicion." (Sure *sounds* like a family law case.)

This distinction between “evidence” and “spin” is emphasized throughout the decision. In one of the applicant's affidavits, she refers to family and caregivers warmly by their first names. But she introduces Ms. Papastefanou as follows:

> Panagiota Papastefanou (“Papastefanou”), who is named as an alternate beneficiary in paragraph III(b)(1) of the Purported 2021 Will in the event Nick had predeceased my father and is described as my father's “caregiver”.

Justice Myers notes three things from this introduction: (1) that Ms. Papastefanou is apparently not deserving of an honorific; (2) that Nick Giannopoulos survived his father, and was always anticipated to do so, therefore the introduction of Ms. Papastefanou by reference to her moot role as alternate beneficiary is used for colour; and (3) the quotation marks around “caregiver” were added for colour and suggest that her caregiving was not real.

Similarly, see the below passages from the same affidavit:

> 19. Prior to my mother's death, I do not recall having any idea of who Papastefanou was, nor of ever having been introduced to her. I do recall, however, a few days after my mother's death, while walking into our church hall following Sunday Liturgy, a woman stopped me and offered her condolences. I had never seen this woman before. Months later, recalling this woman, although I knew nothing of her,

> not even her name, I described her to Nick (everyone was always trying to find a single girl for him) and suggested that he introduce himself and think about asking her out for a date. As I was in the midst of describing her, Nick said, "Who, Yiota?" I responded, "Is that her name?", and he proceeded to tell me that she was already married and had a grown daughter. This was Papastefanou. I do not know how or when Nick knew of this woman. If Nick had known Papastefanou prior to my mother's passing, he did not share that with me.
>
> 20. Surprisingly enough, I later began to hear from Nick that Papastefanou was bringing our father food and giving him rides home from the Danforth Store. Despite us not having known her before, Papastefanou presented herself to my siblings and close family friends as my mother's and father's friend and insisted that she was interested in helping my father after my mother's passing. To this day, I do not know with certainty how Papastefanou was introduced to my parents.
>
> 21. Initially, Papastefanou's involvement seemed relatively innocuous. But over time Papastefanou began to take an increasing and disruptive role in my father's care, while Nick was increasingly cutting me out of decision making."

Justice Myers considered this to have been drafted "disrespectfully to arouse suspicion." The applicant referred to Ms. Papastefanou suspiciously as "this woman". There was nothing inherently surprising in paragraph 20 to justify commencing the paragraph with “Surprisingly enough.” This applicant, his Honour noted, lives in Florida. What did it matter that the Floridian applicant did not know how Ms. Papastefanou met her parents? Finally, in this passage, the applicant attributed an increasing and disruptive role played by Ms. Papastefanou in relation to her feeling that Nick Giannopoulos was cutting her out of the loop. But what did that have to do with Ms. Papastefanou? It was a giant leap with no connection. Absent the spin, the facts plead were simply:

a. An unknown attendee at a funeral offered condolences to a member of the family;

b. Ms. Papastefanou was bringing Fotios Giannopoulos food and giving him rides home from work;

c. She said she was a close to their mother and that she was interested in helping their father.

According to Justice Myers, the tone of disrespect and objectification in this affidavit was "lawyer’s spin dressing up innocuous facts." Justice Myers presents an alternative, unspun, paragraph pleading the same facts:

> I met Ms. Papastefanou at my mother’s funeral when she offered me condolences. I did not know who he was. When I asked Nick about her, he told me that she was married, had a grown daughter, and was bringing food and giving our father lifts from work.

Another applicant's affidavit contained the following:

> 20. I'm not sure how or when Panagiota Papastefanou came into the picture. I am not exactly sure when I learned that this woman, who I had never heard of before, had begun spending time with my dad, bringing him lunch, picking him up from work at the end of the day, and having dinners at my dad's home with him and [the hired caregiver].
>
> 21. I was quite uneasy with the situation, but Nick reassured me that it was innocent and was best for my dad. I asked Nick why this stranger would want to take on this responsibility without payment. He told me that Papastefanou had a poor relationship with her father and really loved our father, as a father figure, and wanted to help.
>
> 22. Though I understood that Papastefanou had a home of her own in Toronto, she ended up moving into my father's home in early 2021. Nick told me that her work for the Ontario Ministry of Health allowed her to work remotely and that with the COVID pandemic she worked full time from my father's home.
>
> 23. Not long after learning this news, I then learned that [the caregiver] had quit the job and now Papastefanou was living full time in the home and taking care of my dad. This made me more uncomfortable and I let Nick know, but once again he reassured me that it was all innocent. I told him that we needed to put a contract together to protect our father's assets and avoid any claims down the road. Nick told me that he had broached the subject with Papastefanou and that she was willing to sign a document to that effect, but it never happened.

Again, Justice Myers asks that we consider the actual bare facts:

a. A woman that the applicant did not know had begun bringing his father lunch, picking him up from work, and having dinners with him;

b. Nick Giannopoulos, who worked and slept with his father, assured the applicant that the relationship was innocent. She loved their father, as a father figure and wanted to help, for free;

c. Although Ms. Papastefanou had a home of her own, she moved into the father’s home in early 2021. Her position with the Ontario government let her work remotely; and

d. The caretaker who had been hired quit and Ms. Papastefanou was living fulltime in the home taking care of the father.

As noted, the only things indicative of wrongdoing in the excerpt above are spin – and spin is not evidence. Calling Ms. Papastefanou "this woman" and expressing the applicant's suspicion were both elements entirely removed from any material evidence.

Justice Myers succinctly summarized the applicant's evidence, making clear that the "actual facts adduced offer no basis to find suspicious circumstances at play." Rather, the *suggestion* of wrongdoing by Ms. Papastefanou comes from the choice of words, adjectives, and spin rather than admissible evidence. To establish a *prima facie* will challenge is not a high hurdle. It can be readily overcome with evidence that there is a real basis for the claim. In this case, the only basis for suspicion was spin.

Is this that different from what we see in family law affidavits every day? We think not. Is it worth considering this and saving “spin” for your factum? We think so.

De Longte v. De Longte*, 2023 ONSC 5512 – The Rule in *Browne v. Dunn

Browne There…Dunn That..

… if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

Lord Herschell, L.C. - *Browne v. Dunn* (1893), 6 R.67 (H.L.)

While we've all (hopefully) heard of the "rule" in *Browne v. Dunn*, it seems that it continues to be misunderstood, misapplied, and sometimes (unfortunately) forgotten. This can be a real problem because, while not often the case (and while exceedingly rare in a civil case), a breach of the Rule in *Browne and Dunn* can be serious enough to warrant a new trial: *R.* v *Abdulle*, 2016 ABCA 5 Fortunately, Justice Fowler Byrne's recent decision in *De Longte v. De Longte* provides an excellent opportunity for a quick refresher.

One the main issues in *De Longte* was whether, and to what extent, the Applicant wife's corporations had unreported cash sales (with the husband claiming they were more extensive than the wife was willing to admit).

As part of her case, the wife and her bookkeeper gave evidence about the corporations, and their knowledge of any unreported cash sales. They were also cross-examined on their evidence.

After the wife closed her case, the Respondent husband opened his. During his examination in chief, the husband tried to give evidence about various events that, if accepted, would support his allegations that the wife had not disclosed the full extent of unreported cash sales. The problem, however, was that the husband had not put these specific allegations to the wife or to her bookkeeper when they were each cross examined. The wife objected, and alleged that the husband's evidence violated the Rule in *Browne v. Dunn*. Was she right?

This resulted in a mid-trial ruling from Justic Fowler Byrne.

Her Honour started her analysis by providing a succinct summary of the rule in *Browne v. Dunn*, and confirming (despite some vague suggestions to the contrary) that the rule absolutely applies in the family law context:

> [9] While more readily identified in criminal proceeding, **the rule in *Browne v. Dunn* is equally applicable to family law trials**. Some examples of its application can be found in *Liu v. Huang*, 2020 ONCA 450 at para. 13-25 and *Alajalian v. Alajajian*, 2019 ONSC 4678 at para. 17.
>
> [10] The rule can be summarized as follows. **If a party intends to impeach a witness called by the opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence**: *Browne v. Dunn*, 1893 CanLII 65, at pp. 70-71; *R. v. Quansah*, 2015 ONCA 237 at para. 75.

> [11] **The rule in *Browne v. Dunn* is a rule that ensures trial fairness.** It ensures fairness to the witness whose credibility is attacked, fairness to the party whose witness is impeached, and fairness to the trier of fact. With respect to the last principle, it ensures that the trier of fact will not be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict: *Quansah*, para. 77. [**emphasis** added]

To further elaborate, as stated by Justice Watt in *R*. v. *Quansah*, 2015 ONCA 237, at para. 70, the Rule is rooted in the following considerations of fairness:

i. Fairness to the witness whose credibility is attacked:

   The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: R. v. Dexter, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; Browne v. Dunn, at pp. 70

ii. Fairness to the party whose witness is impeached:

   The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

   Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

In other words, you can't call evidence to try to prove a witness is lying ("attack their credibility") without giving that witness a chance to tell their side of the story while they are in the witness box. That being said, the rule of *Browne v. Dunn* is not meant to be applied over-zealously. It does not require the cross-examiner to, as the Ontario Court of Appeal colourfully put it in *R. v. Verney* (1993), 67 O.A.C. 279 and *R. v. Dexter*, 2013 ONCA 7, "slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept". Rather, "[o]nly the nature of the proposed contradictory evidence and its significant aspects need be put to the witness." [See also *R*. v. *Drydgen*, [2013] B.C.J. No. 1091 (C.A.); and *R*. v. *K.W.G.*, [2014] A.J. No. 352 (C.A.)] The Rule also does not apply to previous contradictory evidence from the very person being cross-examined: *Yan* v. *Nadarajah*, 2015 ONSC 7614; *Curley* v. *Taafe*, 2019 ONCA 368 – as there could not, in that instance, be claims of "unfair surprise." For the same reason, it does not apply to a witness's own documents or affidavits: *Curley* v. *Taafe*, 2019 ONCA 368; *Yan* v. *Nadarajah*, 2017 ONCA 196. If a witness clearly knows the evidence against him, there is no need for additional notice: *R*. v. *M.L.W*. (1995), 82 O.A.C. 397 (C.A.).

In *De Longte*, the wife had notice of ***some*** of the evidence the husband would be raising to support his claims of unreported cash income, because it was raised in the affidavits that the husband had filed as evidence-in-chief for the trial from some of his witnesses. As the wife had notice of this

particular evidence and had been able to address it as part of her case, this subset of evidence did not violate the rule of *Browne v. Dunn*.

However, the husband also tried to give evidence of events relating to the unreported cash income issue that was ***not*** raised in the Affidavits (including, for example, about a dinner when the husband claimed to have seen the wife accept a cash payment, and about a time when the wife had directed the husband to pick up a cash payment for her). As the wife did not know the husband would be adducing this evidence as part of his case, and as these allegations had not been put to her in cross-examination, she had not had an opportunity to address them. And, as the husband was clearly trying to adduce this evidence to prove that the wife had not been forthcoming about the cash income issue, he conceded that this evidence violated the rule of *Browne v. Dunn*.

As there was no dispute that the husband had not complied with the rule of *Browne v. Dunn*, the real question for Justice Fowler Burne was that of the appropriate remedy would be. This required her to consider a number of factors that were summarized by the Ontario Court of Appeal in *R. v. Quansah*, 2015 ONCA 237 at para. 117, including:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

[See also *Curley v. Taafe*, 2019 ONCA 368 at para. 31, where the Ontario Court of Appeal confirmed that these factors apply in the family law context.]

Although trial judges have broad discretion when it comes to remedying breaches of the Rule in *Browne v. Dunne*, the most common remedies are to "take into account the breach of the Rule when assessing a witness's credibility and deciding the weight to attach to that witness's evidence", or to "allow counsel to recall the witness whose evidence was impeached without notice": *Curley v. Taafe*, 2019 ONCA 368 at para. 31. Excluding the offending evidence may also be available in certain circumstances, although it "should be a last resort and only exercised where any other remedy would be unduly prejudicial to the other party": *Audmax Inc. v. Ontario (Human Rights Tribunal)*, 2011 ONSC 315 (Div. Ct.).

In this case, Justice Fowler Byrne found that the breaches were serious but unintentional. She was also of the view that it was essential to ensure that "all relevant evidence be heard by me, and that I have every opportunity to assess the credibility of all witnesses." Accordingly, she decided the appropriate remedy would be to allow the wife and her bookkeeper to be recalled to address the husband's evidence on the unreported cash income issue that had not been put to them in cross

examination. She also ordered that the husband pay any extra costs that would be incurred as a result of these witnesses having to be recalled.

Given that the wife was asking the court to exclude the evidence in question entirely, this was a fortunate, albeit potentially expensive, lesson for the husband. That said, this case offers an important lesson for all of us: pay attention. Breaches of the Rule in *Browne and Dunn* are not always readily apparent in real time and are easily missed if trial counsel is not on top of the testimony *is* being given, and that *was* previously given. If your witness is being cross-examined on allegations of fact that are new to you, there is a *possible* breach of the Rule in play. And if you are about to elicit evidence from one witness to impeach the evidence of another, you have to make sure your eagerness did not accidentally lead to a violation of the Rule.

_A.M._ v. _D.M._, 2023 ONSC 2113 – Hearsay Evidence

This Brief Evidence Refresher Brought to You by the Hearsay Rule

Principle 1: In most (if not all) Canadian jurisdictions, hearsay evidence (or evidence based on "information and belief") is allowed in affidavits for interim motions if the source of the evidence is identified along with belief in the veracity of the evidence.

Principle 2: In many jurisdictions – especially in the busiest trial courts -- for reasons of judicial economy and in an effort to shorten trials and save expense, the use of affidavit evidence at trial is becoming increasingly common.

Principle 3: It is generally accepted that the rules of evidence should be applied with some degree of flexibility when considering the best interests of the children. For example, from *Gordon* v. *Gordon* (1980), 23 R.F.L. (2d) 266 (Ont. C.A.):

> A custody case, where the best interests of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. It is not necessary for us to go into details.

See also *Powers* v. *Powers*, 2004 ONCJ 281

However, the combination of these three principles sometimes lead counsel to include hearsay in affidavits for use at *trial*, thinking that, when it comes to a best interests analysis, "anything goes." But that is most assuredly not the case. When drafting affidavits for use at trial, counsel must get out of "interim motion mode." The Hearsay Rule (or, more properly, the "Rule Against Hearsay") cannot be relaxed at trial simply because a witness provides evidence in chief by way of affidavit.

This was the problem Justice Mills faced in *A.M.* v. *D.M.* -- D.M.'s direct evidence by way of affidavit was replete with hearsay -- sometimes double or triple hearsay. In her affidavits, D.M. would recounts what was said to her by the children and what the children told others. There was a similar problem with affidavit evidence put forward by some of D.M.'s collateral witnesses.

A.M. opposed the admission of the hearsay statements.

Generally, to avoid having children testify at trial, hearsay evidence of the children is admissible as a principled exception to the hearsay rule if the evidence is necessary and if it is reliable. And, again generally, the "necessity" criterion is satisfied where it would be inappropriate to call the child as a witness to give evidence. [See, for example: *Collins* v. *Petrie* (2003), 41 R.F.L. (5th) 250 (S.C.J.); *G(JD)* v. *G(SL)*, 2017MBCA 117.]

After considering "necessity", as noted by Justice Mills, threshold reliability may be met if the child has repeated the same statement to more than one person, or where the statement has been made to a person who has a demonstrated skill in interviewing children. Then, if admitted, the weight to be given to the hearsay statement of a child will depend on the (physical and mental) age of the child, the circumstances surrounding the taking of the statement, the risk the child was influenced or manipulated when giving the statement or that the statement itself was edited or

manipulated, and the desire of the child to please or appease the parent taking or requesting the statement: *Wilson* v. *Wickham*, 2018 ONSC 2574 at at paras. 30 and 31:

The task before Justice Mills was to satisfy herself that the circumstances surrounding the hearsay statements met the test of "threshold reliability" to be admitted. This requirement will generally be met where there is no concern about the truth of the statement having regard to the circumstance in which it was made (giving rise to circumstantial guarantees of trustworthiness), or where the statement can be sufficiently tested by means other than contemporaneous cross-examination. [*R.* v. *Khelawon*, 2006 SCC 57, at paras. 51, 62-63]

D.M. relied on the (common) argument that the statements be admitted not for the truth of their contents, but rather for the simple fact that they were made. This – that a statement was not made for the truth of its contents but merely for the fact that it was said -- is the classic "non-hearsay purpose" argument for the admission of what otherwise *appears* to be hearsay adopted by the Privy Counsel in *Subramanian* v. *Direction or Public Prosecution*, [1956] 1 W.L.R. 965 (P.C.). (In fact, this is not an exception to the Hearsay Rule; rather, it is an argument that the statement is not being admitted for a hearsay purpose, the truth of the contents of the statement.)

This is perhaps one of the most misunderstood hearsay concepts. To very briefly recount the facts from *Subramanian*, Mr. Subramanian was charged with possession of ammunition for the purpose of helping a terrorist. He pleaded a defense of duress, claiming that he had no choice because the terrorists had threatened to kill him if he did not follow through with their requests. Of course the terrorists were not available to testify and, as a result, the trial court excluded the statements of the threats as hearsay. However the Court of Appeal determined (and the Privy Counsel agreed) that the evidence was not hearsay. The import of the evidence was not that the statement was true – that the terrorists would kill Mr. Subramanian. Rather, the import of the evidence was the simple fact that it was said, causing Mr. Subramanian to fear for his life. Here, it did not matter whether the statements were true; it only mattered that the statements were made to Mr. Subramanian who was present to be cross-examined.

Here, D.M. was looking to use the hearsay statements to provide insight into the family and the challenges faced by the parents in implementing and adhering to the agreed upon parenting schedule. It was argued that the hearsay statements were necessary for the Court to fully appreciate the family dynamics. But that use would require the Court to accept the statements for the truth of their contents – a hearsay purpose. Therefore, the statements were hearsay and presumptively inadmissible.

In addressing the "necessity and reliability" exception to the Hearsay Rule, counsel for D.M. argued that the voices of children in this case could only be heard through the hearsay evidence of parents and that the exception generally reserved for therapeutic professionals should be extended to D.M. a parent. Although the children did meet with professionals, some of the reports were dated. Therefore, D.M. believed herself to be the only source available to provide a full narrative and to offer current evidence respecting the children. That was the basis of the "necessity" argument.

With respect to "reliability", counsel for D.M. argued that the proffered evidence was reliable because D.M. had never been faulted for a lack of credibility or reliability over the 10 years the case had been in litigation. Based on that, D.M. argued that the hearsay statements from her should essentially be afforded a "presumption" of reliability. Essentially Justice Mills was being asked

to expand the test for reliability and to be "more practical" in the application of the rules of evidence in family disputes.

Although a lovely invitation, her Honour respectfully declined:

> [12] In the absence of any legal or statutory authority directing me to depart from the existing rules of evidence or to re-write the rules of evidence in family law proceedings, I decline to do so. The impassioned pleas of counsel to change the way evidence is received in family law trials would result in the admission of unfettered hearsay evidence. There would be no gatekeeper; rather, everything said by a parent would be admitted as being necessary and reliable unless and until proven otherwise. This approach would inevitably result in longer and more acrimonious family law proceedings, a result that will benefit no one.

Here, the children had independent counsel and had participated in assessments and counselling with therapeutic professionals who were going to be witnesses at the trial. The voices of the children would be heard without having to resort to hearsay.

The proffered hearsay statements lacked both procedural/threshold and substantive reliability. There were insufficient circumstantial guarantees of trustworthiness or evidentiary guarantees that the statements were inherently trustworthy. [*R*. v. *Bradshaw*, 2017 SCC 35, at para. 27]

Furthermore, here, there was reason to believe that any statements attributed to the children lacked inherent trustworthiness. Both children had been diagnosed with autism spectrum disorder and cognitive disabilities. Both of the children had admitted to lying to his parents and his teachers and the police. One of the children was highly suggestible and would say what he felt necessary to alleviate situational discomfort.

The statements in question were inadmissible.

And as if a reasonably clear decision was not enough, the decision includes two schedules setting out the impugned statements, explaining why they were or were not admissible. Very helpful.

***Laxmikantha* v. *Adapa*, 2023 ONSC 7151 – Motions at Case Conferences**

Uh, No. And Just When We Thought it was Safe to Forget Latin

A motion is a motion; a Case Conference is a Case Conference – never the twain shall meet…or at least never the twain *should* meet. But in *Laxmikantha*, they met. And in our view, this is a serious problem.

In *Laxmikantha*, the Court decided that Rule 17(8) of the Ontario *Family Law Rules*, 114/99 bestowed upon the Court jurisdiction to award interim decision-making and interim support at a Case Conference, where the payor parent/spouse does not attend to oppose.

In her Case Conference Brief, the Applicant/Mother asked for sole decision-making authority and for significant child support and spousal support. The Respondent/Father did not file an Answer or a Case Conference Brief – and he did not attend the Case Conference. The Mother's proposed support amount was based on the Father's most recent disclosed annual income of $621,393 and the Mother's self-imputed income of $32,000.

There were two children, aged 16 and 13. The Court determined that the Mother was the children's primary caregiver during the 21-year marriage. And how did the Court come to that conclusion? Well -- that is what the Mother claimed in her Application and stated in her Case Conference Brief – both unsworn documents. And this is the problem with all the "findings" on which the Court's decision was made – they were made (presumably) without the benefit of sworn evidence.

The same is true for the "finding" that, as a pharmaceutical executive, the Father travels frequently and only visits the children sporadically.

As noted by the Court:

> [3] **These facts and the details regarding them are not in evidence**, but rather they are facts set out in a Form 17A Case Conference Brief to which the father has not cared to respond with his own brief. Based on this **uncontested data**, the DivorceMate calculations for child support amount to $7,734 per month. The same software produced a range of $11,304 to $14,384 under the Spousal Support Advisory Guidelines' 'with-child-support' formula. In the brief, the mother has sought a temporary and without-prejudice order for child support starting from December 1, 2023, and spousal support in the mid-range figure of $12,852. [emphasis added]

With respect, "uncontested date" is not "uncontested evidence." Even assuming that the Father was properly served and had simply defaulted on filing an Answer and attending the Conference – the Father's bad conduct does not convert the Mother's unsworn statements into evidence on which major substantive decisions can be made.
The Court goes on to state:

> [4] …Had this been a rule 14 motion, the court would have no difficulty ordering the support on an interim and without prejudice basis. Usually, a case conference judge would also attempt to broker a consent order that obviates the need for a contested motion. Here, the father has not defended and did not appear at the hearing of the conference. If he were to bring a motion to set the order aside or appeal this decision, he would have to file evidence and establish that the result on a formal motion would have led to a different order: *Heston-Cook* v. *Schneider*, 2015 ONCA 10, [2015] O.J. No. 120, at para. 12.

While this statement has the ring of accuracy, there are some notable issues:

1. "Had this been a motion" there would have been sworn evidence before the Court on which to base an interim decision.

2. Just as with bad behaviour, the fact that there is no opposite party with whom to "broker" a Consent Order does not convert unsworn information into sworn evidence.

3. *Heston-Cook* v. *Schneider* speaks to a person trying to appeal an order from a motion (at which there was evidence) that person did not attend – not from a Case Conference.

4. Paragraph 12 of *Heston-Cook* v. *Schneider* does actually stand for the cited proposition. Paragraph 12 of Heston-Cook v. Schneider simply states:

> [12] Having regard to the submissions made, we make one further comment. It is trite law that an appeal is always from the order of the court and not the reasons. In dismissing the appeal, the motion judge stated in obiter that, "[T]he respondent should have the right to assert any limitation period defences that may also arise as a result of the need to commence a new action in view of the defective action commenced by the applicant." Any motion invoking a limitation period defence will have to be determined on the basis of the proceedings and pleadings as they stand at the time that motion is heard and the motion judge's comments should not be taken to be determinative of the outcome of that issue.

His Honour justifies the order for decision-making authority and interim child support with reference to the powers provided to the Court by Rule 17(8) of the *Family Law Rules*, which set out the procedural jurisdiction for the granting of orders at a Case Conference:

> **Orders at conference**
>
> (8) At a case conference, settlement conference or trial management conference **the judge may, if it is appropriate to do so**,
>
> (a) make an order for document disclosure (rule 19), questioning (rule 20) or filing of summaries of argument on a motion, set the times for events in the case or give directions for the next step or steps in the case;
>
> (a.0.1) make an order about expert opinion evidence, including,

(i) the engagement of an expert by or for one or more parties,

(ii) the use of expert opinion evidence in a case, or

(iii) the provision, service or filing of experts' reports or written opinions;

(a.1) make an order requiring the parties to file a trial management endorsement or trial scheduling endorsement in a form determined by the court;

(b) make an order requiring one or more parties to attend,

(i) a mandatory information program,

(ii) a case conference or settlement conference conducted by a person named under subrule (9),

(iii) an intake meeting with a court-affiliated mediation service, or

(iv) a program offered through any other available community service or resource;

(b.1) <u>if notice has been served</u>, make a final order or any temporary order, including any of the following temporary orders to facilitate the preservation of the rights of the parties until a further agreement or order is made:

(i) an order relating to the designation of beneficiaries under a policy of life insurance, registered retirement savings plan, trust, pension, annuity or a similar financial instrument,

(ii) an order preserving assets generally or particularly,

(iii) an order prohibiting the concealment or destruction of documents or property,

(iv) an order requiring an accounting of funds under the control of one of the parties,

(v) an order preserving the health and medical insurance coverage for one of the parties and the children of the relationship, and

(vi) an order continuing the payment of periodic amounts required to preserve an asset or a benefit to one of the parties and the children;

(c) make an unopposed order or an order on consent; and

(d) on consent, refer any issue for alternative dispute resolution. [emphasis added]

A review of this section makes one thing perfectly clear – all the listed examples of orders a court can make on a Case Conference – whether with or without notice – are either procedural in nature or the type of order that will preserve *status quo* rights until further agreement or order, to avoid any prejudice to a party. But none of the listed examples could be called substantive.
His Honour determined that the "notice" requirement referenced in Rule 17(8)(b.1) was met by service of the Case Conference Brief. We take no issue with that. That is one of the purposes of the Case Conference Brief. Notably, the Rule does not state what form the notice must take: *Hoque* v. *Mahmud*, 2007 CanLII 39366 (ONSC) at para. 15.

Although the Court in *Hoque* notes that it is "less clear" whether the Rule conferred authority to grant substantive relief, here the Court suggests there is really no ambiguity:

> [7]…The ambiguity can be resolved readily by assuming the drafters followed the usual rules of legislative construction. On first impression, it would appear that para. (b.1) is limited by subject matter to preservation orders and maintenance of financial status quo. However, the specific list of preservation mechanisms follows a general phrase "*any* temporary order" (emph. added) and is connected by the word "including." This grammatical structure takes the meaning outside the *ejusdem generis* rule (limited class interpretation) and protects the generality of the antecedent. See: Sullivan, The Construction of Statutes, Seventh Ed. (Toronto: LexisNexis, 2022), at p. 242, citing National Bank of Greece (Canada) v. Katsikonouris, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029, at 1040-41. It therefore follows that the case conference judge is authorized to grant any temporary orders, if satisfied that the other party has been given due notice.

His Honour therefore concludes that Rule 17(8) confers jurisdiction on a Case Conference:

> [9] I conclude from the foregoing that subrule 17(8) of the FLR confers jurisdiction on a case conference judge to award interim relief of the kind sought by the mother, provided notice is clearly given and stated in the Case Conference Brief and the relief is an appropriate remedy in the circumstances. This interpretation of the rule places the burden on the erstwhile non-participatory spouse/parent to bring a motion to set the order aside, instead of requiring the presumed recipient of support to bring a separation [sic] motion. This would have the effect of reducing steps in most cases and promoting general principles of the FLR in streamlining cases, getting payor spouses used to the idea of paying support, and of rounding up recalcitrant parties into the precinct of the court.

And based on this – but not on any actual evidence – on an interim basis, the Court ordered that the Mother have sole decision-making authority; that the Father pay monthly child support of $7,734; and that the Father pay monthly spousal support of $12,852.

While regular readers will know we are all for measures that enhance judicial economy; procedural fairness must not be sacrificed at that alter. Where one party is truly recalcitrant, they are not likely to respond to a motion after a Case Conference. And if they do, without adequate explanation, they will certainly have to pay costs for wasting the Court's time at the Case Conference.

The fact that *ejusdem generis* does not technically apply (because, here, the specific follows the general rather than the general following the specific) is not a reason to ignore what is otherwise the pretty clear intent of Rule 17(8) the list of 17 example orders that are procedural in nature housed within it.

Furthermore, one good Latin cannon of statutory interpretation perhaps deserves some others?

a. *Noscitur A Sociis*: "it is known by its associates". The meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context – just as the list of procedural orders.

b. *Expressio Unius est Exclusio Alterius*: When a legal document includes a list, anything not in that list is assumed to be purposely excluded – such as substantive orders.

But, then again, any we need not have any Latin philosophers tell us that Orders cannot be made without evidence.

As there is no notion of "noting in default" in the *Family Law Rules*, it further stands to reason that a Court cannot make a final order at a Case Conference -- even where other side does not file Answer: *Rice* v. *Strachan*, 2012 CarswellNfld 395. The fact that the Court here made an interim Order does not really detract from this general principle. And other cases have also clarified that substantive orders should not be made at a Case Conference: *Kocsis* v. *Kocsis*, [2005] O.J. No. 3169; *Jones* v. *Jones*, 2014 ONSC 2122; *Gyan* v. *Bobb*, 2102 CarswellOnt 17489; and that the Court should not rule on (contested) substantive issues without affording parties the chance to tender evidence, test evidence and make submissions: *Lower* v. *Stasiuk*, 2006 BCSC 864; *Robinson* v. *Morrison*, 2000 CarswellOnt 2776.

The one case that *might* support the result in this case is *Burke* v. *Poitras*, 2018 ONCA 1025, where the Court of Appeal suggested that any order that promotes the overall objectives of the *Rules* may be made at any time, including at a Settlement Conference. In that Case, the Court of Appeal notes:

> [5] First, subrule 17(8)(b.1), which sets out a list of final or temporary orders that may be made at conference so long as notice has been served, contains no explicit restrictions on the kind of final order that may be made at a settlement conference beyond the provision of notice.

However, it is important to understand that in *Burke*, the Court of Appeal was actually dealing with other provisions of the *Family Law Rules* – including Rule 1(8) – that specifically provides for the Court striking pleadings where a person fails to obey an order:

> [7] The express purpose of the *Family Law Rules* is to ensure fairness, save time and expense, and give appropriate resources to the case (while allocating resources to other cases), in order to manage the case, control the process, ensure timelines are kept, and orders are enforced. As clearly stipulated in subrules 1(7.1), (8) and (8.1), an order, including an order to strike pleadings, can be made at any time in the process, including the settlement conference, to promote these overarching

> purposes. In this way, any order that promotes the overall objectives of the rules may be made at any time, including at a settlement conference.

Therefore, it is not entirely clear whether Burke supports the result in this case.

We're now going to have a drink. *In vino veritas*.

***Mehralian v. Dunmore,* 2023 ONCA 806 – Attornment and Recognition of Foreign Divorces**

Oh 2 A-Torn in O-man

This case involved two appeals from two jurisdictional decisions in the same matter, the decision of Justice Myers recognizing the validity of an Omani divorce, and the decision of Justice Brownstone dismissing the Husband's motion seeking the return of their child to Oman.

The parties really got around. The Husband is Canadian; the Wife, Iranian. They met while working in Malaysia. They married in Japan in June 2015 and lived there for one year. They moved to the United Arab Emirates in 2016 after the Husband got a job there. They separated for a period in 2017 and reconciled in 2018. They moved to Oman in 2018 and lived there until March 2020. The parties traveled to Ontario in March 2020 to visit with the Husband's family, intending to return to Oman in April. But Covid-19 forced them to stay in Ontario until January 2021, living with the Husband's family. During that time, the Wife became pregnant (as all family lawyers know, children always make it better), and in December 2020, she gave birth to their first and only child.

The family returned to Oman in January 2021. The Husband got a new job in Oman, but he was terminated just over one month after they returned. He then signed a fixed-term contract with an Ontario employer, and the parties returned to Ontario in April 2021.

The parties purchased a chalet in Quebec and were vacationing there in May 2021 when an "incident" occurred. The police were called. The Husband was charged. The marriage was over. The Husband started an application in the Ontario Court of Justice to deal with parenting issues. He brought a 14B Motion claiming the issue was urgent because he was leaving Ontario for work (he found a job in the UAE). A motion was scheduled, but the Husband later withdrew his claims in the OCJ and vacated the motion.

In June 2021, the Wife also brought an application, but in the Ontario Superior Court of Justice, seeking a divorce, corollary relief, and equalization of net family properties. However, as the Wife had not lived in Ontario for the year preceding the Application, Ontario had no jurisdiction to do *anything* under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).

Although this point was not really addressed by the Court below or the Court of Appeal, a quick reminder about *Divorce Act* jurisdiction can save us all some time, trouble and embarrassment – and no time like the present. Recall sections 3 and 4 of the *Divorce Act*:

> **Jurisdiction in divorce proceedings**
>
> 3 (1) A court in a province **has jurisdiction** to hear and determine a divorce proceeding **if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding**.
> **Jurisdiction in corollary relief proceedings**
>
> 4 (1) A court in a province **has jurisdiction** to hear and determine a corollary relief proceeding **if**

> (a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
> (b) both former spouses accept the jurisdiction of the court.

That is, a spouse cannot claim a divorce until one of the spouses has been habitually resident in the province for a year -- and a spouse cannot claim corollary relief under the *Divorce Act* without already having been divorced in Canada or without also claiming a divorce in Canada -- remember that whole *Rothgiesser* v. *Rothgiesser* (2000), 46 O.R. (3d) 577 (C.A.) thing?) ("*Roghgiesser*"). Therefore, the wife's divorce proceeding was a nullity: *Robar* v. *Robar*, 2010 CarswellNB 15; *Enman* v. *McCafferty*, 2010 CarswellNB 167; *Nafie* v. *Badawy*, 2015 ABCA 36; *Green* v. *Green*, 2009 CarswellBC 2006; *Zalizniak* v. *Zalizniak* et al., 2006 MBCA 161; *S.L.* v. *M.E.F.*, 2007 NLCA 12.

Now back to the main show.

The Husband took the position that Ontario was not the appropriate jurisdiction to deal with their family law claims, but he did not bring a motion to dismiss it. Instead, he moved back to the UAE, then to Oman, and commenced a proceeding in Oman in March 2022 seeking a divorce and joint custody of their child.

Although the Wife contested the Omani court's jurisdiction, the Omani Court of Appeal disagreed with her and found Oman had jurisdiction, sending the matter back to the lower Court for a determination on the merits as to the validity of the divorce and custody under Omani law. The Wife participated in the Omani proceeding, taking the position that, under Omani law, her marriage was invalid and seeking custody of their child. The Omani Court found that her marriage, and divorce, were valid, and granted her custody of their child.

The Husband then brought a motion in the Ontario proceeding for an Order recognizing the validity of the Omani divorce. He brought a second motion for an Order returning their child to Oman, where he claimed the child habitually resided. His motions were heard by two different judges on two separate dates.

At the divorce recognition motion before Justice Myers, the Wife argued that the Ontario Court should not recognize the Omani divorce for several reasons, including that it did not have subject-matter jurisdiction and on public policy grounds, claiming the Husband only sought a divorce in Oman to avoid his support obligations to her in Canada. Again, recognition of the Omani divorce in Ontario would meant that the Wife had no standing to claim spousal support under the *Divorce Act* (there's that pesky *Rothgiesser* again). And she, also could not seek spousal support in Ontario under the *Family Law Act*, RSO 1990, c. F.3, which only allows "spouses", and not "former spouses" to claim spousal support.

Justice Myers disagreed with the Wife. His Honour found – properly in our view -- that the Wife had attorned to the jurisdiction of the Omani Court when she actively participated in the proceeding there. His Honour briefly considered the issue of whether recognizing the Omani divorce would violate Canadian public policy because there is no provision for spousal support under Omani law, but noted that he was not provided with sufficient evidence so as to understand what Omani law might provide for separating spouses in general. It is also far from clear that Oman not providing

for spousal support would suffice for the public policy defence to the recognition of the Omani divorce. Justice Myers recognized the Omani divorce. Again -- correct decision.

As for the Husband's motion for the return of the child to Oman, Justice Brownstone found that the child was habitually resident in Ontario at the time the Wife commenced her Application, and therefore, the Ontario court had jurisdiction under section 22(1)(a) of the *Children's Law Reform Act*, RSO 1990, c. C.12 (the "*CLRA*").

Section 22(1)(a) provides:

> 22(1) A court shall only exercise its jurisdiction to make a parenting order or contact order with respect to a child if,
>
> (a) the child is habitually resident in Ontario at the commencement of the application for the order…

Section 22(2) defines habitual residence as follows:

> (2) A child is habitually resident in the place where the child resided in whichever of the following circumstances last occurred:
>
> 1. With both parents.
>
> 2. If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order.
>
> 3. With a person other than a parent on a permanent basis for a significant period of time.

Justice Brownstone dismissed the Husband's motion.

Not to be deterred, the Wife appealed Justice Myers' Order and the Husband appealed Justice Brownstone's Order. The appeals were heard together.

The Court of Appeal dismissed the Wife's appeal. It rejected the Wife's argument that she only participated in the Omani proceeding to dispute jurisdiction. Justice Myers made no palpable or overriding error when he concluded, based on facts which the Wife did not contest, that she litigated the merits of the divorce in Oman, and sought and obtained relief from the Omani court – i.e custody of their child. Her participation was determinative of the issue:

> [30] Parties to an action are free to select or accept the jurisdiction in which their dispute is to be resolved: *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 37. As the Divorce Recognition Judge noted, a party that has voluntarily attorned to the jurisdiction of a court has consented to having the issues in dispute determined by that court. **Where jurisdiction is established through such consent, as in this case, it is unnecessary to consider whether there are other grounds upon which a court's jurisdiction might be either recognized or**

> **challenged, such as whether the parties had a real and substantial connection with the jurisdiction in question**: *Wolfe v. Pickar*, 2011 ONCA 347, 332 D.L.R. (4th) 157, at paras. 43-44.
>
> [31] For the same reason, the Divorce Recognition Judge did not err in his finding that the applicant could not relitigate issues that she had unsuccessfully raised before the Omani court. These issues included whether the applicant had received valid notice of the Omani divorce and whether the respondent had committed fraud in obtaining the divorce.

For the same reason, the Wife could not resist enforcement of the Omani divorce on public policy grounds:

> [32] Although the Divorce Recognition Judge did consider whether the Omani divorce should not be recognized in Ontario because the divorce laws of Oman are contrary to Canadian public policy, in my view it was unnecessary for him to do so. **This is because consent to the jurisdiction of the foreign court necessarily involves consent to the laws applicable in that jurisdiction.**
>
> [33] The Divorce Recognition Judge found that although the applicant was not required to agree that the validity of the parties' divorce should be decided by the Omani courts, she voluntarily chose to do so. In so doing, she agreed to have the validity of the divorce determined in accordance with Omani law. **Having consented to the application of Omani law, the applicant cannot now argue that the decision of the Omani court should not be recognized in Ontario because the law on which it was based is contrary to Canadian public policy.**

Three points are worth emphasizing about attornment:

1. Where jurisdiction is established through attornment – that is the end of it. After a party attorns to the jurisdiction of a Court, there is no need to consider other possible methods of securing jurisdiction, such as real and substantial connection.

2. Attorning to the jurisdiction of a foreign court *necessarily* means consenting to the laws applicable in that jurisdiction.

3. Attorning to the jurisdiction of a foreign court *necessarily* means surrendering the chance to argue that the foreign law is contrary to Canadian public policy.

Or, to put it more gastronomically – one can't have one's jurisdictional cake and eat it to. Maybe that doesn't work so well – but you get our point.

The Court of Appeal also dismissed the Husband's appeal. It rejected his argument that Justice Brownstone failed to consider the "settled intention" of the parties in determining whether the child was habitually resident at the time the application was commenced. He claimed the parties did not intend to move to Ontario when they traveled here in April 2021, but that Ontario was merely a "way station" until they returned to the Middle East.

The Court of Appeal acknowledged that while Justice Brownstone did not specifically refer to "settled intention", she concluded based on her careful and detailed review of the evidence that the parties agreed to move to Ontario in April 2021 – and that residence in Ontario *at the time* was sufficient to establish habitual residence Her Honour rejected the Husband's evidence that they were merely visiting, finding that he was not credible. These were factual findings were entitled to deference, and the Husband had identified no palpable and overriding error that would justify setting her decision aside.

Of some interest is the following statement by the Court of Appeal:

> [42] I see no reviewable error in the Parenting Jurisdiction Judge's factual finding that the parties were residing in Ontario at the relevant time, or in her conclusion that this was sufficient to establish habitual residence of M. **for purposes of s. 22(1)(a) of the CLRA**. [emphasis added]

Personally, we would have appreciated the Court of Appeal more directly addressing the appropriate test to apply when determining "habitual residence" under the *CLRA*, as the above statement suggests that the test is where the parties agreed to and did reside. It It is unclear whether Justice Brownstone was even required to decide the child's "habitual residence" based on (or solely on) whether the parties had a "settled intention" to live in Ontario. The *CLRA* says nothing about "settled intention". But the Court of Appeal gives no further guidance, that is, until a few weeks later when it released its decision in *Zafar v. Azeem*, 2024 ONCA 15 ("*Zafar*").

In *Zafar*, the Court of Appeal suggests (in *obiter*) that the the Supreme Court of Canada's decision in *Office of the Children's Lawyer* v. *Balev*, 2018 SCC 16 dealing with habitual residence under the *Hague Convention* applies equally in non-Hague Convention cases. Recall that in *Balev*, the majority of the Supreme Court concluded (to the chagrin of many) that in deciding "habitual residence" under the *Hague Convention*, a "hybrid approach" should be adopted in Canada over the "parental intention" (or "settled intention") approach. The hybrid approach requires an analysis of "all relevant considerations arising from the facts of the case at hand". The parents' intentions are still important, but they are not the sole focus of the analysis. Under *Balev*, the Court should also consider the age of the child, the focal point of his or her life, the child's links to and circumstances in Country A vs. Country B, and the child's nationality, among other things, in determining the child's habitual residence.

However, as noted above, *Balev* deals with the interpretation of "habitual residence" under the Hague Convention. It is not at all clear that the same analysis applies under the *CLRA* or other provincial acts, all of which have their own "baked it" definition of "habitual residence." There are conflicting decisions on the question:

- On one hand, there are cases that suggest the definition of "habitual residence" under the Hague Convention has no bearing on the definition of "habitual residence" under provincial statutes: *Chan* v. *Chow*, 2001, BCCA 276; *Korutowska-Wooff* v. *Wooff*, [2004] O.J. No. 3256 (C.A.); *Smith* v. *Smith*, 2019 SKQB 280; *Kong* v. *Song*, 2019 BCCA 84; *Guo* v. *Chan*, 2020 ONSC 7237; *Logan* v. *Logan*, 2022 ONSC 4927 (CanLII) at 26-28;

- On the other hand, there are cases that suggest that "habitually resident" has the same meaning under both: *Medhurst* v. *Markle* (1995), 26 O.R. (3d) 178; *Rogala* v. *Rogala*, [2001] O.J. No. 1683; *Solem* v. *Solem*, 2013 CarswellOnt 1699; *Sanders* v. *Aerts*, 2014 ONCJ 20; *Maldonado* v. *Feliciano*, 2018 ONCJ 652; *Moussa* v. *Sundhu* (2018), 11 R.F.L. (8th) 497 (Ont. C.J.); *McKay* v. *Labelle*, 2019 CarswellOnt 4524 (Ont. C.J.); *A.M*. v. *D.L*., 2019 ONCJ 155 at paras. 44 and 45.

And to make you wring *both* hands, *Zafar* appears to contradict another recent Court of Appeal decision, *Gelieden* v. *Rawdah*, 2020 ONCA 254, where the Court was of the view that the determination of "habitual residence" is **not** the same under the Hague Convention and the provincial statutes.

To us, it makes sense that if the provincial statutes include a definition of "habitual residence" that is the definition that should apply in non-Hague Convention cases. They are entirely different regimes informed by different principles. The whole point of the Convention is to create consensus between signatory countries that parenting issues will be dealt with based on the best interests of the children. That same assumption does not apply in non-Hague cases. Moreover, whereas the *CLRA* specifically states that a parent cannot unilaterally change a child's habitual residence, this is completely at odds with the Supreme Court of Canada's comment in *Balev* that "there is no 'rule' that the actions of one parent cannot unilaterally change the habitual residence of a child" – see para 46. (There *should* be a rule in our opinion, but there is not.)

At least for now, remember the lessons of attornment and stop wringing your hands.

Torgersrud v. _Lightstone_, 2023 ONCA 580 – Enforceability of Foreign Marriage Contracts

Foreign Marriage Contracts: Words Matter

This decision from late 2023 about the enforceability of foreign marriage contracts is worth brief comment – not because the decision is wrong – but because some of the *obiter* is concerning.

The spouses signed two marriage contracts in Quebec. Both contracts provided that the parties were separate as to property. Below, the wife was successful in her bid to have the contracts set aside pursuant to s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"). This was the husband's appeal.

The parties were married on March 31, 1987, and they lived in Montreal. After the marriage, the husband asked the wife to sign a marriage contract to protect his family's business interests. This contract (signed in 1988) provided that the parties renounce their property rights to a "partition of acquests", declare that they are "separate as to property", and acknowledge they would not be liable for each other's debts. Under Quebec law, this meant there would be no division of assets of any nature upon marriage breakdown.

The parties signed a second Quebec contract in 1990 in which they agreed to opt out of the family patrimony regime that had recently been legislated into Quebec law. This regime provided that the net value of family patrimony be divided equally upon separation. The family patrimony regime excludes inheritances, property existing at the date of marriage, and gifts, from division.

The parties moved to Ottawa in 1993, where they lived until they separated in 2015, at which time the wife claimed equalization under Part I of the *FLA*. The husband asserted that the Quebec marriage contracts ousted the *FLA*.

The expert evidence from Quebec legal practitioners was that the contracts *would* be recognized in Quebec. The court below concluded that the documents *were* marriage contracts -- but that they did not oust the application of the *FLA*.

The court below found that the Quebec contracts did not include any renunciation, releases, or waivers and that they did not "deal with" or release equalization claims, the statement that the parties were "separate as to property" insufficient. Therefore, the judge below held that the Quebec contracts did not bar the wife's equalization claim. So far – no problem.

However, the court below then went further, saying that there is a "high threshold" for finding an out-of-jurisdiction marriage contract prevails over the *FLA's* equalization provision. The Court of Appeal did not distance itself from that comment, and that is the obiter with which we take issue.

The court below also found that she would have set aside the contracts under s. 56(4) of the *FLA*, because the husband had failed to disclose significant assets at the time of the contracts and the wife did not appreciate the nature and consequences of the contracts. The wife did not have a full appreciation of the husband's financial position at the time the contracts were executed. These were findings the court below was entitled to make.

Referring to the factors in *Dochuk* v. *Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.) and *Demchuk* v. *Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.), the court below found that this was a proper case to set aside the marriage contracts.

The husband's appeal was primarily focussed on the argument that the court below erred in finding that the Quebec contracts did not oust the *FLA's* equalization provisions.

But based on the finding of insufficient disclosure under s. 56(4)(a) of the *FLA*, the Court of Appeal did not have to decide this issue. Section 56(4)(a) provides that a court can set aside a domestic contract (or a provision within it) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made.

As noted above, our concern is with that one line -- that there is a "high threshold" for finding an out-of-jurisdiction marriage contract prevails over the *FLA's* equalization provision. That, respectfully, is not the law.

In this regard, two sections of the *FLA* come to mind.

The first is section 2(10):

> **Act subject to contracts**
> (10) A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise.

The next is section 51 which defines "domestic contract" as including a marriage contract. Then, there is section 52(1):

> **Marriage contracts**
> 52 (1) Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,
> (a) ownership in or division of property;
> (b) support obligations;
> (c) the right to direct the education and moral training of their children, but not the right to decision-making responsibility or parenting time with respect to their children; and
> (d) any other matter in the settlement of their affairs.

Notably, section 52 does not say that the contract cannot be a foreign marriage contract. And finally, we have section 58:

> **Contracts made outside Ontario**
>
> 58 The manner and formalities of making a domestic contract and its essential validity and effect are **governed by the proper law of the contract**, except that,
>
> (a) a contract of which the proper law is that of a jurisdiction other than Ontario **is also valid and enforceable in Ontario if entered into in accordance with Ontario's internal law**;

(b) subsection 33 (4) (setting aside provision for support or waiver) and section 56 apply in Ontario to contracts for which the proper law is that of a jurisdiction other than Ontario; and

(c) a provision in a marriage contract or cohabitation agreement respecting the right to decision-making responsibility or parenting time with respect to children is not enforceable in Ontario. [**emphasis** added]

And on top of this, we have the Ontario Court of Appeal specifically saying there is no presumption that courts will be hesitant to enforce marriage contracts: *Dougherty* v. *Dougherty*, 2008 CarswellOnt 2203 (C.A.).

Therefore, neither the statutory regime nor previous authority from the Court of Appeal suggest that there is a "high threshold" for finding that a foreign marriage contract prevails over the *FLA's* equalization provision.

What the Court of Appeal *has* made clear, however, is that to exclude property from equalization, the foreign contract must evince an intention to exclude certain (or all) property from the property equalization regime (even absent a specific reference to "equalization"): *Lay* v. *Lay* (2000), 47 O.R. (3d) 779 (C.A.) and *Bosch* v. *Bosch* (1991), 6 O.R. (3d) 168 (C.A.).

Stated otherwise, s. 58(a) provides an alternative ground for *upholding* a domestic contract that is governed by foreign law: *Jasen* v. *Karassik*, 2009 CarswellOnt 1507 (C.A.). It is *expansive*, not limiting. Therefore, is it, we respectfully suggestion, inaccurate to suggest that a "high threshold" applies for finding that a foreign marriage contract prevails over the equalization provisions of the FLA.

Casa Margarita Enterprises Ltd. v. *Huntly Investments Ltd.*, 2024 BCCA 31 – The Oppression Remedy in Closely Held Corporations

Wasting Away Again (with Oppression Claims) in Margaritaville (R.I.P. Jimmy Buffet)

The very astute amongst our readers will notice this is not a family law case. But, as regular readers will know, we here at *This Week in Family Law* scour the law reports to let you know about *all* cases – big and small, from every area of law – that might be of use to family law counsel and courts. And while this is, indeed, not a family law case, it details important principles with respect oppression claims in closely held corporations, something which is very common in family law cases, especially for professional like doctors and lawyers that have professional corporations.

In this case, the British Columbia Court of Appeal upheld an order requiring the shareholder majority to purchase a minority shareholder's interest in the company pursuant to an oppression claim.

The primary company, Huntly Investments Ltd. ("Huntly"), had been started by two brothers in 1966. Over time, a small number of shares were sold or given to people outside of the brothers' families. One entity receiving these shares was the respondent, Casa Margarita Enterprises Ltd. ("Casa"), which was owned by Ms Margaret Cowan. The Cowan family had business connections with the brothers in the 1960s and early 1970s.

As time marched on, the brothers died, and their families took over Huntly. Eventually, all of the smaller shareholders were bought out until only the Wolverton family and Casa remained as owners. Casa owned only 1.82% of the common shares of Huntly.

When Ms. Cowan passed away, the Administrator of her estate, understandably, wanted to sell Casa's shares to Huntly in order to wind up the estate. The Administrator tried to have one or more of the Wolverton family members buy the shares so it could distribute Ms. Cowan's estate to her 17 beneficiaries, but his efforts were unsuccessful. None of the Wolvertons were interested in buying the shares.

Casa commenced an action against the Wolvertons and Huntly, claiming oppression under section 227 of the *Business Corporations Act*, SBC 2002, c. 57 (which, for the interest of all, contains similar oppression provisions to similar provincial statutes):

> 227 (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

Casa successful argued that it had a "reasonable expectation" that Huntly or another Huntly shareholder would purchase Casa's shares. ("Reasonable expectations are the touchstone of an oppression claim: *BCE Inc*. v. *1976 Debentureholders*, 2008 SCC 69 ("*BCE*"); *Wilson* v. *Alharayeri*, 2017 SCC 39). The trial judge further found that Huntly had failed to meet those reasonable expectations by, among other things, refusing to facilitate a share purchase and failing to provide information allowing Casa to value its shares.

One of the key issues in the trial was the fact that Huntly refused to permit valuations of the underlying real estate assets which made up most of Huntly's portfolio -- going so far as to block Casa's valuators from being able to enter buildings. At trial, Huntly argued that appraisals were not needed because Casa had access to property tax assessments and some informal internal valuations. The trial judge determined this to be insufficient, particularly given evidence that the assessments and internal valuations were not accurate indications of value.

The trial judge ordered that Casa's shares were to be purchased by Huntly or by two of the controlling shareholders and/or one of the other companies owned by the Wolvertons.

The Court of Appeal upheld this decision.

First, with respect to the standard of review, a finding of "reasonable expectations" is a finding of fact reviewable on the palpable and overriding standard. Whether a reasonable expectation was *violated* by oppressive or unfairly prejudicial conduct is a finding of mixed fact and law subject to review on the same deferential standard (absent an extricable question of law): *Radford* v. *MacMillan*, 2018 BCCA 335 at para. 54.

The Wolvertons argued that Casa could have sold its shares on the open market as there was no shareholder agreement preventing this or requiring that the shares be purchased by another shareholder. At most, they argued, the head of the company could try to arrange a sale.

Oppression is established by first proving that the claimant had a reasonable expectation, and then proving that reasonable expectation was blocked through conduct "[falling] within the concepts of 'oppression', 'unfair prejudice' or 'unfair disregard' of the claimant's interest": *BCE* at para. 89. Further, it is no defence to an oppression claim to rely solely on the otherwise *lawfulness* of the conduct of the corporation and its directors. As noted by the B.C. Court of Appeal in *Canex Investment Corporation* v. *0799701 B.C. Ltd*., 2020 BCCA 231 at para. 13:

> … [T]he remedy is available to address the objective and substantive reality of the manner in which the affairs of a company are conducted. It is not limited by mere formalities of corporate structure. **What matters is substance, not form**. Hence, courts are entitled to examine the realities of how a company is controlled and by whom, and the true nature of relationships within and between related companies. [**emphasis** added]

The Court of Appeal noted that the trial judge properly considered "what was actually happening in the company." There was also evidence that the Wolvertons has purchased other minority shareholder interests in the past. In fact, the Wolvertons had bought some shares Ms. Cowan owned

in another company owned by the family in 1990. This pattern created a reasonable expectation on the part of Ms Cowan's and the Administrator of her estate.

The Court of Appeal did, however, agree with the appellants that Huntly itself could not be required to purchase the shares. The order had to be against the *shareholders*, and against the company itself.

The Court of Appeal also upheld the trial judge's finding that taking steps to prevent a proper valuation of Casa's shares was oppressive conduct. The majority shareholders was responsible for facilitating a reasonable buyout of Casa's interest in Huntly.

This case has clear and obvious implications in family law situations where professional spouses (again, doctors, lawyers, accountants, etc.) often create professional corporations where the spouse hold a minority interest or an interest in a separate class of common or preferred shares without voting rights – and without fair market value. Should the majority shareholder spouse not be willing to purchase the minority interest in such a situations? Well – who knows. But at least Casa Margarita Enterprises Ltd. offers the law you need if you can marshal the necessary facts. We suggest you give the matter the most serious contemplation and consideration – over a Margarita, of course.

Law Society of Ontario | Barreau de l'Ontario

TAB 3

18th Family Law Summit

2022 Judicial Workbook on Bill C-92 – An Act Respecting First Nations, Inuit and Métis Children, Youth and Families - link

Hadley Friedland, PhD., Associate Professor, Faculty of Law
University of Alberta

Naiomi Metallic, PhD., Assistant Professor, Aboriginal Law and Policy
Dalhousie University

Koren Lightning-Earle, PhD., Instructor, Faculty of Law
University of Alberta

March 20, 2024

cpd

2022 Judicial Workbook on Bill C-92 — An Act Respecting First Nations, Inuit and Métis Children, Youth and Families link

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Law Society of Ontario | Barreau de l'Ontario

TAB 4

18th Family Law Summit

Guide to Form 13.1 Financial Statement For Making or Responding to Support and Property Claims

Assisting your client complete their Financial Statement

Shmuel Stern
Disclosure Clinic

Carla Lee Sutton, Family Law Clerk
Disclosure Clinic/CLS Law Clerk Services

March 20, 2024

cpd

GUIDE TO FORM 13.1 FINANCIAL STATEMENT

FOR MAKING OR RESPONDING TO

SUPPORT AND PROPERTY CLAIMS

Welcome!

This is a guide to getting started to assist you through the process of completing your financial disclosure obligations with your Form 13.1 Financial Statement.

This Guide won't provide you with all the answers, but it will give you the confidence to know when you need to ask the right questions.

Goals

Completing family law financial disclosure properly requires four components, which this guide helps you, step by step:

1. Form 13.1 Financial Statement
2. Form 13A Financial Disclosure Certificate
3. Your financial documents, compiled
4. Sending it all to your spouse

A to Z

This guide will walk you through the major steps from start to finish.

But we know you may have more questions as you work your way through it all. So we have created a series of videos with the assistance of Litigation Help.

HOW-TO VIDEOS

Disclosure Clinic
www.disclosureclinic.com

This Guide contains a checklist that is valid to:
April 30, 2025

Table OF CONTENTS

This Guide was created to help motivate and guide you through completing the Form 13.1 financial statement. We recommend reading it in the order it is presented.

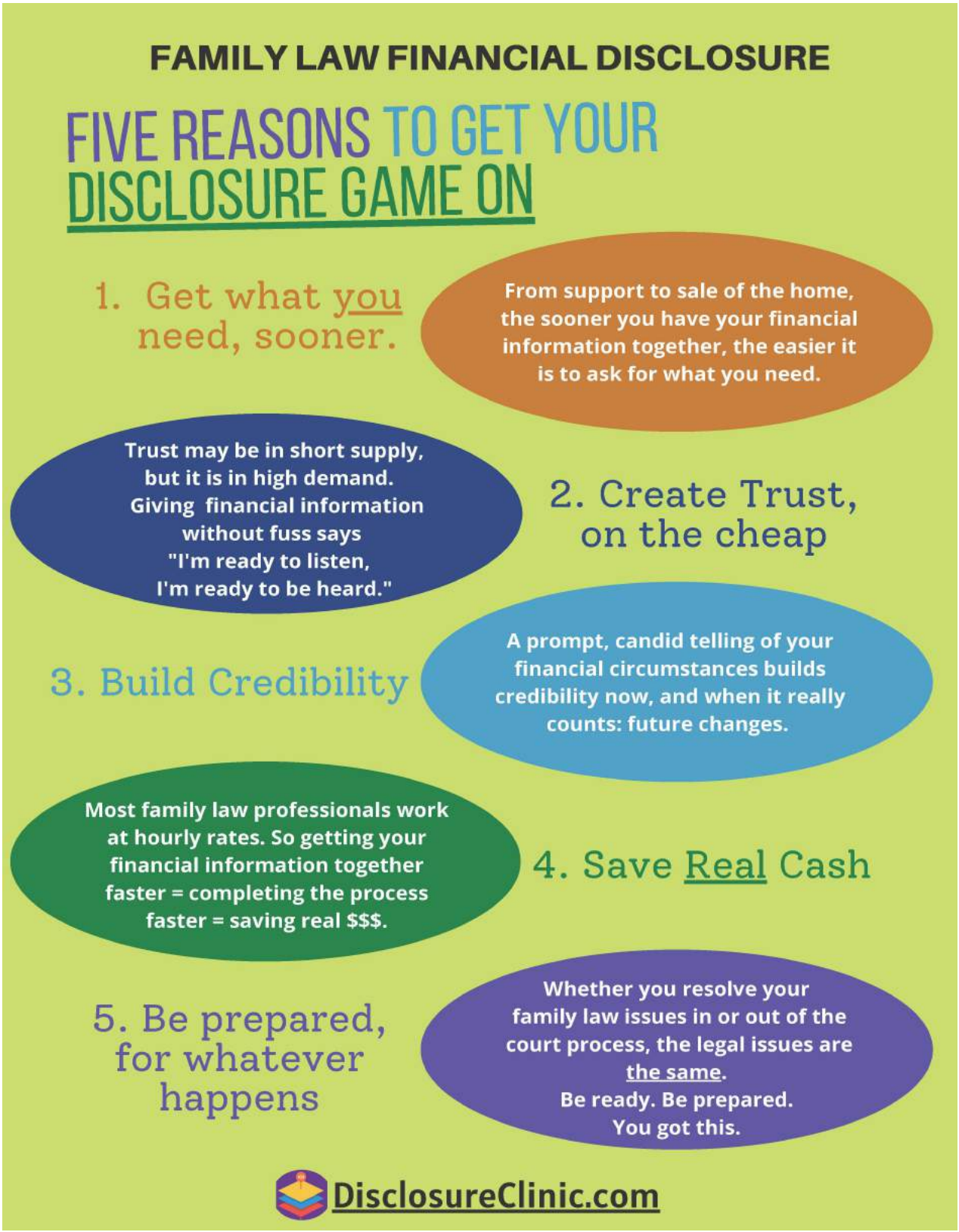
Table of Contents

Legal Disclaimer: This Guide is not providing legal advice. Just as you ought to speak to a doctor before relying or applying medical information you may read, you should speak to a legal professional before relying or applying information you read in this Guide to your specific circumstances.

Version 2024.02, Created by
Shmuel Stern and Carla Lee Sutton

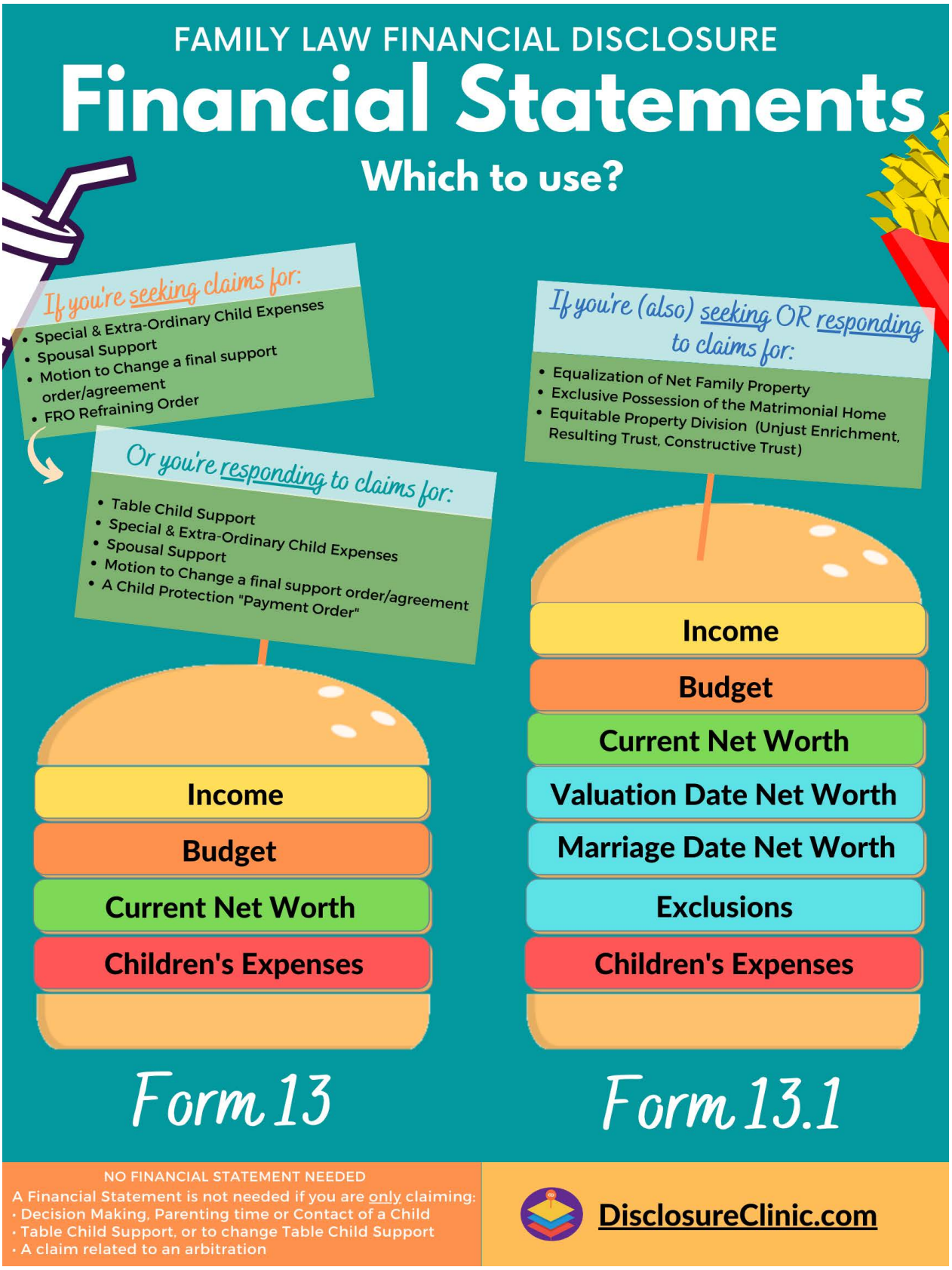
get MOTIVATED

The financial disclosure process requires your effort and concentration, and cannot realistically be completed in one sitting. Before you begin, let's start with some motivation. Come back here when you need it.



get THE CORRECT FORM

Just before we go any further, are you sure you have the correct financial statement form? There are two: **Form 13** and **Form 13.1**. This Guide is for the Form 13.1. Use the infographic below to double check before you begin.



get CONTEXT

You may be wondering where does it all end? This infographic is a summary of the entire disclosure process if you are in a court proceeding. The flow is similar even if you are not. The key is staying ahead of the process, and we'll do just that.

step 1

As you begin your journey in completing your financial statement, know that the process does **not** start with filling out the financial statement. Instead, you need to create a document filing system. Here's how.

File Storage

Before you start working on your financial statement, find either a place on your computer or a cloud storage site that works for you. Collecting necessary documents will help you organize and share them, which is a key component to the financial disclosure process. In choosing a storage site, consider:

- Ease of access for you
- User interface for the device(s) you will likely use for uploading and for organizing
- Ease of uploading
- Privacy Settings
- Ease of controlling the sharing features
- Cost
- Additional features, such as search, listing contents and editing within the cloud

Here are commonly used free services:

Apple ICloud

Google Drive

Box

Microsoft One Drive

Dropbox

Sync

step 2

Now we are going to create some folders to put your documents into.

File Folders

It is essential that you keep track of your documents, so you will want to make folders.

1. Create a top-level folder "**My Financial Disclosure**".
2. Create subfolders. We recommend naming the subfolders with numbers 01, 02… to keep them in the order of the financial statement. We'll give you two options here, simple and more detailed.

Option 1: Simple Folder list

Create the following five folders:

01 Income
02 Expenses
03 Assets
04 Debts
05 Other

Or click here to download the folders already created (you will need to open a ZIP file).

Option 2: Complete Folder list

The more complete folder list includes folders for (almost) every section of the financial statement:

01 Income
02 Budget and Expenses
04a Land
04b Household Goods and Vehicles
04c Savings and Accounts
04d Insurance
04e Business Interests
04f Money owed to Me
04g Other Property
05 Debts and Other Liabilities
06a Date of Marriage Assets
06b Date of Marriage Debts and Liabilities
07 Excluded Property
08 Disposed of Property

Or click here to download the folders already created (you will need to open a ZIP file).

step 3

A consistent method of naming your documents will make it easier to find and identify your documents. It will keep you in control and well-organized, especially when you are compiling your Form 13A Financial Disclosure Certificate.

Naming Your Documents

There is no "correct" way to name your documents, so don't worry. We recommend the methods below, but if you have another idea that works for you, use it.

The key is consistency.

Income Documents

[name of document] – [your name] – [date of document]

2023 Income Tax Return – Y. Name – 2024.04.30
2023 Notice of Assessment – Y. Name – 2024.05.10
Pay Stub – Y. Name – 2024.03.21

Child Expense Documents

[Child] – [Provider] – [date of document] [type of document]

Samantha – Super Camp – 2023.06.03 registration invoice

Property Documents

One trick is to name the document using the column order of the financial statement table that the document belongs to.

For example, for Savings and Accounts, or for Debts and Other liabilities, try:

Category	INSTITUTION *(including location)*/ DESCRIPTION *(including issuer and date)*	Account number	Amount / Estimated Market Value		
			on date of marriage	on valuation date	today

[Category] – ***[Institution]*** – ***[Last 4 Account Number digits]*** - ***[date of document]*** *[type of document]*

Chequing – RBC – 5576 – 2023.07.03 screenshot
TFSA – CIBC – 9981 – 2023.07.03 printout
Mortgage – Simplii Financial – 3343 – 2023.07.03 statement

step 4

There are 3 main sections in the Form 13.1 Financial Statement: **Income, Expenses** and **Property**. There is also Schedule "B" for **Children's Special & Extra Ordinary Expenses**. Let's get right into collecting documents.

Documents to start gathering

Now that you have folders and a sense of how to name your documents, here's an overview of the documents you will be collecting first:

(A) Income Documents

Use the Document Checklist for Support Claims – DC Form 13(3.1) on the next page.

(B) Expense Documents and Children's Expenses

Generally, you don't need to document your entries for the Expenses section unless your budget becomes a primary issue in your circumstances.

You definitely should collect either invoices or receipts for children's expenses that will form a claim of Special and Extra Ordinary Expenses (found at Schedule B of the Form 13.1). The Document Checklist for Support Claims – DC Form 13(3.1) includes a section focusing which child expenses you should collect documents for.

(C) Property Documents

Whereas we've recommended gathering documents before working on the income and children's expenses, it's the other way around for the Property section. You will fill out the form first to list what you own and owe, and then use that list to create a checklist of documents you'll need to collect.

You'll get to property later. First, let's focus on your income & child expense documents.

What if I don't have a required document?

Keep a list of documents you still need to get, and assess the difficulty in getting them. It is better that you are on top of your own disclosure than being told what is missing.

Get STARTED!

On the next 4 pages is a Document Checklist for Support Claims.

Scroll through it to see what you have, or need to get.

This form is just to assist you, so check off what you collect to keep track.

Check as Applicable	PART 1A: PAST AND CURRENT INCOME

☐ **1. If you are a Citizen or Resident of Canada, or otherwise required to file a Canadian Income Tax Return:**

- ☐ 2023 Personal income tax return, including all applicable slips, attachments and schedules
- ☐ 2022 Personal income tax return, including all applicable slips, attachments and schedules
- ☐ 2021 Personal income tax return, including all applicable slips, attachments and schedules

- ☐ 2023 Personal Notice of (Re)Assessments, OR the Income and Deductions printout provided by Canada Revenue Agency
- ☐ 2022 Personal Notice of (Re)Assessments, OR the Income and Deductions printout provided by Canada Revenue Agency
- ☐ 2021 Personal Notice of (Re)Assessments, OR the Income and Deductions printout provided by Canada Revenue Agency

☐ **2. If you are an Indian within the meaning of the *Indian Act (Canada)* and have chosen not to file income tax returns:**
OR
If you earn income in any foreign country not reported in Canada:

- ☐ 2023 Proof of Income Earned: _____
- ☐ 2022 Proof of Income Earned: _____
- ☐ 2021 Proof of Income Earned: _____

☐ **3. If you are claiming a change or cancellation of arrears of support prior to 2020:**

- For each additionally stated year, your personal income tax return including all applicable slips, attachments and schedules

☐ _____ ☐ _____ ☐ _____ ☐ _____

- For each additionally stated year, personal Notices of (Re)Assessments OR the Income and Deductions printout provided by Canada Revenue Agency

☐ _____ ☐ _____ ☐ _____ ☐ _____

☐ **4. If you are an employee:**

- ☐ The most recent paystub / statement of earnings indicating the total earnings paid in the year to date, including overtime

OR

- ☐ A letter from your employer setting out that information including your current rate of annual salary or remuneration

If you are completing this financial statement for the purpose of obtaining a Refraining Order, also include:

☐ ☐ ☐ The <u>three</u> most recent paystubs / statement of earnings indicating the total earnings paid in the year to date, including overtime

☐ **5. If you became unemployed within the last three years:**

- ☐ A complete copy of your Record of Employment, or other evidence of termination, AND
- ☐ A statement of any benefits or income that you are still entitled to receive from your former employer despite or as a result of the termination.

☐ **6. If you received or are receiving any of the following Income Assistance in this current tax year, provide:**

- A most recent stub/statement of income indicating the total amount of income from the applicable source during the current year;

OR

- A letter from the appropriate authority indicating the total amount of income from the applicable source during the current year

Check as applicable

- ☐ Employment insurance
- ☐ COVID Relief
- ☐ Pension payments
- ☐ Social assistance
- ☐ Workers compensation
- ☐ Disability payments
- ☐ Any other source _____

Check as Applicable

PART 1B: SELF-EMPLOYMENT INCOME

☐ **7. If you earn income from a self-employed business, professional practice or rental property not within a corporation:**

	Business or Property 1	Business or Property 2	Business or Property 3	Business or Property 4	
Name or address:					
	☐	☐	☐	☐	If available, 2024 Financial Statement or equivalent
	☐	☐	☐	☐	If available, 2023 Financial Statement or equivalent
	☐	☐	☐	☐	2022 Financial Statement or equivalent
	☐	☐	☐	☐	2021 Financial Statement or equivalent
	☐	☐	☐	☐	2020 Financial Statement or equivalent

☐ **8. If you control a corporation, provide the following documents for *EACH* corporation <u>and</u> any subsidiary corporation**

Note: A subsidiary is a corporation owned or controlled by the corporation you own or control, and includes subsidiaries of subsidiaries.

	Corporation 1	Subsidiary A	Subsidiary B	Subsidiary C	
Name(s):					
	☐	☐	☐	☐	If available, 2024 Financial Statement or equivalent
	☐	☐	☐	☐	If available, 2023 Financial Statement or equivalent
	☐	☐	☐	☐	2022 Financial Statement or equivalent
	☐	☐	☐	☐	2021 Financial Statement or equivalent
	☐	☐	☐	☐	2020 Financial Statement or equivalent

	Corporation 2	Subsidiary A	Subsidiary B	Subsidiary C	
Name(s):					
	☐	☐	☐	☐	If available, 2024 Financial Statement or equivalent
	☐	☐	☐	☐	If available, 2023 Financial Statement or equivalent
	☐	☐	☐	☐	2022 Financial Statement or equivalent
	☐	☐	☐	☐	2021 Financial Statement or equivalent
	☐	☐	☐	☐	2020 Financial Statement or equivalent

	Corporation 3	Subsidiary A	Subsidiary B	Subsidiary C	
Name(s):					
	☐	☐	☐	☐	If available, 2024 Financial Statement or equivalent
	☐	☐	☐	☐	If available, 2023 Financial Statement or equivalent
	☐	☐	☐	☐	2022 Financial Statement or equivalent
	☐	☐	☐	☐	2021 Financial Statement or equivalent
	☐	☐	☐	☐	2020 Financial Statement or equivalent

☐ **9. If you or your corporations are in a partnership:**

- ☐ If available, 2024 Statement confirming your or your corporation's income and draw from, and capital in, the partnership
- ☐ 2023 Statement confirming your, or your corporation's, income and draw from, and capital in, the partnership
- ☐ 2022 Statement confirming your, or your corporation's, income and draw from, and capital in, the partnership
- ☐ 2021 Statement confirming your, or your corporation's, income and draw from, and capital in, the partnership

Check as Applicable

PART 1B: SELF-EMPLOYMENT INCOME, CONTINUED

☐ **10. If you or your corporations are a beneficiary under a trust, provide for *EACH* Trust:**

	Trust 1	Trust 2	Trust 3	
Name(s):				
	☐	☐	☐	A copy of the trust settlement agreement
	☐	☐	☐	If available, 2024 Trust Financial Statement
	☐	☐	☐	If available, 2023 Trust Financial Statement
	☐	☐	☐	2022 Trust Financial Statement
	☐	☐	☐	2021 Trust Financial Statement
	☐	☐	☐	2020 Trust Financial Statement

NON-ARMS LENGTH TRANSACTION SCREENING

Pursuant to *Child Support Guidelines*, you must disclose the existance of transactions between your businesses, partnerships, corporations (including subsidiary corporations) with any "non-arms lenth" persons, businesses, partnerships or corporations.

A person is considered "non-arms length" if that person is:

- a family member of yours, by blood or adoption
- an intimate partner of yours: romantic, marriage or common law
- a business partner of yours, even if not an owner of your particular business(es)
- a family member or intimate partner of any business partner of yours
- a long-time friend of yours

A business, partnership or corporation is considered "non-arms length" if:

- the business or corporation is owned or controlled by any of the individuals listed above.
- the business or corporation is owned or controlled by you

☐ **11. In the past three years, have you, your business, partnership, corporation (including subsidiary corporations) provided or paid salaries, wages, management fees or other payments or benefits to any:**

RESET	YES	NO		*If yes, paying source(s)*	*Name of Recipient(s)*
	◯	◯	family member of yours, by blood or adoption		
	◯	◯	intimate partner of yours: romantic, marriage or common law		
	◯	◯	business partner of yours who is not an owner of this particular business		
	◯	◯	family member or intimate partner of any business partner of yours		
	◯	◯	long-time friend of yours		
	◯	◯	business, partnership or corporation owned or controlled by any of the individuals listed above		
	◯	◯	other business, partnership or corporation is owned or controlled by you		

If you answered yes to any question above, you may be asked, separately, to explain:

(i) the specific transactions, including dates and amounts;
(ii) the nature of the transactions and if they were necessary to earn income; and
(iii) the reasonableness of the transactions in regard to your family law rights and obligations.

Check as Applicable

PART 1C: CHILD SPECIAL AND EXTRAORDINARY EXPENSES

Pursuant to the *Child Support Guidelines*, a court can order that parents of a child share the costs of the following expenses for a child:

a) Child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the parent who has the majority of parenting time;
b) that portion of the medical and dental insurance premiums attributable to the child;
c) health-related expenses that exceed insurance reimbursement by at least $100 annually;
d) extraordinary expenses for primary or secondary school education or any other educational programs that meet the child's particular needs;
e) expenses for post-secondary education;
f) extraordinary expenses for extracurricular activities.

☐ **12. If you are seeking a claim to share the costs of any of the above expenses, provide:**

Description of Expense 1: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 2: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 3: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 4: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 5: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 6: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 7: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 8: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 9: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

Description of Expense 10: _____ **For Child ren :** _____

☐ Document(s) evidencing the Expense
☐ If applicable, a document of any Subsidy, Benefit and/or Tax Deduction related to the Expense

step 5

It's time to start completing the financial statement. Instead of telling you what to do, we've completed a mock financial statement so you can see what the entries could look like. Here are some helpful tips.

Helpful Tips to complete your Form 13.1

Adding your own notes

You can add notes to your financial statement. Doing so is entirely voluntary. We recommend using brief, pointed notes if it will help show/remind you of:

- Calculations: "*Amount shown is $456.00 x 6 months /12*"
- Qualifications: "*This is just an estimate*"
- Compliment: *"Based on the 2022 Invoice"*

Income

You are expected to represent your current income from all sources.

Most people do not get paid on a monthly basis, so you will need to convert your income to monthly. Complicating matters is that there are not exactly 4 weeks in a month. Here is the shorthand calculation methods:

Paid weekly:	[pay] x 4.33
Paid every two weeks:	[pay] x 2.16
Paid twice a month:	[pay] x 2

If you have employment transitions, fluctuating overtime/bonus income or are self-employed, you can rely on last year's income as the best representation of your current income. Divide the annual amount by 12. Be sure to make a note.

Expenses

You can choose what situation your expenses represent. Examples:

- your past situation, if recently separated, including standard of living at the time of separation
- your current situation, including where you have reduced expenses or others are paying your expenses, including your spouse

In addition, you can make a second copy of your expenses pages to represent your future budget, e.g. your expected expenses once you move into a new accommodation.

step 5

Helpful tips, continued, for the Property section.

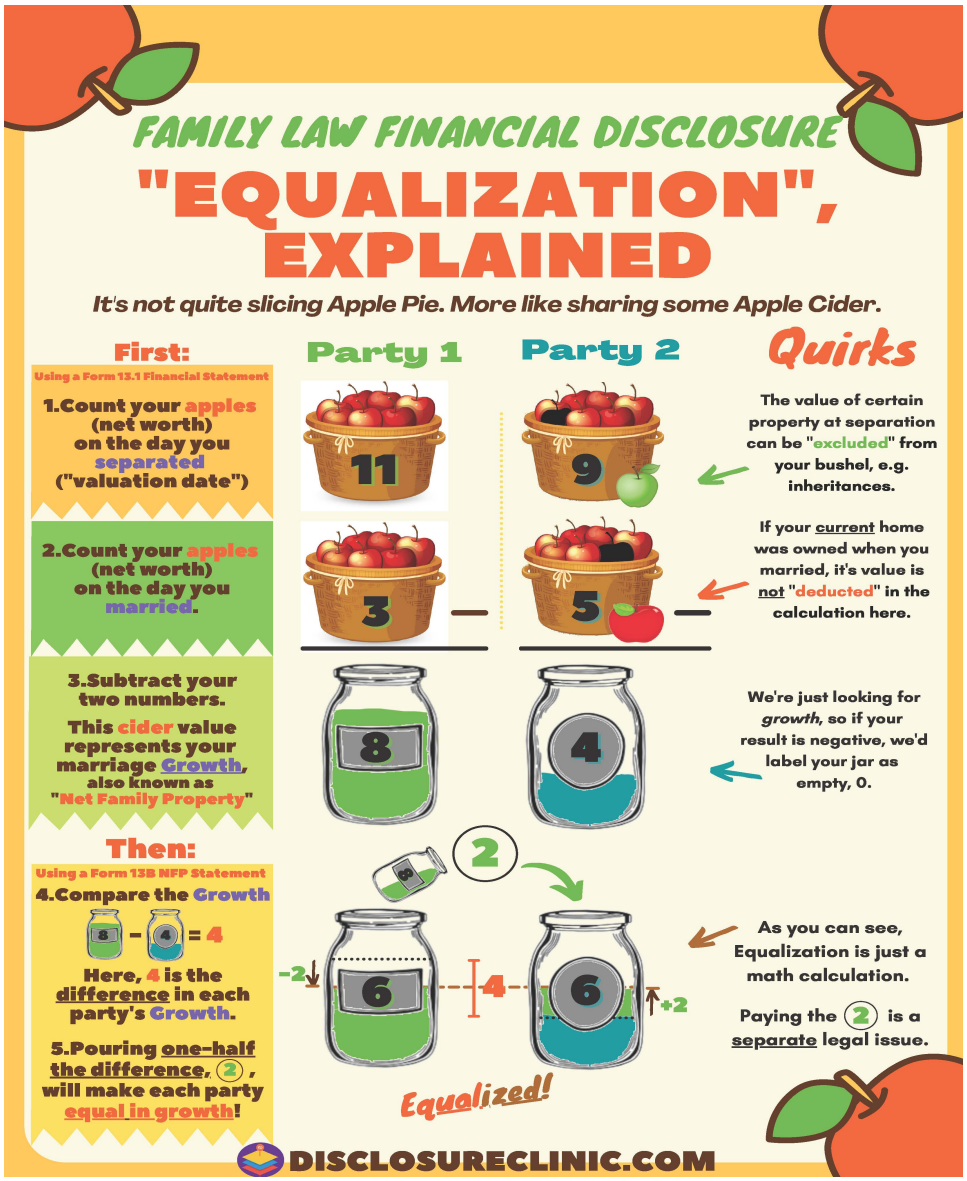
First, it helps to understand why there are three columns.

Helpful Tips to complete your Form 13.1

Property (page 1 of 4)

Category	INSTITUTION *(including location)*/ DESCRIPTION *(including issuer and date)*	Account number	Amount / Estimated Market Value		
			on date of marriage	on valuation date	today

The **middle column [step #1 below]** and **left column [step #2 below]** are used to calculate your "Net Family Property" for the Family Law Equalization of Net Family Property Calculation. The right "Today" column is your current net worth, which is found on both Form 13.1 and Form 13.



step 5

Helpful Property tips, continued.

On this page, we consider how best to start filling out the property section, starting with "Today" and going back in time.

Helpful Tips to complete your Form 13.1

Property (page 2 of 4)

Category	INSTITUTION *(including location)*/ DESCRIPTION *(including issuer and date)*	Account number	Amount / Estimated Market Value		
			3 on date of marriage	2 on valuation date	1 today
Joint Chequing	RBC	2789	N/A	$4,557.86 One-half	$2,356.98 One-half
Savings	BMO	5923	N/A	N/A	$504.76
RRSP	IA Securities	SZS-77-S	$10,825.73	N/A	N/A

1. For each section, try to the list of what you own and owe (i.e. your assets, accounts and debts) for the **"Today"** column. Pick any recent date, be consistent.

2. Then think about whether you owned the same assets, accounts and debts at **Valuation Date**. If you didn't, write "N/A" (*not applicable*) as the value as of **Valuation Date**.

   Still on **Valuation Date**, think if you had any other assets, accounts and debts **at that date** that no longer exist as of **Today**. Perhaps you sold a property or closed bank accounts. List those as well, and put N/A in the **Today** column.

3. Hardest yet, think back to the **date you civilly married**: did you have the same assets, accounts and debts as **Today** or **Valuation Date**? Did you owe or own any additional line items that no longer exist at Valuation Date/Today? Don't forget about possible old debts such as student loans.

	Wondering if your lists are complete? Here is a useful acronym to think about your accounts and other assets: **APRICOT**
Apps on your phone	Banking, Online Wallets, Retail Credit Cards, Crypto, Payment Apps
Prior employment	LIRA, stocks/options, group RRSP, ESP, RSU, RSA, ESOP, DPSP
Retirement accounts	RRSP, RRIF
Investments	GICs, savings bonds, mutual funds, treasury bills, investment property
Current employment	Pension, group RRSP, ESP, RSU, RSA, ESOP, DPSP
Outside Canada	pensions, retirement accounts, real property, accounts, inheritances
Trust Property	RESP, RDSP, children's accounts, trustee or beneficiary of a formal Trust, money or property owned in someone's name but held for you.

step 5

Helpful Property tips, continued.

On this page, we start collecting documents for the property section. As you find each document, be sure to name them and place them into the appropriate folder.

Helpful Tips to complete your Form 13.1

Property (page 3 of 4)

By now you will start to see a list of items that you owned or owed.
Now you can start collecting documents for Date of Marriage and Valuation Date.

(1) For each line item, we are looking to document that you owned it and its value on the applicable date. Some documents may contain both, for example a bank statement will have your name on it (ownership) and the balance (value) on the applicable date.

(2) Some assets you may have separate documents for ownership and value.

Valuing complicated assets and debts

Some assets require "opinion evidence" appraisal by an expert to determine its exact value, such as a:

- real estate property
- vehicles, jewelry, expensive household contents like artwork
- pension
- business
- certain executive compensation, like RSUs and RSAs

Some debts or liabilities may also need opinion evidence for their value:

- "disposition costs" and tax liabilities for certain assets, like investment properties, RRSPs and business interests

Before seeking those values, be sure to obtain the ownership documents first. Appraisals of jointly owned assets may require coordination with the other party. You can write an estimated value and note "estimate", or you can put a "TBD" for those values as a placeholder. You are not expected to have opinion evidence on your first draft.

Checking to make sure you provided the basic documents

The *Family Law Rules* contains a list of specific property documents to collect, based mostly on the above. You can download a cross-check summary chart here and scroll through it to see if you missed anything.

step 5

Helpful Property tips, continued. On this page you will learn about **Part 7: Excluded Property.** Importantly, be sure that any property sought to be excluded is also listed earlier in the form on Valuation Date.

Helpful Tips to complete your Form 13.1

Excluded Property FAQ (page 4 of 4)

What is excluded property?

The purpose of calculating your "net family property" is to share accumulated growth during a marriage, as spouses assume different roles and accumulate different assets and debts. Certain assets do not relate to the relationship or roles within it. These assets include: inheritances, other gifts from 3rd parties, personal injury awards, life insurance proceeds or any asset "excluded" by domestic contract. These assets, if they exist on Valuation Date, are included in your financial statement but can then be "excluded" from the calculation of net family property.

How do I exclude "excluded property"

You need to complete your financial statement showing all your assets in Part 4. Only then, in Part 7, can you exclude the value of the claimed excluded property from your net worth as it was on valuation date.

How do I complete Part 7 of the Financial Statement?

(1) Find the **category** of exclusion that your asset fits into.
(2) Provide **details** as to (a) when you received property or money during the marriage; and (b) which asset or account is being excluded at valuation date.
(3) Insert the **value** – or portion of value - of the asset or account that is being excluded.

PART 7: EXCLUDED PROPERTY

Show by category the value of property owned on the valuation date that is excluded from the definition of "net family property" (such as gifts or inheritances received after marriage).

Category	Details	Value on valuation date
Gift or inheritance from third person	From Grammy's estate, deceased 2015. $25,000 USD received into Chequing USD BMO 5156, moved to TFSA - BMO – 8311 in May 2019. $0.00 in account at the time. No other deposits. Balance remaining.	$10,322.11

What documents do I need to provide?

1. Any documents that show you were entitlement and/or receipt of property or funds during the marriage. This can include a Will or birthday card, or even just a transfer from a third party into your account. You want any documentation that confirms that the property or funds were a gift and whether the donor explicitly intended to exclude the income *in particular*.

2. Any documents "tracing" (linking) the receipt of property or funds from the date of entitlement/receipt to the asset or account owned at Valuation Date. In the case of money, think bank statements.

ONTARIO
Superior Court of Justice, Family Court
(Name of court)

at **161 Elgin St., 2nd Fl., Ottawa ON K2P 2K1**
(Court office address)

Court File Number
FS-24-000216-0000

Form 13.1: Financial Statement (Property and Support Claims) sworn/affirmed March 20, 2024

Applicant(s)

Full legal name *Address* *Phone & fax* *Email*	Katherine N. Holmes 2116 Monson Crescent Gloucester, ON K1J 6A8 Tel: (613) 555-2345 dawsonscreek1998@hotmail.com

Applicant(s) Lawyer

Name *Address* *Phone & fax* *Email*	Rachel Dawes BETTER LAWYERS LLP 301 Wellington St Ottawa, ON K1A 0J1 Tel: (613) 555-2211 lawyer@betterlawyers.ca

Respondent(s)

Full legal name *Address* *Phone & fax* *Email*	Thomas Cruise 2116 Monson Crescent Gloucester, ON K1J 6A8 Tel: 613-882-5555 tomcruise4real@gmail.com

Respondent(s) Lawyer

Name *Address* *Phone & fax* *Email*	Bruce Wayne Barrister & Solicitor 25 Sussex Drive Ottawa, ON K1M 1M4 Tel: (613) 456-7890, Fax: (613) 321-7654 contactgoodlaw@aibn.on.ca

This form is filed by:

☐ applicant ☒ respondent

INSTRUCTIONS

1. USE THIS FORM IF:

- you are making or responding to a claim for property or exclusive possession of the matrimonial home and its contents; or
- you are making or responding to a claim for property or exclusive possession of the matrimonial home and its contents together with other claims for relief.

2. USE FORM 13 INSTEAD OF THIS FORM IF:

- you are making or responding to a claim for support but NOT making or responding to a claim for property or exclusive possession of the matrimonial home and its contents.

3. If you have income that is not shown in Part I of the financial statement (for example, partnership income, dividends, rental income, capital gains or RRSP income), you must also complete **Schedule A**.

4. If you or the other party has sought a contribution towards special or extraordinary expenses for the child(ren), you must also complete **Schedule B**.

*NOTE: You must **fully and truthfully** complete this financial statement, including any applicable schedules. You must also provide the other party with documents relating to support and property and a Certificate of Financial Disclosure (Form 13A) as required by Rule 13 of the Family Law Rules.*

1. My name is *(full legal name)* Thomas Cruise

I live in *(municipality & province)* Gloucester, Ontario

and I swear/affirm that the following is true:

PART I: INCOME

2. I am currently

[X] employed by *(name and address of employer)*
Dependable Zamboni Drivers Ltd.
Canadian Tire Centre, 1000 Palladium Drive, Ottawa, ON K2V 1A5

[x] self-employed, carrying on business under the name of *(name and address of business)*
TC Zamboni, 2116 Monson Crescent, Gloucester, ON K1J 6A8

[ ] unemployed since *(date when last employed)*

3. I attach proof of my year-to-date income from all sources, including my most recent *(attach all that are applicable):*

[X] pay cheque stub [ ] social assistance stub [ ] pension stub [ ] workers' compensation stub

[ ] employment insurance stub and last Record of Employment

[X] statement of income and expenses/ professional activities (for self-employed individuals)

[ ] other (e.g. a letter from your employer confirming all income received to date this year)

4. Last year, my gross income from all sources was $ 82,278.00 *(do not subtract any taxes that have been deducted from this income).*

5. [X] I am attaching all of the following required documents to this financial statement as proof of my income over the past three years, if they have not already been provided:

- a copy of my personal income tax returns for each of the past three taxation years, including any materials that were filed with the returns. *(Income tax returns must be served but should NOT be filed in the continuing record, unless they are filed with a motion to refrain a driver's license suspension.)*
- a copy of my notices of assessment and any notices of reassessment for each of the past three taxation years;
- where my notices of assessment and reassessment are unavailable for any of the past three taxation years or where I have not filed a return for any of the past three taxation years, an Income and Deductions printout from the Canada Revenue Agency for each of those years, whether or not I filed an income tax return.

  Note: An Income and Deductions printout is available from Canada Revenue Agency. Please call customer service at 1-800-959-8281.

OR

[ ] I am an Indian within the meaning of the *Indian Act* (Canada) and I have chosen not to file income tax returns for the past three years. I am attaching the following proof of income for the last three years *(list documents you have provided):*

(In this table you must show all of the income that you are currently receiving whether taxable or not.)

	Income Source	Amount Received/Month
1.	Employment income (before deductions) – I recently received a raise	$6,844.22
2.	Commissions, tips and bonuses	
3.	Self-employment income (Monthly amount before expenses: $ 866.00) (2022)	$233.00
4.	Employment Insurance benefits	
5.	Workers' compensation benefits	
6.	Social assistance income (including ODSP payments)	
7.	Interest and investment income	$158.22
8.	Pension income (including CPP and OAS)	
9.	Spousal support received from a former spouse/partner	
10.	Child Tax Benefits or Tax Rebates (e.g. GST)	
11.	Other sources of income (e.g. RRSP withdrawals, capital gains) *(*attach Schedule A and divide annual amount by 12)*	$28.53
12.	**Total monthly income from all sources:**	**$7,263.97**
13.	**Total monthly income X 12 = Total annual income:**	**$87,167.64**

14. Other Benefits

Provide details of any non-cash benefits that your employer provides to you or are paid for by your business such as medical insurance coverage, the use of a company car, or room and board.

Item	Details	Yearly Market Value
Health Plan	Employer Contributions	$2,344.33
	Total	**$2,344.33**

PART 2: EXPENSES

EXPENSE	Monthly Amount
Automatic Deductions	
CPP contributions	$291.66
EI premiums	$79.42
Income taxes	$1,620.08
Employee pension contributions	
Union dues	$74.03
Health Plan (employee contributions)	$98.40
Life Insurance	$24.44
Gift program	$2.16
SUBTOTAL	**$2,190.19**
Housing	
Rent or mortgage	$2,250.64
Property taxes	$565.85
Property insurance	$135.00
Condominium fees	
Repairs and maintenance	
SUBTOTAL	**$2,951.49**

Utilities	
Water	$100.00
Heat	$140.00
Electricity	$175.30
Telephone	
Cell phone	$120.00
Cable	$140.00
Internet	Included in cable
SUBTOTAL	**$675.30**
Household Expenses	
Groceries	$800.00
Household supplies	$50.00
Meals outside the home	$100.00
Pet care	
Laundry and Dry Cleaning	$20.00
Cleaning Help - $80 per week	$346.40
SUBTOTAL	**$1,316.40**
Childcare Costs	
Daycare expense	
Babysitting costs	

SUBTOTAL	**$0.00**
Transportation	
Public transit, taxis	
Gas and oil	$443.00
Car insurance and license	$255.00
Repairs and maintenance	$75.00
Parking	$10.00
Car Loan or Lease Payments	$654.35
SUBTOTAL	**$1,437.35**
Health	
Health insurance premiums	
Dental expenses – Net of Plan Coverage	$25.00
Medicine and drugs	$15.00
Eye care	$20.00
SUBTOTAL	**$60.00**
Personal	
Clothing	$80.00
Hair care and beauty	$25.00
Alcohol and tobacco	$50.00
Education *(specify)*	

Entertainment/recreation (including children)	$100.00
Gifts	$25.00
SUBTOTAL	**$280.00**
Other expenses	
Life insurance premiums	
RRSP/RESP withdrawals	
Vacations – reduced due to separation	$100.00
School fees and supplies	
Clothing for children	Paid by Katie
Children's activities – includes equipment	$150.00
Summer camp expenses – includes March Break Camp	$105.00
Debt payments	
Support paid for other children	
Other expenses not shown above *(specify)*	
SUBTOTAL	**$355.00**

Total Amount of Monthly Expenses	**$9,265.73**
Total Amount of Yearly Expenses	**$111,188.76**

PART 3: OTHER INCOME EARNERS IN THE HOME

Complete this part only if you are making or responding to a claim for undue hardship or spousal support. Check and complete all sections that apply to your circumstances.

1. ☐ I live alone.

2. ☒ I am living with *(full legal name of person you are married to or cohabiting with)*
Katherine N. Holmes

3. ☐ I/we live with the following other adult(s):

4. ☒ I/we have *(give number)* 1 of child(ren) who live(s) in the home.

5. My spouse/partner
☒ works at *(place of work or business)* WB Network
☐ does not work outside the home.

6. My spouse/partner
☒ earns *(give amount)* $ 2,200 per month.
☐ does not earn any income.

7. ☒ My spouse/partner or other adult residing in the home contributes about $ $500.00 per month towards the household expenses.

PART 4: ASSETS IN AND OUT OF ONTARIO

If any sections of Parts 4 to 9 do not apply, do not leave blank, print "NONE" in the section.

The date of marriage is: *(give date)* November 18, 2006

The valuation date is: *(give date)* July 6, 2022

The date of commencement of cohabitation is (if different from date of marriage): *(give date)* June 1, 2006

PART 4(a): LAND

*Include any interest in land **owned** on the dates in each of the columns below, including leasehold interests and mortgages. Show estimated market value of your interest, but do not deduct encumbrances or costs of disposition; these encumbrances and costs should be shown under Part 5 "Debts and Other Liabilities".*

Nature & Type of Ownership *(Give your percentage interest where relevant.)*	**Address of Property**	**Estimated Market value of YOUR interest**		
		on date of marriage	**on valuation date**	**today**
Matrimonial Home - 50%	2116 Monson Crescent Gloucester, ON K1J 6A8 -estimated date of separation value ($1,200,000/2) -estimated today value ($1,150,000/2)	N/A	$600,000.00 One-Half	$575,000.00 One-Half
House 100%	120 Mud Street West Hamilton, ON L8J 6R7 -net proceeds from sale in December 2006 shown	$10,000.00	N/A	N/A
	15. TOTAL VALUE OF LAND	$10,000.00	**$600,000.00**	$575,000.00

PART 4(b): GENERAL HOUSEHOLD ITEMS AND VEHICLES

Show estimated market value, not the cost of replacement for these items owned on the dates in each of the columns below. Do not deduct encumbrances or costs of disposition; these encumbrances and costs should be shown under Part 5, "Debts and Other Liabilities".

Item	Description	Indicate if NOT in your possession	Estimated Market value of YOUR interest		
			on date of marriage	on valuation date	today
Household goods & furniture	Household contents at 2116 Monson Crescent – to be divided between the parties -Not Included		Not Included	Not Included	Not Included
Household goods & furniture	Household contents at 120 Mud Street West– to be divided between the parties -estimate, list to be provided		$1,600.00	N/A	N/A
Cars, boats,	2016 Honda Element EX		N/A	Leased	Leased
vehicles					
Jewellery, art,	Engagement ring -estimate		$1,000.00	$1,000.00	$1,000.00
electronics, tools,					
sports & hobby,					
equipment					
Other special					
items					
16. TOTAL VALUE OF GENERAL HOUSEHOLD ITEMS AND VEHICLES			$2,600.00	**$1,000.00**	$1,000.00

PART 4(c): BANK ACCOUNTS, SAVINGS, SECURITIES AND PENSIONS

Show the items owned on the dates in each of the columns below by category, for example, cash, accounts in financial institutions, pensions, registered retirement or other savings plans, deposit receipts, any other savings, bonds, warrants, options, notes and other securities. Give your best estimate of the market value of the securities if the items were to be sold on the open market.

Category	**INSTITUTION** *(including location)*/ **DESCRIPTION** *(including issuer and date)*	Account number	Amount / Estimated Market Value		
			on date of marriage	on valuation date	today
Chequing (JT)	RBC -date of marriage balance $2,342.56/2 -valuation date balance $8,411.72/2	xxx-2789	$1,171.28	$4,205.86 One-Half	Account closed
Savings (JT)	RBC -valuation date balance $288.66/2 - today balance $301.16/2	xxx-5923	N/A	$144.33 One-Half	$150.58 One-Half
Chequing (USD)	RBC -date of marriage balance USD $14,231.96 as of October 31, 2006 (looking for November statement), calculated at the Bank of Canada exchange rate of 1.1340 -valuation date balance USD $28,711.54 calculated at the Bank of Canada exchange rate of 1.2876 -today balance USD $28,925.76 calculated at the Bank of Canada exchange rate of 1.3546	xxx-5156	$16,139.04	$36,968.97	$39,182.83
Business Chequing	RBC	xxx-2223	N/A	$554.43	$923.02
TFSA	BMO	xxx-8311	N/A	$10,322.01	$6,598.54
Investment	IA Securities	xxx-77-S	N/A	$103,027.17	$96,774.90
Pension	NHL – ZA -Family Law Value to be obtained	xxx-4003	N/A	TBD	TBD
Crypto	Wealthsimple	xxx-0327	N/A	$34,631.54	$14,590.32
LIRA	Scotiabank	xxx-6988	N/A	$7,510.01	$7,533.20
RRSP	CIBC Estimate, still looking for documents	xxx-3482	$60,000.00	N/A	N/A
RRSP	TD Bank	xxx-2411	N/A	$93,615.08	$95,777.45

RESP Account (Suri)	TD Bank -valuation date balance $22,995.50 -today balance $24,887.90	xxx-554-R	N/A	Not Included	Not Included
Youth Account (Suri)	Scotiabank -valuation date balance $127.64 -today balance $131.56	xxx-4624	N/A	Not Included	Not Included
17. TOTAL VALUE OF ACCOUNTS, SAVINGS, SECURITIES AND PENSIONS			$77,310.32	**$290,979.40**	$261,530.84

PART 4(d): LIFE & DISABILITY INSURANCE

List all policies in existence on the dates in each of the columns below.

Company, Type & Policy No.	Owner	Beneficiary	Face Amount	Cash Surrender Value		
				on date of marriage	on valuation date	today
Manulife Group Life Insurance Policy #xxx-7391-A	Tom	Katie	1x salary	No CSV	No CSV	No CSV
Whole Life Policy #xxx-923-BH	Tom	Suri	$250,000	N/A	$574.33	$594.55
18. TOTAL CASH SURRENDER VALUE OF INSURANCE POLICIES				$0.00	**$574.33**	$594.55

PART 4(e): BUSINESS INTERESTS

Show any interest in an unincorporated business owned on the dates in each of the columns below. An interest in an incorporated business may be shown here or under "BANK ACCOUNTS, SAVINGS, SECURITIES AND PENSIONS" in Part 4(c). Give your best estimate of market value of your interest.

Name of Firm or Company	Interest	Estimated Market value of YOUR interest		
		on date of marriage	on valuation date	today
TC Zamboni	100% (Sole proprietor). See Business Chequing - RBC - 2223	N/A	TBD	TBD
19. TOTAL VALUE OF BUSINESS INTERESTS		$0.00	**$0.00**	$0.00

PART 4(f): MONEY OWED TO YOU

Give details of all money that other persons owe to you on the dates in each of the columns below, whether because of business or from personal dealings. Include any court judgments in your favour, any estate money and any income tax refunds owed to you.

Details	Amount Owed to You		
	on date of marriage	on valuation date	today
Ed Birce (friend) – personal loan		$5,000.00	$5,000.00
20. TOTAL OF MONEY OWED TO YOU	$0.00	**$5,000.00**	$5,000.00

PART 4(g): OTHER PROPERTY

Show other property or assets owned on the dates in each of the columns below. Include property of any kind not listed above. Give your best estimate of market value.

Category	Details	Estimated Market Value of YOUR interest		
		on date of marriage	on valuation date	today
None				
21. TOTAL OF OTHER PROPERTY		$0.00	**$0.00**	$0.00

22. VALUE OF ALL PROPERTY OWNED ON THE VALUATION DATE *(Add items* **[15]** *to* **[21]**.*)*	$89,910.32	**$897,553.73**	$843,125.39

PART 5: DEBTS AND OTHER LIABILITIES

Show your debts and other liabilities on the dates in each of the columns below. List them by category such as mortgages, charges, liens, notes, credit cards, and accounts payable. Don't forget to include:

- *any money owed to the Canada Revenue Agency;*
- *contingent liabilities such as guarantees or warranties given by you (but indicate that they are contingent); and*
- *any unpaid legal or professional bills as result of this case.*

Category	Details	Amount owing		
		on date of marriage	on valuation date	today
Matrimonial Home Mortgage (JT)	RBC Mortgage #x0456 on 2116 Monson Crescent -valuation date balance $471,712.66/2 -today balance $445,064.04/2	N/A	$235,856.33 One-Half	$222,532.02 One-Half
Secured Line of Credit	RBC Mortgage #x4823 on 2116 Monson Crescent -valuation date balance ($4,323.55/2) -today balance reflected on statement dated March 1, 2024	N/A	$2,161.78 One-Half	$0.00
Mortgage	120 Mud Street West	Included in 4(a)	N/A	N/A
Credit Card	Canadian Tire MasterCard Account #xxx-7707	N/A	$5,000.00	$3,515.67
Credit Card	Visa (account TBD)	TBD	N/A	N/A
Personal Loan	Money owed to my father	N/A	$15,000.00	$15,000.00
Student Loan	National Student Debt Account #xxx-8372	$13,203.21	N/A	N/A
Taxes – Canada Revenue Agency	2022 Assessment, including penalty and interest		$423.87	paid

Notional Disposition Costs (50%)	Re: 2116 Monson Crescent -Calculated at 5% commission +HST, plus $1,500.00 legal fees	N/A	$34,650.00	$33,237.50
Notional Disposition Costs	120 Mud Street West	Included in 4(a)	N/A	N/A
Contingent Tax Liability	RRSPs -calculated at 25%	$15,000.00	$23,403.77	$23,944.36
Contingent Tax Liability	Pension -calculated at 25%	N/A	TBD	TBD
23. TOTAL OF DEBTS AND OTHER LIABILITIES		$28,203.21	**$316,495.75**	$298,229.55

PART 6: PROPERTY, DEBTS AND OTHER LIABILITIES ON DATE OF MARRIAGE

Show by category the value of your property, debts and other liabilities, calculated as of the date of your marriage. (In this part, do not include the value of a matrimonial home or debts or other liabilities directly related to its purchase or significant improvement, if you and your spouse ordinarily occupied this property as your family residence at the time of separation.)

Category and details	Value on date of marriage	
	Assets	**Liabilities**
Land	$10,000.00	
General household items & vehicles	$2,600.00	
Bank accounts, savings, securities, pensions	$77,310.32	
Life & disability insurance	$0.00	
Business interests	$0.00	
Money owed to you	$0.00	
Other property *(Specify.)*	$0.00	
Debts and other liabilities *(Specify.)*		$28,203.21
TOTALS	$89,910.32	$28,203.21
24. NET VALUE OF PROPERTY OWNED ON DATE OF MARRIAGE *(From the total of the "Assets" column, subtract the total of the "Liabilities" column.)*	**$61,707.11**	
25. VALUE OF ALL DEDUCTIONS *(Add items* **[23]** *and* **[24]**.*)*	**$378,202.86**	

PART 7: EXCLUDED PROPERTY

Show by category the value of property owned on the valuation date that is excluded from the definition of "net family property" (such as gifts or inheritances received after marriage).

Category	Details	Value on valuation date
Gift or inheritance from third person	From Grammy's estate, deceased 2015. $25,000 USD received into Chequing USD BMO 5156, moved to TFSA - BMO – 8311 in May 2019. $0.00 in account at the time. No other deposits. Balance remaining.	$10,322.11
Income from property expressly excluded by donor/testator		
Damages and settlements for personal injuries, etc.		
Life insurance proceeds		
Traced property		
Excluded property by spousal agreement		
Other Excluded Property		
26. TOTAL VALUE OF EXCLUDED PROPERTY		**$10,322.11**

PART 8: DISPOSED-OF PROPERTY

Show by category the value of all property that you disposed of during the two years immediately preceding the making of this statement, or during the marriage, whichever period is shorter.

Category	Details	Value
Vehicle	I sold a 2023 Yamaha YZ250 in January 2024. Proceeds went into Investment – IA Securities -77-S	$9,594.00
	27. TOTAL VALUE OF DISPOSED-OF PROPERTY	**$9,594.00**

PART 9: CALCULATION OF NET FAMILY PROPERTY

	Deductions	BALANCE
Value of all property owned on valuation date *(from item* **[22]** *above)*		**$897,553.73**
Subtract value of all deductions *(from item* **[25]** *above)*	**$378,202.86**	**$519,350.87**
Subtract total value of all excluded property *(from item* **[26]** *above)*	**$10,322.11**	**$509,028.76**
28. NET FAMILY PROPERTY		**$509,028.76**

NOTE: *This financial statement must be updated before any court event if it is:*

- *more than 60 days old by the time of the case conference,*
- *more than 30 days old by the time of the motion is heard, or*
- *more than 40 days old by the start of the trial or the start of the trial sitting, whichever comes first.*

You may update this financial statement by either completing and filing

- *a new financial statement with updated information, or*
- *an affidavit in Form 14A setting out the details of any minor changes or confirming that the information contained in this statement remains correct.*

Sworn/Affirmed remotely in accordance with Ontario Regulation 431/20 under the Commissioners for Taking Affidavits Act

(municipality)

in Gloucester / Ottawa, Province of Ontario

(province, state or country)

on _____

(date)

_____

Commissioner for taking affidavits
(Type or print name below if signature is illegible.)

_____

Signature
(This form to be signed in front of a lawyer, justice of the peace, notary public or commissioner for taking affidavits.)

Schedule A
Additional Sources of Income

Line	Income Source	Annual Amount
1.	Net partnership income	
2.	Net rental income (Gross annual rental income of $)	
3.	Total amount of dividends received from taxable Canadian corporations	$342.35
4.	Total capital gains ($) less capital losses ($)	
5.	Registered retirement savings plan withdrawals	
6.	Income from a Registered Retirement Income Fund or Annuity	
7.	Any other income *(specify source)*	

Subtotal	**$342.35**

Schedule B
Special or Extraordinary Expenses for the Child(ren)

Child's Name	Expense	Amount/yr.	Available Tax Credits or Deductions*
1. Suri	Orthodontics	$1,200.00	
2. Suri	Math Tutoring $50/session x about 4 per month x 10 months	$2,000 Estimate	
3. Suri	Rep Soccer $450/fall +895/summer + shoes/uniform $330	$1,675.00	$134.40 Early bird discount
4. Suri	March Break Camp	$330.00	Yes, claimed by Katherine
5. Suri	Summer Camps		Yes, claimed by Katherine
6.			
7.			
8.			
9.			
10.			

Total Net Annual Amount	**$3,205.00**
Total Net Monthly Amount	**$267.08**

*** Some of these expenses can be claimed in a parent's income tax return in relation to a tax credit or deduction (for example childcare costs). These credits or deductions must be shown in the above chart.**

[x] I earn $ 87,167 per year which should be used to determine my share of the above expenses.

NOTE:

Pursuant to the Child Support Guidelines, a court can order that the parents of a child share the costs of the following expenses for the child:

- Necessary childcare expenses;
- Medical insurance premiums and certain health-related expenses for the child that cost more than $100 annually;
- Extraordinary expenses for the child's education;
- Post-secondary school expenses; and,
- Extraordinary expenses for extracurricular activities.

Form 13A Financial Disclosure Certificate

The Form 13A is a list of the documents that you will be providing to your spouse or their legal representative in satisfaction of your legal responsibility to provide financial disclosure.

You may be able to use technology to generate the list into the form.

If you are in a court proceeding, the Family Law Rules have different timelines for the Form 13.1 and the Form 13A, so you may not be required to complete this form at the very same time you complete the financial statement. But if you followed the directions until now, your basic disclosure will already be easily compiled and organized in all of the folders.

The list in the 13A is meant to be updated as more documents are exchanged.

A sample 13A follows.

ONTARIO
Superior Court of Justice, Family Court
(Name of Court)

at **161 Elgin St., 2nd Fl., Ottawa ON K2P 2K1**
(Court office address)

Court File Number
FS-24-000216-0000

Form 13A: Certificate of Financial Disclosure

Applicant(s)

Full legal name *Address* *Phone & fax* *Email*	Kate N. Holmes 2116 Monson Crescent Gloucester, ON K1J 6A8 Tel: (613) 555-2345 dawsonscreek1998@hotmail.com

Applicant(s) Lawyer

Name *Address* *Phone & fax* *Email*	Rachel Dawes BETTER LAWYERS LLP 301 Wellington St Ottawa, ON K1A 0J1 Tel: (613) 555-2211 lawyer@betterlawyers.ca

Respondent(s)

Full legal name *Address* *Phone & fax* *Email*	Thomas Cruise 2116 Monson Crescent Gloucester, ON K1J 6A8 Tel: 613-882-5555 tomcruise4real@gmail.com

Respondent(s) Lawyer

Name *Address* *Phone & fax* *Email*	Bruce Wayne Barrister & Solicitor 25 Sussex Drive Ottawa, ON K1M 1M4 Tel: (613) 456-7890, Fax: (613) 321-7654 contactgoodlaw@aibn.on.ca

This form is filed by:

☐ applicant ☒ respondent

TO THE PARTIES

You must provide complete financial disclosure to the other parties in your case. A list of the documents you must provide to the other party is set out in Rule 13 of the *Family Law Rules*. You must list in this form all of the documents that you are providing to the other party in support of the information set out in your financial statement and update it each time additional documents are provided to the other party.

Once you have completed this form,

- if your case includes support with or without special expenses but does not include a claim under Part I of the *Family Law Act* (Family Property), you must:
  - collect all required documentation.
  - prepare this certificate.
  - serve this certificate with attached documentation on the other party with your completed Financial Statement.
- if your case includes a claim under Part I of the *Family Law Act* (Family Property) with or without a claim for support, you must:
  - collect all required documentation.
  - prepare this certificate.
  - serve this certificate with attached documentation on the other party within 30 days of the day that your Financial Statement was due to be served.

If all of your documents are not available within these timeframes, when the additional documents are provided to the other party, you should also update this certificate and provide it to the other party.

If you do not provide financial disclosure as required, a court may make an order against you.

You must file a copy of your most up to date certificate with the court. The documentation is not filed with the court. If you are the applicant or moving party in your case, you must file this certificate seven days before the case conference. If you are the respondent, you must serve it four days before the case conference.

If you have served any additional or updated financial disclosure before the settlement conference, you must prepare, serve and file an updated Certificate of Financial Disclosure.

Document Number	Document Description	Date of Document *(yyyy/mm/dd)*	Date the Document was Provided to the Other Party *(yyyy/mm/dd)*
PART 01 INCOME			
1.	2023 Income Tax Return – T. Cruise –	2024.02.20	With this form
2.	2022 Income Tax Return – T. Cruise –	2023.04.29	With this form
3.	2021 Income Tax Return – T. Cruise –	2022.03.15	With this form
4.	2023 Notice of Assessment – T. Cruise –	2024.03.06	With this form
5.	2022 Notice of Reassessment – T. Cruise –	2023.07.09	2023.08.14
6.	2022 Notice of Assessment – T. Cruise –	2023.05.15	2023.08.14
7.	2021 Notice of Assessment – T. Cruise -	2022.03.28	2023.08.14
8.	Paystub - Dependable Zamboni Drivers Ltd. -	2024.03.07	With this form
PART 04A REAL PROPERTY			
11.	2116 Monson Crescent – MCAP Assessment –	2018.06.04	With this form
12.	120 Mud Street – Property Abstract	2024.03.20	With this form
13.			
PART 04B HOUSEHOLD GOODS AND VEHICLES			
14.	Contents at 2116 Monson Crescent – List	2024.03.05	With this form
15.	2016 Honda Element Ex – Lease Agreement	2022.10.22	With this form
16.			
PART 04C SAVINGS AND ACCOUNTS			
17.	Chequing (Joint) – RBC – 2789 - statement	2022.07.31	With this form
18.	Savings (Joint) – RBC – 5923 - statement	2022.07.31	With this form
19.	Chequing USD – RBC – 5156 - printout	2022.07.31	With this form
20.	Bank of Canada Exchange Rate for July 6, 2022	2024.03.20	With this form
21.	Business - Chequing - RBC – 2223 – printout	2022.07.31	With this form
22.	TFSA – Scotiabank – 8311 – printout	2022.07.31	With this form
23.	Investment – IA Securities -77-S - statement	2022.09.30	With this form
24.	Pension – NHL-ZA – 4003 – FSRAO Form 1	2024.03.20	With this form
25.	Crypto – Wealthsimple 0 9327 – screenshot	2022.07.06	With this form
26.	LIRA – Scotiabank – 6988 – statement	2022.07.31	With this form
27.	RRSP – CIBC – 3482 - statement	2022.09.30	With this form
28.	RRSP – TD Canada Trust – 2411 – statement	2022.09.30	With this form
29.	RESP - TD Canada Trust – 554-R – statement	2022.12.31	With this form
30.	Youth Account – Scotiabank – 4624 - screenshot	2022.07.06	With this form

PART 04D INSURANCE			
31.	Group Life - Manulife 3857391-A – policy statement	2023.12.30	With this form
32.	Whole Life - 88-90923-BH3 – email from broker with value as of July 6, 2022	2024.02.15	With this form

PART 04E BUSINESS INTERESTS			
34.	TC Zamboni – See: 2022 Income Tax Return – T. Cruise – Business Chequing - RBC - 2223		
35.			
36.			

PART 04F MONEY OWED TO ME			
37.	Birce – IOU Note	2021.05.05	With this form
38.			
39.			

PART 04G OTHER PROPERTY			
40.	n/a		
41.			
42.			

PART 05 DEBTS AND OTHER LIABILITIES			
43.	Mortgage (Joint) – RBC - 0456 - statement	2022.07.31	With this form
44.	Secured Line of Credit (Joint) - RBC – 4823 statement	2022.07.31	With this form
45.	Credit Card – Canadian Tire MC - 7707 - statement	2022.07.14	With this form
47.	Personal Loan – Father - Chequing (Joint) – RBC – 2789	2019.01.03	With this form
57.	Tax Owed - 2022 Notice of Assessment – T. Cruise –	2023.05.15	2023.08.14

PART 06A DATE OF MARRIAGE ASSETS			
58.	Contents at 120 Mud Street West – List	2024.03.05	With this form
59.	Chequing Joint – RBC - 2789	2006.11.30	With this form
60.	Chequing USD – RBC – 8311	2006.10.31	With this form
61.	Bank of Canada Exchange Rate for November 18, 2006	2024.03.20	With this form
62.	RRSP – CIBC – 3482	Pending	

PART 06B DATE OF MARRIAGE DEBTS AND LIABILITIES			
69.	Mortgage -120 Mud Street West	TBD	
70.	Student Loan – National Student Debt – 8372 - printout	2005-01.01- 2008.12.31	With this form
72.	Credit Card – Visa	TBD	

PART 07 EXCLUDED PROPERTY			
74.	Grammy's Last Will and Testament	2001.01.27	With this form
75.	Chequing USD – BMO - 5156 - printout	2015.08.13 – 2019.05.30	With this form
76.	TFSA - BMO – 8311 – printout	2019.05.01 – 2022.06.30	With this form

PART 08 DISPOSED OF PROPERTY			
77.	2023 Yamaha YZ250 – sale document	2024.01.19	With this form
78.	Investment – IA Securities -77-S – statement	2024.01.31	With this form
79.			

SCHEDULE B SPECIAL OR EXTRAORDINARY EXPENSES FOR THE CHILD(REN)			
80.	Suri - Orthodontics – Bright Smiles – invoice	2023.11.28	With this form
81.	Suri - Math Tutoring – Ethan Hunter -	Interac transactions for 2024.01.08, 2024.01.15, 2024.01.22, 2024.01.29	With this form
82.	Suri - Rep Soccer – 2024 registration form	Downloaded 2024.02.28	With this form
83.	Suri – Rep Soccer Walmart receipt (last year)	2023.06.18	With this form
84.	March Break Camp	Kate has this document	
85.	Summer Camps	Kate has this document	

I am the Respondent in this case. I certify that I have provided the opposing party with all of the documents that I have identified in this checklist.

Certified at Gloucester *(City)* on March 20, 2024 *(Date)*

_____
(Signature of Party)

step 7

Once you have completed your Form 13.1 and Form 13A, you are at your last steps to completing this stage of your financial disclosure.

Putting it All Together

1. **Finalize your Financial Statement**

   Gather and attach the documents required at page 2 of the Financial Statement:

   a. Proof of Current Income
   b. Notices of Assessment for the past three tax years

2. **Find a Commissioner of Oaths**

   https://www.ontario.ca/page/find-notary-public-or-commissioner-oaths-taking-affidavits

3. **Sign your Form 13A**

   The place to sign is at the bottom of your document. No need for a Commissioner of Oaths.

4. **Send your disclosure to your spouse / legal representative**

   Dear _____,

   Please find attached the following documents:

   (1) Form 13.1 Financial Statement – [Applicant/Respondent] – I. Name – DD-MMM-YYYY
   (2) Form 13A Financial Disclosure Certificate – [Applicant/Respondent] – I. Name – DD-MMM-YYYY
   (3) Income Tax Returns for YYYY, YYYY, YYYY

   Please find a link to the disclosure documents that are in the attached Form 13A: link

   I have a few more documents I am looking for, and intend to provide them to you soon.

   I look forward to receiving your disclosure so we have start the process of resolving the financial issues.

   Thank you,

5. **Service and Filing**

   If you are in a court proceeding, *in addition to other relevant court documents*, you will need:

   (a) a Form 6B Affidavit of Service to confirm you served your Form 13.1 and 13A
   (b) File the Form 13.1, Form 13A and Form 6B with your courthouse.

   Link to online court filing: File Family Court Documents Online

step 8

Depending on your circumstances, you may need to update your financial statement.

Examples: if you have a pension, but it wasn't yet appraised at the time you first signed your financial statement.

The Chart below shows mandatory updating timelines if you are in a Court proceeding.

Assisting your client complete their Financial Statement

Shmuel Stern & Carla Sutton-McIntosh
March 20, 2024

CSG Schedule III
A Visual Guide

Additional Income Document Disclosure
To request (from your own client) pursuant to Rule 13(11)

This from That
Gleaning information from your client's Financial Disclosure

Assisting your client in completing
their financial statement and financial disclosure

A VISUAL GUIDE TO SCHEDULE CSG SCHEDULE III
Shmuel Stern & Carla Lee Sutton

March 20, 2024

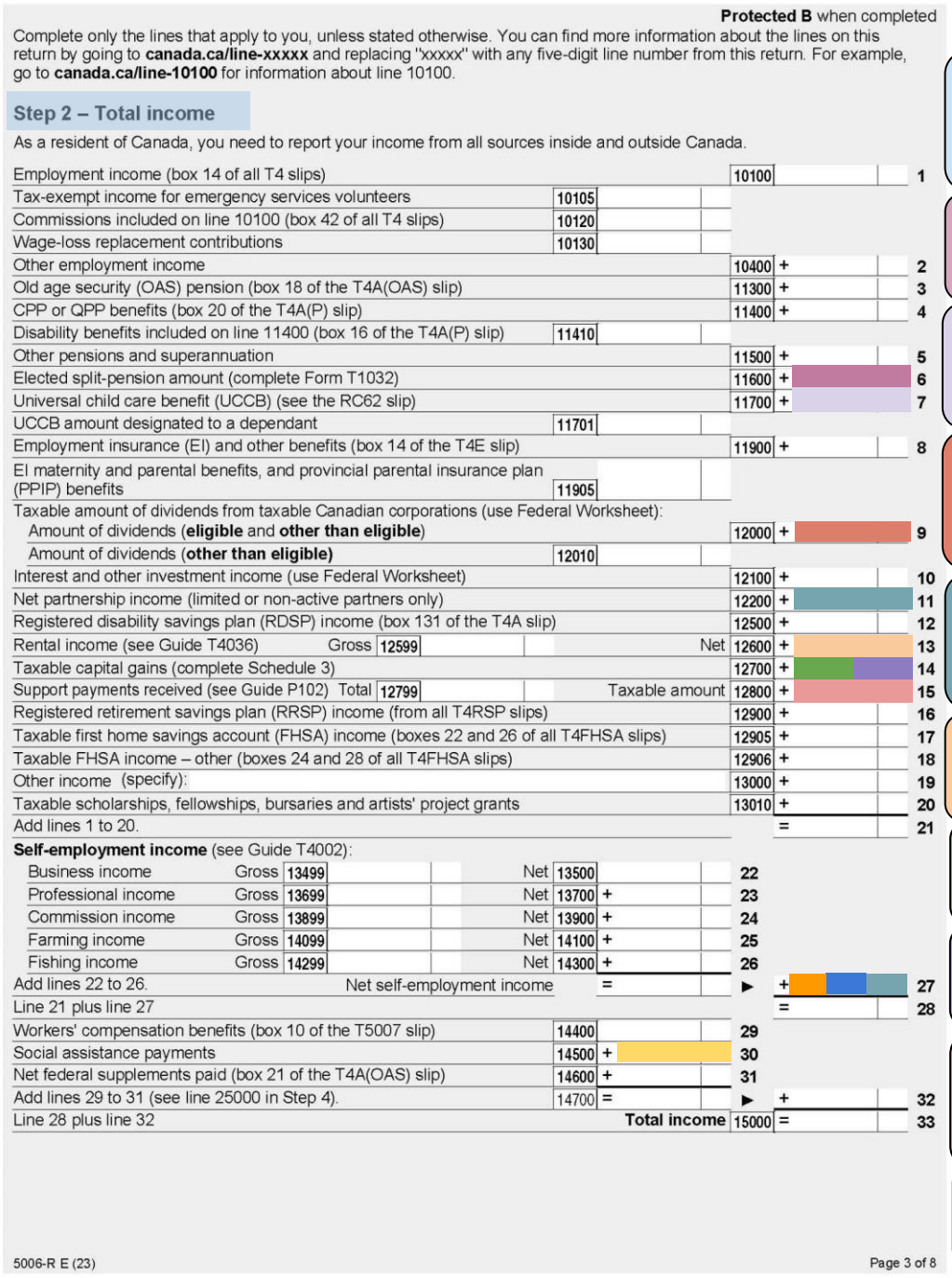
Section	In this paper
Federal *Child Support Guidelines*, Section 16 **Calculation of annual income** **16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.**	**Page** **6 - Tax Return**
Adjustments to Income **Employment expenses** **1** Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the Income Tax Act are deducted: **(a)** [Repealed, SOR/2000-337, s. 8] **(b)** paragraph 8(1)(d) concerning expenses of teacher's exchange fund contribution; **(c)** paragraph 8(1)(e) concerning expenses of railway employees; **(d)** paragraph 8(1)(f) concerning sales expenses; **(e)** paragraph 8(1)(g) concerning transport employee's expenses; **(f)** paragraph 8(1)(h) concerning travel expenses; **(f.1)** paragraph 8(1)(h.1) concerning motor vehicle travel expenses;	**Pages** **7 - Tax Return** **15 - Form T2200** **Sch. T777**

Section	In this paper
(g) paragraph 8(1)(i) concerning dues and other expenses of performing duties; **(h)** paragraph 8(l)(j) concerning motor vehicle and aircraft costs; **(i)** paragraph 8(1)(l.1) concerning Canada Pension Plan contributions and Employment Insurance Act premiums paid in respect of another employee who acts as an assistant or substitute for the spouse; **(j)** paragraph 8(1)(n) concerning salary reimbursement; **(k)** paragraph 8(1)(o) concerning forfeited amounts; **(l)** paragraph 8(1)(p) concerning musical instrument costs; and **(m)** paragraph 8(1)(q) concerning artists' employment expenses.	
Child support **2** Deduct any child support received that is included to determine total income in the T1 General form issued by the Canada Revenue Agency.	**Page** **6 - Tax Return**
Spousal support and universal child care benefit **3** To calculate income for the purpose of determining an amount under an applicable table, deduct **(a)** the spousal support received from the other spouse; and **(b)** any universal child care benefit that is included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency.	**Page** **6 - Tax Return**

Section	In this paper
Special or extraordinary expenses **3.1** To calculate income for the purpose of determining an amount under section 7 of these Guidelines, deduct the spousal support paid to the other spouse …	**Page** **6 - Tax Return**
and, as applicable, make the following adjustment in respect of universal child care benefits: **(a)** deduct benefits that are included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency and that are for a child for whom special or extraordinary expenses are not being requested; or	**Page** **6 - Tax Return**
(b) include benefits that are not included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency and that are received by the spouse for a child for whom special or extraordinary expenses are being requested.	**Page** **6 - Tax Return**
Social assistance **4** Deduct any amount of social assistance income that is not attributable to the spouse.	**Pages** **6 - Tax Return** **13 - Form T5007**
Dividends from taxable Canadian corporations **5** Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.	**Pages** **6 - Tax Return** **8 - Form T5** **- Federal Worksheet**
Capital gains and capital losses **6** Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.	**Page** **6 - Tax Return** **11-12 - Sch. 3**

Section	In this paper
Business investment losses **7** Deduct the actual amount of business investment losses suffered by the spouse during the year.	**Page** **7 - Tax Return**
Carrying charges **8** Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the Income Tax Act.	**Pages** **7 - Tax Return** **16 - Federal Worksheet**
Net self-employment income **9** Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.	**Pages** **6 - Tax Return** **9 - Sch. T2125** **10 - Sch. T776**
Additional amount **10** Where the spouse reports income from self-employment that, in accordance with sections 34.1 and 34.2 of the Income Tax Act, includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.	**Pages** **6 - Tax Return** **17- Sch. T2125** **Sch. T1139**
Capital cost allowance for property **11** Include the spouse's deduction for an allowable capital cost allowance with respect to real property.	**Pages** **6 - Tax Return** **10 - T776**

Section	In this paper
Partnership or sole proprietorship income **12** Where the spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.	**Pages** **6 - Tax Return** **9 - Sch. T2125**
Employee stock options with a Canadian-controlled private corporation **13 (1)** Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation, or a publicly traded corporation that is subject to the same tax treatment with reference to stock options as a Canadian-controlled private corporation, and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares, and any amount paid by the spouse to acquire the options to purchase the shares, to the income for the year in which the options are exercised. **Disposal of shares** **(2)** If the spouse has disposed of the shares during a year, deduct from the income for that year the difference determined under subsection (1).	**Pages** **6 - Tax Return** **11 - Sch. 3**
Split-pension amount **14** If a spouse is deemed to have received a split-pension amount under paragraph 60.03(2)(b) of the Income Tax Act that is included in that spouse's total income in the T1 General form issued by the Canada Revenue Agency, deduct that amount.	**Page** **6 - Tax Return** **18 - T1032**



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Complete only the lines that apply to you, unless stated otherwise. You can find more information about the lines on this return by going to **canada.ca/line-xxxxx** and replacing "xxxxx" with any five-digit line number from this return. For example, go to **canada.ca/line-10100** for information about line 10100.

Step 2 – Total income

As a resident of Canada, you need to report your income from all sources inside and outside Canada.

Employment income (box 14 of all T4 slips)			10100		1
Tax-exempt income for emergency services volunteers	10105				
Commissions included on line 10100 (box 42 of all T4 slips)	10120				
Wage-loss replacement contributions	10130				
Other employment income			10400	+	2
Old age security (OAS) pension (box 18 of the T4A(OAS) slip)			11300	+	3
CPP or QPP benefits (box 20 of the T4A(P) slip)			11400	+	4
Disability benefits included on line 11400 (box 16 of the T4A(P) slip)	11410				
Other pensions and superannuation			11500	+	5
Elected split-pension amount (complete Form T1032)			11600	+	6
Universal child care benefit (UCCB) (see the RC62 slip)			11700	+	7
UCCB amount designated to a dependant	11701				
Employment insurance (EI) and other benefits (box 14 of the T4E slip)			11900	+	8
EI maternity and parental benefits, and provincial parental insurance plan (PPIP) benefits	11905				
Taxable amount of dividends from taxable Canadian corporations (use Federal Worksheet):					
Amount of dividends (**eligible** and **other than eligible**)			12000	+	9
Amount of dividends (**other than eligible**)	12010				
Interest and other investment income (use Federal Worksheet)			12100	+	10
Net partnership income (limited or non-active partners only)			12200	+	11
Registered disability savings plan (RDSP) income (box 131 of the T4A slip)			12500	+	12
Rental income (see Guide T4036) Gross 12599		Net	12600	+	13
Taxable capital gains (complete Schedule 3)			12700	+	14
Support payments received (see Guide P102) Total 12799		Taxable amount	12800	+	15
Registered retirement savings plan (RRSP) income (from all T4RSP slips)			12900	+	16
Taxable first home savings account (FHSA) income (boxes 22 and 26 of all T4FHSA slips)			12905	+	17
Taxable FHSA income – other (boxes 24 and 28 of all T4FHSA slips)			12906	+	18
Other income (specify):			13000	+	19
Taxable scholarships, fellowships, bursaries and artists' project grants			13010	+	20
Add lines 1 to 20.				=	21

Self-employment income (see Guide T4002):

Business income	Gross 13499		Net 13500		22	
Professional income	Gross 13699		Net 13700	+	23	
Commission income	Gross 13899		Net 13900	+	24	
Farming income	Gross 14099		Net 14100	+	25	
Fishing income	Gross 14299		Net 14300	+	26	
Add lines 22 to 26.		Net self-employment income	=	▶	+	27
Line 21 plus line 27					=	28
Workers' compensation benefits (box 10 of the T5007 slip)		14400			29	
Social assistance payments		14500	+		30	
Net federal supplements paid (box 21 of the T4A(OAS) slip)		14600	+		31	
Add lines 29 to 31 (see line 25000 in Step 4).		14700	=	▶	+	32
Line 28 plus line 32			**Total income**	15000	=	33

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CSG s.16
CALCULATION OF ANNUAL INCOME

SCH III s.14
Split-pension amount

SCH III s. 3, 3.1
Universal child care benefit

SCH III s. 5
Dividends from taxable Canadian corporations

SCH III s. 12
Partnership or sole proprietorship income

SCH III s. 11
Capital cost allowance for property

SCH III s. 6
Capital gains and capital losses

SCH III s. 13
Employee stock options with a

SCH III s. 2 and 3(a)
Child support
Spousal support

SCH III s. 9
Net self-employment income

SCH III s. 10
Additional amount (Self-Employment)

SCH III s. 4
Social assistance

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Step 3 – Net income

Enter the amount from line 33 of the previous page.				34
Pension adjustment (box 52 of all T4 slips and box 034 of all T4A slips)	20600			
Registered pension plan (RPP) deduction (box 20 of all T4 slips and box 032 of all T4A slips)	20700			35
RRSP deduction (see Schedule 7 and **attach** receipts)	20800	+		36
FHSA deduction (see Schedule 15 and **attach** receipts)	20805	+		37
Pooled registered pension plan (PRPP) **employer** contributions (amount from your PRPP contribution receipts)	20810			
Deduction for elected split-pension amount (complete Form T1032)	21000	+		38
Annual union, professional or like dues (receipts and box 44 of all T4 slips)	21200	+		39
Universal child care benefit (UCCB) repayment (box 12 of all RC62 slips)	21300	+		40
Child care expenses (complete Form T778)	21400	+		41
Disability supports deduction (complete Form T929)	21500	+		42
Business investment loss (see Guide T4037) Gross 21699 — Allowable deduction	21700	+		43
Moving expenses (complete Form T1-M)	21900	+		44
Support payments made (see Guide P102) Total 21999 — Allowable deduction	22000	+		45
Carrying charges, interest expenses and other expenses (use Federal Worksheet)	22100	+		46
Deduction for CPP or QPP contributions on self-employment income and other earnings (complete Schedule 8 or Form RC381, whichever applies)	22200	+		•47
Deduction for CPP or QPP enhanced contributions on employment income (complete Schedule 8 or Form RC381, whichever applies) **(maximum $631.00)**	22215	+		•48
Exploration and development expenses (complete Form T1229)	22400	+		49
Other employment expenses (see Guide T4044)	22900	+		50
Clergy residence deduction (complete Form T1223)	23100	+		51
Other deductions (specify):	23200	+		52
Add lines 35 to 52.	23300	=	▶ –	53
Line 34 minus line 53 (if negative, enter "0") **Net income before adjustments**	23400	=		54

Social benefits repayment:

Complete the chart for line 23500 using your Federal Worksheet if one or more of the following apply:

- You entered an amount for EI and other benefits on line 11900 **and** the amount on line 23400 is **more than $76,875**
- You entered an amount for OAS pension on line 11300 or net federal supplements paid on line 14600 **and** the amount on line 23400 is **more than $86,912**

If not, enter "0" on line 23500.	23500	–	•55
Line 54 minus line 55 (if negative, enter "0") (If this amount is negative, you may have a non-capital loss. See Form T1A.) **Net income**	23600	=	56

SCH III s. 1
Employment expenses

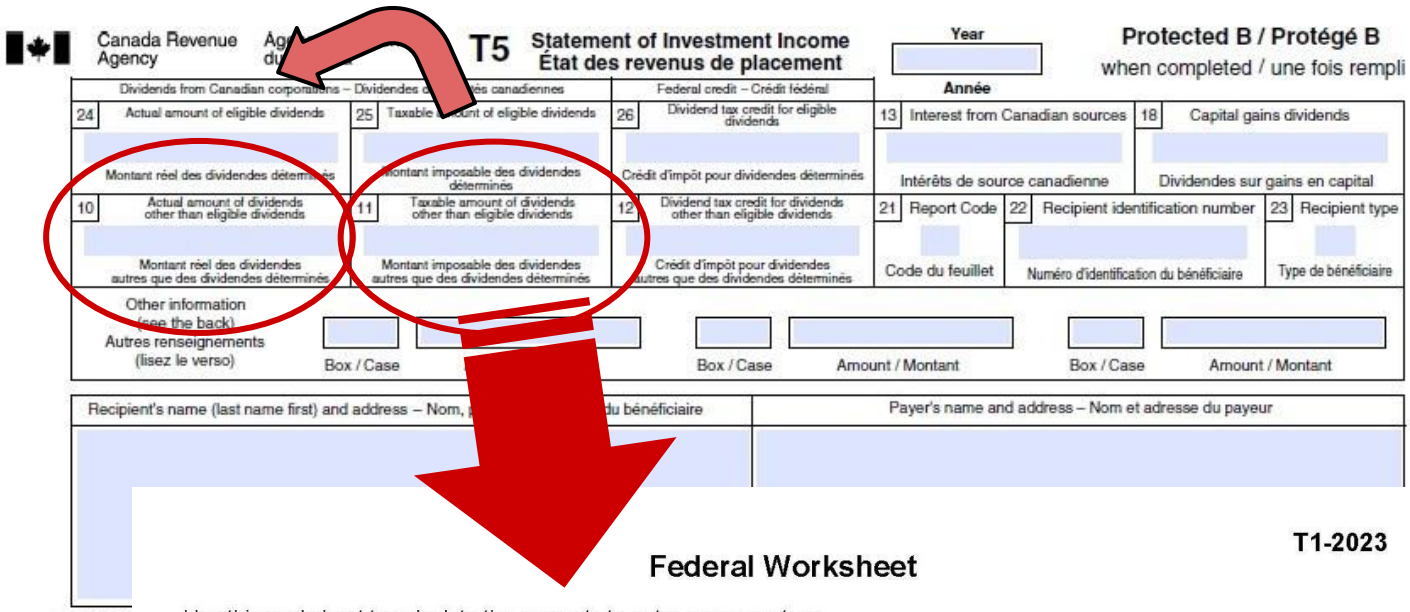
SCH III s. 7
Business investment losses

SCH III s. 3.1
Special or extraordinary expenses

SCH III s. 8
Carrying charges

5006-R E (23) Page 4 of 8

Dividends from taxable Canadian corporations
5 Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.



Canada Revenue Agency

T5 Statement of Investment Income
État des revenus de placement

Year / Année

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when completed / une fois rempli

Dividends from Canadian corporations – Dividendes de sociétés canadiennes		Federal credit – Crédit fédéral			
24 Actual amount of eligible dividends Montant réel des dividendes déterminés	25 Taxable amount of eligible dividends Montant imposable des dividendes déterminés	26 Dividend tax credit for eligible dividends Crédit d'impôt pour dividendes déterminés	13 Interest from Canadian sources Intérêts de source canadienne	18 Capital gains dividends Dividendes sur gains en capital	
10 Actual amount of dividends other than eligible dividends Montant réel des dividendes autres que des dividendes déterminés	11 Taxable amount of dividends other than eligible dividends Montant imposable des dividendes autres que des dividendes déterminés	12 Dividend tax credit for dividends other than eligible dividends Crédit d'impôt pour dividendes autres que des dividendes déterminés	21 Report Code Code du feuillet	22 Recipient identification number Numéro d'identification du bénéficiaire	23 Recipient type Type de bénéficiaire

Other information (see the back) / Autres renseignements (lisez le verso)

Box / Case	Amount / Montant	Box / Case	Amount / Montant	Box / Case	Amount / Montant

Recipient's name (last name first) and address – Nom, ... du bénéficiaire

Payer's name and address – Nom et adresse du payeur

Currency ... Codes de

See the privacy no... T5 (21)

T1-2023

Federal Worksheet

Use this worksheet to calculate the amounts to enter on your return.

Keep this worksheet for your records. **Do not attach it to your return.**

Lines 12000 and 12010 – Taxable amount of dividends from taxable Canadian corporations

Special rules apply for income from property (including shares) that one family member lends or transfers to another. For more information, about loans and transfers of property, go to **canada.ca/line-12000**.

You may be able to claim a dividend tax credit for dividends you received from taxable Canadian corporations. See line 40425 of this worksheet.

Taxable amount of dividends (other than eligible)

Box 32 of all T3 slips			1
Box 25 of all T4PS slips		+	2
Box 11 of all T5 slips		+	3
Box 130 of all T5013 slips		+	4
Add lines 1 to 4. Enter this amount on **line 12010** of your return.		=	5

Taxable amount of dividends (eligible and other than eligible)

Boxes 32 and 50 of all T3 slips			6
Boxes 25 and 31 of all T4PS slips		+	7
Boxes 11 and 25 of all T5 slips		+	8
Boxes 130 and 133 of all T5013 slips		+	9
Add lines 6 to 9. Enter this amount on **line 12000** of your return.		=	10

Taxable amount of dividends if you did not receive an information slip

Actual amount of **eligible dividends** received				11
Applicable rate	×	138%		12
Line 11 multiplied by the percentage from line 12	=		►	13
Actual amount of **dividends other than eligible dividends** received				14
Applicable rate	×	115%		15
Line 14 multiplied by the percentage from line 15 Include this amount on **line 12010** of your return.	=		► +	16

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Statement of Business or Professional Activities

- Use this form to calculate your self-employment business and professional income.
- For each business or profession, fill in a **separate** Form T2125.
- Fill in this form and send it with your income tax and benefit return.
- For more information on how to fill in this form, see Guide T4002, Self-employed Business, Professional, Commission, Farming, and Fishing Income.

Part 1 – Identification

Your name			Your social insurance number
Business name			Business number
Business address	City	Prov./Terr.	Postal code
Fiscal period From Date (YYYYMMDD) to Date (YYYYMMDD)	Was this your last year of business? ☐ Yes ☐ No		
Main product or service			Industry code (see Chapter 2 in Guide T4002)
Accounting method (commission only) ☐ Cash ☐ Accrual	Tax ... number	Partnership business number	Your percentage of the partnership %
Name and address of the person or firm preparing th...			

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Part 4 – Net income (loss) before adjustr...

Gross business or professional income (line 8299 of F...

Expenses (enter only the business part)

Advertising			
Meals and entertainment			
Bad debts			
Insurance			
Interest and bank charges			
Business taxes, licences and memberships			
Office expenses			
Office stationery and supplies			
Professional fees (includes legal and accounting fees)			
Management and administration fees			
Rent		8960	4M
Repairs and maintenance			
Salaries, wages and benefits (including employer's contributions)		9060	4N
Property taxes		9180	4O
Travel expenses		9200	4P
Utilities		9220	4Q
Fuel costs (except for motor vehicles)		9224	4R
Delivery, freight and express		9275	4S
Motor vehicle expenses (not including CCA) (amount 16 of Chart A)		9281	4T
Capital cost allowance (CCA). Enter amount ii of Area A **minus** any personal part and any CCA for business-use-of-home expenses		9936	4U
Other expenses (specify):		9270	4V
Total expenses: Total of amounts 4B to 4V		9368	
Net income (loss) before adjustments: Amount 4A **minus** line 9368			9369

Net self-employment income
9 Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Partnership or sole proprietorship income
12 Where the spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.

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Statement of Real Estate Rentals

- Use this form if you own and rent real estate or other property. It relates mainly to renting real estate but also covers some other types of rental property such as farmland. This form will help you determine your gross rental income, the expenses you can deduct, and your net rental income or loss for the year.
- To determine whether your rental income is from property or a business, consider the number and types of services you provide for your tenants:
  - If you rent space and only provide basic services such as heating, lighting, parking, laundry facilities, you are earning an income from renting property.
  - If you provide additional services such as cleaning, security and meals, you may be conducting a business.
- For more information about how to determine if your rental income comes from property or a business, see Interpretation Bulletin IT-434, Rental of Real Property by Individual, and its Special Release.
- If you are a co-owner of a property, you have to determine if a partnership exists before filling in the Identification part below. To determine if you are in a partnership, see Income Tax Folio S4-F16-C1, What is a Partnership?
- For information on how to fill out this form, see Guide T4036, Rental Income.

Part 1 – Identification

Your name

Your address | City

Fiscal period from | Date (YYYYMMDD) | to | Year | Month 1 2 | Day 3 1 | Was this the final ye

Your percentage of the partnership % | Industry code 5 3 1 1 1 1 | Tax shelter identifica

Name of the person or firm preparing this form

Address of the person or firm preparing thi[s f]orm | City

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Advertising			
Insurance			
Interest and bank charges			
Office expenses			
Professional fees (includes legal and accounting fees)	8871		
Management and administration fees			
Repairs and maintenance			
Salaries, wages and benefits (including employer's contributions)	9060		
Property taxes	9180		
Travel	9200		
Utilities	9220		
Motor vehicle expenses (not including capital cost allowance)	9281		
Other expenses	9270		

Total expenses (**add** the lines listed under "Total expenses") ..... A

Total for personal portion (**add** the lines listed under "Personal portion") 9949

Deductible expenses (total expenses from amount A **minus** total personal portion from line 9949) 4

Net income (loss) before adjustments (total gross rental income from line 8299 **minus** deductible expenses from amount 4) 9369

Co-owners: calculate your share of net income from line 9369. Enter your result on amount 5 5

Other expenses of the co-owner: other deductible expenses you have as a co-owner which you did not deduct elsewhere 9945

Subtotal (amount 5 **minus** line 9945) 6

Recaptured capital cost allowance (co-owners: enter your share of the amount) 9947

Subtotal (amount 6 **plus** line 9947) 7

Terminal loss (co-owners: enter your share of the amount) 9948

Subtotal (amount 7 **minus** line 9948)

Total capital cost allowance claim for the year (amount ii from Area A) 9936

Net ... minus line 9936) 8

If you are a sole proprietor or a co-owner, enter this amount on line 9946.

...om your T5013 slip, Statement of Partnership Income 10

... the year 9974

..... 9943

...o-owners, the result of amount 9. For partnerships, the result of amount ...amount on line 12600 of your income tax and benefit return 9946

Net self-employment income
9 Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Capital cost allowance for property
11 Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

T1-2023 **Schedule 3**

Capital Gains (or Losses)

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Complete this schedule to report your taxable capital gains on line 12700 of your return.
separate sheet. **Attach** a copy of this schedule to your paper return.

For more information about capital gains or losses, including business investment losses
or see Guide T4037, Capital Gains.

If you realized a gain on a disposition, you may be able to claim a capital gains deduction
have capital gains or losses on your T5, T5013, T4PS and T3 information slips, report the
this schedule.

Property type	(1) Year of acquisition	(2) Proceeds of disposition	(3) Adjusted cost base
Qualified small business corporation shares (QSBCS)			
Number Name of corp. and class of shares	(1)	(2)	(3)
Total 10699			Gai
Qualified farm or fishing property (QFFP)			
Address or legal description Prov./Terr.	(1)	(2)	(3)
Total 10999			Gai
Mortgage foreclosures and conditional sales repossessions			
Address or legal description Prov./Terr.	(1)	(2)	(3)
Total 12399			Gai
Publicly traded shares, mutual fund units, deferral of eligible small business corpora			
Number Name of fund/corp. and class of shares	(1)	(2)	(3)
Total 13199			Gai
Real estate, depreciable property and other properties (see **principal residence and p**			
Address or legal description Prov./Terr.	(1)	(2)	(3)
Total 13599			Gai

Bonds, debentures, promissory notes, crypto-assets, and other similar properties						
Face value Maturity date Name of issuer	(1)	(2)	(3)	(4)	(5)	
Total 15199				Gain (or loss) 15300	+	6
Other mortgage foreclosures and conditional sales repossessions						
Address or legal description Prov./Terr.	(1)	(2)	(3)	(4)	(5)	
Total 15499				Gain (or loss) 15500	+	7
Personal-use property (see **principal residence and property flipping** on pages 2 and 3)						
(Provide full description)	(1)	(2)	(3)	(4)	(5)	
				Gain only 15800	+	8
Listed personal property (LPP) (LPP losses can only be applied against LPP gains)						
(Provide full description)	(1)	(2)	(3)	(4)	(5)	
Subtract: unapplied LPP losses from other years					–	
				Net gain only 15900	+	9
Add lines 1 to 9. **Total of gains (or losses) of qualified properties and other properties**					=	10

5000-S3 E (23) (Ce formulaire est disponible en français.) Page 1 of 3

Employee stock options with a Canadian-controlled private corporation

13 (1) Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation, or a publicly traded corporation that is subject to the same tax treatment with reference to stock options as a Canadian-controlled private corporation, and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares, and any amount paid by the spouse to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

Disposal of shares

(2) If the spouse has disposed of the shares during a year, deduct from the income for that year the difference determined under subsection (1).

Capital gains and capital losses

6 Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.

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Calculation of taxable capital gains (or net capital loss) in 2023

Amount from line 10 of the previous page			11
Capital gains deferral from qualifying dispositions of eligible small business corporation shares included on line 4 of the previous page	16100	–	12
Line 11 minus line 12		=	13
Capital gains (or losses) from T5, T5013 and T4PS information slips	17400	+	14
Capital gains (or losses) from T3 information slips	17600	+	15
Add lines 13 to 15.		=	16
Capital loss from a reduction in your business investment loss	17800	–	17
Total of all gains (or losses) before reserves: line 16 minus line 17	19[illegible]	=	18
Reserves from line 67060 of Form T2017 (if negative, show in brackets)	19200		19
Total capital gains (or losses): line 18 plus line 19 (if line 19 is negative: line 18 minus line 19)	19700	=	20
		× 50%	21
2023 taxable capital gains (or net capital loss)	19900	=	22

Capital gains and capital losses
6 Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.

of your return. Instead, use your latest notice of
can use to reduce your taxable capital gains of other years.

inst the taxable capital gains that you reported on your
2020, 2021 or 2022 return, complete Form T1A, Request for Loss Carryback.

You can carry forward your net capital losses indefinitely and apply them against your taxable capital gains in the future.

Principal residence

Complete this part if you disposed of a property (or properties) in 2023 that you are claiming a principal residence exemption for.

Also complete Form T2091(IND), Designation of a Property as a Principal Residence by an Individual (Other than a Personal Trust), or Form T1255, Designation of a Property as a Principal Residence by the Legal Representative of a Deceased Individual, whichever applies.

Even if you do **not** sell your property, you may have a **deemed disposition** that you must report. A deemed disposition occurs when you are considered to have disposed of property even though you did **not** actually sell it. For example, a deemed disposition may occur when you change how you use your principal residence, such as when you change all or part of your principal residence to a rental or business operation, or change your rental or business operation to a principal residence.

If you were **not** a resident of Canada for the entire time you owned the designated property, your period of non-residence may reduce or eliminate the amount of the principal residence exemption. For more information, see Income Tax Folio S1-F3-C2, Principal Residence.

Principal residence designation

Tick the box that applies to your designation of the property described on Form T2091(IND) or Form T1255.

17900 1 ☐ I designate the property as my principal residence for all of the years that I owned it or for all of the years that I owned it except one year.

2 ☐ I designate the property as my principal residence for some but not all of the years that I owned it.

3 ☐ I designate the properties as my principal residences for some or all of the years that I owned them.

Social assistance
4 Deduct any amount of social assistance income that is not attributable to the spouse.

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Statement of Benefits
État des prestations

when completed / une fois rempli

Year / Année	10 Workers' compensation benefits / Indemnités pour accidents du travail	11 Social assistance payments or provincial or territorial supplements / Prestations d'assistance sociale ou supplément provincial ou territorial	12 Social insurance number / Numéro d'assurance sociale	13 Report code / Code de genre de feuillet

Recipient's name and address – Nom et adresse du bénéficiaire

Last name (print) / Nom de famille (en lettres moulées)	First name / Prénom	Initials / Initiales

Payer's name and address / Nom et adresse du payeur

See the privacy notice on your return.
Consultez l'avis de confidentialité dans votre déclaration.
T5007 (23)

Canada Revenue Agency / Agence du revenu du Canada

T5007
Statement of Benefits
État des prestations

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when completed / une fois rempli

Year / Année	10 Workers' compensation benefits / Indemnités pour accidents du travail	11 Social assistance payments or provincial or territorial supplements / Prestations d'assistance sociale ou supplément provincial ou territorial	12 Social insurance number / Numéro d'assurance sociale	13 Report code / Code de genre de feuillet

Recipient's name and address – Nom et adresse du bénéficiaire

Last name (print) / Nom de famille (en lettres moulées)	First name / Prénom	Initials / Initiales

Payer's name and address / Nom et adresse du payeur

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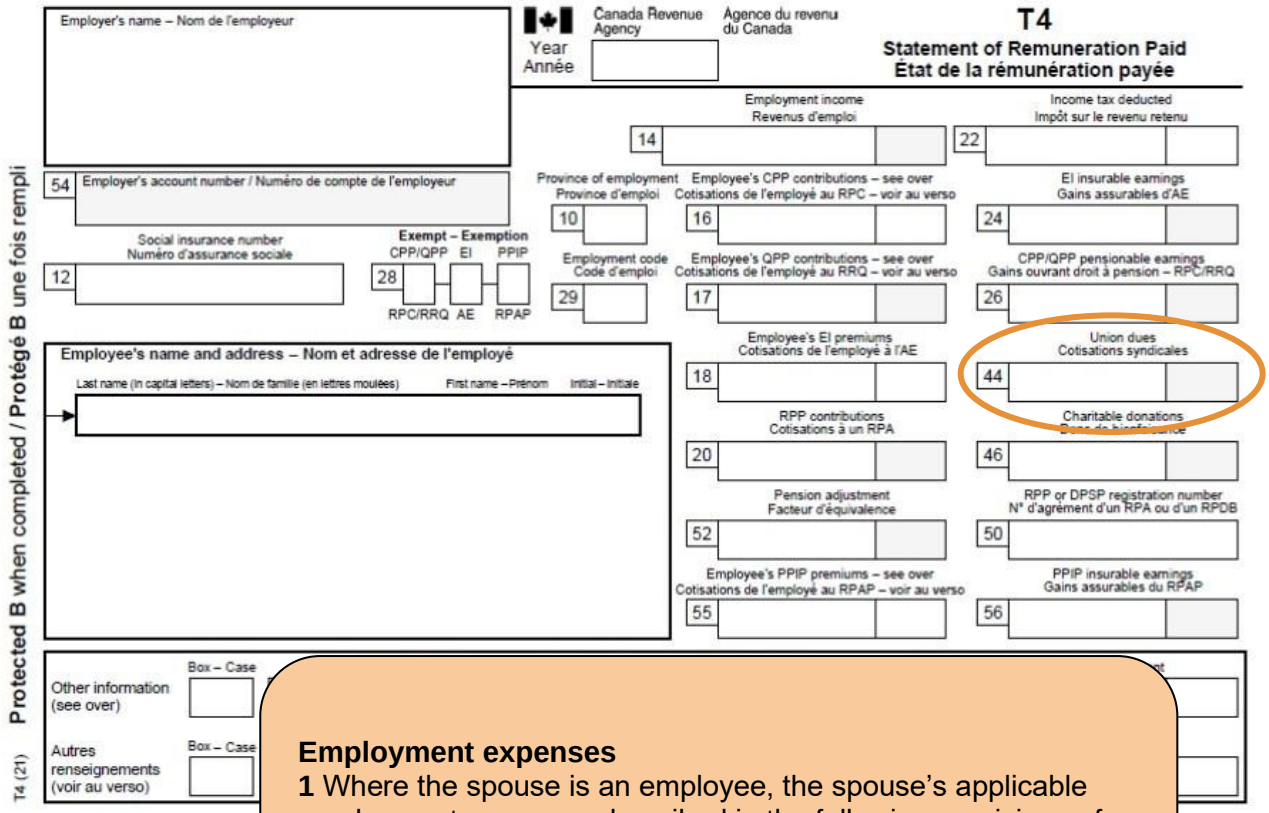
T5007 (23)



Employment expenses

1 Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the Income Tax Act are deducted:

(g) paragraph 8(1)(i) concerning dues and other expenses of performing duties;

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Clear Data

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Declaration of Conditions of Employment

The **employer** must complete this form and give it to the employee for the employee expenses from their income.

The **employee** does not have to file this form with their return, but must keep it asks to see it. For details about claiming employment expenses, see the followi

- Guide T4044, Employment Expenses
- Archived Interpretation Bulletin IT-352R2, Employee's Expenses, Including W
- Archived Interpretation Bulletin IT-522R, Vehicle, Travel and Sales Expenses

Part A – Employee information

Last name	First name
Employer address	
Job title and brief description of duties	

Part B – Conditions of

T2200 E (23)

ulaire est disponible en français.)

Canada Revenue Agency | Agence du revenu du Canada

Statement of Employment Expenses

Use this form to calculate your total employment expenses on line 22900 of your 2023 Incom 2023 Income Tax and Benefit Return for Non-Residents and Deemed Residents of Canada.

For information on how to complete this form, including the capital cost allowance (depreciati Guide T4044, Employment Expenses. **Attach** a copy of this form to your paper return.

Expenses	
Accounting and legal fees	
Advertising and promotion	
Allowable motor vehicle expenses (see chart for line 3 below)	
Food, beverages, and entertainment expenses	× 5
Lodging	
Parking	
Office supplies (postage, stationery, ink cartridge, etc.)	
Other expenses (employment use of a cell phone, long distance calls for employment purposes (specify):	
Tradesperson's tools expenses	**(maximum $**
Apprentice mechanic tools expenses	
Labour mobility deduction (see chart for line 11 on page 2)	**(maximum $**
Musical instrument expenses	
Capital cost allowance for musical instruments (see Part A on page 4)	
Artists' employment expenses	
Add lines 1 to 14.	
Work-space-in-the-home expenses (see chart for line 16 on page 3)	
Line 15 plus line 16 Enter this amount on **line 22900** of your return.	**Total expe**

T777 E (23)

(Ce formulaire est disponible en françai

Employment expenses

1 Where the spouse is an employee, the spouse's applicable employment expenses described in the following provisions of the Income Tax Act are deducted:

(a) [Repealed]

(b) paragraph 8(1)(d) concerning expenses of teacher's exchange fund contribution;

(c) paragraph 8(1)(e) concerning expenses of railway employees;

(d) paragraph 8(1)(f) concerning sales expenses;

(e) paragraph 8(1)(g) concerning transport employee's expenses;

(f) paragraph 8(1)(h) concerning travel expenses;

(f.1) paragraph 8(1)(h.1) concerning motor vehicle travel expenses;

(g) paragraph 8(1)(i) concerning dues and other expenses of performing duties;

(h) paragraph 8(l)(j) concerning motor vehicle and aircraft costs;

(i) paragraph 8(1)(l.1) concerning Canada Pension Plan contributions and Employment Insurance Act premiums paid in respect of another employee who acts as an assistant or substitute for the spouse;

(j) paragraph 8(1)(n) concerning salary reimbursement;

(k) paragraph 8(1)(o) concerning forfeited amounts;

(l) paragraph 8(1)(p) concerning musical instrument costs; and

(m) paragraph 8(1)(q) concerning artists' employment expenses.

T1-2023

Federal Worksheet

Use this worksheet to calculate the amounts to enter on your return.

Keep this worksheet for your records. **Do not attach it to your return.**

Lines 12000 and 12010 – Taxable amount of dividends from taxable Canadian corporations

Special rules apply for income from property (including shares) that one family member lends or transfers to another. For more information, about loans and transfers of property, go to **canada.ca/line-12000**.

You may be able to claim a dividend tax credit for dividends you received from taxable Canadian corporations. See line 40425 of this worksheet.

Taxable amount of dividends (other than eligible)

Box 32 of all T3 slips		1
Box 25 of all T4PS slips	+	2
Box 11 of all T5 slips	+	3
Box 130 of all T5013 slips	+	4
Add lines 1 to 4. Enter this amount on **line 12010** of your return.	=	5

Taxable amo nd other than eligible)

Boxes 32 and		6
B	+	7
Boxes	+	8
Boxes 130 an	+	9
Add lines 6 to 9. Ent on **line 12000** of your return.	=	10

5000-D1 E (23) (Ce formulaire est disponible en français.) Page 1 of 8

Line 22100 – Carrying charges, interest expenses, and other expenses

For more information, go to **canada.ca/line-22100**.

Total carrying charges		1
Total interest expenses	+	2
Total other expenses	+	3
Add lines 1 to 3. Enter this amount on **line 22100** of your return.	=	4

Carrying charges

8 Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the Income Tax Act.

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Protected B when completed

Statement of Business or Professional Activities

- Use this form to calculate your self-employment business and professional income.
- For each business or profession, fill in a **separate** Form T2125.
- Fill in this form and send it with your income tax and benefit
- For more information on how to fill in this form, see Guide

Additional amount
10 Where the spouse reports income from self-employment that, in accordance with sections 34.1 and 34.2 of the Income Tax Act, includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

Part 1 – Identification

Your name			
Business name			
Business address			
Fiscal period — From	Date (YYYYMMDD)	to	Date
Main product or service		(see Chapter 2 in Guide T4002)	
Accounting method (commission only) ☐ Cash ☐ Accrual	Tax shelter identification number	Partnership business number	Your percentage of the partnership %
Name and address of the person or firm preparing this form			

T2125 E (23)

Clear Data

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Protected B when completed

Reconciliation of 2023 Business Income for Tax Purposes

General information

Use this form if you are a self-employed business person, including a self-employed commission salesperson, a professional, a farmer, or a fisher, and you:

- started your business in 2023 and are electing to use the **alternative method** to have a fiscal period that does not end on December 31, effective for the first fiscal period of your business
- already elected to have a fiscal period that does not end on December 31 and are calculating your additional business income. This is mandatory if you have made this election. Fill in all the information in Part 2 that applies
- are cancelling your previous election and are now going to use a fiscal period that ends on December 31. Fill in all the information in Part 5 that applies
- are calculating your business or professional income to report on your 2023 income tax and benefit return

Who can elect to use the alternative method

The alternative method is only available, on a per business basis, for businesses carried on in Canada by individuals or partnerships of which all the partners are individuals.

If you are a goods and services tax/harmonized sales tax (GST/HST) registrant, your choice of the fiscal period end for income tax purposes may affect your GST/HST reporting periods, filing, and balance due dates.

You **cannot** use the alternative method if:

- you are in partnerships that are partners in other partnerships
- you are an individual who is a partner in a partnership that includes a professional corporation as a partner
- the expenditures made while carrying on your business are mainly the cost or capital cost of tax-shelter investments
- you have already elected to use the alternative method and then cancelled the election

How to fill in this form

Fill in Part 2 **only** if you are electing or you have already elected to have a fiscal period that does not end on December 31. We refer to this as the alternative method. If you are cancelling your previous election and are now going to use a fiscal period that ends on December 31, fill in all the information in Part 5 that applies.

You must fill in this form and send it with your income tax and benefit return to calculate your additional business income for as long as your fiscal period does not end on December 31.

If you need to calculate an additional business income for a separate business, fill in another Form T1139 for each one.

Filing and balance due dates related to this form

Generally, as an individual you have until April 30, 2024, to file your 2023 income tax and benefit return. However, if you have self-employed income, you have until June 15, 2024 to file your 2023 return. In both cases, any tax owing must be paid by April 30, 2024.

To have a fiscal period that does not end on December 31, you have to send this form with your income tax and benefit return that includes the first day of your first fiscal period. If you started your business in:

- 2023 and your first fiscal period ended in 2023, you **must** fill in this form and send it with your 2023 income tax and benefit return
- 2023, your first fiscal period ends in 2024, and you decide to report your business income on your 2023 return, fill in this form to request an election for your 2023 income tax and benefit return
- 2023, your first fiscal period ends in 2024, and you will report a business income for the first time in 2024, fill in this form to request an election for your 2023 return

If the due date falls on a Saturday, a Sunday, or a public holiday recognized by the CRA, we consider your payment to be on time if we receive it on the next business day. Your return is considered on time if we receive it or if it is postmarked on or before the next business day.

T1139 E (23) (Ce formulaire est disponible en français.) Page 1 of 7 Canada

Canada Revenue Agency | Agence du revenu du Canada

Clear Data

2023

Protected B when completed

Joint Election to Split Pension Income

Complete this form if you (the transferring spouse or common-law partner) are electing to split your eligible pension income with your spouse or common-law partner (the receiving spouse or common-law partner). You must meet **all** of the following conditions:

- You and your spouse or common-law partner were **not** living separate and apart from each other, because of a breakdown in your marriage or common-law relationship, for a continuous period of 90 days or more which includes December 3
- You and y date of death)
- You recei
  - pensio including eligible
  - certain RCA slips) and yo

Note: Only have eligible pensi **g** spouse or comm use or comm

Split-pension amount
14 If a spouse is deemed to have received a split-pension amount under paragraph 60.03(2)(b) of the Income Tax Act that is included in that spouse's total income in the T1 General form issued by the Canada Revenue Agency, deduct that amount.

Filing instructions

If you are filing electronically, keep this form in case the Canada Revenue Agency (CRA) asks to see it later. If you are filing a paper return, you must complete, sign, and attach copies of this form to **both** your return and your spouse's or common-law partner's return. The information on the forms must be the same.

This form needs to be filed by your filing due date for the year. For more information on filing due dates, go to canada.ca/taxes-dates-individuals.

Under certain circumstances, the CRA may allow you to make a late or amended election, or revoke an original election. Contact the CRA if you need more information.

Step 1 – Identification

Information about you (the **transferring** spouse or common-law partner)

Last name	First name	Social insurance number
Home address		Postal code

Information about your spouse or common-law partner (the **receiving** spouse or common-law partner)

Last name	First name	Social insurance number
Home address (if different from above)		Postal code

Step 2 – Calculate the maximum split-pension amount

To calculate the eligible pension income amount, the **transferring** spouse or common-law partner must complete the calculation for line 31400 on the Federal Worksheet found in the income tax package.

Enter the amount from line 8 of the transferring spouse's or common-law partner's Federal Worksheet for line 31400.	68020		1
Enter the amount from box 128 of the transferring spouse's or common-law partner's T4A slip.	68025	–	2
Line 1 minus line 2		=	3

Additional Income Document Disclosure

To request pursuant to Rule 13(11)

March 20, 2024

The purpose of this tool is to centralize the possible *additional* income documentation you can request from your own client (or the other party) to address the common circumstance where financial disclosure provided under Rule 13(3.1) does not provide enough information for a full understanding of the other party's financial circumstances.

Table of Contents

This is an ongoing project. Please send additions or editing comments to Shmuel Stern at: cpd@disclosureclinic.com.

Employee

Employee Current
A copy of any employment contracts. A copy of the final paystub provided to you from [employer]_____ for the following tax years: _____, indicating the total earnings paid in the year to date, including any overtime, taxable benefits and bonus', or, where such statements are not provided by the employer, a letter from your employer setting out that information. A copy of all benefit information circulars or benefit booklets outlining all employee benefits for health care, dental care, prescriptions and life insurance you may have through your employment. If no circular or booklet is available, a detailed statement from the employer or group plan insurer outlining all of these benefits. A copy of any correspondence confirming your most recent raise in pay rate. If you receive overtime or bonus income, documentation confirming the amount and timing of such income for the past three years. If applicable, Share Options Documentation and/or Profit Sharing Documentation.

Self-Employed

Self-Employed Cash Income

A copy of your bank statements in your sole or joint name for the period of _____ to _____.

A copy of statements for any credit cards in your sole or joint name for the period of _____ to _____.

A copy of your credit report covering the period of _____ to date.

A copy of any application made by or for you for a loan, line of credit, credit card or mortgage, including any statement of income or net worth provided by or for you, for the following time period: _____ to date.

Self-Employed Year to Date Income

A copy of all monthly or quarterly income and expense statements for the business, for the period from January 1, [current tax year] to date.

Self-Employed Expenses Deducted

An affidavit setting out the categories of business expenses deducted from self-employment income on your Form T2125 Statements of Business and Professional Activities attached to their Income Tax Return for the ____ tax year(s). For each category, provide:

(a) A general ledger or equivalent listing of the expenses and amounts included in that category for the applicable tax year(s);

(b) An explanation of how these expenses are related to the generation of income;

(c) Representative documentary evidence supporting the amounts claimed.

Unemployed

Unemployed Benefits

For any current employment insurance, severance, social assistance, pension, workers' compensation, disability payments or other similar benefits, please provide documentation as to whether the income source is taxable income to you.

Unemployed Cash Income

A copy of your bank statements for the period for the period of _____ to _____.

A copy of statements for any credit cards in your sole or joint name for the period of _____ to _____.

A copy of your credit report covering the period of _____ to date.

A copy of any application made by or for you for a loan, line of credit, credit card or mortgage, including any statement of income or net worth provided by or for you, for the following time period: _____ to date.

Unemployed Job Loss

An updated resume setting out education and adult work experience.

An affidavit listing the applications for employment or other income-earning activities within the last 12 months, with dates and contact information, and a copy of all responses received.

If applicable, documentation of your enrolment in any educational institution or course of study during the period from _____ to _____.

If applicable, an affidavit setting out a detailed summary of all efforts which you have made to upgrade their knowledge and skills or re-train, with copies of all documentary proof available respecting such efforts.

Unemployed Medical/Disability

Copies of all medical and other health-related records or reports that you intend to rely upon in support of a claim that you cannot work or that your ability to work is impaired due to illness or disability. Include:

i. Diagnosis;

ii. Prognosis;

iii. Treatment plan (is there a treatment plan? And what is it?);

iv. Compliance with the treatment plan; and,

v. Specific and detailed information connecting the medical condition to the inability to work. (e.g., this person cannot work at the pre-injury job; this person cannot work for three months; this person cannot work at physical labour; this person cannot return to work ever.)

A copy of any application for illness or disability benefits submitted to the Canada Pension Plan, the Ontario Disability Support Program or any illness or disability insurer, and the response to each application.

Details and documentary evidence respecting any disability benefits that you are receiving, when those benefits began and are expected to cease, and whether the benefits are taxable.

Unemployed Student

Documentation evidencing an application for loans, grants and scholarships, including OSAP

Documentation evidencing an receipt of, or a response to an application for, loans, grants and scholarships, including OSAP

Letter of Admission from the Registrar

Copy of academic courseload for the coming semester(s) enrolled

Copy of transcripts for prior courses taken

Documentation explaining the educational program enrolled in, including:

- Courseload for the totality of the program
- The minimum and maximum number of courses/classes taken during a semester
- The method of delivery of the courses/classes (e.g. in person, online)
- Whether an extended or night courseload is available for the same program
- Whether summer courses/classes are required or available
- The nature and amount of time expected to be devoted to out of the classroom work
- Are there any co-operative or internship work within the program that earn income

Bankruptcy

Bankruptcy	Current Income
A copy of any bankruptcy proposal signed by you and the trustee under the *Bankruptcy and Insolvency Act.* Proof of bankruptcy, including copy of assignment in bankruptcy or petition into bankruptcy, statement of affairs, and any discharge. A copy of the projected cash flow statement of the party, signed by you and filed by the trustee along with the final proposal. A copy of the trustee's cash flow statement, the trustee's report on reasonableness of cash flow statement and trustee's report containing prescribed representations of the insolvent party regarding the preparation of the cash flow statement. A copy of the trustee's Income Tax Return.	

THIS FROM THAT:
Gleaning information from your client's Financial Disclosure

Shmuel Stern, Carla Sutton-McIntosh

March 20, 2024

PROPERTY INTERESTS FROM INCOME TAX RETURNS

Item in Tax Return	Possible Property Interests
11500: Other pensions and superannuation 12600/12700: Pension Adjustments 20810: Employer contributions	Pension Interests
12000/12010: Taxable amount of dividends	Investments/Interest in Corporation
12100: Interest and other investment income	Investments
12200: Net partnership income	Capital in Partnership
12599/12600: Rental income	Investment Property
12700: Taxable capital gains	Investments/Investment Property
12900: RRSP income 20800: RRSP Deductions	RRSPs
13100: Taxable scholarships, fellowships, bursaries, and artists' project grants	Intellectual Property
21200: Annual union, professional, or like dues	Pension Interests
21699/21700: Business investment loss (ABIL)	Shares in, or receivable from, a small business corporation
21100: Carrying charges and interest expenses	(deductible debt for) Investments
26600/T1135: Foreign Property over $100,000	Foreign Real Property
48400/48500: Tax balance owing or receivable	Tax Refund/Tax liability

PROPERTY INTERESTS FROM PAYSTUBS

Item in Paystub	Possible Property Interests
Name	Business interests (if salary paid to a corporation)
Address	Real Estate
Vehicle Expenses	Vehicle
Deposit Account	Account information
Retirement Deductions	RRSP, Pension, DPSP RPP
Income line items	Other taxable compensation: RSU, DSU, SAR, SERP, ESOP
Insurance	Life, Disability
Deductions	Debts (Garnishment, FRO)

PROPERTY INTERESTS FROM FINANCIAL STATEMENT EXPENSES

(other than Deductions from Income, addressed above)

Item in Budget	Possible Property Interests
Anything under Housing	Real Property
Cell Phone	If empty or reduced - business ownership
Gas and Oil Car Insurance Repaird and Maintenances Parking Car loan or Lease Payments	If not empty or reduced - Vehicle ownership If empty or reduced - business ownership
Life insurance premiums	Whole Life Insurance
RRSP/RESP withdrawals	RRSP or RESP
Debt payments	Consumer Debt

Law Society of Ontario | Barreau de l'Ontario

TAB 5

18th Family Law Summit

Hague Convention Cases

Fareen Jamal
Jamal Family Law Professional Corporation

Memorandum (2023 and 2024 YTD Cases)

William Abbott
MacDonald & Partners LLP

March 20, 2024

cpd

LSO
18th Family Law Summit
March 2024

Hague Convention Cases

March 20, 2024

Fareen L. Jamal

Hague Convention Cases

~ Fareen L. Jamal[1]

Data collection with respect to International Child Abductions has not been consistent. Various organizations collect statistics on International Child Abductions, but none collect comprehensive national data about both Hague and non-Hague cases in Canada. Though the Federal Government does not maintain comprehensive national statistics with respect to the number of Hague Abduction cases, the Department of Justice compiles statistics with respect to Hague requests from Provincial and Territorial Central Authorities in preparation for special commissions of The Hague Conference and the Associated Statistical Surveys mentioned above.[2]

In 2015, Canada received 43 return and 12 access applications from 27 States. This was a 12% decrease in return applications and an 8% decrease in access applications from the 49 return and 13 access applications received in 2008. In total the Canada Central Authority dealt with 102 applications, a 10% decrease on the 113 dealt with in 2008 and a 25% increase on the 136 in 2003.

Of the return applications received, 47% ended in the child's return compared with 59% in 2008, 42% in 2003 and 60% in 1999.

Overall, 45% of applications globally ended in the return of the children involved. Compared with these global figures, proportionally more applications received by Canada were rejected or withdrawn and fewer ended in access or 'other' outcomes.

In general, applications took less time to resolve than in previous years, at an average of 129 days compared with 145 in 2008.

Globally, applications took an average of 164 days to conclude. Compared with these global figures, applications ending in a voluntary return or judicial refusal were concluded more quickly in Canada, whereas judicial orders for return took longer to conclude.

---

[1] Fareen L. Jamal, fjamal@jamalfamilylaw.com, www.jamalfamilylaw.com.
With gratitude to Max Blitt, K.C., and Fadwa Yehia, my co-authors for a similar paper for the AFCC in 2023, and to Caterina E. Tempesta.
[2] Challenges and International Mechanisms to Address Cross-Border Child Abduction, Report of the Standing Senate Committee on Human Rights, July, 2015.

Canada also received 12 access applications. The overall rate at which access was agreed or ordered was 38%, compared with 27% globally.[3]

As has always been the case, most of the applications are received by the Provinces of British Colombia, Ontario and Quebec. In 2015, Ontario received the most applications (26 in total, compared with 18 in 2008 and 24 in 2003) followed by Quebec (15 applications compared with 23 in 2008, 19 in 2003 and 14 in 1999) and British Colombia (nine applications compared with 15 in 2008).

Background

Canada signed the Hague Convention[4] on October 25, 1980, and it came into force in Canada on December 1, 1983, more than 40 years ago, followed by ratification in each of the provinces and territories.

Canada is a Federal nation and each Province and Territory has a mechanism in place, namely, the Central Authority to put into action the provisions as mandated by the Hague Convention. While the Hague Convention was ratified by Canada in 1983, it had to be brought into force by each province and territory in Canada, which occurred between 1983 and 1988.

The Hague Convention has been incorporation into provincial and territorial statutes, namely:

- **Alberta**: International Child Abduction Act, RSA 2000, c I-4
- **British Columbia:** Family Law Act, SBC 2011, c 25
- **Manitoba**: The Child Custody Enforcement Act, CCSM c C360
- **Newfoundland and Labrador:** Children's Law Act, RSNL 1990, c C-13
- **New-Brunswick:** International Child Abduction Act, RSNB 2011, c 175
- **Northwest Territories:** International Child Abduction Act, RSNWT 1988, c I-5
- **Nova Scotia:** Child Abduction Act, RSNS 1989, c 67
- **Nunavut:** International Child Abduction (Hague Convention) Act, SY 2008, c 5
- **Ontario:** Children's Law Reform Act, RSO 1990, c C.12
- **Prince Edward Island:** Custody Jurisdiction and Enforcement Act, RSPEI 1988, c C-33

[3] Statistical Analysis Of Applications Made In 2015 Under The Hague Convention, Part III — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — National Reports prepared by Professor Nigel Lowe and Victoria Stephens, Conclusions and Recommendations Nos 21-23 of Part I (1-10 June 2011) of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Convention and the 1996 Convention.

[4] The Hague Convention on the Civil Aspects of International Child Abduction 1980.

- **Quebec:** Act respecting the civil aspects of international and interprovincial child abduction, CQLR c A-23.01
- **Saskatchewan:** The International Child Abduction Act, 1996, SS 1996, c I-10.11
- **Yukon:** International Child Abduction (Hague Convention) Act, SY 2008, c 5

In Ontario, s. 46 of the *Children's Law Reform Act* adopts the Conventions.

According to 2015 statistics, the majority of incoming child abduction cases to Canada came from the USA, the UK, Israel and the United Kingdom in descending order. Upon review of the most recent Canadian case law, more particularly during the period of 2018 to date, the USA has without a doubt continued to hold the first position in terms of incoming child abduction cases. Other notable mentions are France, Germany and the United Arab Emirates.

As of November 2022, there were 103 parties to the convention. The last states to accede to the convention were Botswana and Cape Verde in 2022.

Despite being a signatory of the Hague Convention, it is imperative that each Central Authority respects the Convention and assures the return of the children. There have been signatory countries that are notorious for not respecting the Convention therefore, caution is necessary prior to authorizing travel.

The Hague Convention is one of the most important and successful family law instruments established under the aegis of the Hague Conference on Private International Law.

The main objectives are to secure the prompt return of children wrongfully removed or retained in any of the Hague Convention contracting states, to ensure that the best interest of the children are of paramount importance in matters relating to their custody and to ensure that parenting rights under the law of one contracting State are respected in other contracting States. It aims to enforce custody rights and ensure the immediate return of the child to the country of "habitual residence" in the event of wrongful removal or retention.

Terminology: Custody and Access

The recent modifications to the *Divorce Act* have replaced the terminology of access rights and custody. As of March 1, 2021, the new terms refer to parenting arrangements

after the separation and decision-making responsibility and contacts[5]. Parenting time is granted to a spouse with a child.

The distinction between custody and access, parenting time and decision-making responsibility has significant ramifications for a parent whose child has been abducted, as the Hague Convention return machinery does not mandate the return of a child for a violation of access rights. High conflict cases that require police intervention continue to use “custody and access terms” for clarity and to secure police assistance. If no order for custody has been granted, the courts nonetheless look at the child’s habitual residence when putting into motion the articles of the Convention.

International child abduction occurs when the mother, father, guardian, or other person having legal custody or charge of a child takes or detains the child outside the country where the child has his or her habitual residence, without legal authorization or the permission of the parent who has sole or shared custody of the child.

In Canada, in the year 2020, 98 children were abducted by a relative. 48 of the children (21 female, 27 male) were the subjects of a parenting order, while the remaining 45 of the children (18 female, 27 male) were not subject to a parenting order.

Applicability

A Hague Convention application may be brought when a child under the age of 16[6] is removed or retained across an international border, away from his or her habitual residence, without the consent of a parent who has rights of custody under the law of the habitual residence, if the two countries are parties to the Convention.

Pursuant to Article 4, the Convention ceases to apply when the child attains the age of 16 years. In the case of *Szabo v. Radi*, AltaQ.B., Action No. FL01-23324, while it was clearly established that the father wrongfully removed his son from Hungary to Canada, and was a fugitive from a prison sentence in that country, the court declined to order the return of the child given that he was turning 16 years of age within a month of the conclusion of the Hague hearing and was adamant that he did not want to be returned to his mother’s care in Hungary.

The Hague Convention is not intended to deal with the merits of a custody decision but to respect the custody decision of a jurisdiction in which the child resided prior to his or her removal, commonly referred to as “Habitual Residence.” The Convention is intended

[5] Articles 16.1 to 16.4 of the Divorce Act.
[6] Article 4.

to deter international child abduction and secure the prompt return of children who are wrongfully removed. The underlying premise of the Hague Convention is to ensure that custody and access rights determined under the laws of another Contracting State are effectively respected. The Convention cannot be used to determine issues of custody, rather it **merely determines the jurisdiction** in which these issues are to be heard; only after a decision is made that the Convention does not apply or that a child should not be returned can the court here decide the merits of rights of custody (Article 16).

Contracting states are directed to use "the most expeditious procedures available" to secure the objects of the Convention (Articles 2 and 11). Accordingly, an application under the Convention is a summary application oral evidence is to be admitted only in "rare exceptional cases"[7]. In most jurisdictions, the parties are not entitled to a full trial. Typically, evidence in presented in affidavit and exhibit form. In Alberta, a full hearing with *viva voce* evidence is granted following a request before the case managing justice that handles incoming Hague cases.

Nevertheless, a trial may be necessary in some cases where there are conflicting affidavits and cross-examinations and where credibility findings must be made[8]. Also, expediency will never trump "fundamental human rights" – where there are serious issues of credibility, fundamental justice requires that those issues be determined on the basis of an oral hearing[9]. The Ontario Court of Appeal has also confirmed that: *"While it is important that applications arising from alleged child abductions move with dispatch, this cannot be done at the expense of justice."*[10]

In *K.F. v. J.F.*, 2022 NLCA 33, the Court of Appeal for Newfoundland and Labrador confirmed the need for expediency but cautioned that it *"should not come at the expense of fairness"*. The Court further noted that *"even timeliness is contextual"* with cases of abduction being arguably more urgent than *"a case where a child has been in a present jurisdiction for an extended period of time with the consent of the applying parent"*.[11]

Where children are lawfully taken to the new State, and prompt return is not effected (e.g. during the period of a consensual stay, or due to the length of the court proceedings), a new *status quo* may be established. In Re M (Abduction: Zimbabwe), [2007] UKHL 55 (at para. 44) – Lady Hale: "The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully

[7] *Cannock v. Fleugel*, 2008 ONCA 758, at paras. 36-37; *C.B. v. B.M.*, 2021 ABCA 266, at paras. 30-31.
[8] *Korutowska–Wooff v. Wooff*, 2004 CanLII 5548 (ON CA), at para. 19.
[9] *AMRI v. KER*, 2011 ONCA 417, at para. 125.
[10] *Geliedan v. Rawdah*, 2020 ONCA 254, at para. 60); see also *Borisovs v. Kubiles*, 2013 ONCJ 85, at para. 53.
[11] *K.F. v. J.F.*, 2022 NLCA 33, para. 47.

removed or retained…*the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.*"

In October 2022, the *Family Law Rules* a new rule was introduced as follows:

> **37.2(2)** For the purposes of subrules 2 (2) and (4), dealing with an international child abduction case justly includes applying these rules with a view to providing 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**.
>
> Prompt disposition
>
> (3) An international child abduction case shall be disposed of promptly, and not later than **six weeks after the case is commenced** if Article 11 of the Convention on the Civil Aspects of International Child Abduction applies to the case.
>
> Case management judge
>
> (4) Wherever possible, a judge shall be assigned at the start of an international child abduction case to manage it and monitor its progress.
>
> First meeting
>
> (5) A first meeting of the parties with a judge shall be held not later than **seven days** after the case is commenced.
>
> […]
>
> (7) At the first meeting, the judge,
>
> (a) shall set a timetable for the service and filing of further materials in the case, as well as a hearing date; and
>
> (b) may make any further order the judge considers necessary.
>
> Hearing
>
> (8) Wherever possible, the hearing of the case shall be by the judge who attends the first meeting.

The Central Authority in each contracting State is required to receive applications for the return of children and for access to children, to attempt to secure the voluntary return of the child, to provide general information about the child and the State's laws, to initiate necessary proceedings for the return of the child, to help secure legal aid to the parties, and to make the necessary administrative arrangements to secure the safe return of the child.

The Convention requires contracting States to designate a Central Authority to discharge duties under Article 7 of the Convention. In Canada a Central Authority has been designated for each province and territory and a federal Central Authority has also been established. For a list of not only Canadian Central Authorities but for those of

other signatory countries, the Hague website is essential.[12] A person claiming that a child has been removed or retained in breach of custody rights may apply to the Central Authority of the child's habitual residence or the Central Authority of any other Contracting State, pursuant to Article 8, for assistance in securing the return of the child.

Articles of the Convention

Article 3: Definition of Wrongful Removal or the Retention of a Child

The Convention applies where there has been a "wrongful removal" or "wrongful retention" of a child. A wrongful removal occurs where a party takes a child from the jurisdiction that is the child's habitual residence typically without any notice to the left behind parent. A wrongful retention occurs when a child is retained outside the habitual residence, beyond a time agreed upon by the parties or set out in a court order.

Article 3 of the Convention states that:

The removal or retention of a child is wrongful where:

> *(a) it is in breach of "rights of custody" attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *(b) at the time of the removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

Article 3 states that "rights of custody" may arise by operation of law or by reason of judicial or administrative decision or a legally binding agreement under the law of the relevant State. It is important to note that the Convention speaks in terms of "rights of custody" which is different from the term "custody" as understood under both Canadian federal and provincial legislation. Article 3 also provides that "rights of custody" may be attributed to an "institution or any other body". Therefore, once litigation has commenced regarding custody of a child, the removal of that child will be found to be "wrongful" as the "rights of custody" flow to the institution, namely the court.

Article 5: Definition of Rights of Custody vs. Rights of Access

"Rights of Custody" are defined in Article 5 as follows:

[12] http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24.

For the purpose of the Convention:

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular the right to determine the child's place of residence:

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The most common scenario is the situation where parents are living together and both are exercising parental care and control of the child and one parent leaves with the child. In most jurisdictions, both parents are equally entitled to custody until the Court orders otherwise or the parties enter into an agreement varying the custody arrangements.

In Canada, prior to 2018, *Thompson v. Thompson*[13] was the leading Supreme Court decision and outlined the situations where the Convention applies as follows:

> *It by no means follows, however, that the Convention applies to every case where a child is removed from one country to another where a court order prohibits it. From the emphasis placed in the Convention and the preparatory work on the enforcement of custody, as distinguished from mere access, the proper view would appear to be that the mandatory return dictated by the Convention is limited to cases where the removal is in violation of the custody rights of a person, institution or other body. That is the view adopted by Anton, supra, at pp. 546 and 554-55, who stated:*
>
> *It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3.*
>
> *The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible.*

In practice, these situations can become quite complex because "rights of custody" are determined in accordance with the law in the originating country. In the actual Hague Application that is sent by the requesting state, the "rights of custody" that have been breached are set out. Most applications also include the corresponding operational law from the requesting state.

[13] [1994] 3S.C.R.551

However, a parent who has removed a child is not precluded from disputing the issue of whether or not "rights of custody" were breached. Sometimes a contrary interpretation of the law is argued based on a legal opinion from a lawyer in the requesting state.

If there is any confusion or dispute as to whether or not there was a breach of "rights of custody" or any other question with respect to the wrongful removal or retention, a declaration may be requested from the requesting state under Article 15 which states:

> *The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.*

In *Thompson v. Thompson*[14], the Court adopted a quote from Lord Donaldson M.R. from the case of C. v. C., with respect to the difference between the term custody and rights of custody:

> *'Custody', as a matter of non-technical English, means 'Safe keeping, protection; charge, care, guardianship' (I take that from the Shorter Oxford English Dictionary); but 'rights of custody' as defined in the convention includes a much more precise meaning, which will, I apprehend, usually be decisive of most applications under the convention. This is 'the right to determine the child's place of residence'. This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention. I add for completeness that a 'right to determine the child's place of residence' (using the phrase in the convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, e.g. 'within the Commonwealth of Australia'.*

Although few Canadian decisions on this topic exist, in 2019,[15] a father's application for the return of the children to the UK was dismissed by the court given that during the two years following the *de facto* separation of the parties, the father was unable to demonstrate that he was exercising parental responsibility rights:

[14] Supra, footnote 18.
[15] *Ajadi v. Ayeni*, 2019 ONCJ 659.

[82] Considering the above and the evidence that was filed, I find that Mr. Ajadi has not met the low threshold and was not exercising parental responsibility/custody at the time that the children were removed from the United Kingdom. He was an access parent.

The aforementioned decision is based on the following:

[76] Further, the court clearly indicates that the Convention does not give preference to a primary caregiver "in protection of custodial rights." In other words, as I understand this comment, although Ms. Ayeni and the children lived together and separate from Mr. Ajadi for some two years and as such the primary caregiving of the children, as she claims, rested with her, this in itself does not trump Mr. Ajadi's custody rights as it applies to the Convention. It is not about quantity but in this case how Mr. Ajadi exercised "parental responsibility" rights in any way.

[79] As I have found, there is custodial rights to both the mother and father as they both have under the UK law parental responsibility. However, the issue now is whether that was being exercised by Mr. Ajadi, as he is claiming the removal impacts what he was doing actively regarding parental responsibility.

[80] This actual doing of Parental Responsibility, if I can put it in this fashion, is important as this right is not something to put on a shelf, but rather it needs to be alive in a meaningful way for children. I state this as the drafters of the Convention have used the word "exercise" in the Convention and they must have considered the need for active use of one's legal custodial/ "parental responsibility" rights to children.

Black's Law Dictionary, tenth edition, provides the following definition of exercise:

1- to make use of; to put into action.

The decision was not appealed.

Exceptions

Most of the litigation in Hague Convention cases is a result of a party submitting that the Convention should not apply as the facts fall within one of the exceptions to the mandatory return policy.

The burden is on the parent who opposes the return to establish the defense by "a preponderance of the evidence." This burden applies to all the defenses except that of Grave Risk of Harm outlined at Article 13 (b) of the Convention. It has generally been accepted that the exceptions should be stringently applied so as to not undermine the

goals of the Convention by looking for ways to prevent its application other than those set out in the Convention itself.

Article 12

Article 12: The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment.

If more than one year has elapsed from the date of the alleged wrongful removal or retention and the child is now settled in the new environment the court is not mandated to return the child. In *Mauna v. Astorga*,[16] the court states the following:

> *It is the interpretation of Article 12 that is at issue before this court. In order for Mr. Mauna to have validly filed his March 1, 2011 application in less than one year, he would have had to have been aware that the children had been wrongfully retained in Canada on March 2, 2010 or later: Thomson v Thomson, [1994] 3 SCR 551, 119 DLR (4th) 253 at para 83, M.(V.B.) v. J.(D.L.), 2004 NLCA 56, [2004] 240 Nfld & PEIR 147; Blanc v Morgan, 2010 WL 2696 791 at para 10 (US Dist Ct, Tennessee); Hamel-Smith v Gonsalves, 2000 ABQB 269, 185 DLR (4th) 713 at para 39; Lozinska v Bielawski (1998), 56 OTC 59 at para 5 (Ont HC) (QL); Astudillo v Bayas, (1997), 28 OTC 389 at para 6 (Ont HC) (QL).*

This recognizes that the interests of the child in not being uprooted from their current environment may be such that they override the need to protect the child from abduction[17]. Article 12 requires "...a highly "child-centric" factual inquiry aimed at determining the actual circumstances of the child at the time of the hearing."[18]

The starting point of the one-year period begins from the moment the child is wrongfully removed or when the child has been wrongfully retained. It should also be noted that an application under the Convention does not require that the exact location of the child in the destination country has been determined. It is critical to file the Application for Return in the requested state to avoid missing this important limitation under Article 12 of the Convention.

Note that an abducting parent does not necessarily profit by running out the clock, since both American courts and other Convention signatories have considered concealment as a factor in determining whether a child is settled.[19]

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[16] [2011] A.J. No. 464 (AltaQ.B.).
[17] *Kubera v. Kubera*, 2010 BCCA 118, at paras. 37-38.
[18] *AMRI v. KER*, 2011 ONCA 417, at paras. 102-107.
[19] *Lozano v. Alvarez*, 572 U.S. (2014) (USSC), at pp. 13–15; see also *Kubera*, at para. 64.

Article 13(1)(a): The Parent Seeking Return Was Not Exercising Custody

If the applicant parent was not actually exercising his or her custody rights at the time of removal or retention, the court may refuse to order the return of the child under the Hague Convention. Exercising custody rights is a matter of fact in each case. Unfortunately, in most provinces these cases generally proceed by affidavit evidence and the burden is on the parent opposing the return and this may be difficult to prove.

In *Medina v. Pallett*[20], the Court refers to a passage of the US Friedrich judgment which defines the failure to exercise custody, as follows:

In Friedrich, the Court stated:

> *[I]f a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear an unequivocal abandonment of the child. [Emphasis added.]*

Article 13(1)(a): The Parent Seeking Return Consented to the Removal or Retention

In *Katsigiannis v. Kottick-Katsigiannis*[21], the Ontario Court of Appeal explained the meaning of "consent" and "acquiescence" as used in Article 13(a) of the Hague Convention:

> *[46] The words "consent" and "acquiescence" as used in Article 13(a) of the Hague Convention should, in my view, be given their ordinary meaning so that they will be consistently interpreted by courts of Hague Convention contracting states. In any case, I can see no logical reason not to give those words their plain, ordinary meaning.*
>
> *[47] "Consent" and "acquiescence" are related words. "To consent" is to agree to something, such as the removal of children from their habitual residence. "To acquiesce" is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.*
>
> *[48] Subject to this observation, I agree with Lord Brown- Wilkinson's approach and analysis in In re H, supra. When Lord Brown-Wilkinson said that "[a]cquiescence is a question of the actual subjective intention of the wronged parent, not the outside world's perception of his intentions", he was, it seems to me, really speaking of the wronged parent's consent to a child's removal or retention based on evidence falling short of actual stated consent. That is what*

[20] 2010 BCSC 259.
[21] 2001 CanLII 24075 (ON CA), 2001 CarswellOnt 2909.

> *acquiescence is -- subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention.*

The test for acquiescence is subjective on the part of the left behind parent. The length of time that must pass before acquiescence will be found, will depend on the circumstances of each case. To be successful in arguing the exception at Article 13(a), there must be "clear and cogent evidence of unequivocal consent or acquiescence".

Article 13(1)(b): There Is Grave Risk That Return Would Expose the Child to Physical or Psychological Harm or Place the Child in an Intolerable Situation

This exception is the most frequently argued. There must be evidence to establish that "there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". The burden to establish this defense is higher than the typical evidentiary burden of "balance of probabilities" or "a preponderance of the evidence", which falls upon the left behind parent. This defense requires "clear and convincing evidence."[22]

The Supreme Court of Canada in *Thompson v. Thompson,* adopted the following test with respect to the "grave risk of harm" exception:

> *It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation. Examples of cases that have come to this conclusion are: Gsponer v. Johnstone (1988), 12 Fam. L.R. 755 (Fam. Ct. Aust. (Full Ct.)); Re A. (A Minor) (Abduction), [1988] 1 F.L.R. 365 (Eng. C.A.); Re A. and another (Minors) (Abduction: Acquiescence), [1992] 1 All E.R. 929 (C.A.); Re L. (Child Abduction) (Psychological Harm), [1993] 2 F.L.R. 401 (Eng. H.C. (Fam. Div.)); Re N. (Minors) (Abduction), [1991] 1 F.L.R. 413 (Eng. H.C. (Fam. Div.)); Director-General of Family and Community Services v. Davis (1990), 14 Fam. L.R. 381 (Fam. Ct. Aust. (Full Ct.)); and C. v. C., supra. In Re A. (A Minor) (Abduction), supra, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:*
>
> *. . . the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one,*

[22] Husid v. Daviau [2012] O.J. No. 380 at para. 104.

> *but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words `or otherwise place the child in an intolerable situation'.*
>
> *I hasten to add, however, that I do not accept Twaddle J.A.'s assessment that the risk contemplated by the Convention must come from a cause related to the return of the child to the other parent and not merely from the removal of the child from his present caregiver. As this Court stated in Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, from a child centred perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it would be irrelevant from whence it came. I should observe, however, that it would only be in the rarest of cases that the effects of "settling in" to the abductor's environment would constitute the level of harm contemplated by the Convention. By stating that before one year has elapsed the rule is that the child must be returned forthwith, Article 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender. Even after the expiration of one year, return must be ordered unless, in the words of the Convention, "it is demonstrated that the child is now settled in its new environment".*

The Court of Appeal for Ontario in *Jabbaz* v. *Mouamman*[23] further elaborated and defined the phrase "intolerable situation" as "an extreme situation that is unbearable; a situation too severe to be endured."

There is a presumption that the courts of a child's habitual residence will be able to make arrangements in order to protect the child from harm if said child is returned. It is incumbent upon the parent who wrongfully removed or retained the child to establish that such arrangements will not be effective or cannot be made in the child's state of habitual residence[24].

In a recent decision, *Sabeahat v. Sabihat*[25], the Honourable Justice Emery of the Ontario Superior Court of Justice, dismissed the father's requests to repatriate the children to Israel as it concluded that the mother demonstrated that there was a grave risk that the return would expose the children to physical and psychological harm. The court explains the following:

> *[105] Article 13(b) does not require the court to make a finding of wrongdoing against the parent requesting the return of the children. Article 13 (b) only requires that the grave risk anticipated will expose the children to harm of a physical or psychological nature in the requesting State. This risk of harm must be real, whether or not the parent in the requesting State is the source of that*

[23] 2003 CanLII 37565 (ON CA), 38 R.F.L. (5th) 103, at para 23. See also *Ireland v. Ireland*, 2011 ONCA 623, at para. 48; *Ellis v. Wentzell-Ellis*, 2010 ONCA 347, at para. 50; and *Finizio v. Scoppio-Finizio*, 1999 CanLII 1722 (ON CA), at para. 34.
[24] *WDN v OA*, 2019 ONCJ 926.
[25] 2020 ONSC 2784.

> *risk. It must be shown that the change would place the child in a situation beyond what the court would consider appropriate for that child to tolerate. This would include exposing the child either to physical harm, or to psychological harm that would be considered intolerable in the circumstances relevant to that child*[26]*.*

Despite the mother having obtained a protection order from the Israeli Family Court, the mother proved to the court that the Israeli Police was unable to protect her and the children. The court recognized that the there was a grave risk of harm to the mother if she was to return to Israel with the children, which in turn represented a grave risk of the children suffering psychological harm warranting the application of the exception of Article 13 (b) of the Convention.

In *WDN v OA*[27], the court comes to a finding of fact that the mother was the victim of physical and sexual abuse by the father, witnessed on occasion by the older children. The mother, in fear of being deported, did not report these assaults to the police. The court concluded that the state of Michigan could not protect the mother or the children given the mother's vulnerable immigration status. The court opines that had the children been returned to Michigan without the mother's protection, they would ultimately be placed with a physically and verbally abusive father or otherwise, in foster care. Given the particular circumstances, the court refused to return the children to Michigan in accordance to Article 13 (b) of the Convention.

The Alberta Court of Appeal on April 5, 2023, stated about proving grave risk of harm:

> *This has been interpreted to mean a "weighty" risk of "substantial" psychological harm "to a degree that also amounts to an intolerable situation";* ***Thomson v. Thomson,*** [1994] 3 SCR 551 [***Thomson***] at 596-597. Otherwise stated, this defence to automatic return will be met only in "situations that an individual child should not be expected to tolerate"; ***F v N,*** 2022 SCC 51 [***F v N***] at para 73. It is a high threshold: ***Ellis v. Wentzell-Ellis,*** 2010 ONCA 347 at para 37…..the Court [***SCC in F v N***] was unanimous that separating a child from their primary caregiver does not in itself meet the harm threshold; it is dependent upon individual circumstances: paras 78-80 (per Kasirer J), para 178 (per Jamal J). As the majority in ***F v N*** noted at para 78, "courts should be prepared, in some circumstances, to order the return of the children despite a risk of separation from their primary caregiver".[28]

[26] Ibid.
[27] Supra, footnote 24.
[28] *Osaloni v. Osaloni*, 2023 ABCA 116 at paras. 12 and 15.

The Nova Scotia Court of Appeal found that there may be a risk of psychological harm to a child even where their fear of physical harm may not be warranted. *"If the child's fear is not justified in fact, but is nonetheless real to the child, it is relevant to the risk of psychological harm which a return order may create."*[29]

In *AMRI v KER,*[30], the Court of Appeal of Ontario stated that a "child's refugee status gave rise to a rebuttable presumption that her return to Mexico [the habitual residence] would expose her to a risk of persecution and, hence, to risk of harm within the meaning of Article 13(b) of the Hague Convention".[31]

The case discussed the interplay between Canada's international obligations under the Hague Convention on the one hand, and the protective provisions of the Refugee Convention on the other. While acknowledging that neither Convention refugee status, nor a claim for such status displaces Canada's obligations under the Hague Convention, the court also held that:

> *While several cases have confirmed, correctly, that neither Convention refugee status nor a claim for such status displaces Canada's obligations under the Hague Convention, none holds that Canada's non-refoulement obligations are irreconcilable with its obligations under the Hague Convention.*[32]

After analyzing the former interplay with Canada's obligations, and ruling that a rebuttable presumption arose in the case where the child has been granted refugee status, the court went on to say:

> *[…] on an application for the return of a refugee child under the Hague Convention, the child's s. 7 Charter rights mandate that a risk assessment be performed regarding the existence and extent of any persisting risk of persecution to be faced by the child on return from Canada to another country.*[33]

The risk assessment would aid in the ultimate decision of the court. The Court thus made its findings not on the mere grant of the refugee status, but on the evidence that was submitted and considered in the granting of the refugee status.[34]

In an American decision, *Sanchez v. R. G. L.* 761 F.3d 495; 2014 U.S. App. LEXIS 14849, the Court of Appeal discussed, "whether the children's asylum grant should be

[29] *JEA v. CLM*, 2002 NSCA 127, at para. 47.
[30] *AMRI v KER,* 2011 ONCA 417, para. 94.
[31] Ibid at para 94.
[32] ibid at para. 79.
[33] ibid at para. 99.
[34] See also *Borisovs v Kubiles*, 2013 ONCJ 85; *Sabeahat v. Sabihat*, 2020 ONSC 2784.

considered by the district court"[35] in determining whether the children should be returned to their habitual residence. In its amicus brief, the Government advanced the position that a grant of asylum is not dispositive of, but is relevant, to whether either the Article 13(b) or 20 exception applies.[36] The Court of Appeal ruled that "the asylum grant does not supersede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security…."[37] Since the asylum finding had not been made until *after* the District Court's hearing, the Court of Appeal remanded the case back to the District Court for reconsideration of whether the Article 13(b) or 20 exception applies. Reconsideration was ordered in light of the grant of asylum, which was new evidence not considered by the district court in its initial hearing. Since the children had now been granted asylum, all available evidence from that proceeding was to be considered by the district court before determining whether to enforce the return order. The mother, who had filed the initial petition for return, eventually withdrew her request for the return of the children, and the question of return became moot at the re-hearing[38].

On June 15, 2022, the United States Supreme Court, unanimously, decided in *Golan v. Saada,* that a court is not categorically required to examine all possible ameliorative measures before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm. Justice Sotomayor, for the court outlined the facts. Golan, a citizen of the US, married Saada, an Italian citizen. They had a 6-year-old son in Italy where they lived after marriage. The relationship was marred with fighting on an almost daily basis, with Saada being physically violent with his wife Golan, and on one occasion threatening to kill her, in the presence of Golan's family. Much of this occurred in front of their son. Golan flew with her son to the US to attend her brother's wedding, and rather than return moved into a domestic violence shelter. Upon the father Saada's Hague Application, the Court made several key statements when reversing the lower courts. For example, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives. Also, a court may decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse would be such an example. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed. The court further indicated that, "A requirement to 'examine the full range of options that might make possible the safe return of a

[35] *Sanchez v. R. G. L.* 761 F.3d 495 (2014) at pg 12.
[36] Ibid.
[37] ibid
[38] *Sanchez v. Sanchez* 2015 U.S. Dist. LEXIS 68682.

child"…is in tension with this focus on expeditious resolution." Justice Sotomayor ordered the case remanded to the district court to apply the correct legal standard.

A rebuttable presumption against return arises under Article 13(b) in situations where a child has been found to be a Convention refugee. However, while the granting of asylum is important for the Hague Convention hearing, it is not dispositive of the case. The evidentiary burdens in the asylum proceedings are different, and often lower than the evidentiary burden under the Hague Convention. The prior consideration of a risk of harm in a different forum is relevant; however, it does not abdicate the trial court's duty to make controlling findings on the potential "grave risk of harm" to the child.

Article 13(2): The Child Objects to Being Returned and Has Attained an Age and Degree of Maturity at Which It Is Appropriate to Take Account of Its Views

It is important to note that no age limit is included in the Convention leaving the decision to the individual judge to determine whether or not a child has the maturity at which it is appropriate to take into account his or her views. Given that it is a factually based decision involving the judge's discretion, each case shall vary.

This is a stand-alone defence to the return of the child under the Convention and need not be connected with an assertion of grave risk of harm under Art. 13(b).[39]

However, a finding that the child objects to being returned under this Article can give rise to a finding of harm under Art. 13(b) where the child's objections are sufficiently strong to give rise to a grave risk of harm if the child is returned against his/her will.[40]

It is becoming more common to have the court appoint counsel for the child. In fact, both parents do not have to be in the jurisdiction to be interviewed, and in recent cases the interviewing psychologist has been able to speak to the left behind parent by telephone or other electronic means.

In *Cormier v. Borsk*[41]*,* despite the party's admission to the fact that the children, 10 and 14 years old, were habitually resident in Michigan, the Ontario Court of Justice ordered the mandatory return of the youngest child only and the request for the return of the 14 year old was dismissed pursuant to Article 13(2) of the Convention:

> *[47] But there is a stark difference between the children with respect to the nature and strength of their objection to being returned to Michigan.*

[39] *JEA v. CLM*, 2002 NSCA 127, [2002] NSJ No 446, at para. 46.
[40] *Ryding v. Turvey*, [1998] NZFLR 337 (FC), at para. 131; *Cormier v Borsk*, 2019 ONCJ 889, at para. 67.
[41] *Cormier v. Borsk*, 2019 ONCJ 889.

> *[48] The older child's objection is substantial and relates to serious psychological and educational factors. He has clearly and consistently expressed his concerns, mainly about the way his Michigan school treats him as a transgender youth, to both of his parents, to Justice for Children and Youth, to the Office of the Children's Lawyer, and to his Michigan therapist. His concerns did not emerge only after he was retained in Ontario, they are long standing. They were stated to his Michigan therapist over a period of almost a year.*
>
> *[49] In addition to gender dysphoria, he also suffers from emotional dysregulation, Attention Deficit Disorder, anxiety and depression, and takes medication for the latter. It is not disputed that he has engaged in self-harming behaviour, and with much greater frequency in Michigan than in Toronto. He has threatened suicide if returned to Michigan and his own therapist testified that he is impulsive enough to carry out that threat and consequently that he should be monitored 24 hours a day, or even hospitalized if necessary, if returned to Michigan.*
>
> *[50] I find, however, that the younger child's objection does not meet the test of being substantial. While he also suffers from anxiety and depression there was no medical evidence regarding any negative impact of a return.*

The court reiterates that the analysis and decision to refuse to return a child must be evaluated individually, even amongst siblings, and quotes the Manitoba Court of Appeal in *Chalkley v. Chalkley*[42]:

> *[57] The Manitoba Court of Appeal found as follows:*
>
> > *Article 13 of the Hague Convention speaks of the "child" who is the subject of an application for return. It does not speak of "children" or "siblings." The provisions of the legislation are to be applied separately and distinctly to each child who is wrongfully removed from his or her country of origin. The evidence to be considered is the evidence relevant to that child and the risk to that child, not the evidence as it relates to a sibling or other family member. That is not to say a court should ignore evidence of the possible adverse effect on each individual child who is the subject of an application under the Hague Convention of treating siblings differently.*[43]

The Courts have returned children in cases where the reasons behind the child's objection to return were not found to be substantial and the following constitute a few examples[44]:

[42] *Chalkley v. Chalkley*, [1995] M.J. No. 21 at para 10; leave to appeal to the SCC denied: *Chalkley v. Chalkley* (SCC), [1995] SCCA No 33.
[43] Supra, footnote 39.
[44] Ibid, para. 40.

(a) The Application judge in Balev found that while the children in that case (age 9 and 12) were of an age and level of maturity such that it would be appropriate to take account of their views; however, she found their views did not have the requisite strength of feeling, amounting more to a preference for Canada over Germany, rather than an objection to returning to Germany. The Supreme Court specifically noted that it did not overturn those findings of the Application judge in its final decision. The Application judge concluded that the threshold for a court to refuse to return based on a child's objection is high.

(b) The court ordered the return of a 13-year-old who strongly objected to returning to Israel, citing concerns the child was caught up in the vortex of a custody battle. See *Toiber v. Toiber,* [2005] O.J. No. 6139 (Ont. S.C.J.) upheld on appeal 2006 CanLII 9407 (ON CA), [2006] O.J. No. 1191 (Ont. C. A.).

(c) The court ordered the return of a 12-year-old boy to Brazil who objected to the return, citing that he was fearful of his father and preferred his life in Canada. See *Vieira v. Dos Santos Trillo*, 2016 ONSC 8050.

(d) The Alberta Court of Appeal, upheld a decision of the trial judge ordering the return of the three children (the older two of which were 10 and 14) to Holland, despite their objection, noting, "But to give effect to their feelings, though understandable, would undercut the fundamental objective of the Hague Convention… lead to other parents' abducting and relying on children's "contentment" to avoid being returned." See *Den Ouden v. Laframboise*, [2006] A.J. No. 1605.

The following are examples of cases in which the trial judges accept the child's objection and refused to return the child to his or her habitual residence[45]:

(a) The court refused to return an 11-year-old child to England where the child's objections were based on parental misconduct; namely, the father traffics in and uses non-medically prescribed drugs; drinks alcohol to excess; used physical discipline on more than one occasion. See *Wilson v. Challis and Challis*, 1992 CanLII 6301 (ON CJ), [1992] O.J. No. 563 (Ont. Prov. Div.).

(b) The court upheld the trial judge's refusal to return a 10-year-old child to Israel because the child's objections were based on his religious and cultural background and his concerns about being returned to a certain part of Israel. See *R.M. v. J.S.,* [2012] A.J. No. 1148 (Alta Ct. of Queen's Bench). One of the

[45] Ibid, para. 41.

authors was counsel for the child and recommended that the child's objection to return be upheld. The Queen's Bench decision was successfully appealed by the mother, on the basis that counsel for the child cannot be both advocate and make submissions on behalf of the child. Such submissions should be made by an expert, such as a psychologist or social worker, who can be cross-examined. See *R.M. v. J.S.,* [2013] A.j. No. 1390 (Alta. Court of Appeal).

(c) The court upheld the trial's judge's refusal to return a 9-year-old child to France because the child's objections were based on educational concerns. There was evidence of serious psychological problems manifesting as speech difficulties in her French language school, that necessitated a change to an English school in the U.K. See *Re S.,* [1993] Fam. 242 (Eng. C.A.).

(d) The court refused to return a 14-year-old child to South Africa as the child's objection was based on his safety in South Africa. See Erhardt v. Meyer, 2018 ABQB 333.

(e) The court refused to return a 15-year-old to Connecticut because her objection was based on her being teased and bullied at her school in Connecticut because of her sexuality. See *C.C. v. D.R*., 2018 BCSC 176.

Article 20 : The Return of the Child Would Not Be Permitted By Fundamental Human Rights and Fundamental Freedoms of the Requested State

Article 20 of the Convention reads as follows:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

This provision was intended to deal with the rare occasion when the return of the child would utterly shock the conscience of the court or offend all notions of due process. Few cases invoke this exception. In fact, where it has been claimed, the court has often preferred to deal with the matter under Article 13(b) – e.g. *Droit de la famille – 102375*, 2010 QCCS 4390 (QSC).

In *Borisovs v. Kubiles*,[46] the Ontario Court of Justice stated as follows:

> *In the case at bar, the applicant is the perpetrator of the abuse which has resulted in the child's presence in Canada. The respondent and child would face a risk of serious harm in Latvia. State protection would not be reasonably*

[46] Borisovs v. Kubiles, [2013] O.J. No. 863.

> *forthcoming. Ordering the child's return in these circumstances is not permitted by fundamental Canadian principles relating to the protection of human rights and fundamental freedoms. The exception under Article 20 has been established.*

This exception is regularly argued alongside the exception of grave risk of harm outlined at Article 13 al. 1 (b) of the Convention. In both *Sabeahat v. Sabihat and AMRI v KER,* the decision to refuse the return of the children was also based on Article 20 of the Convention and these are the only two (2) reported Canadian cases which were successful. However, there is no reported case in the United States in which a court did not return a child to the habitual residence based on Article 20.

Habitual Residence

Habitual residence is a threshold issue – if the child was not habitually resident in the former country, the Hague Convention does not apply. Accordingly, courts must **first** determine where the child was "habitually resident" immediately prior to the date of the alleged wrongful removal or retention and then determine if the relocation was in violation of custody laws of that country.[47]

However, there is no definition of habitual residence in the Convention. This appears to have been a deliberate decision.

The concept of "habitual residence" refers to that place that is the focus of the child's life, where the child's day-to-day existence is centered and this is a factual determination. A finding of a child's habitual residence can be determinative in a case. If the child is already located in the country of its habitual residence, then the Convention does not apply and the child would not be mandated to be returned to another jurisdiction.

Given the ambiguity surrounding the concept of habitual residence, the Courts in the United States of America, Europe[48] and throughout Canada had developed three primary but divergent approaches to determine the "habitual residence" of a child in the context of the Hague Convention: the parental intention, the child centered approach and the hybrid approach.

The first approach focuses primarily on parental intention. The parents "last mutual intention" regarding their child's habitual residence is presumed to be controlling, although the presumption can be rebutted in exceptional cases.

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[47] Article 3; *OCL v. Balev*, 2018 SCC 16, at para. 43; *Ludwig v. Ludwig*, 2019 ONCA 680, at paras. 24-25, 40.

[48] The leading legal database on International child Abduction Law can be found at: https://www.incadat.com/fr.

The second approach is the “child centered approach.”, where a child’s habitual residence is determined based on the child’s acclimatization in a given country. Here the courts look exclusively at the child’s objective circumstances and past experiences. The inquiry does not consider parental intent which is deemed entirely irrelevant in determining the child’s habitual residence.

The third approach is the hybrid approach, which requires a mixed inquiry into both the child’s circumstances and the shared intentions of the child’s parents. The child’s habitual residence is determined based on all relevant considerations arising from the facts of the case at hand, and where no single consideration is determinative.

Since April 20, 2018 following the decision of the Supreme Court in *Balev*, the hybrid approach is now standard practice in Canada.

OCL v. BALEV

Balev changed the law in Canada for matters under the Hague Convention. The decision was written by the Honourable Chief Justice Beverley McLaughlin with a dissent by the Honourable Justices Moldaver, Côté and Rowe[49].

Summary of the Case

The parties were married in Ontario in 2000 and moved to Germany in 2001. They became permanent residents there and had two children, but later separated. Both children were born in Germany and attended school in Germany. Due to their children's difficulties in school, the parents had decided that the mother would take them to Canada for 16 months in the hope that their results would improve. The father gave his consent for a 16-month stay, namely from April 2013 to August 2014 in a letter in which he agreed to temporarily transfer physical custody of the children to the mother during said period. In March 2014, the father suspected that the mother would not return the children to Germany at the end of the school year. He therefore purported to revoke his consent and resumed custody proceedings in Germany. In April 2014, he also commenced a return application under the 1980 Hague Child Abduction Convention through the German Central Authority. In June 2014 he commenced an application for the return of the children before the Ontario Superior Court of Justice, which the mother opposed. Both children objected to their return to Germany.

The application judge concluded that the intention of the parents was the most important element and that the children’s habitual residence was in Germany. The

[49] 2018 SCC 16 (CANLII), [2018] 1 SCR 398.

application judge determined that the children had been wrongfully retained and their objection did not meet the threshold of Article 13 (2) of the Convention. Consequently, the application judge ordered their return of the children to Germany.

Her decision was overturned by the Divisional Court, which found that the children's habitual residence had changed from Germany to Ontario during their 16-month stay in Canada, using the child centered approached. The Divisional Court's decision was thereafter overturned by the Ontario Court of Appeal, which found that the children had retained their German habitual residence and restored the return order of the application judge.

The children were returned to Germany on October 15, 2016 (a day after a notice of application for leave to appeal had been filed with the Supreme Court of Canada). Shortly after the children's return to Germany, the German courts awarded sole custody to the mother. In April 2017, the children and the mother had returned to Canada. Although the appeal was moot, the Supreme Court of Canada granted the application for leave to appeal on April 27, 2017 as the issues raised were deemed to be important and the law in need of clarification.

Approaches for the Determination of Habitual Residence

The parties and the intervenors in the case offered three possible approaches in determining a child's habitual residence. The main question before the Supreme Court of Canada dealt with the establishment of the habitual residence.

The *parental intention* approach:	This approach determines the place of habitual residence of the child based on the intention of the parents authorized to decide where the child lives. This is the approach retained by the dissenting judges.
The *child-centered* approach:	This approach depends on the acclimatization of the child in the country, so the intention of the parents does not really matter. It focuses retrospectively on the ties the child has established with the state.
The *hybrid* approach:	In this approach, the court is called upon to determine the place of habitual residence by considering all relevant considerations in light of the particular facts of the case.

The majority of the Supreme Court of Canada adopted the “hybrid approach” in determining the habitual residence under Article 3 of the Convention, and a non-technical approach to considering a child’s objection to removal under Article 13(2) of the Convention. Since the appeal was moot, the court did not determine the habitual residence of the children or rule on whether the return should be ordered.

The hybrid approach, which the court described as a fact-bound enquiry with no legal test and a list of relevant factors that is not closed. These factors notably include the duration, regularity, conditions and reasons for the child’s stay in the territory of a Contracting State, and the child’s nationality. They explained that in determining habitual residence, judges must look at the entirety of the child’s situation and consider all relevant links and circumstances – the child’s links to and circumstances in country A; the circumstances of the child’s move from country A to country B; and the child’s links to and circumstances in country B.

The hybrid approach was chosen mainly for two reasons. Firstly, the principle of harmonization supported it; they found that there was a trend towards the hybrid approach in international cases dealing with the Convention and that there was no reason not to follow that trend. The brings Canada in line with the evolving approaches in the EU, the UK, Australia and New Zealand. Note that conflicting appellate approaches in the U.S. have now been harmonized consistent with *Balev* as a result of the USSC decision in *Monasky v. Taglieri*, 589 U.S. (2020). Secondly, it best conformed to the text, structure, and purpose of the Convention.

The majority referred to the rules of interpretation of the Vienna Convention on the Law of Treaties (specifically Articles 31(1) and 31(3)(b)) and elaborated on the principle of harmonization. The purpose of the 1980 Hague Child Abduction Convention is to establish procedures common to all Contracting States to ensure the prompt return of children. To support this harmonization objective, courts applying the Convention must give serious consideration to how it is interpreted and applied by courts in other Contracting States. By adopting the interpretation that has gained the most support internationally – unless there are strong reasons not to do so, the courts will ensure uniformity across the globe.

The majority also held that for the purposes of assessing the interpretative issues raised by the parties, there was no conflict between the 1980 Hague Child Abduction Convention and the Convention on the Rights of the Child. Both instruments seek to protect the best interests of children, protect the child’s identity and family relations, and prevent the illicit transfer and retention of children. Furthermore, both the majority and

the dissenting judges accept the principle that a child of sufficient maturity should have a say in where the child lives.

Criteria Outlined by the Court

As stated by the Supreme Court of Canada in Balev[50], the court is to consider all relevant considerations arising from the facts of each case:

> *[43] On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life — "the family and social environment in which its life has developed" — immediately prior to the removal or retention: Pérez-Vera, at p. 428; see also Jackson v. Graczyk (2006), 2006 CanLII 52861 (ON SC), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. The judge considers all relevant links and circumstances — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.*
>
> *[44] Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality: Mercredi v. Chaffe, C-497/10, [2010] E.C.R. I-14358, at para. 56. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances: see Droit de la famille — 17622, at para. 30. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": O.L. v. P.Q. (2017), C-111/17 (C.J.E.U.), at para. 45.*
>
> *[45] The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children: see Mercredi, at paras. 55-56; A. v. A. (Children: Habitual Residence), [2013] UKSC 60, [2014] A.C. 1, at para. 54; L.K., at paras. 20 and 26-27. However, recent cases caution against over-reliance on parental intention. The Court of Justice of the European Union stated in O.L. that parental intention "can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence": para. 46. It "cannot as a general rule by itself be crucial to the determination of the habitual residence of a child . . . but constitutes an 'indicator' capable of complementing a body of other consistent evidence": para.*

[50] Supra, See note 19.

> *47. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": para. 48.*

As explained by the court, no criterion is determinative in itself. In summary, it is incumbent upon the Courts to analyze the file pursuant to the following criteria:

(a) Family environment;
(b) Social environment;
(c) Child's ties to country A;
(d) Situation of the child in country A;
(e) The circumstances of the movement of the child from country A to country B;
(f) Child's ties to country B;
(g) Status of the child in country B;
(h) The duration, regularity, conditions and reasons for the child's stay in country B;
(i) The nationality of the child;
(j) The situation of the parents and their intentions;
(k) Babies and toddlers vs. older children;

The above criteria are applied in accordance to the proof and evidence put forward by the parties. The weight given to each criterion is dependent on the specific facts of each case:

> *[46] It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal: see In re R. (Children), [2015] UKSC 35, [2016] A.C. 76, at para. 17; see also A. v. A., at paras. 39-40.*
>
> *[47] The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013), at p. 746. It requires the application judge to look to the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation "to overlay the factual concept of habitual residence with legal constructs" must be resisted: A. v. A., at paras. 37-39.*

Since the decision of *Balev*, the Canadian courts have respected the hybrid approach while weighting the particular circumstances of each case. The decision of Balev has been cited over 150 times.

Canadian Caselaw since Balev

In the year 2020, there were 18 reported cases citing Balev: 14 from Ontario, 2 from British Columbia, 1 from Manitoba, 4 from New-Brunswick, and 6 from Newfoundland[51]. The involved countries were France, Poland, United States of America, United Arab Emirates, Australia, Israel, Germany, New Zealand, Hong Kong. The rulings are as follows:

- Four (4) decisions determined that the child(ren) habitual residence was in Canada;
- Two (2) decisions ordered the return to the child(ren) to the United States of America;
- In two (2) decisions, the parents had acquiesced that the child(ren) remain in Canada.
- Two (2) decisions refused the return of the child(ren) based on the exception of Article 13 (b) of the Convention;
- One (1) decision ordered the return of the child(ren) to United Arab Emirates;
- One (1) decision ordered the return of the child(ren) to New Zealand;
- One (1) decision ordered the return of the child(ren) to Poland.
- One (1) decision overturned the decision to return the child(ren) to the United Arab Emirates.

In the year 2022, there was 10 reported cases citing Balev, 3 from Ontario, 1 from Newfoundland and Labrador, 2 from Alberta, 2 from Manitoba and 2 from British-Columbia[52]. The involved countries were Mexico, United States of America, Russia, Italy, Germany and Costa Rica. The rulings are as follows:

- Three of the cases found the habitual residence of the child(ren) were in Canada;

[51] *N. v. F.,* 2020 ONSC 7789 (CanLII), *Kung v Tang*, 2020 BCSC 2155 (CanLII), *Medic v. Medic*, 2020 ONSC 6447 (CanLII), *Rainey v. Summers*, 2020 ONSC 6165 (CanLII), Bakker v Bakker, 2020 BCSC 1620 (CanLII), *Muense v. Muense,* 2020 MBQB 105 (CanLII), *Al-Hadad v. Al Harash*, 2020 ONCJ 269 (CanLII), *A.M. v. A.K.,* 2020 ONSC 3422 (CanLII), *Stefanska v. Chyzynski,* 2020 ONSC 3048 (CanLII), *Sabeahat v. Sabihat*, 2020 ONSC 2784 (CanLII), *Geliedan v. Rawdah*, 2020 ONCA 254 (CanLII), Neshkiwe v. Hare [2020] O.J. No. 1250, *J.M. v. I.L.,* 2020 NBCA 14 (CanLII), *R.K. v. M.A.,* 2020 ONSC 1465 (CanLII), M.A.A. v. D.E.M.E. [2020] O.J. No. 839, M.L. v. G.M.D. [2020] N.J. No. 29, *Farsi v. Da Rocha*, 2020 ONCA 92 (CanLII), Yunus v. Mohammed [2020] O.J. No. 6162,

[52] *Routley v. Palomera,* 2022 ONSC 3557 (CanLII), *K.F. v J.F,* 2022 NLCA 33 (CanLII), *Iron v Zagorodnyaya*, 2022 ABQB 323 (CanLII), *DY v KY*, 2022 ABCA 90 (CanLII), *Singh v. Kaur,* 2022 MBQB 46 (CanLII), *Viltman v Borovskaia,* 2022 BCSC 381 (CanLII), *Kommineni v. Guggilam*, 2022 ONCJ 66 (CanLII), *Campbell v. Misener*, 2022 ONSC 590 (CanLII), *Gadea v. Rath,* 2022 MBQB 5 (CanLII), *N.A.G. v B.E.G*, 2022 BCSC 179 (CanLII)

- Two (2) decisions ordered the return of the child(ren) Canada;
- One (1) decision ordered the return of the child(ren) to Russia
- One (1) decision ordered the return of the child(ren) to the United States of America;
- One (1) decision refused the return in view of the child's objection.

In the year 2023, there was 8 reported cases citing Balev, 4 from Ontario, 1 from British Columbia, 3 from Alberta and 1 from Quebec[53]. The involved countries were United States of America, Romania, Sweden, Portugal, Mexico, and Algeria. The rulings are as follows:

- Two (2) decisions found that the child(ren) habitual residence was in Canada
- Two (2) decisions ordered the return of the child(ren) to United States of America;
- One (1) decision ordered the return of the child(ren) to Romania;
- One (1) decision ordered the return of the child(ren) to Sweden;
- One (1) decision ordered the return of the child(ren) to the Azores (Portugal).
- One (1) decision ordered the return of the child(ren) to the UK.

In the matter of *K.F. v. J.F.*[54], the Court of Appeal of Newfoundland and Labrador overturned the decision of the first instance judge who concluded that the child's habitual residence was in Boston, Massachusetts. On July 25, 2020, with the consent of the father, the mother and the child visited the maternal grandparents to assist the grandfather who had experience a health crisis. The parents later agreed that the child and the mother will remain in Newfoundland to allow the child to attend in-person schooling. At that time, the intention of the parents was that the child would be returned to Boston in August 2021 to pursue her in-person schooling. On July 30, 2021, the mother advised the father that she would not be returning to Boston and that she had filed divorce proceedings in Newfoundland.

This decision is of significant importance given that it was determined by Court of Appeal of Newfoundland and Labrador that the judge in first instance erred in the application of the principles set forth in Balev:

> *[53]….. Balev instructs that it is the focal point of the child's life that must be determined (para. 43) — that the child is the focus of the analysis in determining*

[53] Dieffenbacher v. Diffenbacher [2023] O.J. No. 1174, D.I.H. v. S.I.H. [2023] A.J. no. 282, De Leon Saldierna v. Shergill [2023] B.C.J. No. 326, Ogunboye v. Faoye [2023] O.J.No. 447, M.O.G.v. C.O.G. [2023] a.j. No. 62, Raposo v. Raposo [2023] O.J. no. 184, Mar v. Wu Wu [2023] O.J. No. 185, Osaloni v. Osaloni, 2023 ABCA 116, supra footnote 32.

[54] 2022 NLCA 33(NFLD CA).

> *the child's habitual residence (para. 68). The focus of the child's life is not just a relevant consideration; it is the object of the inquiry. The circumstances of the case, including the child's connections to each jurisdiction, the circumstances of the move to the present jurisdiction, and all other relevant facts including parental intention, are relevant considerations which inform a court's determination of the focus of the child's life for the purpose of determining the child's habitual residence*[55]*.*

The first instance judge improperly relied on the settled intention of the parents to return to Boston in determining that the child's habitual residence was in Boston. As discussed in Balev, the analysis as to a child's habitual residence must focus on the child's life immediately preceding the alleged wrongful removal or retention, rather than the parents' past intention.

> *[59]… . The inquiry into habitual residence must concentrate on the focal point of the child's life immediately before the time of the alleged wrongful removal or retention, and not on past parental intentions that do not reflect the current circumstances of either the parents or the child*[56]*.*

The Court of Appeal of Newfoundland and Labrador further concluded that there was nothing in the Convention that precludes a court from considering a child's general interests while analyzing the focal point of a child's life, the child's connection to its jurisdictions, their environment from their perspective rather than best interest for purposes of parenting:

> *[60] This statement of the law, while correct, requires explanation. For example, while a court deciding a Convention application does not consider the "best interests of a child" for the purposes of determining custody and access, there is nothing in the Convention that precludes a court from considering a child's general interests when focusing on the focal point of the child's life. Such general interests are at the heart of the test for habitual residence. Balev instructs that the determination of a child's habitual residence must consider how connected the child is to the jurisdictions involved. This implicitly involves the child's general interests, insofar as the child's connections to their environment is concerned, as opposed to the best interests of the child for the purposes of parenting. In this regard, see Balev, at para. 89, and Bačić v. Ivakić, 2017 SKCA 23, at para. 25.*

Undertakings and Interim Orders

Consideration may be given to the making of interim orders for access to the left-behind parent pending resolution of the Hague application – this may include face-to-face

[55] Ibid par.53
[56] Supra, footnote 59, par. 59.

contact if the parent is able to travel to the receiving country, as well as telephone and electronic contact, as appropriate.

In cases of alleged domestic violence, where a child may be reluctant to have in-person visits, or where there is a risk of re-abduction, access facilitated through a supervised access facility via video-conference may be a possibility.

The Convention sanctions the use of undertakings by parties to deal with the transitional period between the court making a return order and the time in which the children are placed before the court in the country of their habitual residence. The Courts have frequently and appropriately used such undertakings to alleviate the emotional impact on the child and the financial impact of requiring a parent to return to the child's habitual residence.

The use of undertakings can provide a number of safeguards and protective measures. These may include the following requirements:

(a) The applicant pay for the respondent and child to travel to the country where the child habitually resides;

(b) The applicant make appropriate housing arrangements for the respondent and the child in the country where the child habitually resides;

(c) The applicant pay the living expenses or spousal and child support for the respondent and child in the country where the child habitually resides (recognizing the absconding parent, although acting wrongfully, will have economic needs that must be met in the short term);

(d) The applicant commences an application to determine the custodial rights of the child(ren) immediately, if it has not already been commenced. If such a proceeding has been commenced that the applicant arrange an immediate court date;

(e) The applicant not assume custody of the child if he or she obtained a custody order from the court in the child's habitual residence after the wrongful removal or retention or a return to the pre abduction status quo custodial arrangements;

(f) An order that the applicant have no contact with the respondent if the respondent returns to the country of the child's habitual residence;

(g) An order that the applicant have no contact with the child except through an order of the court in the child's habitual residence;

(h) Provisions that neither party molest, annoy or harass the other parent;

(i) Provisions that a parent refrain from the use of physical discipline, alcohol or drug use while the child is in the care of the parent;

(j) A provision to temporarily stay the enforcement for the return of the child pending completion of the child's school year or the ability of the absconding parent to make travel arrangements;

(k) If the Applicant has caused criminal proceedings against the Respondent, that those proceedings be abandoned prior to the return of the Respondent to the country of habitual residence;

Consider the need for the surrender of passports or travel documents, border alerts, and/or the deposit of a monetary bond or surety.

Forthwith Return

When the conditions of Article 3 are met, Article 12 of the Hague Convention requires the immediate return of the child, which reads as follows:

> *Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.*
>
> *The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*
>
> *Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child. (our underlying).*

The return of the child forthwith implicates the prompt and immediate return of the child in his habitual residence, the designated State. What emerges from the case law is that the return of the child is ordered within a very short period of time ranging from 24 hours to a few days as a general rule.

The judge has the discretion to delay the return of the child to its designated State if the parties demonstrate exceptional circumstances that warrant a delayed return in conformity with the child's best interests. In order to implement and foster the Hague

Convention's objectives, the court has flexibility especially where such a delay is found to be in the child's best interests. A delayed return may be requested to ensure that the child may finish his school year, or his medical treatment or to enable the re-establishment of contacts between the child and the other parent.[57]

In the matter of *Droit de la famille -19412*[58], the Honourable Justices Geneviève Marcotte, Jocelyn F. Francourt and Stephen W. Hamilton ordered that the children be returned at the end of the school year as it deemed it was it was in the eldest child's interest to finish his school year, which was less than three months away. The Court further stated that the immediate return would compromise the older child's school year and cause undue and unnecessary stress to him and to the parents.

In the matter of *Stedanska v. Chyzynski*[59], the Superior Court of Justice Ontario ordered the return of the children to Poland forthwith. In view of the pandemic and the travel restriction prevailing at the time of the decision, namely May 15, 2020, the court provided the parties with a delay to agree on the date of return, failing any agreement, the court would adjudicate on the return date on June 5, 2020. The parties were unable to reach an agreement as to the return date of the children to Poland and the court later ordered that the children be returned no later than July 31, 2020[60].

Costs

The court has discretion to award the costs incurred by the applicant parent pursuant to Article 26 of the Convention which stipulates the following:

> *Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.*

The Courts have not hesitated to order costs to cover the fees of legal representation of the applicant parent, as well as the reimbursement of the travel and lodging costs incurred. Often, parties are given the opportunity to discuss and come to an agreement relating to costs and if they are unable to do so, they are invited to remit their written submissions on costs to the trial judge.

[57] 2019 QCCA 461, par. 33.
[58] Ibid, par. 34 to 38.
[59] 2020 ONSC 3048.
[60] Stefanska v. Chyzynski, 2020 ONSC 3570

In accordance with Article 22 of the Hague Convention, no security, bond or deposit shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of the Convention, whether for the trial or its appeal. It is stipulated at that each Central Authority shall bear its own costs in applying the Convention.

In the decision of *Batten vs. Batten*[61], the Honourable Justice Mayer of the Supreme Court of British Columbia ordered the mother to pay to the father the sum of $43,722.22 to cover the father's legal representation costs, lodging and travel costs incurred in order to repatriate the child to his designated State, France.

In the matter of *Droit de la famille -091664*[62], the Honorable Justice André Wery, Superior Court of Quebec, ordered that the mother pays to the father an amount of $28,646.24 to cover part of the father's cost for his attorneys in Lebanon and in Quebec in order to repatriate the children to Canada.

In the matter *Droit de la famille – 182695*[63], the Superior Court condemned the mother to pay to the father the sum of $7,500.00 for the costs of the airplane tickets of the father and the children as well as part of the father's lodging costs.

In the matter of *S.C.(S.) v. C.(G.)*[64], the court ordered the abducting parent to pay the sum of $25,815.60 representing the travel costs and expert fees as well as $15,000.00 as a provision for costs for the legal representation fees.

In the matter of Chin v. Mills[65] the court ordered the abducting parent to pay costs of $31,572.00 which was full indemnity for his lawyer's fees and a contribution toward his travel costs.

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[61] 2021 BCSC 2507.
[62] 2009 QCCS 3192.
[63] 2018 QCCS 5617.
[64] 2003 CanLII 42516 (QCCS)
[65] 2019 FL01-30861 (Alta. QB)

Memorandum (2023 and 2024 YTD Cases)

1) *Zafar v. Azeem*, 2024 ONCA 15

Facts:

- Non-Hague Case
- Lower court, by oral ruling, granted the father all the relief he sought by declaring that the parties' child was habitually resident in Pakistan pursuant to s. 22 of the CLRA and ordered for the child's return. Also found the parties' foreign divorce in Pakistan to be valid.
- Pakistan acceded to the Hague Convention but Canada has recognized it as a signatory, therefore the Hague Convention does not apply and the CLRA forms a complete code.
- The lower court application proceeded strictly based on affidavit evidence.

On Appeal:

- Parties consented to a stay of the lower court order pending the mother's appeal, which was granted on the following grounds:
    1) Mother was denied procedural fairness and natural justice: Mother was denied procedural fairness in the rush to judgment in the lower court. The parties' affidavit evidence was diametrically opposed so it was an error for the motion judge to decide the issues without proper time afforded to develop the record, including by cross-examination on affidavits and/or viva voce testimony.
    2) No proper consideration of serious risk of harm under s. 23 of the CLRA: Mother's affidavit evidence that the child would suffer serious harm if returned to Pakistan, based on mother being victim of the father's physical and emotional violence. Motion judge erred in concluding that violence towards the mother was irrelevant to the risk of serious harm to the child.
    3) No consideration of what further order was in the child's best interests under s. 40 of the CLRA: Even if child's habitual residence was correctly determined to be Pakistan and the lower court was not persuaded to assume jurisdiction due to serious risk of harm, the court was still required to consider what further order was in the child's best interests under s. 40 of the CLRA. For instance, could have ordered that the child remain in Ontario while parenting proceedings went ahead in Pakistan.
    4) Foreign divorce was found valid based on problematic evidence: The affidavit evidence on the issue of the foreign divorce was problematic because the lawyer who swore the father's affidavit was also the paternal grandfather of the child. The lower court still accepted that evidence without providing the mother opportunity to develop the record.

Key Principles:

- In alleged abduction cases involving non-Hague signatories, the importance of procedural fairness is elevated because we cannot rely on the reciprocal signatory to determine custody issues in the best interests of the child.

- Potential risk of harm to the mother can be akin to risk of harm to a child.
- The discussion in the decision signals that the "settled intention" analysis re habitual residence that applies to Hague cases may still be relevant in non-Hague cases despite the CLRA being a complete code.

2) *Osaloni v. Osaloni*, 2023 ABCA 116

*This is the mother's appeal from a decision ordering the return of the children to the UK pursuant to the Hague Convention. Appeal dismissed.

Facts:

- Parties were married residing in the UK when the mother removed the children from the family home and travelled with them to Calgary (climbing out the window). At that point, the children had lived in the UK for approximately 2 years. Prior to that, they were with the mother in Slovakia while she was studying medicine. The children have dual UK and Italian citizenship.
- The father immediately alerted UK authorities after the removal, and Alberta authorities were also alerted. The father then commenced his Hague Convention application in Calgary within the 1-year period.
- The father's application was successful. The children were found to be habitually resident in the UK at the time of their removal, the father was exercising rights of custody, the removal of the children was wrongful being in breach of the father's custody rights, and the father did not consent to the children's travel to Canada.
- The lower court found that the children would not suffer a grave risk of harm if returned to the UK.

On Appeal:

- The mother appealed the decision – her appeal was dismissed as she focused largely on events occurring since the order under appeal was granted.
- The lower court's interpretation and application of the Hague Convention was upheld. The mother failed to identify any palpable and overriding error.
- The mother principally relied on the fact that the parties had contemplated moving to Canada, the father having sought permanent residence status in Canada previously, and the mother wanting to come to Canada to take medical licensing exams. However, the evidence was clear that the father's behaviour leading up to the date of wrongful removal was inconsistent with him agreeing to the trip.
- The mother also argued that the children were not habitually resident in the UK, but rather in Italy or Slovakia. The COA confirmed that while it's true that a child's habitual residence need not be their location immediately prior to their removal, there was no basis in this case to conclude that the children's habitual residence was anywhere other than the UK. Both children may have been habitually resident in Slovakia when they were there with the mother during her studies, however, the test for determining habitual residence asks where the children were habitually resident *immediately before* the removal or retention.
- The mother failed to satisfy the grave risk of harm exception under Article 13(1)(b) simply by virtue of being the children's primary caregiver: she cannot rely on the harm created by a return order separating the children from their primary caregiver

insofar as she herself created that harm by unreasonably refusing to return to the UK.

Key Principles:

- Events occurring since a return order was granted are not relevant for the purposes of an appeal.
- The test for determining habitual residence asks where the children were habitually resident *immediately before* the removal or retention.
- A party cannot rely on the grave risk of harm exception under Article 13(1)(b) created by a return order separating the child from their primary caregiver insofar as that party herself created the harm by unreasonably refusing to return with the child.

Law Society of Ontario | Barreau de l'Ontario

TAB 6

18th Family Law Summit

Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases (PPT)

Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases

Professor Nick Bala, LSM
Queen's University

Jessica Farshait, Queen's Law J.D. 2025 & Summer Student
Burke & Co.,Toronto

March 20, 2024

cpd

Children Resisting Contact & Parental Alienation: Context, Controversies, Challenges

Prof. Nicholas Bala

Faculty of Law, Queen's University

With thanks to Jessica Farshait, Queen's Law J.D. Candidate 2025

Family Law Summit, Law Society of Ontario

Toronto, Ontario, March 20, 2024

Themes: Complexity & Challenge

- In high conflict cases parents often fail to support relationship of child to other parent, and some parents actively undermine
  - if conflict continues, children often start to resist contact
    - range of reasons: alienation to justified estrangement
- Alienation valid concept, but more often claimed than proven
- Overlap with IPV & PA cases
- Both IPV and PA pose risks to children
- Personality disordered and high-energy litigants
  - lack of insight and defiance of court orders
- Birnbaum & Bala (2024) retrospective study of 2010-22 Ontario cases
  - found rejected parents involved very frustrated at expense and often ineffectiveness of court
  - professionals find cases very challenging
- Limits to law
- Lack of appropriate resources
  - Parties lack resources and/or professionals lack understanding
- Many CRC cases better resolved without trial
  - role of judges and lawyers
  - some require court orders and trial

Concepts

- 1987: Richard Gardner - “parental alienation syndrome”
- Kelly & Johnston (2001) - not a ”syndrome” of child
  - **Alienated Child**: “child who freely and persistently expresses *unreasonable negative* feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are *disproportionate to their actual experience* of that parent”
  - Alienation is *primarily* the result of influence, suggestibility, manipulation by favoured parent, but need to consider entire social context of child (eg context of separation, siblings)

- **Alienation vs. Realistic Estrangement**
  - often try to determine whether child’s resistance is alienation or “justified” (e.g., by abuse, IPV, poor parenting etc.) and “realistic estrangement,” but may not be necessary for resolution
  - **affinity** - wants to more time with one parent, but also wants to see the other
  - **alignment -** child has loyalty to one due to perception of cause of separation, but not rejecting the other
  - **hybrid –** both parents have significant responsibility
- Alienation finding is significant, but not determinative of legal response

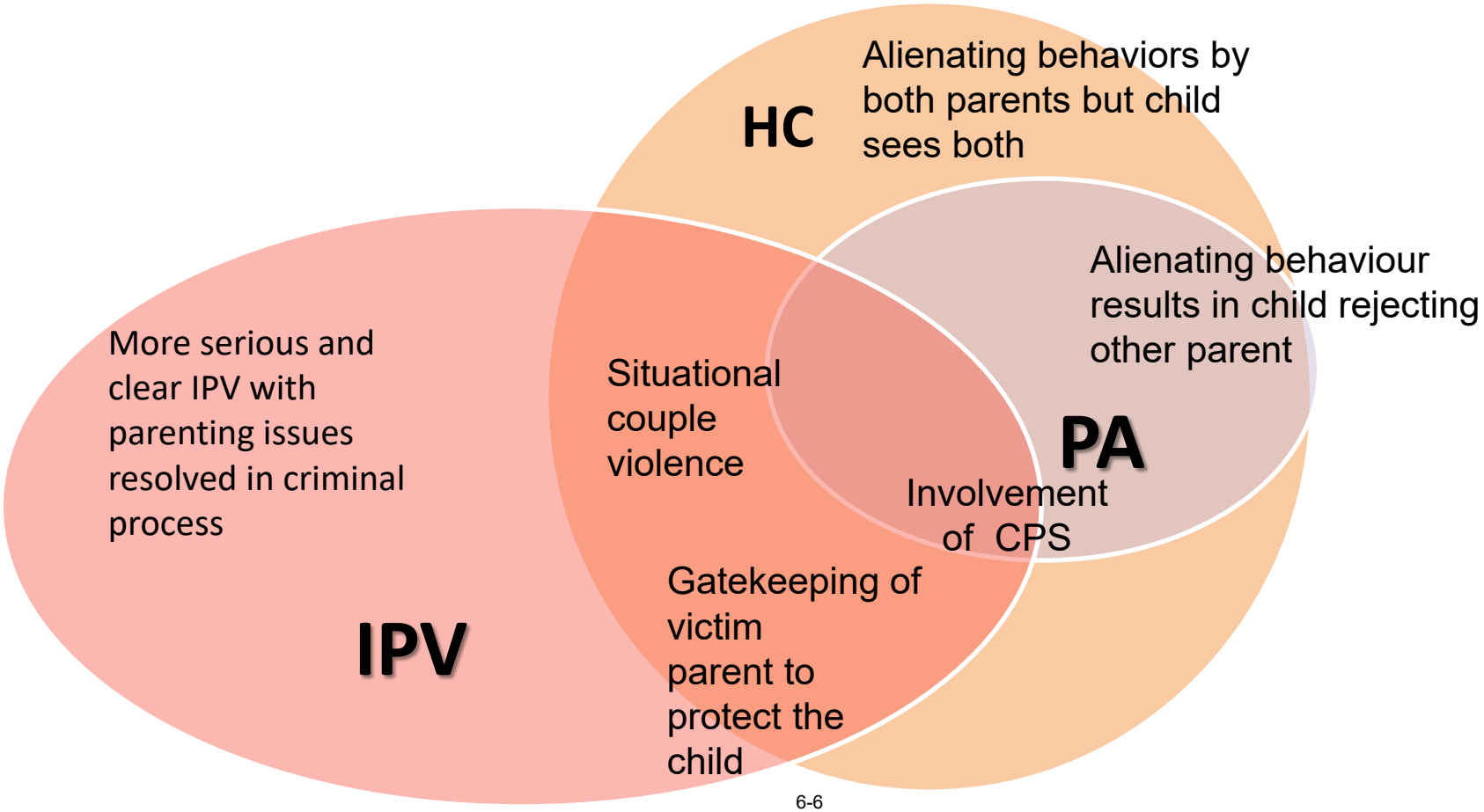
Parental Alienating Behavior(PAB)

- **What alienating parents do:**
  - directly and indirectly denigrate or instill fear in child
  - not permit child to take (or return with) clothing, toys, pets
  - arrange conflicting activities; talk about activities missed
  - induce guilt about visits or good times with other parent
  - make (repeated) unfounded child abuse allegations to CPS
  - tell child: "It's up to you" (which effectively devalues importance of relationship with other parent)
    - yet, can be strict and have high expectations for other required behaviors (eg., school, homework, being polite with others, chores, etc.)
- **What alienating parents do NOT do**:
  - support relationship with other parent
  - "problem solve" with children about realistic shortcomings, as they might with difficult self, teacher, friend, etc.
  - co-operate for rescheduling for vacations (weddings, funerals)

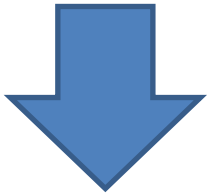
Alienated Child

- Even abused children usually want a relationship with both parents, and rejection of parent by a child is usually reflection of conflict, if not alienation
- With younger children, problem often is that favoured parent refuses to allow visits, defies court orders, and transitions may be dificult
- younger child usually can switch more easily between high conflict parents, though possible to have unjustified fear
- with alienation, once good relationship deteriorates. Key aspect of alienation is that child becomes “independent actor” and often rude, defiant etc.
- alienation less common in younger children, usually starts during pre-adolescence or adolescence (8 -13 years) due to cognitive maturation
  - older child has greater difficulty with loyalty conflict and more likely to be alienated
  - rigid thinking: “black & white” views

Challenges for family justice: Overlap of IPV, PA and High Conflict

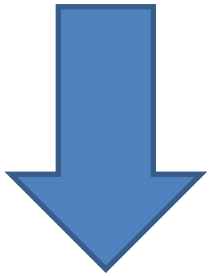


Alienation Remains a Controversial Concept



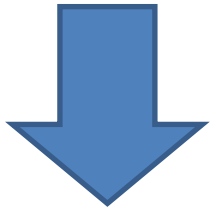
- mental disorder that should have been recognized by APA" in *DSM 5*
- should be recognized as form of abuse and family violence

Bernet (2010); Baker (2005); Harman, Kruk & Hines, 2018; Harman, Warshak, Lorandos & Florian (2022)



Not a child's disorder, but a family relationship problem that may be exacerbated by the litigation process, but in more severe cases be helped by custody reversal.

Kelly & Johnston (2001); Fidler, Bala & Saini (2013); Birnbaum & Bala (2024)



Invented by Gardner to dismiss child sexual abuse post-separation and now used by abusive fathers. "Pseudo-scientific" concept that should <u>not</u> be admissible in court or basis of mental health intervention

Sheehy & Boyd (2020); UN Special Rapporteur, (2023) NAWL (2024)

NAWL Position

https://nawl.ca/pa-letter/ (Jan 2024)

Amend the *Divorce Act* "to prohibit the use of parental alienation or related pseudo-concepts in family law cases"

NAWL position

- PA is based on "junk science"
- PA accusations are primarily made against women, with IPV victims at particular risk
- Courts discount reports of IPV, especially if PA is raised
- Use of PA endangers women and children, and ignores best interests and rights of child
- Women reluctant to even raise IPV issues for fear that there will be response of PA

Responses

- much research validates PA; claims of "junk science" mainly from feminist lawyers & legal scholars
- 25%-40% of PA claims made by mothers
- significant overlap of IPV & abuse allegations with PA, but also many just PA
- if court **finds** IPV, it usually rejects PA, and never orders child to care of abusive father
- most claims of IPV are valid, with more false denials than false allegations.
- But some IPV and Child Abuse claims (especially csa by father) are unfounded
- PA poses long term risk to mental health of children (often personality disordered parent)

Negative Effects of Alienation

Miralles, Godoy & Hidalgo (2023)

- Most children want relationship with parents, even if abuse
- Children exposed to parental alienation show an increase in adulthood
  - depression and anxiety symptoms,
  - psychopathology, lower self-esteem and self-sufficiency.
  - higher alcohol and drug use rates, parental relationship difficulties
  - lower life quality, higher divorce rates, feelings of loss and abandonment
- Children suffer long term negative effects from being exposed to:
  - high conflict when parents together and/or after separation, OR
  - IPV when parents together and/or after separation, OR
  - alienation
  - combination of high conflict, IPV, alienation
- Alienating parent is often personality disordered: perception of reality can be distorted when emotionally aroused & will not respond "rationally" to court orders
- Doing long-term research with this population is challenging, so present research does **not** adequately distinguish HC, IPV and PA

Legal Responses

Canadian Cases Where Alienation is Found
Harman, Giancarlo, Lorandos & Ludmer, 2023

- 500 Canadian reported cases where **alienation was found,** 2004-2020
  - **Most alienating parents are Moms, but many Dads**
    - alienating Parents: Mom=64%; Fathers = 34%
  - **Most alienation cases did *not* involve abuse or IPV**
    - 52 % did *not* involve abuse or IPV allegation
    - when abuse or IPV raised:
      - 71% ruled unfounded;
      - 10% founded (n=35)
    - no case where court found child abuse and placed with alienated parent
  - **Courts NOT awarding primary care fathers who perpetrate IPV**
  - **If finding of alienation, usually *not custody reversal***
    - if Mom alienating parent, Dad increase in primary care from 23% to 33%
    - if Dad alienating parent, Mom increase in primary care from 41% to 45%

Ontario cases where alienation raised

Reported Ontario cases in 2021-23 : Bala & Farshait (2024)

https://doi.org/10.5683/SP3/FI22LU

- **Most alienating parents are Moms, but also Dads**
  - court findings: Mom 43/63 (68%); Dad 20/63 (32%)
- **Most allegation claims NOT established; more likely against Dads than Moms**
  - Founded alienation claims against father 20/43 (47%)
  - Founded alienation claims against mothers 43/138(31%)
- **If finding of alienation, custody reversal may occur, but often not**
  - 9/63 (14%) : 7 Mom to Dad & 2 Dad to Mom
- **Claims of both IPV and PA in 60% (n=103/172) of cases**
  - if IPV found by court, judge usually rejects alienation and almost never reverses custody;*
  - major issue is proof/credibility/reliability

* only 1 case of father who perpetrated IPV was found to be alienated by mother. 6 years earlier father put tracking devise on Mom's car (mischief). Since then, a number of unfounded allegations by Mom of child abuse by father reported to CPS, and she consistently defied court orders. *Bors v Bors*, 2021 ONCA 513

Not supporting other parent is a bioc factor, but so are wishes, and child safety and well-being is "primary consideration"

Divorce Act & CLRA

s. 16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(j) any family violence and its impact on, among other things,

- (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
- (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child…

16(2) When considering the factors referred to in subsection (3), the court shall give **primary consideration to the child's physical, emotional and psychological safety, security and well-being** 6-13

Assessing Cause for Rejection

Mitrow J in *CT v MMM* (2023 ONSC 7247)

> Before a court can find parental alienation, it is necessary to examine whether there has been "realistic estrangement" and whether a rejected parent's behaviour is a contributing factor to a damaged parent-child relationship; even where a favoured parent engages in problematic behaviour, a child may not be "alienated" where there are independent reasons to explain the child's feelings.

- Court-appointed evaluator CLRA s. 30 or OCL
  - 87/172 (51%)
  - When recommendation provided, usually followed in whole of in part (81%)
  - Often not a clear recommendation, esp OCL clinician who now will not express "opinion" about alienation
- CAS involved in 101/172 (59%) cases
- Police involved in 106/172 (62%)cases
  - 71/106 criminal proceedings commenced, with guilt or recognizance in over ½

Judicial Notice and PA

AM v CH, 2019 ONCA 764, upheld finding of PA and custody reversal, with Pardu JA writing:

> In finding that the mother alienated the child from the father, the trial judge was not purporting to make a psychiatric diagnosis of any syndrome or condition. Rather, he was making factual findings about what happened in this family. This is the stuff of which custody trials are made, and as conceded, no expert opinion was required to enable him to do so.
>
> Those factual findings logically led to certain remedies being appropriate or not. *The trial judge did not need expert evidence before choosing the remedy that was in the best interests of the child.*

Legal Responses to PA

- process responses such as having single judge case management, often with the hope of encouraging the parents to address the issues on a consensual basis, and the possibility of dealing with urgent motions;
- order that the judge hearing the case will remain seized, to monitor compliance with court orders;
- "reconciliation counselling" without changing the parenting arrangement [8/63];
- increase the role of the rejected parent in the child's life by increasing the parenting time and/or parental decision-making responsibilities [29/63];
- contempt of court; *Gordon v. Starr,* per Quinn J

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

Despite such judicial pronouncements, contempt is a "last resort" [6/63];

- order police enforcement of the parenting time order [12/63];
- reverse decision-making and primary residence to rejected parent, often suspending contact with the alienating parent ("custody reversal") [9/63];
- costs to the alienated parent, perhaps on an elevated scale; and
- do nothing

Interim Orders

- Risk assessment – any credible evidence of serious parenting concerns that require investigation? Referral to CPS?
- Interim stage is often critical as response before attitudes entrenched, but challenge for court of conflicting narratives
- If credible evidence of abuse, especially if recent, safety must be first priority -> consider supervised contact
- Case management, short adjournments and report to court
- If safety issues addressed, can use temporary terms to overcome barriers to keep/restart contact with RP
  - establish an expected schedule, perhaps reduced but not eliminated parenting time;
  - consider early intervention therapy for both parents and child,
  - encourage FP to demonstrate support for the relationship with the RP
  - detailed specific orders

6-17

Reconciliation counseling

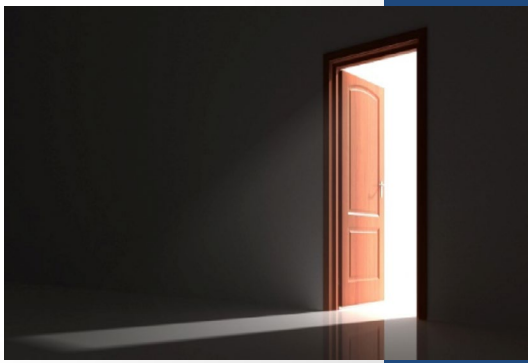
- Court has jurisdiction without legal need for consent
  - *AM v CH* , 2019 ONCA 764
- if no custody reversal, best to involve child & both parents in family systems approach
- Judicial "push" towards counselling *may* have positive effects if it results in favoured parent supporting.
- important to have provision for reporting to court about engagement with counseling
- mental health professional needs expertise with issue of children resisting contact
- No quick fix, but expect behavioural changes (more contact) within 3- 6 months or not likely to happen
- in more severe alienation cases, likelihood of positive outcome for therapy without custody reversal is low.
  - Personality disordered parent custodial parent undermines therapy

"Custody Reversal" – "Last resort"

- Court must be satisfied that change in the child's best interests
  - assess risk of harm if child stays with alienating parent (personality disorder)
  - compare parenting capacities
- Expert evidence helpful but not necessary
  - *AM v CH,* 2019 ONCA 764.
- Ontario in 2021-23, in 9 of the 63 cases (14%) where found alienation, custody reversal was ordered
    - 2/20 with transfer to mother
    - 7/43 with transfer to father
    - often with suspension of contact with alienating parent
  - need to carefully prepare for transition if it is being contemplated by court
  - court may also require for transitional counselling if there are parental resources
    - Intensive programs like *Building Family Bridges*
- Birnbaum & Bala (2024) retrospective study of cases where Ontario court found alienation 2010-22; challenge to locate and engage parents and children in research
  - found 6 who were 3-7 years after custody reversal; all opposed at the time, but now understand reasons for court decision and doing well with previously rejected father.
  - None seeing mother, mainly because of her inability or unwilling to engage in present arrangement
  - Media and anecdotal reports of children traumatized by custody reversal

When to stop trying to enforce:

- Stress to child of enforcement in high conflict cases
- Challenge of enforcement, especially if older child
- Consider resources and capacity of alienated parent
  - Financial, social & emotional with determined adolescent
- Enforcing contact may not be in child's interests
- Difficult decision for lawyers, court and rejected parent to stop trying to enforce
- Need to emphasize giving up legal enforcement, but "leaving the door open for the child"
  - Mode for continuing communication
  - Possibility of supervised "final" visit
  - Significant incidence of "reunions" in late adolescence & early adulthood



Good Practice for Lawyers in CRC cases

- Whether IPV, PA, HC or combination, is it in child's best interests and realistic for child to have relationship with both parents.
  If so, how to achieve; if not which parent should have care?
- Professionals involved need to understand dynamics and impacts on the legal system in CRC cases
- Family lawyers should give parent-clients realistic feedback and promote child-focused settlement, IF this can be done without compromising safety of child or IPV victim.
- There are often no simple "fixes." Cases are complex and always a moving target with many motions, case conferences, trial, enforcement, variation etc. But child suffers while process drags on.
- Need to be prepared to have trauma informed approach to vulnerable clients, but also need avoid over-identification with clients and "Know when to say No!"
- Recognize stress for lawyers and seek support from colleagues.

Questions/Comments/Thoughts ?

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Appendix
SOME RED FLAGS FOR PARENTAL ALIENATION (Fidler)

Proving parental alienation can be very difficult, and assessments must be done to ensure the child isn't turning their back on a parent with whom they used to have a loving relationship because of neglect, physical or sexual abuse. But here are some red flags:

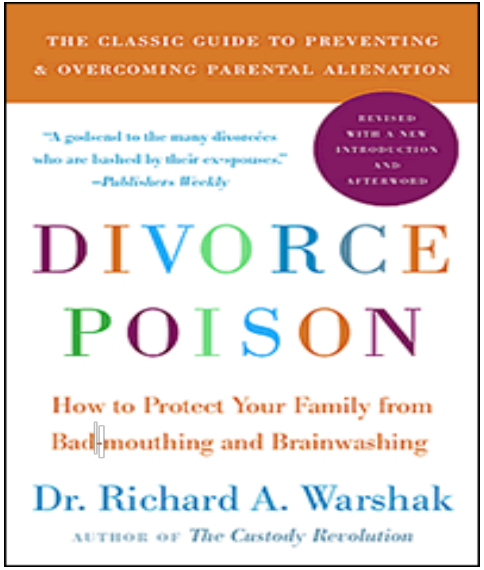
- Constant bad-mouthing of one parent by the other.
- Spying on one parent by the child at the behest of the other.
- Your ex-spouse starts giving the child the power to choose: "It's okay, Mom. I'm not coming home for the weekend. Dad has something more fun planned for me."
- There are no pictures that include you in your ex-spouse's house, which is meant to give the child the message that you no longer exist and they shouldn't be thinking about you.
- The child starts referring to you by your first name, rather than Mom or Dad.
- The other parent starts undermining your authority on your own time with the child such as, say, buying them a TV to put in their room at your house knowing you are opposed to that notion. It sets you up to be the villain and creates the sense your rules are dumb. 6-23

SOME RED FLAGS FOR PARENTAL ALIENATION (2) (Fidler)

- Interfering with communication: You get hung up on and your letters and gifts aren't passed on to your child. This is especially damaging for parents who live too far away for frequent face-to-face outings, making that contact especially important.
- Your child is complicit with your ex-partner in keeping secrets from you: He or she has booked a special trip with your child during your holiday time and then convinces the child there's no need to tell you until the last minute, for fear you'll interfere with the fun.
- Your ex-spouse gets upset when the child has any kind of contact with you. The "classic example" is when both of you show up for your son's soccer game and it's clear your child is reluctant, or even afraid, to talk to you in the presence of the other parent.
- Your child is being told highly personal information about you, aimed at diminishing you in their eyes: "Mommy did drugs in high school." "Your dad is too small." Comments aimed at making the child feel angry with the one parent or feel sorry for the other.

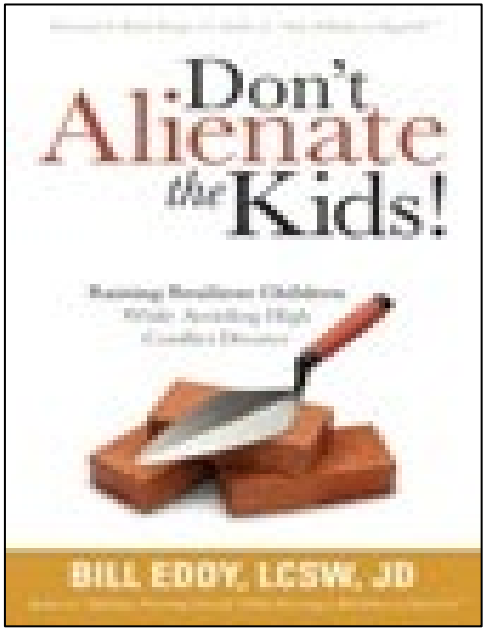
Resources For Professionals & Parents

- **Richard Warshak** www.warshak.com



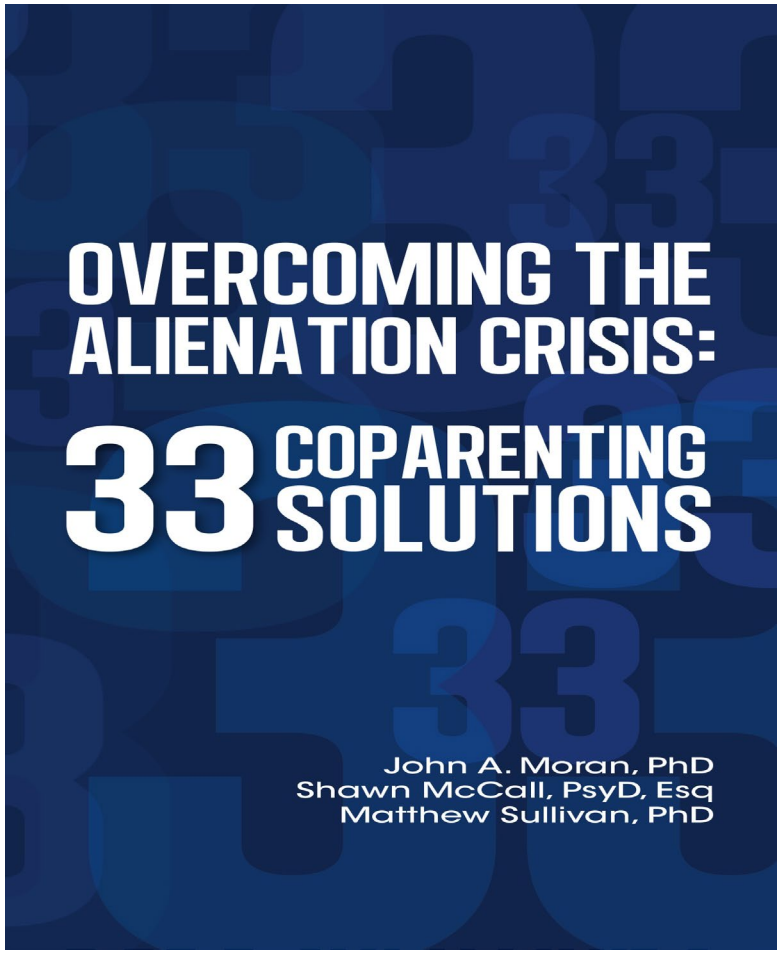
- *Divorce Poison: How to Protect Your Family from Bad-mouthing and Brainwashing*
- *7 Reasons Parents Might Want to Decide to Let Go*

- **Bill Eddy** www.highconflictinstitute.com



- *Don't Alienate the Kids! Raising Resilient Children While Avoiding High Conflict Divorce*

https://sullydoc.com/overcoming-the-alienation-crisis-33-coparenting-solutions/



Children Resisting Contact & Parental Alienation: Context, Controversies, Challenges & Recent Ontario Cases

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Abstract: There are an increasing number of high conflict separations involving children resisting contact with a parent, cases that pose significant risks for harm to children, as well as substantial challenges for professionals. Often these cases involve a rejected parent claiming alienation, and they are difficult to settle without court proceedings. Parental alienation is a controversial concept, and some critics, like the National Association of Women and the Law condemn it as an "pseudo-scientific" concept that should not be used in legal proceedings. However, parental alienation continues to be widely used by judges, lawyers and parenting evaluators in Canada. It is a valid, useful concept, though it is often misused. Alienation cases need to be distinguished from other types of parent-child relationship problems, including cases of realistic estrangement, due to poor parenting or family violence, and affinity towards one parent without rejection of the other. Further the finding that there has been alienation is not determinative of the appropriate response to a case.

Between 2021 and 2023 there were 172 reported family law cases in Ontario involving allegations of parental alienation. The court concluded that parental alienation occurred in 63 cases (36%) where the issue was raised. Although there were more cases in which mothers were found to be the alienating parent, claims of alienation were more likely to succeed against fathers (20/43: 47%) than against mothers (43/138: 31%). In many cases (60%) there were claims of both alienation and intimate partner violence (IPV), with a court finding that there was IPV usually resulting in finding that there was not alienation. The making of unfounded allegations of child abuse or neglect is often related to a finding of alienation.

In some cases, lawyers should help parents whose children are resisting contact with them to recognize that there they are not being alienated but may be helped to restore a relationship through parenting education and counselling. In some cases of children resisting contact, it is possible to encourage parents to change their behaviour to allow the children to have good relationships with both parents, perhaps involving some family-focused counselling that does not require a court finding of alienation. In many less severe alienation cases, a court order may provide parents with support and structure to reduce their conflict and allow a child to have a relationship with both parents. In the most severe alienation cases, contact with an alienating parent may need to be suspended to prevent emotional trauma to the child, which will involve a custody reversal. In other cases, it may be best for the child to give up attempts to legally enforce contact with a rejected parent.

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Children Resisting Contact & Parental Alienation: Context, Controversies, Challenges & Recent Ontario Cases

Nicholas Bala & Jessica Farshait

I. INTRODUCTION: THE CHALLENGE OF HIGH CONLFICT CASES

Family lawyers and judges in Ontario are dealing with a growing number of high conflict cases where children are resisting contact with a parent, with the rejected parent often claiming that the child has been "alienated."[1] The term parental alienation was first coined in the 1980s and was a relatively obscure psychological concept, but it has come into widespread use (and misuse) and it is not uncommon for clients to directly raise claims of alienation with their lawyers. High conflict cases where a child is resisting contact with a parent pose unique challenges to family justice professionals and the court system, as well as the risk of emotional harm to children. There are a significant number of cases where a ***child's resistance to contact*** (CRC)[2] can be characterized as ***parental alienation***, that is primarily a response to emotionally harmful alienating behaviour or attitudes of the favoured parent. However, in many cases where a child is resisting contact with a parent, the allegations of parental alienation are not well founded, and the child's resistance to contact with one parent should be characterized as ***realistic estrangement*** due to abuse or family violence, poor parenting, problems in a stepfamily or other factors primarily related to the rejected parent. There are also cases where a child is understandably ***aligned*** with one parent that does not involve rejection of the other. In other ***hybrid cases,*** the interaction and conduct of both parents may be significantly contributing to the child resisting contact with one parent. In many of cases of CRC, an effective legal response may be needed to promote the best interests of the child, but many of these cases should be resolved without an expensive, embittering trial. While knowledgeable mental health professionals can play a critical role as expert witnesses and in providing appropriate interventions, in some cases inappropriate responses from therapists or child protection services can exacerbate the situation and harm the child. Case management and clear judicial control are very important for high conflict cases.

While there is some variation in precise definitions used by different researchers, clinicians, and judges, it is broadly accepted that "parental alienation" refers to situations that arise post-separation where a child is resisting contact with one parent primarily due to the influence of a favoured parent, and that these cases must be distinguished from cases in which a child is "realistically estranged" due to their own experiences with the rejected parent,[3] and

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[1] Bala & Hunter, Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases, 2016 CanLIIDocs 4594 report that between 1995 and 2005 there were about 5 Ontario decisions a year addressing parental alienation issues, while in 2014 there were 41 cases and in 2015 there were 38 cases. In the study reported in this paper, we found 69 cases raising parental alienation in 2021, 54 in 2022 and 49 in 2023. The increase in Canada reflects broader international trends: see Kline Pruett, M., Johnston, J.R., Saini, M., Sullivan, M., and Salem, P. (2023), The use of parental alienation constructs by family justice system professionals: A survey of belief systems and practice implications, *Family Court Review, 61,* 372-394.

[2] These are also referred to as cases of Parent-Child Relationships Problems (PCCP).

[3] Fidler & Bala (2020), Concepts, controversies and conundrums of "Alienation:" Lessons learned in a decade and reflections on challenges ahead, *Family Court Review, 58(2),* 576-603. In *Bors v. Beleuta*, 2019 ONSC 7029, Van Melle J. approved of a definition of parental alienation proposed by Dr. Michael Stambrook (at para 119):

other situations where a child is favouring one parent. Despite the widespread use of the concept of parental alienation, there is controversy over such issues as: how to reliably identify cases of alienation; the relationship of alienation to family violence; how to respond to alienation; and the consideration of the rights of children in alienation cases.

A significant portion of the discussion and writing about children resisting a relationship with a parent is polarized and often polemical. At one end of a spectrum is the position of the National Association of Women and the Law (NAWL) that parental alienation is based on "junk science" and the use of this concept should be prohibited in family court. This position is supported by feminist scholars who claim that family court judges consistently invoke alienation claims to take children away from protective mothers and place them in the care of fathers who have a history of child abuse and intimate partner violence,[4] and that court-ordered use of "camps" to reintegrate children with rejected fathers is harmful to children and violates their fundamental rights. [5] At the other end of the spectrum are researchers who argue that it is relatively easy to reliably identify alienation cases,[6] and that alienation is often a result of mothers making unfounded claims of child abuse or intimate partner violence.[7] Some

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It is a descriptive term that refers to a process. It is not a diagnostic label. It doesn't appear in any nomenclature about mental health disorders. It is a descriptive term that refers to a process where there is a systematic devaluation, minimization, discreditation of the role of, typically the other parent in a parental dyad. One parent systematically, through a variety of physical, emotional, verbal, contextual, relational set of maneuvers systematically reduces the value, love, commitment, relationship, involvement of the other parent by minimizing, criticizing, devaluing that parent's role. It can involve children having their sense of history being "re-written" by a parent's redefinition of history, reframing things, repetitively talking about things. It can involve sometimes very subtle and sometimes not so subtle suasion, coercion, direction, misrepresentation and so on. So parental alienation is a process, an interactional process where systematically one parent's role in, for the children is eroded over the course of time.

[4] See e.g Sheehy & Boyd (2020), Penalizing women's fear: Intimate partner violence and parental alienation in Canadian child custody cases, *Journal of Social Welfare and Family Law, 42(1),* 80-91; and Zaccour (2020), Does domestic violence disappear from parental alienation cases? Five lessons from Quebec for judges, scholars, and policymakers, *Canadian Journal of Family Law, 33,* 301-320; Meier, J., & Dickson, S. (2017). Mapping gender: Shedding empirical light on family courts' treatment of cases involving abuse and alienation. *Journal of Child Custody*, *Law and Inequality 35*(2), 311–33; and Neilson, L. (2018). Parental alienation empirical analysis: Child best interests or parental rights? Vancouver: The FREDA Centre for Research on Violence Against Women and Children. Available at www.fredacentre.com/wp-ontent/uploads/2018/02/Parental- Alienation_linda-Neilson.pdf

[5] Avalle, D.S., Smith,B.J., Wiedeman. K.E.O. & Garnica, C. (2022), How efficacious is Building Family Bridges? What the legal and mental health fields should know about Building Family Bridges and "parental alienation", *Journal of Family Trauma, Child Custody & Child Development, 19*, 1-15. Andreopoulos, E. & Wexler, A. (2022), The "solution" to parental alienation: A critique of the turning points and overcoming barriers reunification programs, *Journal of Family Trauma, Child Custody & Child Development*, *19*, 417-437; Mercer, J. (2022), Reunification therapies for parental alienation: Tenets, empirical evidence, commonalities, and differences, *Journal of Family Trauma, Child Custody & Child Development, 19,* 383-401; and Jaffe P., Scott, K., Heslop, L., & Hooda, S. (2023). *Sober second thoughts about the benefits and limitations of reunification therapy. Family Violence & Family Law Brief, 27.* London, ON: Centre for Research and Education on Violence Against Women and Children, Western University. ISBN 978-1-988412-72-6.

[6] Bernet, William, and Laurence L. Greenhill. "The five-factor model for the diagnosis of parental alienation." *J. Am. Acad. Child Adolesc. Psychiatry* (2022).

[7] Harman, J. J., & Lorandos, D. (2021). Allegations of family violence in court: How parental alienation affects judicial outcomes. *Psychology, Public Policy and Law*, *27*(2), 187–208; Harman,J. Giancarlo, D. Lorandos, B. Ludmer. (2023). Gender and child custody outcomes across 16 years of judicial decisions regarding abuse and parental alienation, *Children and Youth Services Review*, doi: https://doi.org/10.1016/j.childyouth.2023.107187;

advocates argue that mothers are making an increasing number of unfounded claims of abuse,[8] and there need to be laws enacted laws to more specifically recognize parental alienation and even making it a criminal offence.[9]

Decisions about the appropriate response to children resisting contact with a parent and alienation are often complex and must always be based on an assessment of the best interests of the child involved. Many parents engaging in alienating behaviours can be educated and encouraged by their lawyers or the courts into supporting their children's relationship with the other parent. However, for the most severe alienation cases, it may be in the child's best interests to change parenting arrangements. Judicial options for response to alienation include "custody reversal" and suspending contact with the alienating parent or, at the other end of the spectrum, deciding that is better for the children to give up on legal efforts at trying to establish a meaningful relationship with the rejected parent.

This paper reviews some of the key concepts and controversies in the social science literature related to children resisting contact with a parent post-separation and parental alienation, and discusses issues related to proof of alienation and legal responses. The paper considers the intersection of claims of Intimate Partner Violence (IPV) and Parental Alienation (PA).[10] The paper provides an analysis of the 172 reported Ontario family cases from 2021 to 2023 that raised parental alienation claims.

The paper concludes by offering suggestions for lawyers about good practices for dealing with cases where parental alienation is alleged. The reality is that the law is a blunt social instrument. While a relatively small number of these cases need to result in a court order that restricts the involvement of one parent in the life of their child (at least for period of time), in most cases a child-focussed resolution can be achieved that does not result in the exclusion of either parent from the child's life. These resolutions may require court involvement, at least to have a judge urge the parents to take a child-focussed approach and often involve a co-ordinated response of mental health and social service professionals as well as the courts and lawyers.

II. PARENTAL ALIENATION: THE SOCIAL CONTEXT

"Parental Alienation *Syndrome*": Development and Critique

By the start of the twentieth century, courts recognized that post-separation an embittered parent might try to "poison the mind" of their child towards the other parent, but it was only in the 1980s that the American psychiatrist Richard Gardner proposed the concept of Parental Alienation Syndrome (PAS), defining it as:

> a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no

[8] See e.g sites of the Parental Alienation Awareness Organization, https://www.paaousa.org and the Canadian Children's Rights Council

[9] See e.g https://mensdivorcelaw.com/brazil-outlaws-parental-alienation/

[10] This paper does not offer an in-depth consideration of the critical issues related the effects of IPV on children and appropriate responses to IPV in parenting cases. For a discussion of these issues, see Jaffe, Bala, Medhekar & Scott, *Making appropriate parenting arrangements in family violence cases: Applying the literature to identify promising practices*, 2023 (Justice Canada) https://www.justice.gc.ca/eng/rp-pr/jr/mapafvc-cbapcvf/index.html

> justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.[11]

Gardner believed that the alienating parent, almost always the mother according to him, was motivated by a concern with gaining sole custody and excluding the other parent from the child's life.[12] Gardner believed that alienation was often accompanied by the mother making unfounded allegations of sexual abuse against the father to reinforce her position.

While the concept of parental alienation is now widely accepted, Gardner's formulation of Parental Alienation Syndrome was controversial, as it focused only on the alienating parent and child, and suggested that a clinician could diagnose this "disorder" in a child.[13] Although some mental health professionals[14] adopted Gardner's model and advocated for inclusion of "parental alienation syndrome" as a mental disorder in the *Diagnostic and Statistical Manual of Mental Disorders 5,* the American Psychiatric Association decided not to include this condition, in part because it is not an empirically validated "syndrome," defined as a collection of symptoms that have a "commonly recognized, or empirically verified pathogenesis, course, familial pattern or treatment selection."[15]

Although parental alienation is a real phenomenon that occurs in high conflict separations, it is not accurate to describe it as a syndrome of the child. Rather, parental alienation should be considered as one possibility for characterizing a situation where child is resisting contact with one parent. It is always necessary to try to determine the reason why a child is rejecting a parent. In some cases, the resistance to contact may be due to a history of parental abuse, violence, or poor parenting, and may be classified as realistic estrangement rather than alienation.

A second, and related, criticism of Gardner's formulation of parental alienation syndrome was that it used "the terminology of a medical syndrome to explain the behavior of family social systems."[16] Rather than viewing parental alienation as a mental condition of a child that can be diagnosed, it is more realistic to understand it as condition that reflects the context of a post-separation family, using family systems theory to consider the role of all family members.[17]

Kelly & Johnston: A Multi-factorial Approach to the "Alienated Child"

Writing in 2001, American mental health professionals Joan Kelly and Janet Johnston critiqued Gardner's theory of parental alienation syndrome as it "focuses almost exclusively on

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[11] Richard A. Gardner, "Should Courts Order PAS Children to Visit/Reside With the Alienated Parent? A Follow-Up Study" (2001) 19 American Journal of Forensic Psychology 61 at 61.
[12] Richard A. Gardner, "Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome'" (2004) 42 Fam. Ct. Rev. 611 at 612.
[13] See e.g. Janet R. Johnston & Joan B. Kelly, "Rejoinder to Gardner's 'Commentary on Kelly and Johnston's 'The Alienated Child: A Reformulation of Parental Alienation Syndrome'" (2004) 42 Fam. Ct. Rev. 622.
[14] William Bernet, "Parental Alienation Disorder and DSM-V" (2008) 36 American Journal of Family Therapy 349 at 349.
[15] Barbara Jo Fidler, Nicholas Bala & Michael A. Saini, *Children who Resist Post-Separation Parental Contact: A Differential Approach for Legal and Mental Health Professionals* (Oxford University Press, 2013) at p 42.
[16] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 258.
[17] Benjamin D. Garber & Robert A. Simon (2023), Looking Beyond the Sorting Hat: Deconstructing the "Five Factor Model" of Alienation, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2023.2262359

the alienating parent as the etiological agent of the child's alienation."[18] This is problematic in the context of high-conflict divorce or separation. In many high conflict cases one or both parents engage in parenting alienating behaviour (PAB) without the child becoming alienated. There are factors other than the behaviours of the favoured parent that need to be considered, such as a history of conflict within the marriage, the causes of the separation, differences in parenting styles, the child's age and temperament, and sibling relationships. The focus of inquiry must include consideration of children's responses to parental alienating behaviour, and take the "child, his or her observable behaviours and parent-child relationships" as the focal point of inquiry, rather than the just consideration of the behaviour of one parent.[19]

Kelly and Johnson defined an ***alienated child*** as "one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."[20] Thus, determining whether a child is alienated requires consideration of the conduct of the rejected parent, as well as of the child and the favoured parent. Clinicians taking this approach recognize that "effective assessment and intervention [of a child's rejection of a parent] requires a multi-pronged understanding and approach to the problem that incorporates the entire family system."[21]

It is estimated that up to a third of separated couples have a high conflict separation, and that 20 to 50 percent of children whose parents have a high-conflict separation experience post-separation problems in maintaining a strong attachment to both parents.[22] It is essential to distinguish between different patterns of parent-child relationship issues. Kelly and Johnston conceptualized a range of situations where a child may favour one parent, including situations of ***affinity, alignment, alienation*** and ***justified estrangement***.[23]

The Continuum Parent-child Relationships

Post-separation parent-child relationships can be viewed as being on a continuum from cases where a child has a strong, positive attachment to both parents, to ones where the child is strongly rejecting one parent, whether due to alienation or realistic estrangement. There are also cases where post-separation one parent, most often a father, ceases to want much contact with the child, perhaps due to his relocation or new relationships. While the "disappearing dad" is a significant social concern, often causing children to feel rejected, it is not a legal issue, as there is no effective court-imposed remedy that can address these cases.[24]

While the diagram below is helpful for understanding basic concepts in post-separation

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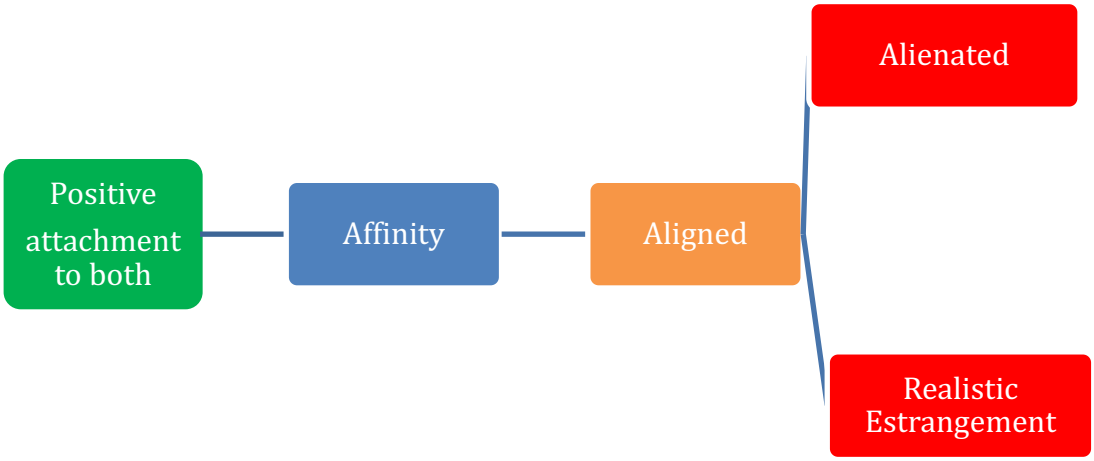
[18] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 249.
[19] Ibid.
[20] Kelly & Johnston, "The Alienated Child", at 251.
[21] From an updated version of this analysis, see Sullivan, Pruett & Johnston (2024), Parent-child contact problems: Family violence and parental alienating behaviors either/or, neither/nor, both/and, one in the same? 62:1 *Family Court Review* 68, at 70
[22] Janet R. Johnston et al., "Allegations and Substantiations of Abuse in Custody-Disputing Families" (2005) 43 Fam. Ct. Rev. 283; and Anita K. Lampel, "Children's Alignment with Parents in Highly Conflicted Custody Cases" (1996) 34 Fam. Ct. Rev. 229 at 232-35.
[23] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 258.
[24] Furstenberg, F.F. and Harris, K.M., 2019. The disappearing American father? Divorce and the waning significance of biological parenthood. In *The changing American family* (pp. 197-223). Routledge.

parenting, it must be appreciated that some cases cannot be fit neatly into these categories, and that family situations may change over time. Further, while the terminology used here is often used by family justice professionals, there continues to be debate about concepts and definitions, and even more so about how to identify cases (or operationalize the terminology).[25]



Positive Attachment to Both Parents: Even if their parents separate, most children have a strong, positive attachment to both parents, and express love and affection for each. Children may enjoy doing different activities with each parent, but generally want to have significant involvement with both. Although having a strong relationship with both parents requires that a child spends significant time with each parent on a regular basis, it does *not* require an equal parenting time arrangement.

Affinity with one parent occurs when the child, due to their "temperament, gender, age, shared interests, sibling preferences of parents and parenting practices", may prefer to reside or spend more time with one parent, but is not rejecting the other parent.[26] Affinity is distinguished from alienation because, although the child has a preference for spending more time with one parent, they still wish to have a good relationship with the other, and the preferred parent is supporting this continued relationship. Affinity, may, for example reflect an adolescent boy's desire to spend more time with a father who is actively involved in the sports that the boy plays.

As children move towards adolescence, it is a part of normal development for peer relationships, school and extra-curricular activities to become more important. As they grow older, some children who have been in an equal parenting time arrangement at a younger age may want to change towards having a "home base" and spending more time at the residence of one parent, perhaps the parent who lives closest to school or various activities or friends, or the parent who is most supportive of certain activities. While children should not be getting the message from one parent that it is "their right" to decide whether or not to see the other parent, as they grow older, they should have a significant voice in their living arrangements, and a parent who may be seeing less of their children whose interests are changing should not view

[25] Garber, B.D. and Simon, R., 2024. Moving Toward Consensus: Joining Bernet and Baker, Emery, and Griffin to Better Understand the Dynamics of Parent-Child Contact Problems (PCCP). *Family Transitions*, pp.1-13.
[26] Joan B. Kelly & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249 at 258, at 252.

this as a situation of "parental alienation." Indeed, inappropriate responses by a parent to a child's changing needs and interests may contribute to the child's estrangement from that parent.

Alignment occurs when there is an "an alliance with one parent," and the child only wants limited contact with the other parent, and expresses feelings of "anger, sadness and love" towards that parent.[27] This alliance often occurs because the child has "chosen sides" in a separation, based on their opinion of which parent is "in the wrong" for having caused the separation, such as due to infidelity, or because that parent precipitated conflict in the family prior to separation. The child may have already preferred the aligned parent prior to the separation and this preference may be intensified by the separation. Although aligned children do not want much contact with the other parent, they are not alienated because they still express love and other positive emotions towards the other parent and their extended family and will spend some time with them.

A child's complete rejection of a parent and unwillingness to spend time with that parent may be characterized as realistic estrangement or alienation.[28]

Realistic estrangement occurs when the child has a valid reason to reject a relationship with one parent. There may be a history of abuse or violence in the spousal relationship that results in a child fearing the rejected parent, or the rejected parent may have significantly deficient parenting abilities, or serious addiction or mental health issues.[29] In some cases, the child may reject a parent who is instigating conflict with the other parent. For example, in the Ontario case of *Giroux v. Giroux*, the judge found that the children, aged 11 and 17 years, no longer wished to have a shared time residential schedule and transferred sole custody to the father because mother was instigating constant conflict with the children and father regarding drop off times and locations.[30] At times she refused to allow the children to visit with their father, which caused "considerable stress" for the children.[31] The judge characterized her as the "author of her own misfortune. By her own actions she has 'driven a wedge' between herself and her children."

Parental alienation is characterized by an unjustified reluctance or refusal by a child to visit the rejected parent, primarily due to the influence of the favoured parent in the context of a high conflict separation.[32] Children are more suggestible than adults, and repeated denigrating comments from a parent may result in distortion of a child's perceptions and memories, or even result in reports from a child about events that did not actually occur. When an alienated child is interviewed about their reluctance or refusal to visit the rejected parent, their reasons for not wanting to do so often sound rehearsed and may include statements or (mis) information that could only have been provided by the favoured parent. Often the alienated child will appear to feel no reluctance or guilt about their rejection of their parent, and they may even give the appearance of obtaining satisfaction from this rejection. In true alienation cases, the favoured parent will be generally be aware that they are undermining the child's relationship with the other parent, though they may deny this.

There are ways in which an alienated parent can further intensify the rejection. For

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[27] Ibid.
[28] Ibid at 253.
[29] Ibid.
[30] *Giroux v. Giroux*, [2013] O.J. No. 349 at para 5.
[31] *Giroux v. Giroux*, [2013] O.J. No. 349 at para 5.
[32] Ibid.

example, rejected parents may lack the ability to show empathy towards their child, demonstrate warmth, and appreciate and respect their child's point of view, or try to induce a sense of guilt in the child.[33] Some rejected parents may maladaptively respond to their rejecting child by emotional retaliation which may then deepen the cycle of alienation. [34]

The development of alienation in a child is often age related. One of the notable aspects of alienation is that a child may have a good relationship with a parent for a significant period after separation that then deteriorates, sometimes fairly quickly. Younger children may be able to transition between hostile parents without feeling intense loyalty conflict and may have good relationships with both parents.

An important dimension of alienation is that the child becomes an active "independent agent" in resisting contact with a parent, developing their own strategies to demonstrate "resistance." As children reach the pre-adolescent stage (8 to 11 years), their perceptions of relationships develop, and they may find it harder to transition between hostile parents and feel that it is better for them to "pick a side in the war" between their parents. Older siblings may then influence younger siblings. As alienation develops, the child may be extremely rude, angry, defiant or "sulky" when in the care of the rejected parent.

An important aspect of PA cases are forms of Parental Alienating Behaviours (PAB). A common form of PAB is when a favoured parent makes negative comments about the other parent ("badmouthing") to the child to attempt to cause the child to share this negative opinion. Another type of PAB is for the alienating parent to tell the child that the other is to "blame" for the separation and family breakdown.[35] Other types of PABs include involving the child in parental disputes and litigation, so that the child will feel pressured to "choose a side." This type of alienation can range from the subtle—showing the child court reports and documents—to the more explicit—such as the alienating parent asking the child to write letters to the judge,[36] or having the child attend at the courthouse to participate in the litigation process. [37] A related form of PAB is to involve the child in the financial issues regarding separation.

Some alienating conduct is more indirect, such as arranging "fun activities" during planned time with the other parent and offering the child a "choice" about whether to "cancel" the visit.

Not infrequently PAB involves causing a child to have unjustified fear of the other parent, especially around times of transition. However, if the rejected parent has actually been abusive or violent, protective behaviour of the favoured parent may be appropriate.

Alienating parents usually have unresolved feelings of anger, grief, or betrayal about the end of the spousal relationship, and often have distorted perceptions about their relationships. Many parents who continue to engage in serious alienating conduct are personality disordered. As discussed below, not infrequently the "successful alienator" is an overprotective "enmeshed" mother, but in a significant number of cases, parental alienation is precipitated by

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[33] Janet R. Johnston, "Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child" (2005) 38 Fam. L.Q. 757 at 770-71.
[34] Johnston, "Children of Divorce", ibid. at 771.
[35] See e.g. *Britt v. Britt*, [2000] O.J. No. 527 (Sup. Ct.).
[36] See e.g. *Figliano v Figliano* (2007), 35 R.F.L. (6th) 71 (Ont. Sup. Ct.) at paras. 81-87.
[37] Ontario judges will almost always not allow the child to testify and be subject to cross-examination in a high conflict parenting case, though court may use a judicial interview or other methods to learn the views of children. See e.g. *Bailey v. Bailey*, [1996] O.J. No. 4891 (Ct. J. (Gen. Div.)

an abusive partner, often the father.[38] Male perpetrators of domestic abuse often have a pattern of denigrating their spouse's parenting and other abilities, and often criticize the mother's ability to care for the home in front of the children. Children may become allied with the parent whom they perceive as more powerful and express a strong preference for living with that parent if the couple separates.[39]

Effects of parental alienation

There are significant methodological limitations to almost all research about the long-term effects of harmful parental behaviour on children, including engaging in parental alienating behaviour, high conflict, and intimate partner violence, as it is impossible to do control group studies or randomized trials. Also, there is often an interaction of genetic, environmental, and other factors related to harmful parental behaviour, as well variation in its effects on children, even in the same family. There is, however, a growing body of research that clearly links parental alienation to a range of negative effects on children and their development.[40]

Children who have been alienated may adopt the role of caring for their alienating parent, a concept called "parentification,"[41] which "interferes with the child's development, peer relationships, and his or her ability to maintain a healthy relationship with his or her other parent."[42] Parentified children are more likely to have feelings of guilt and social isolation, depression, and suicidal ideation. Alienated children have been reported as having problems with behaviour, information processing and emotional regulation.

Adults who were alienated as children often report that they have experience low self-esteem, substance abuse, depression, difficulty in forming stable intimate adult relationships and other social problems.[43] As well, some of these adults describe how, as children, they secretly wished that the courts had enforced access to the rejected parent.[44]

Judicial recognition of the significance a parent's undermining of the child's relationship with the other parent is found in the 2021 Ontario decision in *S. v. A,* where the court made a finding of alienation and ordered a custody reversal. Justice McGee explained that[45]

> when a parent is unwilling to support the development and maintenance of a child's relationship with the other parent, and [that parent] has no insight into the resulting emotional harm caused to their child… Whether passively permitted or actively encouraged, a child who rejects a parent is parallelly empowered to reject other important people in his life. He is taught to avoid difficult feelings instead of how to cope with them and to work through them. He suffers an emotional impairment that deprives him not only of the love and protection of a parent, but of a wide array of complex social relationships.

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[38] Garber, B.D. (2011), Parental alienation and the dynamics of the enmeshed parent–child dyad: Adultification, parentification, and infantilization. *Family Court Review*, *49*(2), pp.322-335.
[39] Ibid.
[40] Miralles, P., Godoy, C. and Hidalgo, M.D. (2023), Long-term emotional consequences of parental alienation exposure in children of divorced parents: A systematic review, *Current Psychology*, *42*(14), pp.12055-12069.
[41] Benjamin D. Garber, "Parental Alienation and the Dynamics of the Emeshed Parent-Child Dyad: Adultification, Parentification, and Infantilization" (2011) 49(2) Family Court Review 322 at 334.
[42] Ibid at 325.
[43] Amy J.L. Baker, *Adult Children of Parental Alienation Syndrome: Breaking the Ties that Bind* (New York: W.W. Norton & Company, 2007).
[44] Ibid.
[45] *S v. A*, 2021 ONSC 5976, at para 30 -31.

"Reconciliation Counselling" & Clinical Interventions

Related to the mental health literature on the nature, causes and effects of children resisting contact with a parent, is a significant literature on interventions to address these cases. Since lawyers often propose that there should be a clinical intervention to respond to these cases, and it is not uncommon for courts to order or recommend some form of mental health response, it is important for lawyers to appreciate the purpose and likely effectiveness of different forms of intervention. Lawyers also need to know about the resources that are actually accessible in their community and within the financial resources of the parents in their cases.

For some children caught in high conflict parental separations there may be value in the child having confidential therapy. Such therapy will not be directed at restoring the child's relationship with a parent, but rather is intended to help the child differentiating themselves from their parents' conflict and deal with its stresses. It is generally preferable for both parents to agree on the selection of the therapist and undertake not to call the therapist as a witness. Otherwise, the therapist may just come to viewed as an ally of the parent who retained them.

While the broad term "reconciliation counselling" (or "reunification therapy") is often used to describe interventions that respond to PA and CRC, there are a wide range of clinical responses or interventions to cases that may be characterized as parental alienation.[46] This is a particularly challenging type of clinical work, and it should be undertaken only by professionals with special training and understanding of the dynamics of children resisting contact, intimate partner violence and high conflict separations, though there are few restrictions professionals who claim to provide this type of service. There is a significant literature describing the interventions that these professionals provide in these cases, and some studies on short-term outcomes, but there are significant methodological limitations to the research on interventions.

One important distinction is between interventions that are intended to address "parental alienation," and those that may be appropriate for cases where there is uncertainty about the nature of a child's resistance to contact. In this latter category are ***early interventions*** that do not require a court finding and may be arranged on a consent basis. Some clinicans refer to this a ***multifaceted family systems intervention,*** as it involves working with both parents and the children (the whole family) in a number of different possible ways. Although there is limited research on the outcomes of this type of intervention, experienced clinicians and teams report considerable success with this type of early response to high conflict cases with parent-child relationship problems.[47]

Another important distinction is between mental health services provided under a court order but without a change in parenting arrangements, with the child continuing to spend significant time with the favoured parent, and services intended to support a change in parenting arrangements or "custody reversal."

In some cases where the court makes a finding of alienation but does not reverse custody, the court may order some form of reconciliation counselling. Sometimes a mental health

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[46] Much of the mental health literature used the term "reunification therapy" and this term is widely used, but there has been a recent trend in Ontario to use the term "reconciliation counselling," as it avoids having the court order a person to engage "in therapy," which might require their consent.

[47] See Greenberg, L.R., Doi Fick, L. and Schnider, H.R.A., (2016), Catching them before too much damage is done: Early intervention with resistance-refusal dynamics, *Family Court Review*, *54*(4), 548-563; and Lyn R. Greenberg, Barbara J. Fidler, Michael A. Saini, *Evidence-Informed Interventions for Court-Involved Families: Promoting Healthy Coping and Development* (Oxford University Press, 2019).

professional will provide counselling to the rejected parent or to the child, or more commonly some form of joint counselling to the child and the rejected parent. This approach may also be effective for responding to cases of justified estrangement, where a rejected parent needs to alter their behaviour and interactions with the child. However, for true cases of alienation it is preferable for reconciliation counselling to involve both parents and the child.[48]

In less severe alienation cases, family-based counselling is valuable because "alienated children need a family-focused intervention that includes all parties…determined to be contributing to the dynamics."[49] These interventions try to engage both parents and their children in some form of counselling to improve their interactions. These approaches may have success in improving the relationship between the rejected parent and child, in particular if the child perceives that the favoured parent supports this effort and both parents are committed to making this effective.[50] This support from the favoured parent may be a result of a genuine belief that it beneficial for the child to have a relationship with the rejected parent, though it may reflect a desire to engage in order to prevent a court-ordered custody reversal.

In developing a mental health intervention for an alienated child, their age, developmental stage, and mental and emotional health need to be considered.[51] Generally, older children are more entrenched in their alienation and thus more difficult to engage in the counselling. Therapists should assist children in understanding that they do not have the power to refuse all contact with a parent; children should be helped to share their own feelings with both parents, although they should be expected to be respectful and civil in their interactions. Older children who are ordered to have contact with a parent may feel angry at their perceived lack of power and how the rejected parent and the courts are not respecting their feelings and opinions.

A different form of clinical intervention is intended to provide transitional support for alienated parents reunited with their children after a custody reversal has been ordered by a court. These interventions could involve community-based counselling for the rejected parent and child, or an intensive multiday program. The small research literature on these programs has focussed on intensive multiday (usually 4 days) programs, such as *Family Bridges*,[52] whose original development involved American psychologist Richard Warshak and *Turning Points* offered by New York based social worker Linda Gottlieb.[53] Forms of these programs have been offered by Ontario social worker Jacqueline Vanbetlehem and psychologist Dr. Barbara-Jo Fidler. Referred to as "camps" by some critics,[54] these programs are sometimes offered in a

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[48] See e.g. Benjamin Garber, *A Collaborative, Cognitive-Behavioral Reunification Protocol Serving the Best Interests of the Post-Divorce, Polarized Child* (2021).

[49] Janet R Johnston, Marjorie Gans Walters & Steven Friedlander "Therapeutic Work with Alienated Children and their Families" (2001) 39(3) Family Court Review 316 at 316.

[50] See e.g. Saini, M. (2019). Strengthening coparenting relationships to improve strained parent–child relationships: A follow-up study of parents' experiences of attending the overcoming barriers program. *Family Court Review*, *57*(2), 217-230.

[51] Janet R Johnston, Marjorie Gans Walters & Steven Friedlander "Therapeutic Work with Alienated Children and their Families" (2001) 39(3) *Family Court Review* 316.

[52] See Warshak, R.A., 2019. Reclaiming parent–child relationships: Outcomes of Family Bridges with alienated children. *Journal of Divorce & Remarriage*, *60*(8), pp.645-667.

[53] Harman, J.J., Saunders, L. and Afifi, T., 2022. Evaluation of the Turning Points for Families (TPFF) program for severely alienated children. *Journal of Family Therapy*, *44*(2), pp.279-298.

[54] There have, for example, been media reports of children experiencing emotional abuse at the "Turning Points Texas" program operated by New York social worker, Linda Gottlieb: see Hannah Dreyfus, "A Court Ordered Siblings to a Reunification Camp With Their Estranged Father. The Children Say It Was Abusive," *Propublica,* May 18, 2023 https://www.propublica.org/article/family-reunification-camps-kids-allege-more-abuse

resort or vacation setting, to allow parents and children to have recreational opportunities. Given the level of intensive professional involvement, and travel, these programs are expensive.[55]

Research exists on the *Family Bridges* and *Turning Points* multiday programs, though it has limitations, as, for example, there are no control groups and the studies involve small numbers of participants. Involvement for those interventions requires a custody change require a judicial decision that this is an appropriate case at least for custody reversal. The available research on these two interventions suggests these programs are generally effective (80% or more) at supporting a stable custody reversal. Although in theory the programs provide for the possibility of later engagement with the alienating parent to allow that parent to also have a healthy relationship with the child, these parents are often unwilling to participate after a custody reversal, choosing to abandon their children.

The research of these intensive programs has been critiqued, especially by feminist scholars and advocates, who argue that removal of children from the care of a custodial parent, usually the mother, especially one who has been the victim of family violence, may endanger the psychological well-being of children and violate their rights.. There are small number of highly publicized cases of older children and young adults reporting that they were psychologically abused in these programs and were very relieved to have returned to the care of their allegedly alienating mothers.[56]

The Feminist Critique of Parental Alienation

The National Association of Women and the Law (NAWL) has recently charged that parental alienation is an unscientific "pseudo-concept" whose use should be prohibited in the family courts, as there is a lack of research to establish that it can be reliably or validly identified and is often used by violent fathers to gain custody of children from abused mothers.[57] This position has some international support[58] and is reflected in recently enacted legislation in a few American states,[59] but in our view it should not be adopted.

There was also a multiday program for several families at a time family called the "Overcoming Barriers Camp" which operated at a summer camp location with some success for a few years, that involved both of the parents and the child attending a summer camp setting together for a period of days: Saini, M., 2019. Strengthening coparenting relationships to improve strained parent–child relationships: A follow-up study of parents' experiences of attending the overcoming barriers program. *Family Court Review*, *57*(2), .217-230.

[55] In *Barrett v Huver*, 2018 ONSC 2322, at para 44, there was evidence that a "multiday intensive" of Families Moving Forward, including accommodation, costs were in the range of (CAD) $25,000-$40,000. Costs have certainly increased since then.

[56] Avalle, Smith, Wiedeman & Garnica (2022), How efficacious is Building Family Bridges? What the legal and mental health fields should know about Building Family Bridges and "parental alienation", 19 *Journal of Family Trauma, Child Custody & Child Development,* 1-15*;* Andreopoulos & Wexler (2022), The "solution" to parental alienation: A critique of the turning points and overcoming barriers reunification programs, *Journal of Family Trauma, Child Custody & Child Development* 417-437; Mercer (2022), Reunification therapies for parental alienation: Tenets, empirical evidence, commonalities, and differences, *Journal of Family Trauma, Child Custody & Child Development, 19(3/4),* 383-401; and Jaffe P., Scott, K., Heslop, L., & Hooda, S. (2023). *Sober second thoughts about the benefits and limitations of reunification therapy. Family Violence & Family Law Brief, 27.* London, ON: Centre for Research and Education on Violence Against Women and Children, Western University. ISBN 978-1-988412-72-6.

[57] https://nawl.ca/pa-letter/ (posted Jan. 23, 2024).

[58] The NAWL position relies heavily on the work of Reem Alsalem, *Report of the Special Rapporteur on Custody, Violence Against Women and Violence Against Children* (United Nations Human Rights Council, April 2023).

Many of the prominent critics of the use of the concept of parental alienation are feminist legal scholars and domestic violence advocates who lack confidence in the ability of parenting evaluators and family court judges to understand and respond to IPV. While we share the concerns of NAWL that abusive or inadequate parents often make unjustified claims of parental alienation (PA) to explain their rejection by their children, we also share the views of many family justice professionals, including Canadian judges, that PA is a useful concept. Most of the researchers and practising mental health professionals who write on high conflict separations and many family justice professionals accept that parental alienation is a valid concept.[60] Although in a majority of cases the parent claiming to be alienated is the father, many mothers are also rejected by their children due to alienation by fathers, who in some cases have also abused the mothers.[61] While there is a significant overlap between issues of intimate partner violence (IPV) and alienation, there are many alienation cases that do not involve claims of IPV.

There is no doubt that courts and family justice professionals face real challenges when dealing with conflicting claims of IPV and PA. Concerns about the safety of children might suggest that courts should always "err on the side of caution" and reject alienation concerns whenever it is claimed that the child's rejection of a parent is due to that parent's violence or abuse. However, the unfortunate reality is that children who are alienated may also suffer long-term emotional harms if they remain in the care of a alienating parent with mental health issues, [62] and engaging in more severe alienating parental behaviours is often characterized as a form of emotional abuse or family violence.[63]

That report is often cited for the proposition that the "United Nations" has condemned the use of the concept of parental alienation. It is, however, the work of a Special Rapporteur, and not endorsed by the United Nations. Canadian courts have demonstrated skepticism about automatically placing weight on such reports. As observed by Stratas J, in *Canada v. Boloh* 2023 FCA 120, where he rejected the views of a Special Rapporteur:

> [50] Different international authorities are of different value, and, in particular, international court decisions in adjudicative contexts ….deserve far more weight than the non-adjudicative individual opinions of other international actors, such as [a] letter from the UN Special Rapporteur.

[59] In the USA a number of states have enacted versions of what is known as *Kayden's Law* or *Piqui's Law* that prohibits or restricts expert evidence about parental alienation, and prohibits courts from ordering "reunification therapies… which cannot be scientifically proven" to be "safe, effective and have therapeutic value." See e.g. https://www.nationalsafeparents.org/kaydens-law.html .

It is understandable that a naïve politician would want to enact a law that requires that family court interventions are "*scientifically proven"* to be "safe, effective and have therapeutic value." This standard may well be appropriate for decisions about issues like a Covid vaccination, but the vast majority of orders made in child protection and family cases could not begin to meet these standards. The reality is that it is impossible to the randomized "double blind" research that this type of standard implies, including the ordinary type of orders, such as ones for shared parenting or supervised visitation for abusive parents. See Benjamin Garber (2023), The emperor has no clothes: A systemic view of the status and future of child custody evaluation (CCE), 61:4 *Family Court Review* 747-761.

[60] Johnston, J. R. & Sullivan, Matthew J. (2020). Parental alienation: In search of common ground for a more differentiated theory. *Family Court Review*, 58(2), 570-592; and Kline Pruett, M., Johnston, J.R., Saini, M., Sullivan, M., and Salem, P. (2023). The use of parental alienation constructs by family justice system professionals: A survey of belief systems and practice implications. *Family Court Review, 61,* 372-394.

[61] See e.g. Rowlands, G.A., Warshak, R.A. and Harman, J.J., 2022. Abused and Rejected: The Link Between Intimate Partner Violence and Parental Alienation. *Partner Abuse*, *14*(1), pp.37-58.

[62] Miralles, P., Godoy, C. and Hidalgo, M.D., 2023. Long-term emotional consequences of parental alienation exposure in children of divorced parents: A systematic review. *Current Psychology*, *42*(14), pp.12055-12069.

[63] See e.g. Kraft J. in *Y.H.P. v. J.N.,* 2023 CarswellOnt 16173, 2023 ONSC 5766, at para. 59:

Further, while advocates for abused women are right to point out there has too often been a tendency for authorities to discount reports of IPV, it must also be appreciated that some of those who report being victims of IPV or that their children have been abused by the other parent, especially in the context of high conflict family litigation, perhaps due to personality disorder, mental illness or their own childhood trauma, may be unreliable or even dishonest witnesses. A feature of many cases is that the alienating parent has made repeated unfounded allegations of child abuse against the other, resulting in multiple, unnecessary investigations by CPS or the police. The making of repeated, unfounded allegations of child abuse may itself be symptomatic of personality disorder and raises concerns about the capacity to be a child focussed parent.

Like so many issues related to parenting disputes and the "best interests of children," a determination that there has been parental alienation requires an often-complex set of factual findings specific to a case. While there are approaches to parenting evaluations that can help establish whether the child has been the subject of parental alienation,[64] there is no psychological test that can reliably determine the presence or absence of parental alienation, or for that matter the credibility of parents, IPV or the best interests of a child. Although parental alienation and IPV are sometimes offered as alternative, mutually exclusive explanations for a child's rejection of a parent, both may be present in some cases. Despite the challenges in determining whether there has been parental alienation, and if so, deciding how to respond, in our view Canadian courts and family justice professionals have been justified in using the concept. It is, however, also important to appreciate that individual cases are often multi-layered and complex, and simplistic or unjustified use of labels and responses does not advance understanding or a resolution that promotes the best interests of an individual child.

III. RESEARCH ON CANADIAN CASES OF PARENTAL ALIENATION

Recent studies of reported Canadian family law decisions provide a broad picture of the types of cases that raise parental alienation issues, though there are limitations to this type of research. Judicial assessments of critical issues, like whether a claim of IPV is valid, may not always be correct. Further, reported cases often fail to provide all the information that a researcher might want.

Canadian Cases: 2004-2020

A team led by American psychologist Jennifer Harman analyzed 500 reported Canadian cases in which the court made a finding of parental alienation decided between 2004 and 2020;[65] the study did not include the larger number of cases in this period where alienation was

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> Considering my finding that the mother has engaged in a practice of parental alienation against the father, I find that her conduct amounts to family violence and seriously impacts her ability to care for and meet the needs of [the child].

See also e.g. Sullivan, Pruett & Johnston (2024), Parent-child contact problems: Family violence and parental alienating behaviors either/or, neither/nor, both/and, one in the same? 62:1 *Family Court Review* 68-85.

[64] See e.g. Benjamin D. Garber & Robert A. Simon (2023) Looking Beyond the Sorting Hat: Deconstructing the "Five Factor Model" of Alienation, Journal of Divorce & Remarriage, DOI: 10.1080/10502556.2023.2262359

[65] Harman, J., Giancarlo, C., Lorandos, D. and Ludmer, B., 2023. Gender and child custody outcomes across 16 years of judicial decisions regarding abuse and parental alienation. *Children and Youth Services Review*, *155*, p.107-187: https://doi.org/10.1016/j.childyouth.2023.107187. The Harman et al results are broadly consistent of an earlier study of Canadian cases, though that earlier study included all cases where alienation was raised, not

raised, but not found. In that study, most of the cases involved alienating mothers (64%), though in a significant portion of cases (34%), the father was found to be the alienating parent.

Almost half of the cases involved claims of IPV or child abuse (48%) which were generally investigated by a third party, such as child protection services, the police or a court appointed expert. Not surprisingly, since the focus of that research was on cases where alienation was found, in 71% of the cases the claims of IPV or abuse were rejected there was a finding of violence or abuse in only 11% of cases where the issue was raised. The researchers found no cases where the court placed a child with an alienated father who had a substantiated history of child abuse.

There was a court appointed expert in 69% of cases; when the expert expressed an opinion on alienation, it was usually followed by the court (83% of cases where expressed), but not always, suggesting that judges have an independent role and are not simply adopting the views of experts. Although a finding of alienation sometimes resulted in a "custody reversal," this was *not* the most common response, with primary care to alienated fathers increasing from 23% of the cases where the mother was the alienating parent to 33% of those cases, while where fathers were found to be the alienating parent, primary care for the mother increased from 41% to 45% of cases.

Quebec Cases: 2017-2020

A study by psychologist Amylie Paquin-Boudreau and her colleagues analyzed all reported Quebec decisions between 2017 and 2020 (n=164) that raised the issue of parental alienation.[66] The court found alienation in only 40/164 (24%) where the issue was raised. While there were more findings of alienation against mothers (n = 24) than fathers (n =16), the rate of findings of alienation against fathers was higher (34 %: n =16/47) than the rate of findings of alienation against mothers (21 %: n = 24/115); this suggests that courts were more likely to find claims of alienation made by mothers to be validated. The issue of Intimate Partner Violence DV was raised in 21% of the cases (n =35/164); the court made a clear finding that there had been IPV in 12 cases but rejected the claim of IPV as unfounded in 4 cases, suggesting that courts were not systematically dismissing the claims of female victims of IPV in cases where alienation was raised.

Of the 40 cases where the court concluded that parental alienation occurred, a custody reversal was ordered in only 8 cases (20%), with 7 a transfer from the alienating mother to the rejected father, and 1 from the alienating father to the rejected mother.

Ontario Cases: 2021-23

The authors of this paper undertook an analysis of the 172 reported Ontario cases from January 1, 2021, to December 31, 2023, that raised the issue of parental alienation.[67] Most of the parents had legal representation, though mothers were more likely to have lawyers (89%)

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only those where alienation was found. See Bala, Hunt & McCarney (2010), "Parental Alienation: Canadian Court Cases – 1989 to 2008" (2010), 48(1) *Family Court Review* 164.

[66] Paquin-Boudreau, E., Poitras, K., & Bala, N. (2022). Family court responses to claims of parental alienation in Quebec. *International Journal of Law, Policy and the Family,* 36(1). https://doi.org/10.1093/lawfam/ebac014;

[67]The study focused on decisions about parenting and excluded costs decisions. The data set is available at https://doi.org/10.5683/SP3/FI22LU. The number of cases reported for various issues in this paper do not always sum to 172 as total or 63 for alienation as the data set includes a few cases there were cases where each parent made alienation claims against the other (8) and where grandparents made alienation claims (3); for some variables, some cases were coded as unknown or unclear and are excluded from reported results.

than fathers (75%). The Office of the Children's Lawyer (OCL) provided legal representation for the child in 24 cases (14%) of the cases.

The court concluded that parental alienation occurred in 63 cases (36%) where the issue was raised. Although there were more cases in which mothers were found to be the alienating parent, claims of alienation were more likely to succeed against fathers (20/43: 47%) than against mothers (43/138: 31%).

There were many cases with claims of both IPV and PA (n=103/172: 60%), revealing significant overlap between the issues. In the 63 cases where the court found alienation, there was a claim of IPV in 47 of the cases, and a finding of IPV in 15 of those cases. In the 109 cases where the court did not find alienation, there was a claim of IPV in 56 cases, and a clear finding of IPV in 28 of those cases, 13 cases where the court rejected claim of IPV, and another 15 cases where the court did not make a clear finding about the IPV allegation.

There were 26 cases where the father claimed that the mother was the alienating parent but the court found that he was a perpetrator of IPV. In 21 of these cases, the court rejected the claim of alienation. In 5 of the cases the court concluded that there was alienation despite a finding of IPV, but in only 1 case was there a custody reversal, and in that case there was a conviction for mischief against the father more than 6 years earlier and subsequently the mother had made a number of unfounded claims of child abuse against the father to the CPS and she repeatedly defied court orders to allow him to spend time with the child [68]

A significant portion of the cases where the mother was found to be an alienating parent 17/43 also involved allegations of child abuse that the court ruled unfounded.

These findings clearly suggest that although parental alienation is an often-mentioned issue in high conflict cases, it is not infrequently raised, especially by fathers, in cases where there is justified rejection, or at least an understandable reluctance by children to visit with a parent. They are also broadly consistent with the results of other studies which reveal that the court's conclusion that the claim of IPV was founded generally resulted in rejection of the alienation claim, and does not support the assertion of NAWL that courts are placing children with abusive fathers based on their claims of being alienated parents.

Only 9 out of the 63 cases (14%) where alienation was found resulted in a custody reversal; most of these (7/9) were reversal from mother to father. This is consistent with other studies which establish that courts are using custody reversal as a "last resort" in alienation cases.

IV. JUDICIAL ASSESSMENTS OF CHILDREN RESISTING CONTACT

The *Divorce Act,* amended in 2021, establishes that a parent's willingness to support the child's relationship with the other parent is a factor in making decisions about parenting:[69]

> s.16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

[68] *Bors v Bors,* 2021 ONCA 513. After the separation, the father was found guilty of mischief for placing a tracking device on the mother's car. Since then the mother had made repeated unfound reports of child abuse by the father to the CPS, and consistently failed to comply with court orders. A court-appointed expert recommended custody reversal.

[69] *Divorce Act* RSC, 1985, c. 3 (2nd Supp.)

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

s16 (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

While these provisions establish that parents generally have a positive obligation to support a child's relationship with the other parent and to facilitate the exercise of parenting time (formerly called access),[70] they do not establish a presumption of shared parenting. [71] Further the *Act* specifies that the views of the children involved are important, and that family violence is a "primary consideration" in parenting cases where the violence is directed at the child or at the other parent (i.e. child abuse or intimate partner violence):

s.16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including …

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained…

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child…

16(2) When considering the [best interests factors], the court shall give ***primary consideration*** to the child's physical, emotional and psychological safety, security and well-being.

The effect of these provisions (and prior jurisprudence) is that a court faced with the issue of a child resisting contact generally needs to make an determination of the reasons for this situation, such as parental alienation, realistic estrangement due to child abuse or intimate partner violence, or a hybrid situation. As explained by Mitrow J in *CT v MMM*:[72]

Before a court can find parental alienation, it is necessary to examine whether there has been "realistic estrangement" and whether a rejected parent's behaviour is a contributing factor to a damaged parent-child relationship; even where a favoured parent engages in problematic behaviour, a child may not be "alienated" where there are independent reasons to explain the child's feelings.

In that case the judge refused to make an interim order for a custody reversal based on the father's claim of parental alienation. While that claim had some support from a therapist involved in the case, the court was concerned that the father failed to prioritize the children's intense commitments for competitive sports, and that his past examination of the daughter's vagina for infection significantly contributed to their refusal to see him. The clinician of the

[70] *Ayotte v. Bishop*, [1996] O.J. No. 4810 (Ct. J. (Gen. Div.)) [*Ayotte*] at para 1.
[71] For a rejection of a presumption of shared parenting and a discussion of the significance of family violence in parenting cases, see *Barendregt v Grebliunas,* 2022 SCC 22.
[72] *C.T. v. M.M.M.,* 2023 ONSC 7247, at para. 82, additional reasons at 2023 ONSC 4552

OCL reported that the children had formed independent opinions to not want to see their father, who abandoned his claim for custody reversal after this interim decision.

While it may ultimately be necessary for a court making a parenting order to decide whether or not the child is alienated, in many less severe cases it may be understandable that the court lacks the evidence to make a clear determination. The court might, for example, conclude that the child is not in fact resisting contact, but only has an affinity for one parent and wants to spend less time with the other parent without actually rejecting them. In some cases it may be preferable for the court to case manage a high conflict situation and support a consensual resolution that does not require a clear determination that either parent is an "abuser" or an "alienator."

In some cases, it may be either impossible or unhelpful for a court to reach a definite conclusion about the reason that a child is resisting contact with a parent. In the British Columbia case of *KFM v KGT,* the trial extended over 43 days, with the father was claiming that his son had been alienated from him by his mother and seeking an order for equal parenting time. The mother argued that it was a situation of justified estrangement due to the father's emotional and physical abuse of the child. Justice Brundrett did not fully support the position of either parent, observing:[73]

> The facts in this case do not lend themselves to a clear finding one way or the other with respect to parental alienation or unjustified estrangement. I therefore find it unhelpful in this particular case to focus on who is to blame for the breakdown in [the child's] relationship with his father. I would focus instead on a child-centered approach and the fundamental consideration of best interest factors in s. 37 of the FLA.
>
> I …therefore reject an approach in this case that adopts alienation as a legal conclusion that places blame on one parent for disruption in the parent-child relationship. I do recognize that there is a pattern of resistance and refusal behaviour by [the child] toward the father…. and that he appears to have sometimes expressed disproportionate hostility toward the [father] without reasonable justification. I also recognize that the parenting regime has sometimes operated unfairly for the [father], like when he was falsely accused of assault and lost his contact with the child for several months. …there are a multitude of factors at play, and the best focus is on [the child's] long-term interests.
>
> I find in this case that a careful assessment of the context and the characteristics involved in the best interests of the child is called for to determine the parenting issues here, rather than a judicial finding assigning blame for the attachment disruption — a finding that is only likely to lead to further litigation and conflict.

The court ordered that the mother would retain primary care and decision-making, with an increase in the father's time from the prior arrangement, but not equal parenting time.

Expert Evidence

The report of a neutral court-appointed mental health professional who has conducted an evaluation of both parents and their children often has significant weight in assisting the judge in determining whether there has been parental alienation. Although the courts are clearly not bound by the opinions expressed by these experts, the failure of a parent to participate in a

[73] 2023 BCSC 1347, at 261-264. For a similar "holistic" approach, see *JI v AA,* 2023 ONSC 2942, per Fryer J.

court-ordered evaluation is likely to lead to an adverse inference against that parent. In *Hormillosa v Tosani-Levine,* Smith J explained:[74]

> The crux of the Father's position is that the Mother is the cause of the damaged relationship with his children. On the evidentiary record before me, the Court does not find that the children have been alienated from their Father.
>
> Although expert evidence about parental alienation is not necessary [for a court to find that it has occurred], the Father nonetheless had the opportunity to participate in a parenting assessment, where his allegations of parental alienation could have been fully explored…. Had the Father been truly concerned with parental alienation, as alleged, the Court believes that he would have proceeded with the court ordered assessment.

Although the opinion of a court-appointed expert often has significant weight, the court may disregard it if the judge concludes that it is based on erroneous factual assumptions or that the expert lacked the qualifications to deal with the specific case. In *RE v SJL,* the court rejected a mother's application to relocate from Prince Edward Island to British Columbia. The mother placed significance reliance on the views of the court-appointed expert who did not accept that she was alienating the child but rather concluded that she was the victim of spousal violence and supported her relocation. In rejecting the expert's opinion and refusing to allow the mother to relocate, Cann J. wrote:[75]

> Expert opinions which are formed in part on the basis of factual assumptions lose validity if the factual assumptions prove unfounded. Moreover, in a forensic context, the decision to simply choose to accept a version of the truth, especially in the face of concerns of parental alienation having been raised, gives rise to concerns of a lack of objectivity of methodology (to be contrasted with impartiality), which substantially weakens the probative value of the opinion….
>
> Further, cross examination of [the court-appointed expert] regarding his qualifications in respect of assessing parental alienation concern me. Independent of his approach to the information-gathering aspect… I am able to attribute minimal weight to his conclusions. The paucity of his training and education specific to parental alienation did not become evident until he had been qualified to give opinion evidence (without objection or cross examination by opposing counsel). …

In Ontario, the court may appoint an expert under the *Children's Law Reform Act* s. 30, with the requirement that the parents pay for the parenting plan evaluation (also called an assessment), with costs that are often in the range of $20,000 - $30,000, beyond the capacity of many parents to pay. These experts are often psychologists, but may be psychiatrists or social workers, and usually provide an opinion about whether or not there is parental alienation and make a recommendation to the court.

Courts in Ontario may also request that the Office of the Children's Lawyer (OCL) become involved in a case to provide a "clinical investigation," without charge to the parents. The OCL reports are usually prepared by social workers. While these reports may include a recommendation about parenting arrangements, the present practice of the OCL is that these

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[74] 2023 ONSC 4120, at para. 28-29

[75] 2023 PESC 1, at para 50-54. See also e.g *K.K. v M.M.,* 2022 ONCA 72 where the psychiatrist Dr. Sol Goldstein erroneously concluded that the mother had alienated the two children; the doctor was ultimately subjected to professional discipline.

clinicians are not offer an opinion about whether or not there has been "parental alienation,"[76] since this requires special expertise. Further, some recent decisions have held that unless specifically qualified as experts, the recommendations of an OCL clinician about parenting arrangements are not admissible.[77]

In 2021-23 there were 87 Ontario alienation cases (51%) where a court-appointed neutral expert was appointed. In 42 of these cases the professional included an opinion about whether parental alienation occurred, with a conclusion that it had occurred in 16 cases, and that alienation had not in 26 cases. The court completely accepted the court-appointed expert's recommendations in 19 of these cases, partially accepted them in another 15, and did not adopt the recommendations in 8 cases. Thus in 81% of cases (34 of 42) where the expert provided recommendations, they were followed in whole or in part.

There were 30 cases in which a party retained a mental health professional to express an opinion about the case. In some cases, this was a critique of the evaluation of the court-appointed experts. There were 43 cases in which a therapist or counsellor testified. The opinions of experts who are not court-appointed are generally afforded less weight those that of an independent court-appointed assessor, reflecting the fact that party-retained experts will generally not have the broad range of information that is available to a court-appointed parenting expert.[78]

The Child's Views: Voice of the Child Report & Judicial Interviews

In high conflict cases involving alienation claims, there is usually significant evidence about the child's views, as the child has expressed a strong preference for not seeing one of the parents. This evidence may be available from a parent, or if a court-appointed expert has undertaken an evaluation, that expert will be able to report on the child's views and may be able to express an opinion about whether those views are independent or a result of the influence or manipulation of the favoured parent.

In Ontario, the court may request involvement of the Office of the Children's Lawyer to prepare a Voice of the Child Report, with a social worker interviewing a child on a couple of occasions and reporting on the child's perspectives and preferences, but without attempting to assess whether the child is alienated. Although potentially valuable for high conflict cases where there are no alienation claims, Voice of the Child Reports may have less value when alienation is a central issue, and they were only provided in 20 out of 172 (12%) cases in Ontario in 2021-23.

In some high conflict cases, especially when the parties have conflicting positions about the child's views, a judicial interview may be valuable. In Ontario judicial interviews are rare when alienation is at issue. There are, however, cases where the judge and child may find it helpful to have a meeting. In *MSR v DMR,* the court received a substantial amount of evidence, including in a report form a court-appointed expert, that the 13.5-year-old boy had been alienated from the mother. The parents both requested that judge meet the child, and he agreed

[76] Birnbaum & Bala (2024 under review), Parental Alienation Cases: Experiences of Ontario Legal and Mental Health Professionals, *International Journal of Policy, Law & the Family.*

[77] See e.g. *AB v SM,*2023 ONSC 1718; and *Da Torre v Grossi,* 2023 ONSC 6133.

[78] See e.g. *C.T. v. M.M.M.,* 2023 ONSC 7247,

to do so.[79] Justice Thomas observed that the purpose of "interview was not to gather evidence" but that it was "appropriate" for him to meet so that the boy knew that [80]

> I was aware of his views; and to discuss the trial process and the difference between having a voice and deciding an issue. It is my hope the judicial interview process will enhance the likelihood that [the boy] would accept my decision…. During the interview I told [the boy] I would be happy to meet with him and explain my reasons to him once I made a decision. He indicated he wanted to have this further meeting.

Notwithstanding the child's very clearly stated "detest" for his mother, the court found the boy to be alienated and ordered a custody reversal from the father to the mother, with the mother and boy to participate in the Family Bridges program, and a minimum 90-day period of no contact with the alienating father.

Role of Child Protection Services

It is becoming increasingly common for the Child Protection Service (often called the Children's Aid Society in Ontario) to become involved in high conflict separation cases where there are allegations of domestic violence or alienation, as one or both parents report about emotional, sexual or physical abuse by the other parent.[81] In some cases another professional who works with the child, such as a physician or teacher may report about suspected abuse or neglect, or the police may contact the CPS to report concerns arise out their being called to the home to deal with family violence issues. In 2021-23, the CPS was involved in 101 Ontario cases (59%) where parental alienation was raised, mainly in an investigative or supportive role.

It is clear that a Family Court judge dealing with high conflict parenting dispute does not have the jurisdiction to *order* that the CPS investigate or provide services.[82] The Court may, however, report to the CPS if the judge believes that child may be subject to emotional abuse as a result of the conflict, which may be done by sending a copy of the decision to the agency. In practice the agencies are generally responsive to such judicial reports and may send counsel or a report to the Family Court. [83] However, there are concerns that the CPS is often not doing enough to co-ordinate its response with other agencies and fails to recognize the emotional harm caused by high conflict separations and parental alienation.[84]

There are relatively few cases in which the CPS brings a protection application due to concerns about alienation and emotional abuse arising from a high conflict separation. An example of such a case is *Jewish Family and Child Services of Greater Toronto v. AK*[85] where the father was alienating the children from their mother; as a result, the children became

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[79] 2022 BCSC 1398.
[80] 2022 BCSC 1398, at apar 216-221.
[81] See e.g. Houston, Bala & Saini, "Crossover Cases of High Conflict Families Involving Child Protection Services: Ontario Research Findings and Suggestions For Good Practices" (2017) 55(3) *Family Court Review* 362-374.
[82] *Fiorito v. Wiggins,* 2015 ONCA 729.
[83] *MAB v MGC,* 2023 ONSC 3748.
[84] Birnbaum & Bala (2024 under review), Parental Alienation Cases: Experiences of Ontario Legal and Mental Health Professionals, *International Journal of Policy, Law & the Family.*
[85] 2014 ONCJ 227. See also e.g. *Catholic Children's Aid Society of Hamilton v. V. A, N. E. and M. E.*, 2022 ONSC 4684.

verbally and physically abusive towards her. The CPS concluded that the children were in a "state of emotional crisis," and apprehended them, a decision upheld by Sherr J., with the plan of placement in foster care and undertaking of therapy to eventually allow them to be placed in the care of their mother.

While the CPS is generally not in a position to determine whether or not there has been parental alienation, the role of these agencies is especially influential if they conclude that a parent is been making unfounded allegations of child abuse against the other parent which is consistent with a finding of parental alienation.[86] A CPS conclusion that a parent has perpetrated child abuse is also highly relevant for rejecting a claim of alienation, and often results in a resolution without a family trial.

Role of the Police

The police are often involved in high conflict family cases, as a parent or neighbor may contact the police during a parental argument. In 2021-23 the police were involved in 106 of the 172 cases (62%) where parental alienation was raised, with 71 of these cases resulting in criminal proceedings being commenced. Over half of these proceedings resulted in criminal convictions or a recognizance. While a criminal conviction may be significant for a parental alienation case in terms of proving that there has been family violence, the fact that charges were not laid, or resulted in an acquittal or recognizance, does not establish that there has not been abuse or violence for the purposes of the family proceeding.

Judicial Notice: Not Necessary to Have an Expert

While an expert opinion about alienation can be very helpful to a judge, it is clearly not essential for an expert to testify for the court to make a finding whether or not alienation has occurred.

In *AM v CH* the parties had an 11-day trial, with evidence from various counsellors who worked with family members and from CPS workers who investigated the mother's largely unfounded reports of child abuse by the father. The trial judge concluded that there had been parental alienation and that it was in the best interests of the 14-year-old boy to have custody transferred from the alienating mother to the father. The mother appealed on several grounds, including that the trial judge made a finding of alienation without proper expert evidence. In dismissing the appeal, Pardu JA wrote: [87]

> In finding that the mother alienated the child from the father, the trial judge was not purporting to make a psychiatric diagnosis of any syndrome or condition. Rather, he was making factual findings about what happened in this family. This is the stuff of which custody trials are made, and as conceded, no expert opinion was required to enable him to do so.
>
> Those factual findings logically led to certain remedies being appropriate or not. *The trial judge did not need expert evidence before choosing the remedy that was in the best interests of the child.*
>
> Further, judges deciding custody cases do so in places as diverse as Cochrane, Ontario and downtown Toronto. It cannot be assumed that comprehensive parenting capacity assessments are

[86] See e.g. *A.M. v C.H.* 2019 ONCA 764.
[87] *A.M. v C.H.,* 2019 ONCA 764, at para 32-36 (emphasis added); see also *Bouchard v. Sgovio*, 2021 ONCA 709.

universally available or affordable. Even competent assessors may not have the luxury of lengthy time to evaluate family dynamics and appropriate remedies…

Some expert assessments may be very helpful to a trial judge, but they are not a prerequisite to making the order the trial judge thinks is in the child's best interests, based on all of the evidence at the end of the trial. In fact, the trial judge is obliged to make that order, regardless of whether expert evidence is adduced.

It is accepted that judges may take judicial notice of behaviours that are commonly associated with alienation. A frequently source cited in the Canadian courts for "red flags of alienation" was provided by Dr. Barbara Jo Fidler, a leading expert, in her testimony in the 2009 case of *AGL v. KBD,* where she set out common characteristics of the child, the favoured parent, and the rejected parent. Justice McWatt quoted Dr. Fidler at length:[88]

Child Behaviours

- View of parents one-sided, all good or all bad; idealizes one parent and devalues the other parent.
- Vicious vilification of target parent; campaign of hatred.
- Trivial, false and irrational reasons to justify hatred.
- Reactions and perceptions unjustified or disproportionate to parent's behaviours.
- Talks openly to anyone about rejected parent's perceived shortcomings.
- Extends hatred to extended family and pets (hatred by association).
- No guilt or ambivalence regarding malicious treatment, hatred, etc.
- A stronger, but not necessarily healthy, psychological bond with alienating parent than with rejected parent.
- Anger at rejected parent for abandonment; blames him/her for divorce.
- Speech is brittle, a litany; obsessed; has an artificial quality; affect does not match words; no conviction; unchildlike, uses adult language; has a rehearsed quality.
- Stories are repetitive and lacking in detail and depth.
- Mimics what siblings report rather than own experience.
- Denial of hope for reconciliation; no acknowledgement of desire for reconciliation.
- Expresses worry for preferred parent, desire to care for that parent; or, defensive denial that child is indeed worried about parent.

Alienating Parent Behaviours:

- Allows and insists that child makes decisions about contact.
- Rarely talks about the other parent; uninterested in child's time with other parent after contact; gives a cold shoulder, silent treatment, or is moody after child's return

[88] This list was first quoted by McWatt J. in *L.(A.G.) v. D.(K.B.*) (2009) 93 O.R. 409 (Sup. Ct. J.). It is often cited by the courts across Canada; see e.g. *MS v KA* 2022 ONSC 6570; *P.R.M. v. L.G.*, 2016 MBQB 242; *Malhotra v. Henhoeffer*, 2018 ONSC 6472, 2018 CarswellOnt 18560, affirmed as *A.M. v. C.H.*, 2019 ONCA 764; *M.(L.) v. B.(J.)*, 2016 NBQB 93; *Droit de la famille - 211179*, 2021 QCCS 2765; *Cantave v. Cantave*, 2014 ONSC 5207, at 58; and *Maharaj v. Winfred-Jacob*, 2016 ONSC 7925, at 138 - 145. See also *Green v. Green,* 2021 NSCA 61, leave to appeal to SCC dismissed Feb. 22, 2024.

This list was slightly updated in Fidler B. & Bala, N. (2020), "Concepts, Controversies, and Conundrums on 'Alienation': Lessons Learned in a Decade and Reflections on Challenges Ahead" *Family Court Review*, 58(2), 576-603, which is also cited by the courts; see *Catholic Children's Aid Society of Hamilton v. V. A, N. E. and M. E*, 2022 ONSC 4684.

from visit.

* No photos of target parent; removes reminders of the other parent.
* Refusal to hear positive comments about rejected parent; quick to discount good times as trivial and unimportant.
* No encouragement of calls to other parent between visits; rationalizes that child does not ask.
* Tells child fun things that were missed during visit with other parent.
* Indulges child with material possessions and privileges.
* Sets few limits or is rigid about routines, rules and expectations.
* Refuses to speak directly to parent; refuses to be in same room or close proximity.
* Does not let target parent come to door to pick up child.
* No concern for missed visits with other parent.
* Makes statements and then denies what was said.
* Body language and nonverbal communication reveals lack of interest, disdain and disapproval.
* Engages in inquisition of child after visits.
* Rejected parent is discouraged or refused permission to attend school events and activities.
* Telephone messages, gifts and mail from other parent to child are destroyed, ignored or passed on to the child with disdain.
* Distorts any comments of child that might justify accusations.
* Doesn't believe that child has any need for relationship with other parent.
* When child calls and is quiet or non-communicative, parent wrongly assumes pressure from target parent, or that child is not comfortable with target parent; evidence of bad parenting; does not appreciate that child is uncomfortable talking to alienating parent about target parent.
* Portrays other parent as dangerous, may inconsistently act fearful of other parent in front of child.
* Exaggerates negative attributes of other parent, and omits anything positive.
* Delusional false statements repeated to child; distorts history and other parent's participation in the child's life; claims other parent has totally changed since separation.
* Projection of own thoughts, feelings and behaviours onto the other parent.
* Does not correct child's rude, defiant and/or omnipotent behaviour directed towards the other parent, but would never permit child to do this with others.
* Convinced of harm, when there is no evidence.
* False or fabricated allegations of sexual, physical and/or emotional abuse.
* Denigrates and exaggerates flaws of rejected parent to child says other parent left "us," divorced "us" and doesn't love "us'.'
* Over-involves child in adult matters and litigation.
* Child required to keep secrets and spy or report back on other parent.
* Child required to be messenger.
* Overt and covert threats to withdraw love and affection from child unless other parent is rejected.
* Extreme lack of courtesy to rejected parent.

* Relocation for minor reasons and with little concern for effects on child.

Parental Behaviours of Target Parent that Make Alienation More Likely

* Harsh, rigid and punitive parenting style.
* Outrage at child's challenge to his/her authority.
* Passivity or withdrawal in face of conflict.
* Immature, self-centred in relation to child.
* Loses temper, angry, demanding, intimidating character traits, but not to level of abuse.
* Counter-rejecting behaviour.
* Lacks empathic connection to child.
* Inept and unempathetic pursuit of child, pushes calls and letters, unannounced or embarrassing visits.
* Challenges child's beliefs and/or attitudes and tries to convince them otherwise.
* Dismissive of child's feelings and negative attitudes.
* Induces guilt.
* May use force to reassert parental position.
* Vents rage, blames alienating parent for brainwashing child and takes no responsibility.

While this list is a helpful tool, not all of these factors will be present in every case where there is parental alienation, and it is necessary to consider the context, frequency and intensity of these behaviours as well as their presence.

V. LEGAL RESPONSES TO PARENTAL ALIENATION

The discussion which follows considers a range of judicial responses that may be used where the court concludes that there has been parental alienation, recognizing that the response will be affected by the legal context, which may include: at an initial application, either at the temporary or trial stage; an application for enforcement of a previously made parenting order; an application for variation of a previously made order; or in a relocation application.

There may be a sequence of responses as a case evolves, or new evidence is brought before the court in proceedings that may start with an interim application and end with a variation or enforcement proceeding. Further, some of these responses may be appropriate when a child is resisting contact with a parent even if the court does not conclude that there has been parental alienation.

To make the discussion manageable each response is considered in isolation. However, it must be appreciated that more than one may be used in a case, such as an increase in the parenting time with a rejected parent and court mandated counselling and perhaps a police enforcement clause. The responses include, in roughly increasing order of intrusiveness:[89]

[89] The Ontario Court of Appeal in *A.M. v. C.H.* 2019 ONCA 764 sets out four options as a response to parental alienation, though as discussed here, the list omits some possible responses:

1. do nothing and leave the child with the favoured parent;

- process responses such as having single judge case management, often with the hope of encouraging the parents to address the issues on a consensual basis, and the possibility of dealing with urgent motions to enforce parenting time (access);
- order some form of reconciliation counselling without changing the parenting time arrangement;
- increase the role of the rejected parent in the child's life by increasing the parenting time and/or parental decision-making responsibilities;
- an order that the judge hearing the case will remain seized, to monitor compliance with court orders;
- find the alienating parent in contempt of court;
- order police enforcement of the parenting time order;
- reverse decision-making and primary residence to place the child with the rejected parent, often suspending contact with the alienating parent ("custody reversal");
- order that the alienating parent pay costs to the alienated parent; and
- do nothing, leaving the child with the favoured parent, hoping that the situation may improve with time.

In deciding how to respond to the finding of alienation the court will consider such factors as the severity of the child's alienation, the parenting capacities of both parents, and the child's age and likely response to a court order.

Process: Case Management, Urgent Motions and Rule 1(8)

The Ontario courts are increasingly recognizing that high conflict parenting cases require judicial control and timely effective responses to violations of court orders, whether by abusers who are violating restraining orders or alienating parents violating orders for parenting time.

One method to increase the effectiveness of judicial responses to high conflict cases is to have single judge case management. Judicial continuity increases the likelihood of the judge being able to get a sense of how the parents are interacting with each other and their children. Judicial continuity will help a judge identify cases that may be settled, and gain sufficient trust from warring parents to be able to get some of them to focus on the interests of their children, and resolve their disagreements without lengthy, embittering and expensive litigation.[90] At this

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2. reverse decision-making and primary residence and place the child with the rejected parent;

3. leave the child with the favoured parent and order therapy and counselling; or

4. provide a neutral, transitional, placement for the child and order therapy, so as to facilitate a placement with the rejected parent at a later date.

See also detailed discussion of possible legal responses in Zechariah Martin (2023), Remedies for Parental Alienation in Canadian Family Law, 42 *Canadian Family Law Quarterly* 85.

[90] Bala, N., Birnbaum, R. and Martinson, D., 2010. One judge for one family: Differentiated case management for families in continuing conflict. *Can. J. Fam. L.*, *26*, p. 395.

In *Bouchard v. Sgovio,* 2021 ONSC 1055, Hughes J wrote, at para 53 (affd 2021 ONCA 709) [Emphasis added]

> 53 It takes many years of training and experience to be able to identify the sophisticated nature of the manipulation typically engaged in by parents with tendencies toward alienating their children, and it

interim stage, there may be skilled mental health professionals who can an offer an early intervention that will include a report to the court about the engagement of the parents and children.[91]

Urgent Motions for Enforcing Parenting Time (Access)

The *Children's Law Reform Act* s. 20(4) provides that if parents separate, they both continue to have a right to share in decision making, unless there is "consent, implied consent or acquiescence" to some other arrangement, and further provides that "entitlement to parenting time continues unless suspended by a court order or separation agreement." The effect of this provision is that, in the absence of criminal charges resulting in a suspension of the right to contact with a child as a condition of bail release (or sentencing), a parent with *de facto* care should be allowing the child to spend parenting time with the other.

If after separation, the parent with *de facto* primary care refuses to allow the other parent to have reasonable parenting time with the child, the parent being denied contact can bring an "urgent motion" (without a prior case conference) under the *Family Law Rules,* R 14(4.2) for an order for some parenting time (access). [92]

In *O.M. v. S.K.* six months after their legal separation the parties had commenced family proceedings but continued to reside in same dwelling. With competent counsel, they negotiated a shared parenting regime that required the mother to vacate the matrimonial home in exchange for a financial settlement.[93] A few days after signing the agreement, and without leaving the house, the mother reported to the police and CPS that before her signing of the agreement the father had physically and emotionally abused her and that he had physically and sexually abused the child. The father denied all of the allegations and claimed that the mother was manipulating and alienating the child. The mother and father made competing, urgent parenting applications, based on "two diametrically opposed versions of events," without any opportunity for cross-examination or independent evidence before the hearing. Justice Bell concluded that the mother's evidence was not "credible or reliable based on the internal inconsistencies," and observed that:[94]

> A finding of parental alienation can be made at the interim stage and on a written record, particularly when the evidence overwhelmingly points to this conclusion. The urgency raised by parental alienation necessitates early and decisive intervention by the court:
>
> > If there is anything everyone agrees on, whether it be lawyers, experts or judges, it is essential that a parental alienation case be dealt with quickly. As a practical matter, if it is

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> takes considerable insight and discernment to differentiate between those cases that present as possibly justified estrangement vs. alienation. In order to do so, it is often necessary to scrutinize parental behaviour over many months, even years. It is not possible to accurately do so by observing what amounts to a snapshot in the family's lifetime, or by giving the dominant parent more audio time. We must guard against our human nature to start to believe a certain narrative simply because we hear it repeated often. *Hence the encouragement from our Court of Appeal for judges to seize ourselves of these high conflict and excruciating cases.*

[91] See discussion above early interventions. In Alberta, Family Practice Note 7 of the Court of King's Bench specifically allows for an intervention with a report to the court. See e.g. *JLZ v. CMZ,* 2021 ABCA 200..

[92] *Clement v Clement,* 2010 ONSC 1113; see also *Cataldo v Cataldo*, 2014 ONSC 6344.

[93] 2020 CarswellOnt 8535, 2020 ONSC 3816; see also *Matteliano v. Burt*, 2018 CarswellOnt 12417.

[94] 2020 CarswellOnt 8535, 2020 ONSC 3816, at para. 45

> to be dealt with quickly it must be resolved by way of a motion, long before trial (*Hazelton v. Forchuk*, 2017 ONSC 2282 (Ont. S.C.J.), at para. 2).

While the judge concluded that the child, likely because of her young age (4.5 yrs), was not "exhibiting the behaviours of an alienated child," she held that by not allowing the father any parenting time the mother was "depriving [the child] of her relationship" and had engaged in "parental alienation." The judge was ordered that the father was to have interim sole custody, with the mother having visits 3 times a week.

There is, however, a "high threshold" for a court to make a finding of alienation at an interim hearing. In *JC v RP* the parents separated when their daughter was very young and eventually agreed to an equal parenting time arrangement.[95] When the daughter was 14 years of age, she had a major argument with her mother and went to live with her father, refusing to have any meaningful contact with mother, her younger half-sibling or her maternal grandparents. The father brought a motion for sole decision-making authority and for the mother's parenting time to be only as the child wished, as well as child support, and the mother brought a cross-motion for interim order requiring the child to participate in reunification therapy, claiming that the father and stepmother had alienated the daughter from her. A clinician from the Office of the Children's Lawyer did not specifically address the alienation claim but reported that the daughter acknowledged a past positive relationship with the mother but had her own reasons for not wanting to live with her mother and not missing her younger sibling. Justice Broad dismissed the mother's motion, observing:[96]

> There are admittedly troublesome aspects to certain of the statements in the text messages from the father and step-mother [undermining the girl's relationship with the mother.]... However, they are not sufficient to satisfy *the high threshold required to support a finding of parental alienation, particularly on an interim motion on a paper record.*
>
> The situation is complex and the exact causes of the child's current rejection of the mother are far from clear…
>
> Based upon the conflicting evidence, it appears likely that the parents share responsibility for the breakdown in the relationship between the child and the mother. The father may not sufficiently recognize the importance of the child maintaining a strong and healthy relationship with the mother and his responsibility to take positive steps to actively encourage it. On the other side, the mother may not recognize her own role in causing damage to the relationship through her conduct towards the child.
>
> I am not satisfied on the record before the court that parental alienation on the part of the father has been proven.

Justice Broad suggested that there needs to be "overwhelming" evidence to make a finding of alienation if there has been no prior finding in the proceedings. [97]

[95] 2022 ONSC 2751.
[96] 2022 ONSC 2751, at para 63-66. Emphasis added.
[97] 2022 ONSC 2751, at para 66.

Judicial Enforcement of Orders Under Rule 1(8): *Bouchard v Sgovio*

If a parent has an order providing for specified parenting time that the other parent is violating, the parent whose rights are being violated may seek an "enforcement order" under Rule 1(8) of the *Ontario Family Law Rules.*

In its 2021 decision in *Bouchard v. Sgovio*[98] the Ontario Court of Appeal upheld the decision of the motion judge under Rule 1(8) in response to the alienating father's violation of the prior parenting order to grant temporary custody to the mother and order that the children participate with the mother in the Building Family Bridges program. Two years earlier, the parents entered into a parenting agreement that was made into a final parenting order on consent, which provided that their two children would receive weekly counselling and forbade the parties from involving children in conversations about legal issues. The father did not comply with that order, and the mother brought a motion for compliance under Rule 1(8). The motion judge found that there was ample evidence based in the father's own evidence that he was breaching the parenting order by withholding one child from the mother as a strategy for resolving outstanding property issues. A temporary consent order was granted that the mother's care of the children was to resume, and that the children were to attend counselling. The motion was adjourned to permit the father's compliance and the children's progress in therapy to be monitored. At the resumption of the motion, although there was no expert evidence about alienation, the motion judge found that the father was alienating the children, and that he was actively obstructing the therapeutic efforts. The motion judge concluded that it was in the best interests of the children to be enrolled in the therapeutic program to address the parental alienation, and that a temporary parenting order should be given to the mother while the children were enrolled in the therapeutic program.

The Court of Appeal upheld the decision, with Paciocco JA writing:[99]

> As long as the judge is satisfied that there has been a failure to obey an order 'in a case or a related case' subrule 1(8) is triggered and the relief provided for therein can be ordered:... even though, with the notable exception of r. 1(8)(g), each of the itemized forms of relief in r. 1(8) can be described as purely procedural, r. 1(8) has not been interpreted as being confined to purely procedural remedies….
>
> The rule therefore provides broad discretion to courts to make orders it considers necessary to fully address a party's failure to comply, a flexibility that is of particular importance when the orders address the well-being of children.

In *Bouchard v. Sgovio,* the Court of Appeal upheld a broad judicial power to address alienating behaviour that results in a violation of a parenting order.

Reconciliation Counselling Without Change in the Parenting Plan

There is a range of mental health interventions that can be considered to be reconciliation counselling (or "reunification therapy") and provided without a change in parenting time. As discussed above, there is no standardized approach for such interventions. However, the most effective approaches for decreasing a child's resistance to a relationship with a parent and

[98] 2021 ONCA 709
[99] 2021 ONCA 709, at para 49.

addressing the many contributing factors generally adopt a ***family systems approach*** and involve both parents and the child(ren). A number of evidence-informed approaches are utilized in family-systems interventions, including: cognitive-behavioural therapy; affect regulation skill training; motivational interviewing; psycho-social education; and recreational therapies. Without a change in parenting (custody reversal), the support of the favoured parent is likely necessary for any type of intervention to be effective, though this support may be the result of judicial education or encouragement, or even the threat of more intrusive responses.

The courts have accepted that they have the jurisdiction to order parents and children to attend counselling, even without their consent, having accepted that this is not court ordered medical treatment which would require consent.[100] The authority to make these orders is found in the *CLRA* s. 28(1)(b) and (c)(vii), and such an order can also be made as part of a sentence for contempt[101] or enforcement under Rule 1(8).

These orders were made in 8 of the 63 cases (13%) in which alienation was found. The courts generally recognize that this type of response is only likely to be effective in less serious cases of alienation, or it may be appropriate if there is high conflict between the parents but no finding of alienation.[102]

In *Leelaratna v Leelaratna,* Justice Julie Audet suggested that a number of factors are highly relevant for judges exercising their discretion to make a therapeutic order: [103]

> a) Is the cause for the family dysfunction (whether alienation, alignment or reasonable estrangement) clear based on expert evidence or otherwise? If not, does it matter in light of the type of therapy proposed?
> b) Is there compelling evidence that the counselling or therapy would be beneficial to the child?
> c) At what stage is the therapeutic order sought (motion based on potentially incomplete evidence vs. trial based on full evidentiary record)?
> d) Are the parents likely to meaningfully engage in counselling despite their initial resistance to the making of the order? Will a strong judicial "recommendation" compel participation and cooperation by the recalcitrant parent?
> e) Is the child likely to voluntarily engage in counselling/therapy?

While it is not necessary, expert evidence may be useful in persuading a court to order reconciliation counselling. In *Da Torre v Gross* the father was alleging alienation by the mother, and sought an order for reconciliation counselling. In her decision not to order counselling, Justice Vella emphasized the need for evidence to establish a plan for such an intervention:[104]

> there is no expert evidence on the utility of reunification therapy, much less the plan. While expert evidence is not always necessary, it may be here. The lack of a detailed plan for reunification therapy, and any necessary preliminary steps such as therapy for the Child, is another challenge at this stage in the proceedings. [The father's] proposal is simply putting forward a number of alternative therapists who would be satisfactory to him and that therapy start as soon as possible…

[100] See e.g *AM v CH,* 2019 ONCA 764.
[101] *JM c BC,* 2021 NBQB 262..
[102] *Leelaratna v. Leelaratna***,** 2018 ONSC 5983, per Audet J
[103] *Leelaratna v. Leelaratna***,** 2018 ONSC 5983, at para 68, per Audet J
[104] 2023 ONSC 6133, at para 104.

Having consistent, single judge case management for high conflict family cases, including after the court makes an intervention order, may encourage engagement and result in more effective responses, ultimately reducing the stress on children from prolonged proceedings and unresolved parental conflict. [105] If a community-based mental health intervention is attempted, one should expect to see some changes consistent with the goals of the intervention within 3 to 6 months.[106] If no significant changes are observed in that time, other clinical or legal remedies should be considered. Case management with review dates within this time period will help with the monitoring of progress, and modification if needed.

Increased Parental Role for Rejected Parent

While Ontario courts will generally not order shared parenting or shared decision-making if there is hostility and poor communication between the parents, in some parental alienation cases judges will order an increased role in decision-making or more time for the rejected parent. These types of orders are intended to give the parent who is not favoured more opportunity to have a good relationship with the child, as well as "sending a message" to the favoured parent that there may be a custody reversal if there is continued resistance to support of the child's relationship with the other parent.[107] In 2021-23, this type of orders was made in 29 of 63(46%) of cases where alienation was found.

In *Ciarlariello v Iuele-Ciarlariello*, the mother was the primary care giver for four boys, and attempted to alienate them from their father, including making unfounded allegations of abuse to the CPS. The two older boys, aged 10 and 12 years, were especially resistant to contact with their father. Each parent was seeking custody, though the father did not put forward a detailed plan and his work schedule and living arrangements would have required significant adjustment to allow him to assume full care for the four boys. Justice Ingram observed that the mother wanted an "order for sole custody in her favour. Due to her unwillingness to show cooperation in regard to access, to award her sole custody would be to reward her for her behaviour." [108] The court ordered joint custody; although the mother retained primary care, a detailed plan of care and reunification therapy was put in place, including involvement of the local CPS, and the judge included a term in the order that: [109]

> If the mother fails to follow the terms of this order, the father may apply by motion for a finding of contempt or an immediate change of custody of the children. To this end, the father shall have available a detailed plan of the accommodation and daily care provisions for the children.

[105] Bala, Birnbaum & Martinson, *Differentiated Case Management for Family Cases: 'One Judge for One Family'* (2011) 26 Can J Fam L 339-394.
[106] Fidler B. & Bala, N. (2020), "Concepts, Controversies, and Conundrums on 'Alienation': Lessons Learned in a Decade and Reflections on Challenges Ahead" *Family Court Review*, 58(2), 576-603, at 589.
[107] See e.g *Garland v. Brouwer*, 2011 ONSC 6437, 14 R.F.L. (7th) 380, and *Sinclair v. Sinclair*, 2013 ONSC 1226, 31 R.F.L. (7th) 29.
[108] [2015] O.J. No. 918, 2014 ONSC 5097, at para. 185.
[109] [2015] O.J. No. 918, 2014 ONSC 5097, at para. 218, clause 14.

Supervised Parenting Time

By the time a judicial finding has been made that a child has been alienated, the child may have been rejecting access with the rejected parent for a significant period of time. In these situations, judges must be sensitive to the fact that reintroducing to the rejected parent may need to be done carefully, and if possible, with therapeutic support.[110]

In some cases, it may be appropriate that the restoration of a relationship with a rejected parent should only be undertaken with some form of supervision by a mental health professional, which may be viewed as a form of "reunification therapy." There are significant downsides to supervised contact, including its expense and the difficulty in maintaining a natural relationship in this environment as well as the limitations that it may impose on the amount of time that can be spent with the children. In an alienation case, ordering supervision of contact with the rejected parent may also suggest to the child that fears of that parent are justified.

There are cases in which contact with an alienating parent should be supervised. In *J.B.H. v T.L.G.* [111] there were concerns about the father's mental health. The father had made unfounded allegations of neglect, physical and sexual abuse by the mother to the CPS, none of which had not been substantiated. The father showed an "alarming lack of insight into child development" and there were concerns that his conduct might alienate the child from his mother. The mother had insight into her own behavior and continued to promote the father's relationship with the child. The father was completely oblivious to the impact his own behaviour had on the child. The court ordered custody to the mother with only supervised access to the father for three hours once per week.

Post-Order Judicial Control

It is not uncommon in high conflict cases for the judge who makes a decision to order that they will remain seized of the case, and that any applications for enforcement or variation will be returned to the same judge, provided that judge is available to deal with the matter. This is especially appropriate in a case where the court finds that there has been alienation, but decides not to reverse custody, and rather imposes conditions on both parents and expects some degree of continuing co-operation, including the possibility of reunification counselling.[112] The judicial continuity is intended to both promote engagement with the order and allow for an expeditious, efficient response to non-compliance by a judge who is knowledgeable about the case and has indicated that non-compliance might result in a change in custody.[113]

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[110] *B.R. v. EK*., [2007] O.J. No. 278 (Sup. Ct.) (QL) [*B.R.*] at para. 9.
[111] *J.B.H. v T.L.G.,* 2014 ONSC, [2014] O.J. 2742 at para 280.
[112] See e.g *Valettas v. Chrissanthakopoulos*, [2013] O.J. No. 3577; and *N.S. v. C.N.*, [2013] O.J. No. 1120 and [2013] O.J. 3351.
[113] See e.g. *Hajji v. Al-Jammou,* 2020 ONSC 6403 (Ont. S.C.J.); and *K.F.M. v K.G.T.,* 2023 BCSC 1347

Contempt of Court

A parent whose rights under a parenting order, for example for specified parenting time, have been violated, may make an application to find that the party violating the order in contempt of court.[114] As Justice Quinn put it in *Gordon v. Starr*[115]

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

Despite such judicial statements, securing compliance with parenting orders, especially through the contempt process, is often challenging. The Supreme Court decision in *Carey v Laiken* provides that to have a finding of contempt, the parent whose rights have been violated must establish that the other parent knowingly and wilfully disobeyed the order.[116] While this is a civil process, the standard of proof is beyond a reasonable doubt because a finding of contempt of court may result in imprisonment.[117] There is a the three part test for contempt, requiring a finding that (1) the order was clear and unequivocal; (2) the party violating the order had actual knowledge of the order; (3) and that the breach was intentional and unjustified. Even if this test is satisfied, there is judicial discretion about whether to make a finding of contempt.

A finding of contempt may result in an order for counselling for the parents and child, an order for compensatory parenting time ("makeup time") or payment of costs incurred by the parent seeking enforcement of the order. There may also be more punitive responses such as a fine or even a jail sentence, though the Canadian Judicial Council suggests that sentencing for contempt in family cases should be done with "particular restraint" because it is in the best interests of children that their parents are not obligated to pay fines or be imprisoned.[118] Judges are aware that "the law of contempt . . . is a blunt instrument that is not particularly well suited to the complex emotional dynamics of access disputes."[119]

The challenges of legal enforcement of a parenting order are illustrated by the 2022 Ontario case of *McCarthy v Murray*.[120] The parents separated and agreed to a consent order for a joint custody regime with equal parenting-time when the child was 7 years old. When the girl was 9 years old, the child's time with the father was significantly reduced by the mother, who often told the father that their child "doesn't want to see you right now," though some weekend visits with the father took place. The mother also unilaterally changed the child's school arrangements. The father brought the matter back to court, which resulted in a series of court appearances and orders by two different judges requiring compliance by the mother with the prior shared parenting arrangements and making cost orders against the mother. The mother continued to say that the daughter did not want to see the father as required by the parenting

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[114] *Carey v. Laiken*, 2015 SCC 17; see also Canadian Judicial Council, (2001). *Some Guidelines on the Use of Contempt Powers,* online: <https://www.cjc-cm.gc.ca/cmslib/general/Contempt_Powers_2001_with_Header.pdf>. at 10.
[115] (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.), at para 23.
[116] Ibid at 11.
[117] Ibid.
[118] Canadian Judicial Council *supra* at 10-11.
[119] *Paton v. Shymkiw* (1996), 114 Man. R.(2d) 303, at 308 (.Q.B. Fam. Div.).
[120] *McCarthy v. Murray,* 2022 ONSC 855 (Ont. S.C.J.) per Braid J.

order. The father then brought a motion for contempt and other relief that was heard by Braid J. when the girl was 11 years of age. While the court found that the mother had disobeyed court orders, Braid J. emphasized that in family cases, a finding of contempt is a "last resort," and dismissed the contempt application, observing: [121]

> Although a child's wishes should be considered by a court prior to making an access order, once the court has determined that access is in the child's best interests, a parent cannot leave the decision to comply with the access order up to the child. A parent has a positive obligation to ensure a child who allegedly resists contact with the access parent complies with the access order. Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they reasonably can.
>
> I find that the mother is in breach of these terms of the court orders. However, I decline to make a finding of contempt. The mother should consider herself on notice that any further unilateral decisions by the mother concerning the child will likely lead to a contempt finding by this court.

This judicial restraint in making findings of contempt or ordering police involvement is consistent with the approach of some recent decisions from the Ontario Court of Appeal which accept that a finding of contempt is a "discretionary exercise," and recognize that coercive state involvement in a parenting dispute will often not promote the interests of the child involved. [122]

It is not uncommon, and often wise, for judges making a finding of contempt to refrain from imposing an immediate penalty, but rather require the contemptor to pay the costs of the proceedings, make specific directions to attempt to ensure compliance, perhaps by requiring reconciliation counselling therapy, and indicate that further violations may result in more serious sanctions or a custody reversal. [123] This may reduce the tendency for a non-compliant parent to feel like a martyr and blame the other parent for this situation, and may encourage a parent towards compliance. Maintaining judicial case management after a finding of contempt with a threat of an interim variation in custody may be the most effective method of gaining compliance with terms for access and engagement in therapy,[124] though in more severe alienation cases a parent often has significant personality disorders and may not respond even to the clearest judicial messages.

An example of a potentially effective use of the contempt power to enforce a court-ordered parenting regime is provided by the recent Nova Scotia decision of Jollimore J. in *Bose*

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[121] *McCarthy v. Murray,* 2022 ONSC 855 (Ont. S.C.J.) at paras 32-52.

[122] As Justice Jamal (then on the Ontario Court of Appeal) explained in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), at para.10:

> . . . *Exercising the contempt power is discretionary.* Courts discourage the routine use of this power to obtain compliance with court orders. *The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort.* A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance. [Emphasis added]

Moncur v. Plante (2021), 57 R.F.L. (8th) 293 (Ont. C.A.); *Chong v. Donnelly*, 2019 ONCA 799 (Ont. C.A.); and *Hamid v. Hamid* (2023), 91 R.F.L. (8th) 447 (Ont. C.J.)

[123] *Valettas v. Chrissanthakopoulos* [2014] O.J. No. 4835 (S.C.), per Price J. For a commentary that questions whether courts should "encourage good parental behaviour," see Felicity Kaganas, "Regulating Emotion: Judging Contact Disputes" (2011) 23 Child & Fam. L.Q 63-93.

[124] *Valettas v. Chrissanthakopoulos* [2014] O.J. No. 4835 (S.C.), per Price J.

v Bose.[125] The parents separated when the child was about 1½ years of age; the mother moved out of the home with the child and denied the father any contact with the child for 10 months. At trial, the judge made a detailed order for the father to have parenting time, alternate weekends overnight and two non-consecutive weeks in the summer, which the mother often breached. After 8 months of limited, sporadic compliance with the order, the father began contempt proceedings.

In the contempt proceedings, the mother vaguely claimed that the order was unclear and that she did not really understand the order. Justice Jollimore found that most of the mother's breaches were intentional and unjustified, and found the mother in contempt. At the penalty hearing, Jollimore J. provided a useful explanation of the important role of the contempt proceedings to ensuring respect for the rule of law:[126]

> The focus of a contempt proceeding is far greater than the impact of [the mother's] denial of parenting time because obeying the law and following court orders are foundations of social order.
>
> Respect for court orders means following them. If a decision is thought to be wrong, it should be appealed. If the circumstances on which a decision is based have changed, it should be varied. Until stayed, overturned, or varied, court orders must be followed. Since the parenting decision was made in February 2022, [the mother] has not applied to stay it, sought to appeal it, or asked to vary it.
>
> [The mother's] penalty is both to secure her compliance with the Corollary Relief Order and to protect the administration of justice…
>
> Securing compliance with the order means ensuring that [the mother] does not continue to thwart [the father's] parenting time.
>
> Denouncing [the mother's] conduct and deterring both her, specifically, and others, generally, from defying court orders is particularly important where this order relates to parenting time for a young child. The denial of parenting time for a young child can negatively impact a child's relationship with a parent and the child's own well-being.

Justice Jollimore found that that the mother's breaches began immediately after the Order was released; and that the mother responded to the contempt motion by cutting off all contact between the father and the child. Accordingly, Jollimore J. held that the mother should be sentenced to one month in jail for her contempt. However, she gave the mother one last chance to avoid prison by suspending the mother's sentence on condition that she complied with the final Order, attend a parental education course "designed to include a component to educate parents about the damage done to children by continuing levels of conflict and animosity between parents", and facilitate the child attending therapy to help reunify him with the father.

There is much to commend this approach to the mother's serious, blatant, and repeated breaches of the parenting order, which were effectively preventing the child from having a strong relationship with his father. The decision will hopefully secure the mother's compliance with the order and allow the father and son to develop their relationship in the crucial pre-school years of his life. The decision may also be cited as a warning to defiant parents in other cases.

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[125] 2023 NSSC 229. This decision was the subject of favourable comment in *2024-04 Franks & Zalev - This Week in Family Law*

[126] 2023 NSSC 257, at para 5-9.

Police Enforcement Order

In most Canadian provinces legislation allows a judge to include a provision in a parenting order directing the police to enforce the order.[127] While in theory police can assist with the enforcement of a parenting order, without such a specific provision, they will normally only attend and advise about compliance. Officers try to exercise sensitivity in enforcing parenting orders, hoping that their presence will ensure parental compliance.

In 2021-23 there were 12 such orders made in the 63 (19%) Ontario cases where alienation was found.

The courts accept that an order for police involvement "...is an order of last resort...to be made sparingly and in the most exceptional circumstances."[128] Judges and rejected parents hope that the fact that a police enforcement order is made will result in compliance.[129] If the police are actually required to enforce an order for parenting time, it can be very disruptive or even traumatic for children. Although some children, especially younger ones, might enjoy the presence of a "friendly" police officer, police involvement is often viewed as intimidating by children, and may result in further rejection of a parent.

Custody Reversal: The "Last Resort"

The most dramatic judicial response to alienation is the transfer of primary care (or custody) from the alienating parent to the rejected parent. A change of custody in alienation cases is often accompanied by a suspension of contact with the alienating parent, at least initially for a period like 90 days. [130] This "cooling off" or "blackout" period is often needed to

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[127] See e.g., *Children's Law Reform Act*, R.S.O., 1990 ch. 12, s. 36

[128] *Allen v. Grenier*, [1997] O.J. 1198, 145 D.L.R. (4th) 286 (Gen. Div.); see also *Hajji v. Al-Jammou,* 2020 ONSC 6403 (Ont. S.C.J.).

[129] See *R.L.H. v. G.L.B*., 2002 ABQB 302 at para. 47: "While I understand counsel's position on not wanting to involve a seven-and-a-half-year-old child with police authorities over the question of access, I believe that the police enforcement clause is the only way that this [father] will live up to the obligations he has under this Court Order to produce the child." The judge hoped that the threat of police enforcement would help ensure compliance by the custodial parent, without the actual need for such enforcement.

[130] There is variation in custody reversal cases about the length of a "cooling off" or "blackout period" when all contact with an alienating parent may be suspended: e.g 60 days, *V.S. v. I.M.B.,* 2021 ONCJ 705; 90 days, *G.(J.M.) v. G. (L.D.)*, 2016 ONSC 3042; or 120 days, *Y.H.P. v. J.N., 2023* ONSC 5766.

Richard Warshak (2010). Family Bridges: Using insights from social science to reconnect parents and alienated children, *Family Court Review, 48(1),* 48-80 suggests a 90 day period, but observes (at fn 95) :

> Ideally, the resumption of contact is tailored to each family based on an evaluation of the child's progress and an evaluation of the formerly favored parent's willingness and ability to modify behaviors that would make it difficult for the child to maintain the gains. Optimal timing depends on a number of factors, such as the favored parent's ability to modify behaviors that create difficulties for the children, the children's vulnerability to feeling pressured to realign with a parent, the duration of the alienation or estrangement prior to the Workshop, and the favored parent's past conduct and compliance with court orders. If a time period had to be stated in advance, based on my clinical experience, in general I suggest considering a period of 3–6 months before regular contacts resume, to allow a child to consolidate gains and work through the numerous issues that arise in living with the rejected parent free from the influence of the favored parent. But, contacts in a therapeutically monitored situation may optimally occur sooner. Three months is about the length of time that children in therapeutic boarding schools and residential treatment centers initially go without seeing a parent. This has not been subjected to systematic empirical research, and it would be difficult to conceive of a study that could do so, given all the variables that must be controlled, such as the Workshop leaders, the site of the Workshop, the age and gender of the children

allow the child's relationship with the rejected parent to be restored without the influence of the alienating parent. Although it is hoped that the child will eventually have a good relationship with both parents after this type of order, the alienating parent is often unwilling (or unable) to adapt to the new situation and have a relationship with the child after such an order is made.[131]

A variation in custody is sometimes referred to as a "last resort," but if courts wait too long to respond in this way, it may be ineffective. In the most severe cases, a timely decision to vary custody may be the only way to effectively address the alienation, and in some cases, it will be the least detrimental alternative for the child. In other cases, however, despite severe alienation and the failure of other interventions, the court may conclude a change in custody is not appropriate and recognize there is no effective way for a court order to allow the re-establishment of a child's relationship with a rejected parent.

In Ontario in 2021-23, in 9 of the 63 cases (14%) where the court found alienation, custody reversal was ordered; this was done in 2/20 (10%) of the cases where the father was the alienating parent and 7/43 (16%) of the cases where the mother was the alienating parent.

If an application is made to vary primary care in response to alienation, the court must be satisfied that this action is in the "best interests" of the child(ren). Parents seeking often provide expert testimony to establish that the child has been alienated, and that the emotional distress to the child from the change in primary parenting is likely to be limited in duration. However, judges may make this order without expert evidence.[132] Such action is usually only taken after the alienating parent has proven resistant to less intrusive responses, and the judge has concluded that a change in custody is the only effective way to end the emotional harm caused by the alienating custodial parent.

A number of decisions to "reverse custody" in alienation cases explicitly recognize the immediate disruptive effect such an order will have on the child(ren). However, a common theme is that this concern should be subordinated to the longer-term objective of maintaining the child's emotional health. In the British Columbia case of *A.A. v. S.N.A.,* the trial judge recognized that he faced a "stark dilemma" in whether to leave the child with a "highly manipulative" and "intransigent" mother who would never permit her child to have any sort of relationship with her father, or to transfer custody to the father, who had little contact with the child for over a year. Despite the finding of alienation, the trial judge decided not to award custody to the father due to a concern that "the immediate effect of that change will be extremely traumatic."[133] In reversing this decision and awarding custody to the father, the British Columbia Court of Appeal observed: [134]

> the trial judge wrongly focused on the likely difficulties of a change in custody - which the only evidence on the subject indicates will be short-term and not "devastating" - and

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and of the rejected parent, the extent to which the favored parent and the rejected parent have contributed to the problem, the exact nature of the court orders, etc..

[131] See e.g Birnbaum & Bala (2024 under review), A Retrospective Study of Outcomes of Custody Reversal in Parental Alienation Cases, *University of New Brunswick Law Journal*; and Warshak, Richard A. "Reclaiming parent–child relationships: Outcomes of Family Bridges with alienated children." *Journal of Divorce & Remarriage* 60.8 (2019): 645-667.

[132] See e.g *AM v CH,* 2019 ONCA 764.

[133] *A.A. v. S.N.A*., [2007] B.C.J. 870 para. 75, 77, 84-85, (C.A.) Preston J. A. See also e.g. *S.T. v. J.T*., 2019 SKCA 116.

[134] *A.A. v. S.N.A.,* [2007] B.C.J. 1474 (C.A.) para. 27. The courts ultimately decided that the variation in custody would only be effective if all contact with the mother was suspended for a year; see A.A. v. S.N.A.*,* [2009] B.C.J. 558 (B.C.S.C.).

> failed to give paramountcy to M.'s long-term interests. Instead, damage which is long-term and almost certain was preferred over what may be a risk, but a risk that seems necessary if M is to have a chance to develop normally in her adolescent years.

In *Rogerson v. Tessaro*,[135] the Ontario Court of Appeal upheld a lower court's decision to transfer custody of twin boys, aged five years at the time of trial, to their father, based on evidence that the mother was persistently attempting to undermine the relationship between the children and father. The appellate court acknowledged that the remedy of changing custody was a "drastic one," but it approved the trial judge's structuring of the order as it was gradual, and thus likely to "cause as little disruption as possible for the children."[136]

Another example of a custody reversal decision is the 2021 ruling of McGee J in *S v. A.,* a decision affirmed by the Ontario Court of Appeal. [137] The parents separated when the two boys were 4 months and 33 months. The mother had primary care, and consistently undermined the father's relationship with the boys, including making unfounded allegations of abuse to the CPS and the police. There were efforts at counselling to address the issues between the parents, and ultimately two court appointed neutral assessors were involved. A trial occurred 5 years after separation. After 39 days of hearings, McGee J. found that the mother had been "pretending to support the boys' relationship with their father while taking extraordinary steps … to destroy any prospect of that relationship."[138] Justice McGee made a finding of contempt, and more significantly, concluded that it was in the best interests of the children for them to in the care of their father while a counsellor would work with the father and children to restore their relationship, and the mother would only have limited supervised contact until the matter was reviewed by the court.

Justice McGee observed:[139]

> Children are entitled to develop the best relationship possible with each of their parents, independent of the relationship between their parents…
>
> In my view, a reversal of primary care is the most difficult of parenting decisions. It is an option that must be approached with caution, and each case must be considered on its own facts. *A reversal is not a vindication of which parent is right or wrong*. It is a finding as to which parent can best provide physical, emotional, and psychological safety and security to a child in distress. Which parent will best protect the child from the conflict and place the child's well-being above the litigation "win." [Emphasis of the Court.]

While the mother was ordered to pay costs on a full recovery basis, the cost of the litigation resulted in her bankruptcy and the costs award will never be fully recoverable.[140]

In the most severe cases where a child has been refusing all contact with the rejected parent and there is a prospect that the child might run away (inevitably with at least the tacit support and often with the covert aid of the alienating parent), there must be planning and detailed judicial control over the transition process. In cases of severe alienation where custody reversal is being contemplated, the favoured parent may be required to bring the child

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[135] [2006] O.J. 1825 (C.A.).
[136] *Ibid*., at para.8
[137] *S. v. A.,* 2021 ONSC 5976 (Ont. S.C.J.), affirmed 2021 ONCA 923 (Ont. C.A.). See also e.g. *Yousufy v. Yousufy*, 2019 ONCJ 791; *H.B. v. M.B.,* 2018 ONCJ 916; and *R.B. v. D.B.,* 2019 ABQB 826
[138] *S. v. A.,* 2021 ONSC 5976 (Ont. S.C.J.), at para. 12, affirmed 2021 ONCA 923 (Ont. C.A.).
[139] *S. v. A.,* 2021 ONSC 5976 (Ont. S.C.J.), at para 29-33, affirmed 2021 ONCA 923 (Ont. C.A.).
[140] *S v A,* 2023 ONSC 5579

to the courthouse, or another suitable location, before the court's decision is announced. There have been some tragic cases where an alienating parent has had a short period to transfer care and has killed the child, sometimes in a murder suicide, in response to an order reversing custody.[141]

Plans then need to be made for supervision of the children at the courthouse, for telling the children what the judge has ordered, and supporting their transition. In some cases, a child's lawyer or therapist may be engaged to tell the child about the decision. It will be very important for the rejected parent and advisors involved to plan for the possible use of support services, as children's attitude and behavior at the time of the transition and immediately following can be difficult to handle. In severe cases where children refuse contact and threaten to run away or harm themselves or someone else, a transitional support program such as Family Bridges may help the family safely adjust to the court orders.

A custody reversal with a suspension of contact with the alienating parent is dramatic, and there is a lack of sound research about its value. However, a recently completed retrospective study by Birnbaum and Bala attempted to contact all children in Ontario cases reported between 2010 and 2022 where the court found parental alienation, almost half of which involved a custody reversal.[142] Only 6 out of the 138 children in these cases were located and agreed to be interviewed; all 6 had been subject to a custody reversal order. Although at the time of the trial all 6 of the children were opposed to the order being made, with hindsight they appreciated why the court made the order and were satisfied with the decision that had been made. While none of them had contact with the formerly favoured, alienating parent, this was due to inability of that parent to remediate their behaviour to have a relationship with the child after the court reversed primary care, rather than interference by the previously rejected parent.

Costs awards and other financial penalties

When a court finds that a parent has been engaging in alienating behaviour and refusing to comply with terms of a court order concerning parenting, there is a significant likelihood that costs will be awarded against that parent. These awards are intended to sanction the parent who is responsible for the expense of ensuring compliance with court orders and encourage parents to refrain from behaviour that will negatively affect their children, as well as compensate the rejected parent for some of the costs of seeking to re-establish a relationship with their child.

In *AF v. JW* **the** parties engaged in litigation over 6 years about custody of their children. The court found that the mother had engaged in alienating conduct; initially she was permitted to retain custody, but under conditions that required her to co-operate with reunification therapy. At a review hearing it was established that she was continuing to alienate the children, and custody was transferred to the father, with the mother to have only limited, supervised contact. The court awarded the father close to full indemnity costs of $400,000, observing that "the father acted reasonably throughout these proceedings…. he was a father who was merely attempting to have a relationship with his children." Justice Harper concluded that the mother "falsely represented to her children and anyone who would listen [that the father was] a man to be feared and one who is incompetent as a father. I found none of her allegations to be true.

[141] https://sites.google.com/site/centralohiopa/resources-for-parental-alienation

[142] Birnbaum & Bala (2024 under review), A Retrospective Study of Outcomes of Custody Reversal in Parental Alienation Cases, *University of New Brunswick Law Journal.*

This type of litigation driven by a false obsession cannot be condoned."[143]

In *MAB. v. MGC* the parents never cohabited but had a child together, who was in the primary care of the mother. She made repeated unfounded allegation of abuse against the father and failed to comply with court orders for parenting time. At trial, the mother was self-represented, and the father had a lawyer; the mother was successful in obtaining child support and primary care and decision-making, but the father obtained scheduled parenting time and court mandated mental health interventions. The father obtained a more favourable result than in his severable settlement offer. Justice Chappel concluded that the mother acted "extremely unreasonably and in bad faith" and hence awarded the father full recovery costs of $138,157, observing: [144]

> Bad faith can be established by evidence that the party intentionally failed to full an agreement in order to achieve an ulterior motive, or intentionally breached a court order with a view to achieving an improper purpose… It can be made out by evidence that the party has made unsubstantiated allegations of abuse by the other party, has made significant false representations to the court relevant to the best interests of a child, or has engaged in conduct aimed at alienating a child or otherwise undermining their relationship with the other party without justification….

Courts will also award costs against parents who are found to have falsely alleged parental alienation. In *Seed v. Desai*, the judge found that the custodial mother would continue to have custody and was "entitled to generous partial recovery costs" given that the "respondent's insistence on pursuing unfounded allegations of parental alienation…warrant cost sanctions."[145]

Courts have made it clear that they will not respond to a finding of alienation by reducing child support, and a tort claim cannot be brought by one parent against the other for alienation of the child.[146] There are cases of a judge reducing spousal support payable to an alienating mother; while this may seem like a just result, it is unlikely to affect parental behaviour,[147] and does not seem consistent with the laws governing spousal support.

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[143] [2013] O.J. No. 4785. In *S v A,* 2021 ONSC 5976, there was a nine-week trial, one of the longest family trials in Ontario history, primarily dealing with parenting issues. The mother, who was represented by two lawyers at trial, was found to have acted in "bad faith," including such behaviors such as a surreptitious baptism of the child, a pattern of sabotaging court orders, a series of false allegations of child abuse against the father, and frightening of the children about their father, which the court concluded was clearly harmful to the children.[143] The court ordered a custody reversal with a 90 suspension of contact with the mother. The mother was ordered to pay costs on a full recovery basis, $677,000, although unfortunately the cost of the litigation resulted in her bankruptcy and the costs award will never be fully recoverable. *S v A,* 2023 ONSC 5579

[144] *MAB v MGC,* 2023 ONSC 3748, at para. 49.

[145] *Seed v. Desai*, [2014] O.J. No. 3754 at para 13. See also *F.S. v. M.B.T.,* 2023 ONCJ 102.

[146] *Frame v Smith,* [1987] 2 SCR 99. Some have argued that this decision should be revisited; see discussion of Zechariah Martin (2023), Remedies for Parental Alienation in Canadian Family Law, 42 *Canadian Family Law Quarterly* 85.

[147] See *Bruni v Bruni,* 2010 ONSC 6568, per Quinn J. This order did not affect the attitude of the mother or the children who continued to reject the father for the next decade; see *Bruni v Bruni,* 2019 ONSC 3506. See also e.g. *L. v. M.,* 2016 ONSC 809; and *V.L. v. M.L.***,** 2019 ONSC 7367 (Audet J.)..

When Is It Better To Take No Action?

In some cases, children are very resistant to any efforts to change their attitudes towards seeing an alienated parent, whether by counseling or by using judicial sanctions imposed on a custodial parent to enforce contact. Older adolescents may be especially resistant to interventions and may be difficult to manage after the custody reversal or may threaten self-harm or suicide if custody reversal is ordered by the court.

It can be very difficult an alienated parent to come to terms with this type of rejection,[148] but in some of these cases, the rejected parent may decide to give up the effort to seek to enforce parenting time or access. The decision may reflect the emotional or financial exhaustion of the rejected parent, or an assessment that it is better for the child not to seek to enforce an access order. In some cases, a judge may decide that it is not appropriate to order or enforce parenting time or may make comments suggesting that continuing efforts to enforce access might not be in the child's best interests, [149] despite (or because of) the alienating conduct of the custodial parent.

If a court determines that a child's rejection of a parent is due to alienation (and not justified rejection), it may nevertheless conclude that it would be contrary to a child's best interests to force a child to have a relationship with the rejected parent. In these situations, it is usually appropriate to try to arrange for the rejected parent to have a "final" visit with the child, even if the child seems reluctant to attend. That meeting might be facilitated by a mental health professional or the child's lawyer, with the intent of allowing the rejected parent to explain to the child why the effort to use the legal process to enforce contact is being discontinued, and to express the hope that a relationship may be resumed at some point in the future.[150] These sentiments may also be put in a letter to the child. The rejected parent may also be permitted to continue to correspond with the child and send gifts, which the favoured parent should be required by court order to share with the child. The favoured parent may also be ordered to continue to provide significant information about the child's education and health, and restricted from relocating with the child or changing the child's name. Leaving the lines of communication open in whatever manner possible, such as occasional cards or gifts, may pave the way for a future reconciliation, a better alternative than providing no trail of resolution for the grown child. The rejected parent might also have a social media page, perhaps one that only the child has access to, for posting pictures and news.

While a decision not to enforce access may relieve the child of the immediate pressure of being caught between two parents, the child may well still feel abandoned under such circumstances, notwithstanding any stated wishes and protestations of rejection. In these cases, there is the hope that if the "door is left open" the children may eventually seek to restore a relationship with the rejected parent, perhaps in late adolescence or early adulthood.[151]

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[148] Tavares, A., Crespo, C. & Ribeiro, M.T. What Does it Mean to be a Targeted Parent? Parents' Experiences in the Context of Parental Alienation. J Child Fam Stud 30, 1370–1380 (2021). https://doi.org/10.1007/s10826-021-01914-6

[149] For recent examples of a court declining to force older adolescents into "reconciliation therapy," see *Gee v. Gee*, 2023 ONSC 2992; and *R.L. v. M.F*, 2023 ONSC 2885.

[150] See Richard Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003), 37:2 Fam. L.Q. 273, at 282; and M.J. Sullivan & J.B. Kelly, "Alienated Children in Divorce: Legal and Psychological Management of Cases With An Alienated Child" (2001), 39 Fam. Ct. Rev. 299, at 311.

[151] For a discussion of when and how to cease enforcement efforts, see Chapter 9, Richard Warshak, *Divorce Poison: How to Protect Your Family from Bad-mouthing and Brainwashing* (2010, Harper: New York). There is

VI. CONCLUSION: THE ROLE OF LAWYERS

Being involved in a case where children are rejecting a parent is very challenging for lawyers, as well as their clients. While there is an important role for advocacy in these cases, there is also a role for lawyers in providing guidance. Although some of these cases will require litigation to resolve, there are also cases where the parents may be encouraged and supported to arrive at a resolution that allows both parents to have a continuing role in their children's lives. Referrals for parenting education and counselling can help to resolve cases where parents are less entrenched and children are at lower risk without a lengthy, costly court battle, even if there has been some less serious alienating conduct or abuse by one or both parents. In some cases, early intervention counselling for the whole family without requiring a court finding of the reasons for a child's resistance to contact with a parent may be an effective strategy. Good family lawyers need to know when they should be aggressive litigators and when they should push back against clients who are taking positions that are unrealistic or not child focussed.

Parents who are being denied contact with their children in defiance of court orders are understandably deeply frustrated with the ineffectiveness, delay and expense of the justice system, and this may spill over in anger or disappointment with their own lawyer, even if their representation and advice are very good. Parents who are being rejected by their children are often deeply emotionally wounded by this experience and may be challenging clients for this reason as well.

It is important for lawyers with clients who are losing contact with their children to be ready to respond in a timely and effective fashion. Although various forms of alternative dispute resolution and negotiation are often the best for resolution of family disputes, when alienation is a concern there may be a need for quick resort to the courts, even if only to have a judge at a conference make clear to an alienating parent the legal and emotional consequences of failing to comply with parenting orders. It is also important to be realistic about the limits of the law, and in some cases discuss whether not enforcing parenting time or contact with the child may be the least detrimental alternative for the child, as frustrating as this may be for the client.

A lawyer representing a parent who is alleged to be alienating a child also has a challenging and important role. Counsel for rejected parents also need to be child-focussed and realistic with their clients, including assessing the extent to which the conduct of their client may have caused or contributed to the deterioration in the relationship: is this a case of alienation, or is realistic estrangement or perhaps a hybrid case? In some cases, the rejection of a parent may be due to issues of domestic violence or abuse, and effective measures may be required to protect the victim and children. In other cases, however, it may be clear that a client is alienating their children from the other parent. Clients who are alienating their children from the other parent need to be informed of the legal consequences, including findings of contempt, cost consequences and the potential for a custody reversal.

The *Divorce Act*[152] now makes clear that that counsel for a parent has an obligation to advise a parent about the importance of compliance with court orders and about the harmful effects of conflict and family violence on children. Counsel for parents who are alienating

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a need for more research on the long-term effects of enforcement of court orders in high conflict cases, and of ceasing to seek enforcement.

[152] *Divorce Act,* as amended by S.C. 2019. C. 16, s. 7.7.

children also need to be aware of the harm that this may cause children and educate their clients about the effect of their conduct on their children.

When a parent "succeeds" in alienating their children from the other parent, they are actually harming them. As observed by Justice Smith in a case where two boys, aged 16 and 17 years, were refusing to visit their mother due to the influence of their father:

> The [father's] statements in an e-mail show that he believes that he has won some imaginary battle by alienating and controlling the children and depriving the [mother] of a relationship with them. However, his actions have, in fact, harmed his children and hopefully they will realize this someday when they are older and be able to re-establish a relationship with their mother.[153]

As the judge noted, the father's "success" in alienating his children from their mother was ultimately a failure to meet his responsibilities as a parent. While the alienating parent may have won the custody battle, they would have lost the war by failing to raise healthy and happy children.

Good family lawyers educate their clients about the harm that their alienating conduct is doing to their children and may be able to persuade them to change their behaviour. Too often, however, lawyers fail to meet this responsibility, or alienating parents decide to represent themselves because they do not appreciate the sound advice that they are receiving from their counsel.

[153] *Cantave v. Cantave* [2014] OJ No 4142 at para 66.

Law Society of Ontario | Barreau de l'Ontario

18th Family Law Summit

Top 10 Trial Tips – Judicial Panel Material

The Honourable Justice Faisal Mirza
Superior Court of Justice (Brampton)

March 20, 2024

cpd

Top 10 Trial Tips

TMC Preparation

1. Trial Estimate: be reasonable in your assessment:

    a. a trial day is 4 ½ hours. Consider objections and a reasonable pace to deal with transcripts, technology, other factors that within a day take ½ hour at least. If there are interpreters required, factor accordingly.

    b. An accurate estimate has consequences on getting informed instructions from client; retainer; costs; admissions; settlement offers.

2. Admissions or Agreed Statement of Facts: agree on non-controversial facts preferably before the TMC and prior to the start of the trial. File them as Exhibits.

3. Evidence by Affidavit: where appropriate an affidavit can be effective when it is concise, uses headings and attaches the exhibits. Prepare proper Bookmarks and Hyperlinks.

4. Request To Admit Documents: deliver requests to admit. This will inform what issues need to be litigated.

5. Expert Evidence: Provide notice and reports in compliance with the rules. Consider admissions. Consider time for a *voir dire* and ruling if admissibility is contested.

6. Determine Pre-trial Issues: evidentiary or other issues that require a ruling before trial and those that can be determined within the trial.

    a. Determine whether evidence sought to be called is admissible or contested.

    b. Determine the necessary applications and file appropriate notices/factums/casebooks.

    c. Canvass at TMC if the issue should be dealt with as a motion before trial.

    d. Determine whether *viva voce* evidence should be called on applications or whether evidence can be put before court by agreement (transcripts, witness statements, agreed statements of fact).

Trial Preparation

7. Focused Opening Statement: a brief overview of what the case is about and the issues that the court must determine. Consider a draft order that identifies the issues and positions where appropriate.

8. Preparation of Witnesses: Make sure technology you require, works in advance. Prepare examination in chief – mindful of affidavits; and cross-examinations that are organized, with reference to materials on CaseLines and tabs/bookmarks.

9. Meet with the Opposing Counsel: Confirm the admissions and contested issues. Good communication between counsel is important to the effective running of a trial. Professionalism and civility during a trial will allow the judge to focus on the issues in question and not be side tracked by counsel's conduct.

10. Slow Down:
    i. In your questions.
    ii. During your submissions.
    iii. Wait for the judge to find the document or case you are referring to. Make sure the judge is with you and following on the right page.