Law Society of Ontario | Barreau de l'Ontario

TAB 2

Family Law Refresher 2020

Another Decade, Another Dollar…
Some Interesting/Important Cases from the Past Year (or so)...

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Family Law Refresher

Table of Cases

Support

***Choquette* v. *Choquette*, 2019 ONCA 306 – Self Sufficiency and Spousal Support**

> *The greatest thing in the world is to know how to be self-sufficient*
>
> -Michel De Montaigne

This is an important decision from the Ontario Court of Appeal that speaks to a number of important issues surrounding spousal support.

The parties separated in 1994 after 15 years of marriage. At trial in 1996, the husband was ordered to pay spousal support in the amount of $4,750.00 a month on an indefinite basis. Both had Commerce degrees and, when married, both were appropriately employed.

While the wife had left the paid workforce when the first child was born, and had been out of the workforce for some 10 years at the time of trial, the trial judge determined that she would be able to quickly return to the workforce. The trial judge held that a failure to return to the paid work-place would be a material change in circumstances, but thought that she was likely to re-train and re-enter the workforce quickly.

The husband unsuccessfully appealed the trial decision. The Court of Appeal thought that the husband's concern that the wife would not re-enter the workforce – if that proved to be the case -- was best addressed on a variation application, than on appeal.

The wife never re-entered the paid workforce. Her income consisted almost exclusively of spousal support. She purchased rental properties, some of which operated at a loss, and ran an organic farming business that also operated at a loss. After separation, the wife had obtained her CMA accounting designation and a real estate agent's licence. The wife's net worth had increased from $200,000.00 at the date of separation to $781,112.00. The husband's income had increased from $390,000.00 at the time of trial to well in excess of $1,000,000.00

The husband sought to terminate spousal support.

At the motion, the wife argued that she had been "frustrated" in her attempts to find work because of the residual impact of having been out of the workforce, at home with the children, for ten years during the marriage. She also sought to introduce evidence that she suffered from depression that prevented her from obtaining or even looking for meaningful work.

The motion judge disagreed and found that the wife never obtained employment, despite having marketable skills, because she never made serious attempts to do so. While she argued that she was prevented from working because of her depression, she produced no meaningful evidence to that effect. The motion judge considered all of the objectives in s.17 (7) of the *Divorce Act*, with thorough reasons for each. The motion judge made a finding that the trial judge had awarded support based on a non-compensatory basis, though the trial judge had not expressly set out whether support was on a compensatory or non-compensatory basis. The motion judge stated, "[t]he only order that can be made to promote her self-sufficiency would be a termination of

support." The motion judge determined that the wife was no longer entitled to spousal support from the husband.

The Court of Appeal upheld the motion judge's decision.

On Appeal, the wife argued that the motion judge had put excessive emphasis on the "self-sufficiency" objective in s.17 (7)(d) of the *Divorce Act*. She argued that she was *not* self-sufficient and that, to the extent that she was *ever* capable of becoming self-sufficient, she was (at the time of the appeal) 62 years of age and incapable of supporting herself. The Court of Appeal disagreed, finding that the motion judge went through and assessed each of the objectives under section 17(7) of the *Divorce Act*. None of the objectives spoke in favour of continued entitlement to support. The Court of Appeal further stated, citing its decision in *Walsh v. Walsh*[1], that "unless it can be said that the judge gave unreasonable emphasis to the self-sufficiency factor" that an appeal court has "no basis for interfering."

The wife argued that the motion judge had failed to recognize that the original trial award of support was made on a compensatory basis. The Court of Appeal noted that the trial judge had not specified. However, as the motion judge analyzed every objective under the *Divorce Act* and determined that the wife had, in any event, been compensated for her role during the marriage, this was not a "palpable and overriding error."

The wife further argued that the motion judge had erred in not finding that she was entitled to share in the husband's substantial post-separation increase in income. She argued that she "indirectly" contributed to his ability to earn a high income because of her sacrifices during the marriage. The Court of Appeal dismissed this ground of appeal as well. The original support order made no provision for support to be indexed to any increases in the husband's income. Furthermore, *given the motion judge's finding that the wife had made no attempt to become self-sufficient*, the Court of Appeal stated, **"it is entirely appropriate that she not be entitled to participate in his increase in income."**

Finally, the wife argued that the termination of support was an unnecessarily harsh remedy. She argued that the motion judge could have imputed her with income in order to lower her support and incentivize her to achieve self-sufficiency. The Court of Appeal rejected this argument as well. The motion judge considered the wife's resources which were significant, even if the husband's were substantially more. Disparity in the financial resources of the spouses usually does not provide a reason to continue spousal support. While the wife might suffer financial hardship, the motion judge determined that this was not a result of the marriage or its breakdown – but, rather, on account of her own improvident conduct and choices.

Harsh. Probably the right decision. But harsh.

[1] 2007 ONCA 218

***Dissanayake* v. *Dissanayake*, 2019 ABCA 370: Direct Payments of Support**

The road to bad judgements is paved by well-meaning lawyers.

In the words of the Alberta Court of Appeal, this case arose as a result of a chambers judge being provided with a confusing, complicated and disputed record, summarized inaccurately by counsel who, in turn, was, searching for remedies that do not align entirely with the original applications. The chambers judge made an error because he believed what counsel told him.

In this case, the husband sought credit against the Alberta's equivalent of the Family Responsibility Office, the Maintenance Enforcement Program ("MEP"), on the basis that he had made a series of payments against the mortgage to the **jointly owned** matrimonial home. The husband had been ordered to pay interim spousal support to the wife and had fallen into considerable arrears. The order set out the interim spousal support payable and provided that the wife would have exclusive possession of the matrimonial home. In addition, the wife would be responsible for the payment of the mortgage and other costs associated with the home.

The husband fell into arrears of his support payments, and the wife failed to maintain the mortgage payments (likely because the husband was in arrears). Consequently, the MEP began to take action against the husband and the bank started foreclosure on the matrimonial home. Rather than pay the support he was obliged to pay, the husband made payments against the mortgage in the amount of approximately $70,000.00 during the lifetime of the interim order and sought to have those payments credited to him. The chambers judge ordered that the husband be given credit and directed the MEP to account accordingly.

The Court of Appeal determined that this was an error.

The husband could not unilaterally decide the method by which he was going to pay his court-ordered support. His obligation was to pay the wife. However, he elected, at least for some periods of time, to make mortgage payments to secure the jointly owned home rather than make the support payments directly to the wife as ordered. The husband gained a benefit from these payments, as the matrimonial home was jointly owned. The Court set out that it was not for the husband to, "re-design his obligations unilaterally." Courts must discourage self-help in family law and parties cannot be permitted to make support payments according to their own theory of how they should work.

The fact that the husband made payments to the mortgage could be treated as a factor in the division of matrimonial property – but the husband could not get credit for property payments to avoid his support obligation.

Dancy v. *Mason*, 2019 ONCA 410: Spousal Support and Incomes over $350,000.00

> Homer: He might have all the money in the world but there's one thing he can't buy.
>
> Marge: What's that?
>
> Homer: A dinosaur.

In this case, the parties separated in 2005 after 19 years of marriage. The parties had four children together. When the parties first married, the wife was a lawyer, but she then stayed home with the parties' children until the youngest was eight, at which point she became a teacher. The husband was a successful doctor.

The parties entered into a Separation Agreement in 2008, with the husband paying support on an income of $330,000.00 and an income for the wife of $67,500.00. In 2010, they entered into an Amending Agreement for a higher amount of support, and in 2016, the wife brought a motion for a further increase in support, while the husband brought a cross-motion to terminate support.

In September 2018, the motion judge increased spousal support from $9,300.00 to $12,000.00 a month using the husband's full 2016 income of $632,827.00 and an amount "just below the low end of the *Spousal Support Advisory Guidelines*." This amount would step-down over time and terminate on July 1, 2026.

At the time of the motion the husband was earning $646,180.00 and the wife was earning $104,542.00.

The motion judge found that the amendment to the separation agreement was a material change in circumstances, permitting a variation order under section 17(4.1) of the *Divorce Act*, as the support portions of the original Separation Agreement in 2008 had been incorporated into a divorce order. The motion judge found that there was an original compensatory basis for support for the wife.

On appeal, the husband argued that the motion judge should have terminated, or at least reduced, spousal support. The husband argued that he had been paying support since 2005 and had fully compensated the wife for any economic disadvantages accruing from their 19-year marriage and its breakdown. She was not suffering any economic hardship and was economically self-sufficient. He argued that any contribution the wife may have made to his career during the marriage was now too remote. He argued that the increase in his income was now so far removed from the parties' roles during the marriage that he ought not to be required to share a portion of it with her.

The wife, on the other hand, argued that the motion judge had erred by failing to use the "mid-range" of the *Spousal Support Advisory Guidelines* ("SSAGs"), given the length of the parties' marriage, and she argued that there should have been no automatic step-down and termination of support.

The Court of Appeal was not persuaded by either party to overturn the order. They noted that the motion judge considered the evidence, including the parties' original Separation Agreement, the

objectives enumerated under section 17(7) of the *Divorce Act*, the applicable jurisprudence, the SSAGs and the evidence put forward by the parties.

While the motion judge found that the wife had achieved a "measure of self-sufficiency," her level of self-sufficiency was lower than the husband's. In addition, the parties' Separation Agreement contemplated an increase in the husband's income and did not specifically contemplate an end-date. The motion judge determined that the wife had not yet been fully "compensated" for her contributions to the husband's career and his higher earning potential, but that she would be by the termination date, which coincided with the husband's anticipated retirement date. That is, the court may determine when in the future the compensatory nature of support will come to an end and order termination as of that point.

Importantly, the Court of Appeal also stated that the support amount ordered was not accurately described as "just below the low-end of the *Spousal Support Advisory Guidelines* range." This is because the SSAGs suggest that for a payor with income over the $350,000.00 ceiling, there is a ***range of appropriate income*** to be input into the calculation. For payors with incomes over $350,000.00, in addition to the low, mid-point and high-point suggested by the SSAGs, there is also a range of possible appropriate payor income inputs. In this case, for example, the Court of Appeal stated that the motion judge could have selected a payor income of $491,000.00, namely the half-way point between $350,000.00 and the husband's actual income of $632,827.00. This would have generated a monthly support range of $9,531.00 to $12,708.00, placing the amount ordered at the "high" end of that range. That is, over an income of $350,000, the "ranges" become somewhat "elastic."

The Court of Appeal did not, however, provide *any* guidance as to how litigants are to place themselves in the range of appropriate income inputs.[2]

[2] The Court does reference *Halliwell* v. *Halliwell*, 2017 ONCA 349

Colucci v. _Colucci_, 2019 ONCA 561: Retroactive Reduction of Support

> *We made too many wrong mistakes*
>
> - Yogi Berra

In this case, the Court of Appeal considered the appropriate analysis for a retroactive *reduction* in child support.

The father in this case had significant arrears totalling more than $170,000.00 related to a support order that extended back to 1996.

The father sought a significant retroactive reduction of what he owed and sought to vary child support based on his actual earnings.

The motion judge found that the coming into force of the *Federal Child Support Guidelines* was a change of circumstance which entitled the father to move for a variation. The Court of Appeal agreed that there had been a change of circumstances, but strongly disagreed that the father was entitled to a reduction.

The Court of Appeal, in this case, set out the principles that govern retroactive child support variation where a payor claims a retroactive decrease in support.

The Court of Appeal made it clear that the principles enunciated by the Supreme Court of Canada in *S. (D.B.) v. G. (S.R.)*[3] and by the Ontario Court of Appeal in *Gray v. Rizzi*[4], govern how the court is to deal with retroactive child support.

In *Gray*, the Court of Appeal opined that the threshold for a retroactive variation of support has to meet the factors governing the variation of retroactive support orders identified in *D.B.S.* Accordingly, for both a claimed retroactive increase and decrease in child support, the factors to be considered are:

> i. Whether there was a reasonable excuse as to why a variation in support was not sought earlier;
>
> ii. The conduct of the payor parent;
>
> iii. The circumstances of the child; and
>
> iv. Any hardship occasioned by a retroactive award.

In *Gray*, the Court of Appeal adopted Justice Chappel's analysis in *Corcios v. Burgos*[5] where she made clear that the *D.B.S.* principles apply to a motion to change child support retroactively to effectively rescind arrears.

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[3] (2006), 31 R.F.L. (6th) 1 (S.C.C.) [*D.B.S.*]
[4] (2016), 74 R.F.L. (7th) 272 (Ont. C.A.)
[5] 2011 CarswellOnt 3910 (Ont. S.C.J.)

The Court recognized a distinction between requests for a reduction of arrears based on *current* inability to pay and arrears arising from a change in financial circumstances that historically affected the payor's ability to make the support payments *when they came due*. Current inability to pay will generally not result in a reduction unless the payor can demonstrate that he or she cannot, and will not *ever*, be able to pay the arrears. However, a change in circumstances that occurred while arrears accumulated and rendered the payor unable to make support payments for a period of time may allow for a retroactive decrease or reduction of the arrears.

Gray set out the factors cited by Justice Chappel in *Corcios* to guide courts in deciding whether to grant retroactive relief:

1. The nature of the obligation to support, whether contractual, statutory or judicial;

2. The ongoing needs of the support recipient and the child;

3. Whether there is a reasonable excuse for the payor's delay in applying for relief;

4. The ongoing financial capacity of the payor and, in particular, his or her ability to make payments towards outstanding arrears;

5. The conduct of the payor, including whether he or she has cooperated with the support enforcement authorities, and whether he or she has complied with obligations and requests for financial disclosure from the support recipient;

6. Delay on the part of the support recipient, even a long delay, in enforcing the child support obligation does not, in and of itself, constitute a waiver of the right to claim arrears; and

7. Any hardship that may be occasioned by a retroactive order reducing arrears or rescinding arrears, or by an order requiring the payment of substantial arrears.

The Court of Appeal unanimously held the motion judge erred by failing to consider whether and to what extent a variation order should be made in light of the principles in *D.B.S.* and *Gray*. When applying those principles, the Court took into account that the father had been a recalcitrant payor for over 23 years. The father had made only a few support payments, had not made proper financial disclosure, and misrepresented his financial position. These factors were fatal to his application to reduce the arrears and the motion judge's order below was set aside. That is, failing to make full disclosure and misrepresenting disclosure may be fatal to a motion to change. The father will now have to find a way to pay the $170,000.00 of arrears he still owes.

Brear v. Brear– 2019 ABCA 419 – _D.B.S._ and the Court's Jurisdiction for Retroactive Support Claims

> *Why'd you have to go and make things so complicated?*
>
> - Avril Lavigne

In this case the Alberta Court of Appeal weighs in on the contentious issue of whether a court has jurisdiction to entertain a claim for retroactive child support when the children are no longer children of the marriage at the time the application is made.

There is divided appellate authority on whether the court's jurisdiction to hear an application for retroactive child support differs depending on whether the application for child support is an original application under s. 15.1(1) of the *Divorce Act* or a variation application under s. 17(1) of the *Divorce Act*.

Appellate courts in Saskatchewan, Manitoba and Nova Scotia have applied the jurisdictional requirement outlined in *S. (D.B.) v. G. (S.R.)*[6] to retroactive applications regardless of whether they were original or variation applications. In those provinces, the children must be children of the marriage at the time the application is brought. See for example, *Hnidy v. Hnidy*[7], *Daoust v. Alberg*[8], *Smith v. Selig*[9].

In 2017 the Ontario Court of Appeal in *Colucci v. Colucci*[10], was the first appellate court to address the distinction between s. 15.1 and s. 17.1 applications. *Colucci* followed the trial decision in *Buckingham v. Buckingham*[11].

After *Colucci* was decided, the British Columbia Court of Appeal weighed in a five-member panel in *Dring v. Gheyle.*[12]

In *Dring*, Justice Goepel found that *Colucci* was not consistent with *D.B.S.* and that it was contrary to the weight of appellate authority.

In *Colucci*, the Ontario Court of Appeal concluded that *D.B.S.* did not directly address the jurisdictional issue and that a principled interpretation of s. 15.1 and 17.1 leads to the conclusion that they are to be approached differently. In *Dring*, the British Columbia Court of Appeal suggested that *D.B.S.* did address the jurisdictional issue inferentially.

In this case there are three different decisions. Madame Justice Pentelechuk found that the jurisdictional requirements that govern original applications for support under s. 15.1(1) of

[6] (2006), 31 R.F.L. (6th) 1 (S.C.C.) [*D.B.S.*]
[7] (2017), 96 R.F.L. (7th) 40 (Sask. C.A.)
[8] (2016), 71 R.F.L. (7th) 274 (Man. C.A.)
[9] (2008), 56 R.F.L. (6th) 8 (N.S. C.A.)
[10] 2017 ONCA 892 – yes this matter has been to the Ontario Court of Appeal twice.
[11] (2013), 32 R.F.L. (7th) 180 (Alta. Q.B.)
[12] (2018), 17 R.F.L. (8th) 34 (B.C. C.A.).

the *Divorce Act* do not and should not apply to variation applications under s. 17.1 of the *Divorce Act*. Thus, she parts company with the British Columbia Court of Appeal.

However, Justice Pentelechuk noted that the Chambers judge found that the father engaged in blameworthy conduct, and that finding triggered the Court's jurisdiction to hear the mother's application. No other court has adopted that approach. Justice Kevin Feehan concurred in the result but did not accept that blameworthy conduct can trigger an application and agreed with the dissent of Justice McDonald who made it clear that blameworthy conduct does not trigger the court's jurisdiction to award retroactive support if the children are no longer children of the marriage.

This creates a very difficult situation for counsel in Alberta, as the Justice Pentelchuk is in the majority as to the fact that *D.B.S.*, does not necessarily apply to variation applications, but in the minority on the issue as to whether blameworthy conduct could trigger the court's jurisdiction.

Justice Pentelechuk reinforced her decision that the court has jurisdiction based on the fact that there really was notice by the mother within the requisite time. The mother served but did not file a notice to the father to disclose financial information while the children were still all children of the marriage.

Justice McDonald in dissent disagreed and noted that in *Henry v. Henry*[13] it is very clear that notice must first be filed.

Justice McDonald has this to say about *Colucci*:

> In *Colucci* the Ontario Court of Appeal stated in part at para 19 " . . . we are not bound to import the interpretation accorded to s. 15.1(1) by the Supreme Court in *DBS* when interpreting s. 17(1)". With respect, this ignores the clear ratio in *Henry* where the Supreme Court of Canada held that the court's jurisdiction to retroactively increase child support is only triggered when either the Notice to Disclose/Notice of Motion or Notice of Application is filed and served.

Justice Feehan concurring in the result agreed with Justice McDonald's interpretation of the *D.B.S.* general rule of s. 15(1) of the *Divorce Act*, that the Court has no jurisdiction to award retroactive support for a child who is no longer a child of the marriage at the date of the served and filed original application. He also agreed with Justice McDonald's interpretation of the *Henry* exception that jurisdiction will be extended to the date of any prior filed and served Notice to Disclose. Thus, as he says:

> It therefore follows that I agree with his interpretation of the decision of this Court in *Calver* that a court's jurisdiction to make a retroactive support order under s 15.1 exists if the child is still a child of the marriage when the payor is served either with a filed application for retroactive support or to disclose income. This is a limited enforcement

[13] Henry is part of the *D.B.S.* trilogy made famous (or infamous) for the *Henry* exception that allows for applications for child support or a variation of support when the payee filed a Notice to Disclose before the children ceased being "child of the marriage."

> jurisdiction triggered by a formal legal measure. Alberta's family law rules specifically contemplate the filing of a Notice to Disclose and the service of a filed application upon the responding party.

Justice Feehan disagreed with the view of Justice Pentelechuk that the decision may be based on a general concept of fairness, or that the court's jurisdiction is triggered by blameworthy conduct. Justice Feehan did find, however, that a principled interpretation of sections 15.1 and 17.1 of the *Divorce Act* leads to the conclusion that they are to be approached differently. He noted, in particular, that the wording of the sections are different. Despite his significant agreement with Justice McDonald's interpretation of *D.B.S.* and the *Henry* exception, the application before the Court was one pursuant to s. 17.1 and not 15.1 of the *Divorce Act* and the jurisdictional requirements of each differ. This led him to the conclusion that the appeal would be allowed and the mother granted retroactive child support. Thus, by a slim majority in Alberta, provided that the application is under s. 17.1 of the *Divorce Act*, the *Colucci* approach may be adopted. This creates a problem as the cases in the different provinces cannot be reconciled. The Court of Appeal for British Columbia in *Graydon v. Michel*[14], held that the jurisdictional question which has been the subject of much debate throughout Canada with different appellate courts coming to different answers to the question, was resolved in British Columbia in *Dring v. Gheyle*.

The appeal in *Graydon* was heard by the Supreme Court of Canada on November 14, 2019. The Supreme Court granted the appeal, with reasons to follow.[15] While we have not received the decision yet it will hopefully provide some certainty as to this issue.

[14] 2018, 19 R.F.L. (8th) 26 (B.C.C.A.)
[15] Something rarely seen in civil matters.

Haworth v. *Haworth*, 2018 ONCA 1055: Variations of Support

> *Life can only be understood backwards but must be lived forwards* – Soren Kierkegaard

In this case, the parties separated after a 17-year marriage and reached a settlement that was incorporated into a court order under the *Divorce Act*. The Divorce order required the husband to pay spousal support in the amount of $4,000 per month "until the wife dies".

The husband was a dentist earning a significant income at the time of the settlement. As his retirement approached, the husband put the wife on notice that he would eventually seek to have spousal support terminated. Once he retired, his income dropped to about $65,000 per year, plus about $27,000 of investment income. At the time the motion came before the motion judge, the parties were 73 years of age. The motion judge found two material changes in circumstances and reduced the spousal support from $4,000.00 to $1.00 per month:

1. The wife's failure to seek employment since the separation; and

2. The significant drop in income by the husband on his retirement. The husband was 72 at the time of retirement and the motion judge did not find that he took "early" retirement in order to avoid a support obligation.

The Court of Appeal disagreed with the motion judge's finding that the wife's failure to seek employment constituted a change in circumstances. The clear wording of the Divorce order was that support was payable for life, and where parties make trade-offs and compromises in a Separation Agreement, one party cannot move to vary to change the deal. The Court of Appeal stated:

> The appellant was entitled to rely upon that judgment. The respondent waited far too long to raise the appellant's decision not to seek gainful employment until an age when she was effectively precluded from correcting the situation.

Although the Court of Appeal agreed with the motion judge that the husband's significant drop in income constituted a material change of circumstances entitling the husband to a variation of his spousal support obligation – the Court disagreed with the motion court's analysis of the support issue because the motion judge did not take the original Divorce order into account in determining the appropriate variation. In their view, the motion judge should have used the original support order and varied it *only to the extent required* by the change. For example, see *Droit de la famille - 091889* and *Pustai* v. *Pustai*.[16] Having determined a material change, the court is only to vary as much as may be required to address the specific change.

[16] For example, see D*roit de la famille* - 091889 (2011), 6 R.F.L. (7th) 1 (S.C.C.) and *Pustai* v. *Pustai*, 2018 ONCA 785.

The Court of Appeal applied this analysis and reduced the spousal support in proportion to the respondent's decrease in income and used the SSAGs as a guide. They noted that the original support order was two-thirds of the low-end of the SSAGs and, accordingly, they used the same formula, but based on the husband's current income. The Court determined that the low-end of the SSAGs was $1,275.00 a month and two-thirds of that amount was $850.00 per month. The Court of Appeal ordered that the husband pay to the wife $850.00 per month for the rest of her life.

This case is an important reminder of the principles in *L.M.P v. L.S.* A variation is not a "fresh start" and the original order or agreement must be taken into account when determining an appropriate variation. The variation must reflect the change and only the change.

***Climans v. Latner*, 2019 ONSC 1311: Who is a spouse?**

A spouse by any other name…

This case turned on the question of whether or not Ms. Climans met the definition of "spouse."

Mr. Latner was a very wealthy individual. The parties were in a relationship for fourteen years and both had children from previous relationships. When the parties separated, Ms. Climans was 41 years old and Mr. Latner was 59 years old.

The evidence in this case was hotly contested, and although the judge had issues with some of Ms. Climans' evidence, finding that she was "prone to hyperbole," Ms. Climans was found to be more credible than Mr. Latner. Mr. Latner took the position that the parties were not in a relationship despite the fact that Mr. Latner:

- Paid for all of Ms. Climans' expenses;
- Provided Ms. Climans with an engagement ring and other lavish gifts;
- Took Ms. Climans on numerous luxurious vacations;
- Wrote love letters to Ms. Climans;
- Celebrated anniversaries with Ms. Climans;
- Was cared for by Ms. Climans when he was ill;
- Demanded that Ms. Climans quit her job so that she could be more available to go on errands and travel with him; and
- Took a picture with Ms. Climans in front of a message in the sand stating "Will you Marry Me?"[17]

Mr. Latner claimed that Ms. Climans was just a friend and a travel-companion. He attempted to downplay the romantic aspects of their relationship, though he acknowledged that he bought Ms. Latner gifts, paid her expenses, and had a sexual relationship with her.

The Court considered whether Ms. Climans met the definition of a spouse in the *Family Law Act*. In s.29 of the *Family Law Act*, a spouse is defined to include either of two people who are not married to each other and who cohabited continuously for a period of not less than three years. Section 1(1) of the *Family Law Act* defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage." The question became, therefore, whether the parties were "living together in a conjugal relationship."

The Court considered the Supreme Court decision of *M. v. H.*[18], wherein the Supreme Court cited the case of *Molodwich v. Penttinen*[19] for the following criteria in considering if a couple is in a "conjugal relationship":

[17] Mr. Latner claimed in his cross-examination that someone else had written this in the sand. Of course.
[18] [1999] 2 S.C.R 3
[19] (1980), 17 R.F.L. (2nd) 376 (Ont. Dist. Ct.)

1. Shelter:
(a) Did the parties live under the same roof?
(b) What were the sleeping arrangements?
(c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:
(a) Did the parties have sexual relations? If not, why not?
(b) Did they maintain an attitude of fidelity to each other?
(c) What were their feelings toward each other?
(d) Did they communicate on a personal level?
(e) Did they eat their meals together?
(f) What, if anything, did they do to assist each other with problems or during illness?
(g) Did they buy gifts for each other on special occasions?

3. Services:
What was the conduct and habit of the parties in relation to:
(a) preparation of meals;
(b) washing and mending clothes;
(c) shopping;
(d) household maintenance; and
(e) any other domestic services?

4. Social:
(a) Did they participate together or separately in neighbourhood and community activities?
(b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:
What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):
(a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessaries of life (food, clothing, shelter, recreation, etc.)?
(b) What were the arrangements concerning the acquisition and ownership of property?
(c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:
40 What was the attitude and conduct of the parties concerning children?

In *M v.* H, the Supreme Court set out that courts must adopt a "flexible approach" to the criteria in determining whether or not a couple was in a conjugal relationship.

The Court found that *all* of the elements in *Molodwich* were present in this case and the conclusion that theirs was a conjugal relationship was inescapable. The only element that caused the Court some concern was the factor of shared shelter. Ms. Climans unquestionably maintained a separate home from Mr. Latner in Toronto. The Court determined that although the parties maintained two houses in Toronto that was not, in and of itself, fatal to Ms. Climans' claim for spousal support.

The Court then considered whether or not the parties were "cohabiting" under the *Family Law Act*. The Court cited Justice Karakatsanis' decision in *Campbell v. Szoke*[20]:

> The fact that the parties maintain separate residences does not prevent the finding of cohabitation. The court must look at all of the circumstances and consider the reasons for maintaining another residence, such as to facilitate access with one's children: *Thauevette v. Maylon* (1996), 23 R.F.L. (4th) 217 (Ont. Gen. Div.). Continuous daily cohabitation is not a necessity for a finding under section 29 of the *Family Law Act*. A couple who lived together only on weekends was found to be cohabiting in *Hazelwood v. Kent*, [2000] O.J. No. 5263 at 8 (Ont. S.C.J.). Whether a couple has cohabited continuously is both a subjective and an objective test. Intention of the parties is important. Where there is a long period of companionship and commitment and an acceptance by all who knew them as a couple, continuous cohabitation should be found: *McEachern v. Fry Estate*, [1993] O.J. no. 1731 at para. 21 (Ont. Gen. Div.).

The Court also cited the Court of Appeal's decision of *Stephen v. Stawecki*.[21] In that case, the parties each had their own homes, but were spending three to four nights each week together. They were exclusive to one another, socialized as a couple, and held themselves out as a couple to their friends.

While the Court determined that each case is fact specific, there must be "some element of living together under the same roof." The definition of cohabit requires that the parties live together in a conjugal relationship at least some of the time. In this case, the parties lived together for many months during the year. The parties spent the summers together in Muskoka at Mr. Latner's cottage and a considerable amount of time in Florida together in the winter.

The parties travelled extensively together, and Mr. Latner generously supported Ms. Climans during the length of the 14½ year relationship. Together with the presence of all of the other *Molodowich* indicia, the Court found that the parties were cohabiting in a conjugal relationship.

The parties were, therefore, determined to be "spouses", and Mr. Latner was, therefore, obliged to pay spousal support. Ultimately, the Court determined that this was a non-compensatory claim only and that Ms. Climans did not have a compensatory claim. The Court determined Ms. Climans' needs taking into consideration the lavish lifestyle of the parties and ordered indefinite spousal support of $53,077.00 per month based on an income of $6,500,000.00 for Mr. Latner and $30,000.00 per year for Ms. Climans.

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[20] 45 R.F.L. (5th) 261 Ont S.C.J

[21] 2006 CarswellOnt 3653 (Ont. C.A.)

The Court did not use the *SSAG*s in this case, because of the husband's very significant income and given that entitlement was based only on need. In the end, Ms. Climans received about 11 percent of the net disposable income and more than enough to meet even her proposed very generous budget.

Bexon v. McCorriston*, 2019 ONSC 6060 – Section 9 Calculation and *Contino

Can the Court of Appeal just decide this already?

The parties had previously entered into a Separation Agreement that saw the parties sharing time with the children equally, and no child support to be paid by either party. The mother brought a motion to change the parenting and financial terms of the Separation Agreement. The parties consented to the mother having time with the children before and after school (the father would drop them off and pick them up at the mother's home). The only remaining issue was whether the father exercised a right of access to the children for "not less than 40 percent of the time" over the course of the year, such that s. 9 of the *Guidelines* applied. Somewhat surprisingly, the parties did not disagree over the amount of time calculated by the mother during the school year. The parties agreed that if the time the children routinely spent in school was credited to the mother, then the children would be considered to be with her 63% of the time. But if the time spent in school was "neutral", the children would be considered to be with the mother 53% of the time with the father 47% of the time.

The threshold issue was whether the time the children spent in school was to be considered time with the mother or neutral. Justice Broad undertook an exhaustive review of the leading cases involving calculation of time. The leading decision of Czutrin J. in *L.(L.) v. C.(M.)*[22] confirmed that the relevant period is the amount of time the child is in the *care and control* of the parent, not the time the parent is *physically present* with the child.

In *L.(L.) v. C.(M.)*, Justice Czutrin confirmed that a non-custodial parent would be credited with the time that child spent sleeping or at school for those hours when the non-custodial parent is actually exercising rights of access to the child or the child is sleeping in the non-custodial parent's home.

Summing up these cases, Justice Broad made the following comment:

> It is clear that responsibility for a child's well-being while in school need not be assigned to only one parent, but rather may be shared, particularly in a joint custody and shared parenting time arrangement, with the result that the time spent in school may be found to be neutral for the purpose of s.9. That is what was found by Sloan, J. in the case of *Barnes v. Carmount* at para. 74, involving a situation where the parents agreed to share joint custody accompanied by a detailed parenting plan allocating parenting time on a 14-day rotating schedule. In making this finding Sloan J. relied on criteria derived from the case of *Ferguson v. Ferguson*, (2005) 12 R.F.L. (6th) 304 (P.E.I.S.C.).

The non-exhaustive list of factors set out in the *Ferguson* case were:

A. Whether one or both parent's names are on a list at the school;
B. The relative availability and proximity of the parents during school hours;
C. who enrolls the child;
D. who goes to parent-teacher meetings;
E. who signs the report card;

[22] (2013), 28 R.F.L. (7th) 217(Ont. S.C.J.)

F. who pays the bill (in the case of daycare);
G. who signs the notes to the teacher; and
H. who responds to telephone or written message from the teacher or the school.

In addition to these factors and the time spent, Justice Broad also considered the *intention* of the parties when they entered into the current parenting arrangement.

After a careful review of both parties' evidence -- particularly the Separation Agreement, which specifically provided for joint custody and equal parenting time -- Justice Broad concluded that responsibility for the children at school continued to be shared by the mother and father, albeit not equally, but for the purposes of calculation called for under s. 9, the children's time at school in this particular case was to be considered neutral. Thus, the father met the s. 9 threshold. Justice Board then considered *Contino v. Leonelli-Contino*[23] and the set-off.

The Court looked carefully at the budgets of the parties and also considered their net worth. Ultimately, Justice Broad came to the following conclusion:

> Based upon the overall situation of the parties and, in particular, their relative disposable incomes and net worth, I do not find it appropriate nor fair to reduce the applicant's child support obligation below the set-off amount based upon the Tables, notwithstanding that the applicant supports more of the cost of the children's clothing, toiletries, school supplies and personal items. I find that given the disparity in the parties' relative incomes, the applicant has a greater capacity to bear those expenses.

Ultimately, Justice Broad offers a careful and useful analysis of s. 9 of the *Guidelines* and *Contino*. It is of note that at paragraph 56 the Court stated that its analysis was "hampered" by the fact that neither party had submitted an itemized budget setting out their child-related expenses. A *Contino* analysis can be onerous and complicated, and many counsel will just rely on the set-off approach as a result. However, this is not correct under *Contino* and unless both sides agree to that kind of approach, bringing evidence of the child-care budget is mandatory.[24]

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[23] (2005), 19 R.F.L. (6th) 272 (S.C.C.)

[24] It is an error of law for the court to not consider and apply the section 9 factors: *Marchand* v. *Boudreau*, 2012 CarswellNS 548 (C.A.). In fact, if the parties do not come to court with the proper evidence, the trial should be adjourned to allow the parties to marshal it: *Woodford* v. *MacDonald*, 2014 NSCA 31; *Dyck* v. *Bell*, 2015 BCCA 520; *Conway* v. *Conway*, 2011 ABCA 137. Contrast *Burgess* v. *Burgess*, 2016 NLCA 11: where there is insufficient evidence of the section 9 factors, the basic setoff applies

FJN. v. JK, 2019 ABCA 305 – Section 7 Expenses and Children with Disabilities

This, as my daughter used to say, is a "tricky bit."

In this case, the Alberta Court of Appeal considered the intersection of children with special needs and section 7 expenses.

The met on the Internet and had an extramarital affair. The father was a high-income doctor. The mother did not earn a significant income and already had four children of her own with her husband. The mother became pregnant. The doctor was the father. The child was born with Down Syndrome. The father initially disputed parentage, but was determined to be the biological father. By the time of the trial, the child was four years old.

In determining the father's contribution to the child's (very significant) section 7 expenses, the trial judge determined that the child was entitled to enjoy the standard of living of a "relatively well-financed couple." The trial judge determined that the child's needs were more extensive due to her disability, and that the mother's claim for an *au pair* and a car for the child (with related expenses) were section 7 expenses under the *Guidelines*. The court ordered the father to contribute accordingly.

A majority of the Court of Appeal disagreed with the trial judge's analysis and determination regarding the child's section 7 expenses. The majority emphasized that the Court cannot characterize an expense as an "extraordinary expense" as a matter of discretion, merely because a payor can afford it. The majority determined that the trial judge had awarded excessive section 7 expenses solely because the child's needs made the monthly amount of support seem too low. Section 7 of the *Guidelines* was not intended to increase monthly child support when a court might feel that it was not enough money on a monthly basis. Section 7 was not enacted to overcome shortcomings in the basic Tabel Amount. The language of section 7 requires the expenses claimed to be "extraordinary" for the specific child, *not the specific family*. Ordinary day-to-day expenses, regardless of the amount, are "covered" by the Table Amount. The clearest example of this was the transportation cost, which the majority found was covered by the monthly child support.

The majority noted that it was not unreasonable for the trial judge to find that the Table Amounts would need to be supplemented by section 7 expenses, given the child's disability. However, the fact that the child had needs that other children did not would not expand the definition of section 7 expenses to cover day-to-day costs. The Court set out that while the child fit the definition of "special needs", such needs must still be subject to scrutiny. The impact of a disability on what is to be considered a "reasonable" or "necessary" section 7 expense must be properly linked to the disability and to its impact on the child's life as a whole.

The majority also set out that a court must have regard to how the child's needs might be reasonably accommodated elsewhere in the education system or community, such as public transit or other non-means tested public arrangements. The majority stated that "better versions" of arrangements or educational opportunities are not section 7 expenses as a matter of justice simply because the payor parent may be in a position to fund such "better versions."

The trial judge had adopted an approach that was, essentially, to decide what seemed like a "good idea" for the child, to presume the receiving parent could not afford it or did not need to pay for it with the Table Amount, and then charge it to the payor. This was an error. Consequently, the majority then re-examined the issue of section 7 expenses.

The majority determined that an *au pair* was neither reasonable nor necessary, as the child attended school on a full-time basis. The majority acknowledged that some assistance for the child during her walk to and from school would be reasonable, though neither party had put forward such an option. The Court of Appeal also declined to order the father to contribute to the purchase of a vehicle as the mother and her family already had one. The additional transportation costs were incremental and therefore not a section 7 expense. The majority left open the possibility that necessary modifications to the car due to a child's disability might be properly considered a section 7 expense.

Justice O'Ferral wrote an extensive and thoughtful dissent in this case. The question of what was "necessary and reasonable" was a matter for the trial judge to decide and that finding could not be overturned, absent a palpable and overriding error. The trial judge ordered the vehicle expenses and *au pair* because they were found to be in the child's best interests and the parents could afford it. Concerns about one family subsidizing the other or transfers of wealth are not part of the analysis. The dissent noted that the trial judge's view of what was reasonable and necessary was entitled to deference and there was no basis to overturn their decision.

Wardlaw v. Wardlaw, 2019 ONSC 6906 - Lump Sum Spousal Support to Provide a Clean Break and End the Conflict

How to **not** win judicial sympathies.

Lump sum spousal support orders in long term marriages – even those without children - are exceedingly rare. However, in *Wardlaw*, Justice Le May awarded a lump sum to achieve certainty and finality in circumstances where one of the parties would likely view a periodic award as an invitation to continue the fight through multiple variation applications in the future.

The parties were married for 17 years and did not have any children. The wife was self-represented at trial and, despite Justice Le May's efforts to get her to focus on the actual issues (i.e. property and support), the wife insisted on trying to deal with issues that were wholly irrelevant, such as whether there were problems with the Clearance Certificate, and the specific dates that various documents had been served. Critically, the wife also made it clear in her evidence that, from her perspective, the trial was not going to end the dispute, and that she was going to continue litigating with the husband and his family well into the future. This was a dangerous message to send to a well-meaning trial judge.

As a result of the wife's conduct, and although the wife was likely entitled to indefinite support, Justice Le May directed the parties to make submissions about whether the $540 a month in indefinite spousal support he had awarded the wife should be converted into a lump sum.

The husband made submissions as to why lump sum support would be appropriate. The wife, on the other hand, took that opportunity to claim that the trial decision was "bogus" because it had the wrong date on the front cover, did not list where the case was heard, and did not include the husband's lawyer's Law Society number. She also indicated that she did not want a lump sum because of her unsubstantiated concern that someone had been surreptitiously accessing her bank accounts.

In *Davis v. Crawford*[25], the Ontario Court of Appeal broke from their historical restraint regarding lump sum support in *Elliot v. Elliot*[26], and held that lump sum support was not longer to only be awarded in "very unusual circumstances." Rather, lump sum support could be awarded in appropriate situations – one such situation being one where the case one with significant animosity between the parties. While considerations of "high animosity" are generally used to justify a lump sum award against the payor's wishes, in *Wardlaw* Justice Le May used the wife's clear animosity toward the husband as justification for awarding lump sum support against the recipient's wishes. It made good sense to do so rather than resign the husband to a future of never-ending litigation at the hands of the wife.

[25] 2011 CarswellOnt 2512 (C.A.)
[26] (1993), 48 R.F.L. (3d) 237 (C.A.)

In this case, even though the SSAGs provided for indefinite support, His Honour concluded that a lump sum award would be appropriate because: (a) the wife would bring multiple variation applications against the husband; and (b) the parties' financial circumstances were unlikely to change in the future as the husband had already retired and the wife had already been out of the workforce for many years. The husband also had the ability to pay lump sum support.

As a result, Justice Le May ordered the husband to pay the wife a lump sum of $114,064.00 based on the low range of the SSAGs. While it is not clear from the decision what duration his Honour used to capitalize this amount, it would have taken more than 35 years of taxable/deductible monthly payments of $540 a month to equate to $114,000, which seems a bit long given that the husband was already 57 and the wife 51 at the time of trial. However, given the wife's conduct and the fact that the husband had a net worth of over $4,000,000.00, it is unlikely that the husband would complain about paying something in this range for the benefits of certainty and finality.

Justice Le May also ordered significant costs against the wife (more than $112,000) and, relying on the Divisional Court's decision in *Hindocha v. Patel*[27], allowed the husband to set off those costs against the lump sum support award (likely to avoid any possibility that the husband would pay the lump sum spousal support but the wife would refuse to pay the costs). This was also recently done in *Karges v. Karges*[28], (although in *Karges*, the court set off periodic support against costs ordered to be paid on a monthly basis).

As a result, the wife will ultimately receive the grand total $1,501.90. This was a very expensive lesson for the wife about the importance of behaving reasonably in litigation, and hopefully one that will cause the wife to rethink her prior threats to try to continue litigating with the husband and his family.

To paraphrase Justice Pazaratz in *J.S. v. M.M.*[29]: Nasty does not work. Nasty will not be tolerated.

[27] 2009 CarswellOnt 2611
[28] 2018 ONSC 7574, aff'd 2019 ONCA 833
[29] 2016 ONSC 2179

Fiorellino-Di Poce v. Di Poce, 2019 ONSC 7074 – High Incomes and Income Reports

Mo' Money does not necessarily mean Mo' Income Reports.

This case is deserving of brief comment with respect to the determination by the court that an income report was not necessary for a high-net-worth and high income payor with very complicated holdings and income.

In this case, the applicant was claiming very significant interim disbursements for legal fees and to pay for a valuation and income report with respect to the respondent's assets and income.

While Justice Akbarali ordered interim disbursements for legal fees and a valuation report, she determined that the applicant was not entitled to interim disbursements for an income report. The respondent, himself, did not provide an income report on the basis that he earned very significant income such that he had the means to pay whatever support award might be made. Therefore, a report as to his income was not necessary, required, or proportional. Her Honour agreed that there was "little point" in trying to determine the respondent's income with precision because support would be driven by the applicant's needs, as measured against her standard of living during the 6 or 7 year marriage (the applicant was 62 and the respondent was 84). Whatever quantum was ordered, the respondent would be able to pay it.

Justice Akbarali relied on the concept of proportionality as a core principle that is specifically applicable to fixing costs under the *Family Law Rules*. However, while the concept of proportionality is regularly considered when considering costs payable to a successful party after a motion or trial, her Honour applied the concept of proportionality to the question of interim disbursements. She found that a court should not order interim disbursements to fund steps that are not proportional to the litigation as a whole. She concluded that, "if costs would not be awarded for steps that are not proportional, a litigant intending to take such steps ought not to be able to receive interim disbursements to fund them either." This is an entirely logical and clever way to apply the concept of proportionality to a claim for interim disbursements. In fact, it would be inconsistent with Rule 2 of the *Family Law Rules* to require a party to fund a report that would, at the end of the day, serve no purpose and that would only add expense and delay.

***Ferguson v. Ferguson*, 2019 BCSC 1946 – Imputation of Income for High Income Earners**

What is wrong with flipping burgers at McDonalds?

This case involved a very wealthy man trying to vary a 2017 trial decision after his employment had been terminated. At the initial trial, the husband had been ordered to pay support on the basis of an income of $933,820.00 for child support purposes and $855,545.00 for spousal support purposes.[30]

At the time of the trial, the husband was employed as the Managing Director – Western Canada for Scotiawealth. On January 28, 2018, the husband's position was eliminated. The husband commenced a wrongful dismissal proceeding and, on May 23, 2018, he settled the case. He would receive a salary continuation for 18 months, ending July 30, 2019, and the annual salary used for this continuation was $1,000,681.00. The husband's motion to change motion was heard in October 2019.

The Court properly opined that the first step was to determine whether there had been a material change in the husband's financial circumstances. In determining this, the Court considered whether the husband's ***income*** would be materially different in 2019 than it was in 2018. The mere fact that the husband had been terminated did not, in and of itself, justify a change in the support order if there was to be no material change in his income. The Court considered the husband's income and determined that he would receive income from the following sources:

- $250,000.00 from RSUs in 2019;
- $560,000.00 in salary continuation in 2019;
- The Court attributed $171,000.00 to the husband based on a 3% rate of return for his $5.7 million in financial assets. The Court acknowledged that the husband had spent $2.9 million on a home – but that still left him with $2.8 million in financial assets that could generate $84,000.00 in income per year based on a 3% rate of return.

Taking the lesser number for the amount he could generate from his investment, the husband was left with an income of about $894,000.00. When compared to the incomes used for the determination of support at trial, $855,545 and $933,820, the Court found that there had not been a material change in circumstances to justify a modification of the support order – and without a material change, the inquiry could proceed no further. The Court noted that the husband's income in 2020 *might* justify such a modification, but it was unclear at the time. This decision emphasizes that high-income payors may be able to sustain larger fluctuations in annual earnings before a material change is found than payors of much more modest means.

[30] There were some double-dipping issues that caused his income to be lower for spousal support purposes

While the Court did not have to consider whether or not to impute income to the husband, it did embark on that analysis. The Court considered whether he was intentionally unemployed as a result of the fact that he did not have a job at the time of his motion to change. The Court noted that the husband had received job offers, but that they were not equivalent to his old job in terms of "prestige", position, or compensation, so he had not accepted them. While an individual is entitled to a reasonable period of time to try and find work in their field after they have been become unemployed, eventually there comes a time when they must "widen the net." Further, the fact that the husband had rejected a number of offers demonstrated that he was indeed intentionally underemployed. Consequently, the Court stated that if it were going to impute income to him for 2019 it would have been $325,000.00 which was based on the mid-point between the two salaries of the employment offers he had rejected.

***Lokhandwala v. Khan* - 2019 ONSC 6346 (Div. Ct.) – Appealing Interim Support Orders**

"Le Rant"

This was an important decision regarding leave to appeal interim support orders penned by Justice Corbett for a unanimous Divisional Court panel.

Leave to appeal can be granted under Rule 62.02(4)(a) or (b) of the Rules of Civil Procedure. Under either branch of the test, the moving party must show an issue that rises above the interests of the particular litigants. As Justice Corbett put it, the issue, "must raise questions of broad significance or of general application that warrant resolution by a higher court because they affect the development of the law and the administration of justice." Further, as Justice Corbett noted, "even when there is an issue of importance, leave will still not be usually granted when that issue is still available for appellate adjudication after trial."

In this case, the motions judge ordered the father to pay spousal and child support for two children. Although the children spent half their time with the father, the motions judge did not acknowledge this fact, and did not mention or apply s. 9 of the *Child Support Guidelines*. He did not explain why he declined to apply s. 9, given the time the children spent with each parent far exceeded the 40% threshold.

The Divisional Court found that even if the motions judge had made a palpable and overriding error, and even if that error would raise a doubt as to the correctness of the order, that would not have made the proposed appeal a matter of such importance that leave to appeal would have been granted.

The rationale for not granting leave in these kinds of circumstances was set out by Justice Corbett as follows:

> In family law, temporary support orders are designed to establish or maintain a reasonable state of affairs pending trial. Unless expressly stated otherwise, these orders are without prejudice to adjustment by the trial judge. Interlocutory appeals in family law matters are costly, time-consuming, and tend to impair the reasonable and efficient course of those proceedings. Errors in temporary support orders - even ones that are straightforward - are almost always better addressed at trial rather than by way of interlocutory appeal. As argued by the responding party in her factum, "instead of expending their scarce resources on a potential appeal from a [temporary] Order, the parties should focus their attention on resolving the case on a final basis".
>
> This case is not important to the development of the law. Any error there may have been calculating temporary child support may be adjusted by the trial judge in due course. And any error made by the trial judge on these issues can be pursued by way of an appeal from a final order.

To further emphasize their concern, the Divisional Court stated:

> Finally, we wish to be clear that we are not criticizing counsel for the moving party in this endorsement. The practice of seeking leave to appeal in cases like this has been common place in family law matters. By this endorsement we signal to the family law bar that this practice should not continue.

Respectfully, something has gone very seriously wrong here. If trial dates were readily available, there would be much force in Justice Corbett's decision. But that is not the case. In some jurisdictions, an interim order could be in place for two or three years before being addressed and adjusted by a trial judge. By then, much damage can be done to one or both of the parties – including the inability of a payor to pay, or the inability of a recipient to put food on the table. Mistakes happen; and they must be corrected.

If an interim order is made that is demonstrably too high or contains an error in principle, such as ignoring s. 9, there is a risk that the payor will default. When the payor defaults, the ultimate remedy by the recipient is to have the payor's pleadings struck. This leads to an uncontested trial and enforcement proceedings. Motions to change interim orders are notoriously difficult – and motions to change a result after an uncontested trial even more so. All of this results from allowing an interim order that was improperly determined to exist until the time of trial that could be years away.

The fact is that there are lengthy backlogs in trials in many jurisdictions. That cannot be ignored. While Justice Corbett's prodding to “forget the appeal and get on with the case” works in theory, in practice, it just does not work. This is now a matter for the Family Law Rules Committee.

Property

Khan v. Khan, 2019 ONSC 4687 – Sale of the Matrimonial Home and Grandkids

KHAAAAAANNN!!!!!
– James T. Kirk

KIIIIIIIIIRK!!!!!!!!

- Kahn Noonien Sing

In *Khan*, the parties were married in Pakistan in 1976. They moved to Canada in 2001 and purchased the matrimonial home in 2003. The parties spent most of the marriage living apart, as the husband worked in the oil and gas industry in Calgary and Japan. There was a dispute as to the date of separation. The husband argued they separated on January 1, 2010, while the wife contended they did not separate until May 11, 2018.

The husband lived primarily in Pakistan, but resided in the matrimonial home from time-to-time when visiting Ontario. The parties had two adult children and grandchildren, all of whom lived in the matrimonial home with the mother.

The husband brought a claim to have the matrimonial home listed for sale and for the wife to pay occupation rent. The wife counter-claimed, seeking an order for exclusive possession and for the transfer of the home to the parties' son for $625,000. The wife argued that removing her from the matrimonial home would negatively impact her and the residents of the home, including the parties' children and grandchildren.

In dismissing the mother's claim, Justice Charney held that the joint owner of a home has a *prima facie* right to sell it. A matrimonial home can be ordered to be sold without spousal consent where the evidence does not support a realistic need to maintain the house as a home for the benefit or stability of the children pending trial. Justice Charney stated that the husband had a *prima facie* right to sell the matrimonial home before trial. He noted that the wife did not adduce evidence to show that the husband's right should be defeated. Even if the wife's date of separation was accepted, the parties had been separated more than a year and both children were adults. Justice Charney remarked that, "adult children cannot defeat their father's right to have the house sold because they want to continue to have a free place to live."

Justice Charney noted that while the *Family Law Act* may apply to grandchildren, there was no evidence as to why that particular house was necessary for the grandchildren's best interests, or why the adult children were unable to find alternate accommodations for their families.

Justice Charney also set out that a court does not have the authority to grant a spouse (or a child) the right to purchase the other's interest in the matrimonial home.[31] If the parties' son wanted to buy the matrimonial home, he could make an offer when the home was listed for sale, but there could not be an order compelling the father to sell it to him.

[31] See *Batler* v. *Batler* (1988), 67 O.R. (2d) 355 (H.C.); *Goldman* v. *Kudeyla*, 2011 CarswellOnt 2890 (S.C.J.); *Miller* v. *Hawryn*, 2010 CarswellOnt 8319

Jiang v. Zeng, 2019 ONSC 1457 - Sale of the Matrimonial Home and Non-Titled Spouses

Home is where the heart ~~is~~ used to be.

In this case, the husband was seeking an order for exclusive possession of the matrimonial home that was owned solely by the wife. The home, purchased in 2013, was a residential unit above a commercial unit. The wife claimed that she paid the down payment of $260,000.00 with a loan from her father and sister. The husband, on the other hand, argued that the wife had funded the down payment herself and that her father and sister were impecunious. The husband requested an order for exclusive possession of the matrimonial home pending trial and an order allowing him to rent out the commercial unit and collect the rent.

The husband argued that he had nowhere else to go and could not afford to obtain alternate accommodations for his adult son and mother, both of whom lived with him and were dependent on him. He argued that the matrimonial home should not be sold until a trial.

The wife had a *prima facie* right to sell the matrimonial home. A claim for exclusive possession cannot defeat that right, but exclusive possession can be granted while a matrimonial home is listed for sale. Justice McGee noted that a matrimonial home will generally be ordered to be sold on a motion unless there are children residing in the home or an entitlement under the *Family Law Act* would otherwise be defeated. Section 24(3) of the *Family Law Act* permits a Court to decline to order the sale of a matrimonial home to preserve stability and continuity in the children's lives as their parents' legal issues are determined. However, in this case, the only dependent child lived with the wife and not in the matrimonial home. The residence and well-being of the husband's adult son and mother were "outside the scope of a claim for exclusive possession."

Justice McGee ordered that the wife be permitted to sell the home. A court will order a matrimonial home to be sold without the non-titled spouse's consent when the evidence does not support a realistic need to maintain the house as a home for the benefit or stability of the children pending trial or unless the sale would defeat a *meritorious* claim by the other party. In her notice of motion, the wife set out that while she wanted the matrimonial home sold, the proceeds would be paid into court pending a final determination. According to Justice McGee, the husband's claim to an equalization payment would benefit from the sale, as the sale would provide a "pot" of money to fund the payment. The husband did not have any claim to an ownership interest in the matrimonial home. Interestingly, Justice McGee declined to order that husband give vacant possession of the matrimonial home. Essentially, the court stated that it was premature to make such an order, particularly in the absence of evidence that the husband, his mother and his son would not cooperate with the listing, showing and sale of the home.

Steele v. Doucet, 2019 ONSC 544 – A Shift in Pre-Trial Sale?

HOME SWEET (soon to be sold) HOME

The Applicant in *Steele* brought a claim under the *Partition Act*. The parties cohabited for ten years but were not married. For the duration of their relationship, they lived at a property on Redan Drive. The Respondent initially owned the property, but it was transferred into the joint names of the parties in joint tenancy on June 11, 2009. The parties were jointly responsible for the mortgage. Both parties funded expenses and did significant work on renovations to the house. The parties disagreed about their respective contributions to the property and whether the respondent had a larger beneficial interest in the property.

The Applicant brought a motion for the sale of the property and that the net proceeds of sale shared evenly between the parties. The Respondent argued that he had a trust claim for more than 50% of the property and that the claim should be resolved before the home was sold.

The Applicant argued that he, as a joint tenant, had a *prima facie* right to sell the house. For the court to exercise its discretion to refuse the sale, the Respondent would have to establish that the Applicant had engaged in malicious, vexatious or oppressive conduct regarding the sale.[32] The Respondent, on the other hand, argued that the sale of the property should be determined at trial, as the beneficial interests of the parties would then be determined. The Respondent noted the trial was set for only four months later.

Ultimately, the Court agreed with the Respondent. The Court noted that a trial would be necessary to determine the respective beneficial interests of the parties, with the benefit of a full evidentiary record to illuminate the respective contributions of the parties to the property. The Court determined that there was a genuine issue to be determined at trial as to the beneficial interests of the parties in the property. This, in turn, was a reason to defer the sale of the property until the conclusion of the trial. The Court noted that this was "especially" the case when the trial was to be relatively soon. The Court stated that it would be "unjust and unfair" to order sale when the "just allocation" of proceeds must await determination of the beneficial interests in the property.

[32] *Latcham* v. *Latcham*, [2002] O.J. No. 2126 (C.A.); *Marchese* v. *Marchese*, 2019 ONCA 116

***Delongte v. Delongte*, 2019 ONSC 6954 – Partition & Sale**

And the pendulum continues to swing.

There is nothing new or earth shattering in *Delongte*. But it does oppose what seems to be a recent trend (or swinging of the pendulum) of *not* ordering interim partition and sale.

While acknowledging that orders for interim sale should not be made "as a matter of course", Justice Shaw emphasized that the sale of the home is sometimes the most appropriate catalyst to move a matter forward.

In the decision, Justice Shaw also clarified that the following factors will not be a sufficient basis to deny a motion for interim partition and sale:

- The fact that the home is the only home the children have ever known.
- The fact that the children are attached to the home and that the home provides the children with a sense of stability (if that was, in fact, a sufficient basis to resist sale, there would rarely be an order for interim sale where children are present).
- The fact that the home is close to the children's school.
- The fact that the party moving for sale has significant other assets such that s/he can afford another residence.
- A bare claim for unequal division.
- A bare claim for final exclusive possession.
- The fact that the resisting party would like the chance to purchase the home.

***Miaskowski v. MacInTyre*, 2019 ONSC 1872 – Reconciliation and Property Division**

Reconciliation requires reconciling of rights.

This case considered the impact of a parties' reconciliation on their separation agreement and previous property division. The parties married on October 16, 1997, separated on July 22, 1999, and entered into a separation agreement on January 18, 2002. The Separation Agreement included property releases, as the wife used the equalization owing to her to setoff some of the cost of buying out the husband's interest in the matrimonial home. The Separation Agreement also provided that if the parties reconciled and cohabited for 90 days, the provisions of the Agreement would become void -- but that the reconciliation provision would not "affect or invalidate any payment, conveyance or act made or done pursuant to the provisions of [the] agreement" – a somewhat standard clause.

The parties reconciled on March 1, 2006, only to separate again on December 7, 2014. The main point of contention at trial was how to value the husband's pension. The wife argued that the pension should be valued from the date of marriage to the date of the *second* separation. The husband, on the other hand, argued that his pension should be valued from the date of reconciliation to the date of the second separation.

The wife argued that after the parties had reconciled and then cohabited for 90 days, the terms of the Agreement, including the waiver to a division of the pension, were null and void. The wife argued that the Agreement implied that its terms -- including the waiver to pension division -- would be null and void once the parties reconciled and cohabited for 90 days. She also argued that the parties had specifically intended this result. The wife had placed the husband back on title to the matrimonial home (that she then solely owned) after they reconciled. If the husband wished to protect his pension at that point in time, he could have requested a new Agreement. The wife also relied on a letter from the husband's lawyer, in which the lawyer responded to the husband's revelation that the parties had reconciled by and reminded him of the potential impact of the 90-day clause.

The Court considered *Sydor v. Sydor*[33], a 2003 Ontario Court of Appeal decision. In *Sydor*, the Court of Appeal noted the common law rule is that a separation agreement is void upon reconciliation, "subject to a specific clause in the agreement that would override the common law."[1] The Court of Appeal further stated that, "a specific release of all rights to a particular property can be viewed as evidence that the parties considered the disposition of that property final and binding, regardless of what may occur in the future."

The Court determined that the releases in the agreement were in the nature of a "specific release" as considered in *Sydor*. The parties had made specific transfers and acted on the basis of those transfers. Pursuant to the terms of the Separation Agreement, the wife had already "received" her

[33] 2003 CarswellOnt 3765 (ONCA)

share of the pension, or at least was satisfied with that amount. The subsequent conduct of the parties corroborated that interpretation as well. There was no indication that the husband acted in contradiction of any belief that the portion of the pension prior to the parties' first separation was protected by the Separation Agreement. The fact that the husband was put on title to the matrimonial home did not represent a benefit to him, as he also assumed responsibility for an equivalent amount of debt. There was nothing in the parties' behaviour that set aside the clear terms of the Agreement and, as a result, the terms were a complete answer to the wife's claim to share in the pension prior to reconciliation.

***Marley v. Salga* - 2019 ONSC 3527 – Severing a Joint Tenancy through a Will**

Get legal advice on Wills and Estates matters, folks.

This is an important case – albeit likely wrongly decided. But pending the opinion of an appellate court, it cannot be ignored. The case involves a dispute between the three children of the recently deceased husband and his second wife. The husband and wife held title to the matrimonial home as joint tenants. However, in his Will, the husband set out that the wife would have a life-interest in his one-half interest in the matrimonial home. After she died, it would be sold and the proceeds split between his children.

The wife argued that because of the right of survivorship, she received full title to the matrimonial home upon the husband's death. The children, on the other hand, argued that the husband had effectively severed the joint tenancy because of the following two events:

1. First, the husband's act of preparing the Will itself. The children argued that by stating that the wife had a life estate in *his half* of the matrimonial home, the husband severed the joint tenancy; and,

2. Second, there was a surreptitiously-recorded conversation between the husband and the wife during the husband's final days at the hospital. The children claimed that this conversation proved the husband's intention to sever the joint tenancy and the wife's awareness of this intention.

A joint tenancy may be severed in one of three ways, now known as the “three rules”:

> Rule 1: By unilaterally acting on one’s own share, such as selling or encumbering it.
>
> Rule 2: By mutual agreement between the co-owners to sever the joint tenancy.
>
> Rule 3: Through any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.[34]

The Court was satisfied that the parties took title to the matrimonial home as joint tenants when they purchased the home in 2004. In 2015, one month before he died, the husband executed the Will setting out that the wife would have a life interest in his half-interest in the matrimonial home and that his half-interest would go to his children when the wife either passed away, remarried, or stopped residing in the home. The children claimed that the wife was aware that the husband intended, by executing this Will, to sever the joint tenancy. To bolster their claim, the children relied on the (poorly) recorded conversation in the hospital as indication of the wife's understanding.

The Court noted that in *Hansen Estate* Ontario Court of Appeal has previously set out that a testamentary disposition cannot sever a joint tenancy. However, the provision in a Will is a piece

[34] See *Hansen Estate v. Hansen*, 2012 ONCA 112

of evidence that can be used to help discern whether there was a common intention to treat the joint tenancy as severed, particularly if the provision in the Will was known to the other party.

In this case, the Court determined that the extrinsic evidence of the conversation in the hospital, where the wife allegedly acknowledged the husband's intention, and the husband's drafting of the Will, was proof that the husband and wife engaged in a course of dealing sufficient to intimate that the interests of all were “mutually treated as constituting a tenancy in common.” The Court did not deal with the fact that the only course of dealing in this case was the Will itself. Neither the husband nor the wife sought to change title. It appears on the evidence that the wife was *aware* of the husband’s will, but it is unclear how this was a "course of dealing."

This case has been appealed and we will see the result.

***O' Donoghue v. Walker* - 2019 BCPC 257 – The Personification of Dogs**

"Woof"

-The Dog

This is a dog case that appears to have had a judge who was very much a "dog person." In this case, the parties were in a two-year common law relationship during which they adopted a dog, Akiro. After the breakdown of the relationship, O'Donoghue brought an application to Small Claims Court in British Columbia for Akiro's return. The judge went on a strikingly deep dive into the facts of this case, determining:

- The dog was the result of the breeding of a half poodle, half miniature schnauzer and a fox terrier[35];
- The dog was "remarkably" cute;
- When the dog was adopted the parties executed an adoption agreement that indicated that Walker would have the dog if the couple were to break up;
- The dog spent most of her time with Walker, but had a "strong bond" and was well loved by O'Donoghue;
- In the last months of their relationship the parties shared time with Akiro on a month-on/month-off basis; and
- O'Donoghue suffered from bipolar disorder and had to be hospitalized, but was on a stable medical regime.

The judge found that she had jurisdiction to deal with the dog as it was a claim for "recovery of personal property." However, the judge found that the parties had agreed at the end of their relationship that, despite the adoption agreement, they were co-owners of the dog and would engage in an equal sharing regime with Akiro. The judge found that the parties had a binding contract to the effect that O'Donoghue had properly brought an application for "specific performance" of that contract.

The judge then stated the issue as follows: "Is it in Akiro's best interest that notwithstanding the joint ownership that I have found, that the dog stay with only one or with both people[?]" The Court determined that there was, "no doubt that both of these women love this dog." She further found that it was "in the dog's best interests to be in the shared custody of both of them" and specifically that "it is 100 percent in Akiro's best interest to be with both of her mothers." The Court ordered a month-on/month-off dog-sharing regime, but set out the following conditions:

[35] Or as I call it, a "Schnau-fox-a-doodle." E I E I O

- Akiro would have one long walk a day no more than five kilometres.
- Akiro will have two short walks later on in the day at different times.
- Both homes would have two water bowls that are filled two or three times a day to ensure that she always has water.
- "If during the course of the time that she is with one mother – and I know I should say "owner" but I am saying "mother", if there is any sign of any illness that person is required to immediately text the other and let the other know."
- The parties would at all times take the dog to their own homes and if neither party could care for the dog for more than one night they are obligated to let the other know and give them the chance to care for Akiro.

Woof.

Yared v. Karam, 2019 SCC 62 – When does a Trust Property count as "Family Patrimony"?

"Trust me."

This is a decision of the Supreme Court of Canada regarding the Quebec property law regime that *may* have a much wider impact on the issue of trusts and division of property across Canada. Whether or not it will have such impact remains to be seen.

In 2011, the parties discovered that the wife was suffering from an incurable form of cancer. The parties moved to Montreal shortly thereafter. As a result of the diagnosis, the husband set up a trust to protect the family's assets. The wife and the parties' four children were the beneficiaries of the trust. The husband and his mother were the trustees. The husband had a special power of appointment to add himself as a beneficiary.

Both parties made contributions to the trust during the marriage. The trust purchased a home in Montreal that the family used as its matrimonial home in 2012 for $2,250,000.00. The parties separated in 2014. The wife left the matrimonial home and commenced divorce proceedings. The wife died in 2015. The liquidators of the wife's estate continued the litigation, which centered on whether or not the matrimonial home was part of the family patrimony regime. If not, the wife's estate would have little value. Property included in the family patrimony regime in Quebec is subject to an equal division.

Article 415 of the Civil Code of Quebec ("CCQ") includes family residences as well as "rights which confer use" of such residences in the family patrimony.

The majority of the Supreme Court determined that under the CCQ, none of the Settlor, Trustees or the beneficiaries had "ownership rights" (that is to say, rights *in rem*) in the trust property,[36] but what may or may not constitute a "right which confers use" will depend on the specific powers and level of control granted to specific individuals in a specific trust. A spouse who is a Trustee or a beneficiary might have a "right which confers use" depending on the level of control exercised by that spouse with respect to the residence. The intention of the parties when they create the trust is irrelevant, except to determine whether or not the residence was being used by the family. If a spouse has the right to control the entitlement to the value of the asset and the right to control who may benefit from the use of the property, then the residence should be included in the family patrimony. [37]

The majority found that the father had sufficient control over the trust, given that he was a Trustee and that he had the power to appoint beneficiaries (including himself), the power to remove a beneficiary, and the power to determine how the income and capital of the trust would be

[36] In Ontario, see *Spencer* v. *Riesberry*, 2012 ONCA 418

[37] In Ontario, this is similar to *Debora* v. *Debora* (2006), 83 O.R. (3d) 81 (C.A.), but with respect to a corporate that owns a matrimonial home.

distributed. These powers constituted a “right which confers use” to the husband and meant that the residence should be included in the family patrimony as “belonging” to him.

The minority vigorously disagreed. The minority determined that while the division of the family patrimony is a public issue, it does not oblige either spouse to purchase family patrimony property. Just as spouses are free to rent a property rather than purchase property, they are free to arrange their affairs in any way that deem fit, so long as they are not acting with specific intent to defeat the family patrimony scheme. The uncontested evidence was that the intention of the trust was to protect the wife and child, not for the husband to defeat the family patrimony. Therefore, the residence should not be included.

Re: Galeano, 2019 CarswellOnt 18341 (Ont. S.C.J.) – Bankruptcy, Discharge and Equalization – Oh No!

-and-

Re Marino, 2019 ABQB 903 (Alta. Q.B.) – Bankruptcy, Discharge and Equalization – Oh Yes!

I hear the weather is nice in Regina 15 days a year.

This was an Ontario decision from Justice Kershman (who was a bankruptcy specialist before he was appointed to the Bench), is another stern warning to counsel that if your client's spouse goes bankrupt, your client's rights will be ***severely*** prejudiced if you (or your client) do not take ***immediate steps*** to deal with the situation.

The husband and wife separated in April 2016. About 7 months before they separated, they filed a joint consumer proposal. However, they were unable to keep up with the payments after they separated, and they both ended up filing in bankruptcy in the fall of 2016. As a result, all of their assets, including their matrimonial property claims, vested in their respective trustees. However, the husband was able to keep his pension - it was exempt from the bankruptcy as a result of the combined operation of s. 67(1)(b) of the *Bankruptcy and Insolvency Act* (the "*BIA*") and s. 83(c) of the *Canadian Forces Superannuation Act* which governed the husband's pension.

The wife was discharged from bankruptcy in August 2017, and the husband was discharged in October 2018. Pursuant to s. 178(2) of the *BIA*, the discharges released both parties "from all claims provable in bankruptcy", including their respective matrimonial property claims.

Even though the husband had already been discharged, in April 2019, the wife commenced a proceeding to try to have the husband's military pension divided. Justice Kershman dismissed the wife's claim because the husband had already been discharged, and the wife had not established any basis for setting the discharge aside. His Honour also rejected the wife's creative argument that the court could "deem" her equalization claim to have survived the husband's discharge because her position was contrary to the Supreme Court of Canada's conclusion at paragraph 21 of *Schreyer v. Schreyer*[38] that a discharge from bankruptcy releases a debtor from all claims that are provable in bankruptcy, including equalization claims.

This was a very unfortunate result for the wife, as the husband got to keep his entire pension while the wife was left with nothing. It is even more unfair when considering that the result would likely have been completely different had the parties lived in a "non-equalization" jurisdiction (that is, a division of property province such as Alberta, New Brunswick, Nova Scotia, Newfoundland or Saskatchewan) rather than an "equalization" jurisdiction such as Ontario, Manitoba or P.E.I. A proprietary claim (such as a claim for statutory property division in a non-equalization province) is not a claim provable in bankruptcy and, accordingly, is not released by the discharge[39]. Although

[38] 2011 SCC 35
[39] Schreyer v. Schreyer2011 SCC 35 at para 14 and Re Marino, 2019 ABQB 903

there is a fine line between an "equalization" jurisdiction and a "division" jurisdiction, that fine line can make all the difference.

The difference is set out by the Supreme Court of Canada in *Schreyer*, as follows:

> [14] Every Canadian province has tried to address in some way the inequities or difficulties arising out of the distribution of family assets after the breakdown of a marriage or of a common law relationship to which the same rules apply. Broadly speaking, the provincial legislatures have chosen between two different models: equalization and division of property [citations omitted].
>
> [15] The equalization model involves a valuation of the family assets and an accounting. The value of the assets is then divided between the spouses, usually in equal parts, although family courts have a limited discretion to order an unequal division. The valuation and the division give rise to a debtor-creditor relationship in the sense that the creditor spouse obtains a monetary claim against the debtor spouse. But the assets themselves are not divided. Each spouse retains ownership of his or her own property both before and after the breakdown of the marriage. Neither acquires a proprietary or beneficial interest in the other's assets. Assets are transferred only at the remedial stage, as agreed by the parties or as ordered by the family court in exercising its discretion, as a form of payment or execution of the judgment [citations omitted]. The division of property schemes, on the other hand, give rise to a proprietary or beneficial interest in the assets themselves, not just in their value.

If you are dealing with a case where the opposing party has gone bankrupt (in an equalization jurisdiction), you can avoid this type of result (and a call on your deductible) by immediately commencing a claim for an equalization payment, and obtaining leave under s.69.4 of the *BIA* to pursue the claim against exempt assets (e.g. a pension or an RRSP).[40]

Alternatively, have your client move to Alberta. Or Saskatchewan. Or New Brunswick.

[40] See, for example: Cunningham v. Cunningham, 2009 CarswellAlta 2155; Re Scott, 2014 ONSC 5566; Fiorito v. Wiggins, 2017 ONCA 765; and Shirkie v. Shirkie, 2015 SKQB 303.

***Testani v. Haughton*, 2019 ONSC 174 – Intergenerational Loans**

A Note from Mom may not be enough.

In this case the Court had to deal with an inter-generational loan and a gratuitous transfer of a piece of property from the wife's mother, to the husband and wife. The parties had been married in 2003 and separated in 2015, they had one child together. The wife's mother, Filomena, bought a rental property in 2005 and the parties began to live in it. In 2013, the property was transferred to the husband and wife. They paid the land transfer tax, Filomena's capital gains and took over the outstanding mortgage of $175,000.00.

In addition, in February 2013, Filomena and the wife executed a note which stated, in Italian, that the wife would repay to Filomena $125,000.00 on Filomena's request representing the funds Filomena had spent on the property. The wife never told the husband about the promissory note and on subsequent bank documents, she did not list the promissory note as a debt that was owing.

The property itself was transferred in June of 2013. The documents stated that it was being transferred for no consideration and there was no mention of the promissory note. By the time of the trial Filomena had appointed the wife's brother as her power of attorney and he was managing most of her affairs. After the parties had separated, the wife paid back the $125,000.00, though her brother placed it in a GIC in his name alone and it was not put into Filomena's account.

The husband argued that the transfer of the property had been a gift from Filomena to the couple. The Court set out that equity presumes a bargain, not a gift, and it was incumbent on the husband to prove the requisite elements of a gift; intention of the donor at the time of transfer, acceptance of the gift and delivery of the gift. The husband acknowledged that he had never had any discussions with Filomena about the property. His claim for a gift rest on circumstantial evidence involving the transfers including the absence of consideration noted on the transfer document, the fact that the wife had not told him about the promissory note until after separation and the failure of the wife to alert third parties, such as the bank and real estate lawyer, about the note.

The Court did not accept that this was a gift. There were clear indicia that the transfer was not a gift:

A. The parties had paid Filomena's capital gains taxes;

B. The parties assumed Filomena's mortgage on title to the property;

C. Filomena and the wife signed a note acknowledging $125,000.00 of debt to Filomena relating to the transfer;

D. There had been another similar transfer of another property from Filomena to the wife's brother in August 2012 on similar terms;

E. The evidence of the wife, Filomena and the wife's brother was consistent and clear that there was no gift intended. By contrast, the husband had been less credible and could not recall basic details and dates and events critical to the case.

The Court determined the transfer was not a gift.

The Court then considered the issue of the Promissory Note. Under section 4(1) of the *Family Law Act*, the wife has the onus of proving, on a balance of probabilities, all of her assets and liabilities. This is particularly so in cases when one spouse is challenging the validity of a debt. While the note itself was evidence of a debt, it was not determinative of the issue. The husband argued that the note was concocted after separation in an effort to financially assist the wife. While the Court determined that this was not the case that did not mean that the wife was entitled to a deduction equal to the note's face value.

Instead, the Court determined that it would discount the note because it was unlikely that the wife would ever actually be required to pay back the note to Filomena. In doing so, the Court followed a long line of cases, and specifically the Ontario Court of Appeal decision of *Cade v. Rotstein*[41]. The Court discounted the Note down to $12,500.00 or 10% of its face value[42]. This discount was applied for the following reasons:

A. The parties were of modest means, they had a combined income of between $65,000 to $70,000 and lived paycheque to paycheque;

B. Filomena had owned three properties, two of which were rental properties. She gave one to the wife and one to the wife's brother. The Court determined that Filomena had no need for her equity in the property transferred to the parties in 2013 or when the parties' separated in 2015;

C. The Note was not made contemporaneous with any actual advance of funds or the transfer of the property, the transfer happened four months later;

D. The wife never told the bank about the Note;

E. Neither the wife nor Filomena told the real estate lawyer about the Note;

F. The husband was never told about the Note until after the parties separated;

[41] 2004 CarsswellOnt 363 (ONCA)
[42] This was the same discount applied by the Ontario Court of Appeal in *Cade* and by Justice Heeney in *Poole v. Poole*, 2001 CarswellOnt 1939 (Ont.SCJ)

G. No demand for payment pursuant to the Note was made before the parties separated;

H. Although Filomena was retired when the parties separated, there was no evidence that before then, she had any financial health-related, or other care needs;

I. There was no evidence that at the time of trial she had any financial, health-related or other care needs;

J. The brother had deposited the $125,000.00 paid by the wife into a GIC in his name alone. He could not provide a satisfactory explanation for this at trial.

The Court determined that in all likelihood, the wife would not have been required to pay back this debt. Therefore, it was discounted down to 10% of its face value.

***Rotstein v. Rotstein*, 2019 ONSC 943 – Family Loans and the Real Property Limitations Act**

Limitation periods.

"Oh sh*t."

In this case the husband's parents had loaned the parties $310,000.00 during the marriage in 2003 and secured this debt by way of a mortgage against the matrimonial home. The mortgage was a demand mortgage payable on demand, or when the matrimonial home was sold or either the husband or the wife passed away. There was no interest payable on the mortgage. The mortgage was registered against title to the matrimonial home in 2003, no payment was made nor was there any acknowledgement of the debt afterward.

The parties separated in 2015 and, inevitably, the first demand for payment by the parents occurred shortly thereafter, and twelve years after the mortgage was original executed and registered. The wife argued that the mortgage was statute barred by the *Real Properties Limitations Act*[43]and brought a summary judgment motion for an order reflecting that.

Justice Douglas accepted that the *Real Properties Limitations Act* governed and created a ten year limitation period. In the case of *Mortgage Insurance Company of Canada v. Grant*[44], the Ontario Court of Appeal determined that the "cause of action" for a demand mortgage occurs upon the ***execution of the demand mortgage***. There are some exceptions to the rule, depending on the circumstances and the specific terms of the mortgage, such as in *Saved by Technology Inc. v. Thomas*[45], wherein although the mortgage provided for no payment for ten years, after ten years, the mortgagee was entitled to obtain an appraisal and depending on the value at that time, the principle became payable. In *Thomas* the cause of action did not accrue on execution because no monies were owing at that time or within the following ten years. There was another exception for collateral mortgages.

In this case, there was no reason for an exception to apply. It was not a collateral mortgage and the demand could have been invoked at any time after the execution of the mortgage. As a result, the ten year limitation period began to run in 2003 and expired by 2013. The Court granted the wife's motion for summary judgment and the mortgage was found to be invalid as against the wife. There was no indication the wife had acknowledged the debt during the limitation period nor was there any evidence that a demand had been made.

[43] R.S.O 1990 c. L.15
[44] 2009 ONCA 655
[45] 2003 CanLii 72352 (ONSC)

G.M.C v. A.M.F. , 2018 ONSC 2704 (Affirmed at *Christopher* v. *Freitas*, 2019 ONCA 84) – Unjust Enrichment and Joint Family Ventures

Enrichment, or no enrichment…that is the question.

In this case the parties had cohabited in a common law relationship from September 2011. They had one child together, born in September 2015, and separated on October 13, 2016. The parties held title to the family residence jointly. The wife provided $5,000.00 to the purchase of the family residence and the husband contributed $116,000.00. The balance of the purchase price was obtained through mortgage financing.

The house was sold in December 2016 with ultimate net proceeds being $140,909.20.

The parties' evidence about the relationship was contradictory and fraught with emotion. The Court found that the relationship was tumultuous and high-conflict throughout. The husband had claimed that the intention between the parties when purchasing the home was that his investment of $116,000.00 would be returned to him if they ever sold the property. The wife, on the other hand, claimed that the parties had intended to hold the home jointly as they were making a "fresh start" after a difficult period and obtaining a new home for their family.

The wife also claimed that she had made extensive contributions to the home through her domestic role and direct financial contributions to the everyday expenses of the family residence.
The cited *Kerr v. Baranow*[46] stating that the unequal contributions made by the parties, but the title being taken as joint tenants, was a gratuitous transfer. The general rule is that a rebuttable presumption of resulting trust would therefore apply. This presumption was separate and distinct from the analysis regarding unjust enrichment. The Court noted that Justice Cromwell in *Kerr*, had introduced the concept of a "joint family venture" in situations where domestic relationships involve a joint effort, or partnership, where the parties jointly contribute towards a common goal. Where there is a joint family venture and one party retains more than half of the asset, unjust enrichment may occur.

The Court determined that the wife had not brought sufficient evidence to rebut the presumption of resulting trust. The wife did not bring any evidence as to the husband's intent at the time of the purchase of the home, she adduced evidence to her understanding and intention, but evidence as to her intent was not relevant to rebutting the presumption. The wife also argued that the intention to gift could be found in the actions and conduct of the husband, such as the integration of finances and other "such matters" after the purchase of the family residence. However, the Court stated that events that occurred after the purchase cannot be used to establish prior intent unless there is an indication of a subsequent gift, which was not the case here. As the wife had failed to rebut the presumption, a resulting trust applied to the funds the husband had contributed to the family residence over and above $5,000.00.

The Court then considered if the husband had been unjustly enriched. The Court determined that the wife did make contributions to the house domestically, bought some groceries and items for the child and contributed to family vacations. The husband, on the other hand, was paying the

[46] 2011 SCC 10

mortgage, utilities and other carrying costs of the residence. While the parties had a joint account, only the husband contributed to it. The Court determined that for the period prior to July 2014, the wife's contributions were offset by the benefit she received from living in the home and not having to pay rent or purchase her own home. The Court noted that after July 2014, economic integration between the parties had occurred. The parties began to intermix their finances and the wife became pregnant with their first child. The Court noted a joint family venture commenced in July 2014.

The Court determined that both parties would receive their initial investments in the property and the remaining net proceeds of sale would be split evenly. This would reflect the Resulting Trust and ensure there was no unjust enrichment.

***Boechler v. Boechler*, 2019 SKCA 120 – Misrepresentation in the Negotiation of Contracts**

If you get disclosure…best to actually review it.

In this case, the wife sought to set aside a separation agreement that the parties reached on the eve of trial. The issue came down to the treatment and representation of a shareholder loan from one of the husband's companies to the other. The husband had produced all of the relevant disclosure regarding this issue, but the different corporate year-ends and a change in how it was shown from one year to the next led to confusion on the wife's part. This became an issue as the wife and husband resolved their matter only days before the scheduled start of their trial. The very next day, the wife claimed that the husband had materially misrepresented his financial circumstances to the extent of $310,000.00.

The Court of Appeal considered the duty to disclose when negotiating family law property settlements. Each party has a duty to provide full and honest disclosure of all relevant information to the other party. The purpose of disclosure is to ensure that the family property is distributed in a manner that is free from informational asymmetry and psychological exploitation.

Unlike British Columbia and Ontario, the Saskatchewan *Family Property Act*[47], does not provide specific authority for a court to set aside a separation agreement on the basis of a lack of disclosure (nor for that matter, does the Manitoba *Family Property Act*). However, the Court did determine that a court has the authority to set aside an "inter-spousal contract" if it is unconscionable or grossly unfair. Such a situation might arise from a failure to adequately disclose the relevant disclosure.

The Court of Appeal set out that the husband had a duty to provide financial disclosure that was full and forthright. The purpose is to allow for the other side (in this case, the wife) to have the ability to genuinely decide for themselves whether a bargain was fair. A contract that is negotiated with full and fair disclosure and without exploitative tactics will likely survive judicial scrutiny.

The Court found that while there may have been a failure on the wife's part to understand the disclosure regarding the husband's companies (and especially the shareholder loans), this did not equate to a failure to disclose. The husband provided the information. The wife's expert had flagged the issue during the negotiations and the wife specifically told him to not follow up with it. The wife had all of the appropriate information and, it did not help that the wife used the documents she already had to argue that she had been misled. She simply realized the difference after the separation agreement had been signed.

In addition, the deal was a "global settlement" wherein the precise value of the company was not a specific factor. The husband did not have a duty to point out to the wife that she may have undervalued an asset or to provide advice on how to value an asset. The husband had a duty to

[47] SS. 1997, c. F-6.3

provide full and frank disclosure. And he did. If the wife was confused, there was an onus on her to clarify her understanding.

The wife also argued that the contract should be set aside on the basis of unilateral mistake. Unilateral mistake occurs when one party knows the other has made a mistake but does not correct it and thereby takes advantage of the mistaken party. The Court rejected this argument as the agreement arose as part of a global settlement of their issues. In the end, the party did not agree on the value of the corporate assets (or a number of other assets). They were able to agree to a compromise total payment that they were each willing to accept. Under the circumstances, the Court did not think it just to set aside the contract.

Parenting

A.M. v. C.H., 2019 ONCA 764 – Reunification Therapy

Some answers can't be found in courtrooms.

In this case, the Ontario Court of Appeal resolved the debate as to whether a court can order a child into reunification therapy without the child's consent. Ontario courts have released conflicting decisions as to whether the *Health Care Consent Act* prevents a judge from doing so;[48] however, the Court of Appeal found unequivocally that it is within a court's authority to order that reunification therapy occur, even when the child refuses to give consent.[49]

This case involved a 14-year-old boy who refused to spend time with his father. The trial judge found that the mother had systematically poisoned the child's relationship with the father, and that both mother and child were uninterested and unwilling to participate in reconciliation therapy. The court ordered that the child attend for reunification therapy and suspended access between the mother and child. The child was to live with the father and to not have contact with the mother. The trial judge determined that, in terms of detriment to the child, the long-term impact of the child's severed relationship with his father far outweighed the "short-term difficulties" of the custody reversal and no-contact order.

The Office of the Children's Lawyer and the mother appealed the decision. The OCL argued that the trial judge erred by failing to consider the potentially catastrophic consequences of separating the child from his mother and failing to give effect to the child's wishes. The OCL further argued that there was a lack of expert evidence as to the likely effect of such a remedy on the child and that there was no "therapeutic support" to help the child with the transition. The final ground of appeal was on the basis that the court had erred in ordering the child to participate in reconciliation therapy without his consent to treatment as required by the *Health Care Consent Act*.

In response to the OCL's claim that the court needed expert evidence about the effects of the remedy on the child and ought to have put therapeutic supports in place, the Court of Appeal stated:

> 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.

[48] Compare *Leelaratna* v. *Leelaratna*, 2018 ONSC 5982 and *Barrett* v. *Huver*, 2018 ONSC 2322
[49] S.O. 1996.

> 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 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.
>
> There is also no legal requirement for therapeutic support when custody reversal is contemplated, though it might be helpful in some cases. Here, it would be of doubtful utility, given the mother's refusal to participate in that process.
>
> The trial judge had few choices. The mother and the child were unwilling to participate in reconciliation therapy on an outpatient basis. If the child remained with his mother, it was virtually certain that the child would lose any chance for a relationship with his father, who was a reasonably competent parent.

The Court of Appeal then set out that a court has the jurisdiction to make therapeutic orders under both the *Divorce Act* and the *Children's Law Reform Act*. The *Health Care Consent Act* protects a person's autonomy to make decisions about their well-being, even if the decisions are not in their best interests to make. Children, in contrast, do not have the autonomy to make decisions about their own best interests. As a result, the *Health Care Consent Act* cannot act as an automatic bar. The Court of Appeal set out that while the *Act* does not limit the court's jurisdiction to make therapeutic orders in the child's best interests, a court must consider the child's views and preferences. A refusal is not determinative, but must be considered in the context of the age and maturity of the child. In this case, the trial judge found that the child lacked the requisite maturity to refuse counseling with his father. While the Court of Appeal determined the *Health Care Consent Act* did not override a court’s ability to order therapy for a child, it did acknowledge that a child may refuse to comply and a health care practitioner may consider that a child is capable and they cannot override the child’s refusal. The attempts at therapeutic intervention may fail. The Court of Appeal stated simply “Courts cannot fix every problem.”

This case had a sad ending. The relationship between the child and father did not improve. In fact, it got much worse. The child (and a friend) viciously attacked the father and was subsequently arrested. Because of the arrest, the child could not be near the father. As a consequence of the family court order, he could not be with his mother. The child was found in need of protection and placed in a foster home. The child left the foster home, was involved in a robbery, assaulted and hospitalized. Both parties brought fresh evidence about these events, but the Court of Appeal declined to hear it, stating that the matter would be better suited to a trial judge.

In the words of the Court of Appeal, "there are often no legal solutions to family problems."

Ludwig v. Ludwig, 2019 ONCA 680 - The Impact of *Balev*

Balev explained.

In *Ludwig*, the Ontario Court of Appeal considered the recent Supreme Court decision of *Office of the Children's Lawyer v. Balev*, and how the hybrid approach set out by the majority in that case should apply.[50] In doing, so, it sets out an excellent summary of Hague process.

The case involved four children, aged 15, 13, 12 and 9. The father was a German citizen and the mother was Canadian. The parties and the children had lived exclusively in Germany since the parties were married in 2001. The family moved to Ontario on August 3, 2017, and took steps to establish a life in Ontario. The parties expressed their uncertainty about the duration of the move to Ontario.

The parties separated in March of 2018. The father made plans to return to Germany. On July 23, 2018, the mother told the father that she intended to remain in Canada with the children and commenced an application. The father commenced a *Hague Convention* application in August of 2018 for the children to be returned to Germany. The father argued that the children were supposed to return to Germany in September of 2018, as there were some indications that was the plan at the time.

The trial judge stated that in order to apply *Balev* and the hybrid approach, she first had to consider in which state the children were habitually resident *immediately prior to the (alleged) retention*. In this case, the "retention" took place in September 2018, based on the father's argument that the children were to return to Germany. The trial judge determined that there was not sufficient evidence to find a clear parental intention for the children to return to Germany after a limited stay in Ontario. The parties brought most of their possessions to Ontario and bought a home there. The parties had enrolled the children in school, and the father had suggested at one point that the mother obtain OHIP coverage for the children. The trial judge concluded that, under the hybrid analysis, the children were habitually resident in Ontario. While their connections to Germany were of a longer duration, the children had connections to Ontario as well: they had started school and had relationships with extended family there, and the elder children expressed a wish to remain in Ontario. The centre of the children's lives was Ontario in the period immediately prior to September 2018.

The Court of Appeal decision, authored by Justice Tulloch, offered "useful guidance to litigants, lawyers and judges seeking to understand and apply the proper approach to Hague Convention proceedings." Justice Tulloch endorsed the two-step approach by the application judge and, in particular, confirmed that the first step of analysis is for the court to determine the date of the alleged wrongful removal or retention. One needs to find the date of the alleged wrongful retention as a first step because it is a starting point to determine where the children were habitually resident at that point in time. Justice Tulloch accepted that the Supreme Court's decision in *Balev* changed the approach to habitual residence and eliminated the "parental intention" approach as set out by

[50] 2018 SCC 16

the Ontario Court of Appeal in *Korutowska-Wooff v. Wooff*.[51] The hybrid model adopted by the Supreme Court combines parental intention and the circumstances of the children. Under the hybrid approach, the application judge must look at all relevant considerations including both parental intention and the circumstances of the children. As Justice Tulloch set out:

> The aim of the hybrid approach is to determine 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": at para. 43. To determine the focal point of the child's life, the majority required judges to consider the following three kinds of links and circumstances:
>
> 1) The child's links to and circumstances in country A;
>
> 2) The circumstances of the child's move from country A to country B; and,
>
> 3) The child's links to and circumstances in country B.

Finally, if the court determines that the child was habitually resident in the applicant's claimed jurisdiction, the court must order the return of the child unless any of the five exceptions, Articles 12, 13 or 20 apply. Here, the father argued that the "settled in" exception in Article 12 applied. The "settled in" exception only becomes available if the following two conditions are met:

1) The applicant has commenced return proceedings one year or more following the date of the wrongful removal or retention; and,
2) It is demonstrated that the child is now settled in its new environment.

The Court of Appeal set out that under the "settled in" exception, the court must assess the children's connection to the country they are in at the time of the hearing of the application and not immediately before the date of the wrongful removal or retention. The difference in timing can be significant. The "settled in" exception accounts for the possibility that a child will develop closer ties to the jurisdiction to which the child has been wrongfully removed or retained in the period of time that follows the date of the wrongful removal or retention. In *Balev,* the Supreme Court of Canada noted:

> It may be that on the hybrid approach habitual residence favours return o the child, but that the one-year period and settling-in indicate that the child should not be uprooted and returned to his or her place of habitual residence.

The father also relied on the "Objections Exception" in Article 13(2), which gives the court the discretion to refuse to order the return of a child of sufficient age and maturity who objects to that return. However, even if both of those elements can be proved, a court is not *required* to refuse to order the child's return. As stated in *M., Re*[52], at para. 46, when deciding whether to exercise its discretion, the Court ought to consider:

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[51] (2004), 5 R.F.L. (6th) 104 (Ont. C.A.)
[52] [2007] UKHL 55 (Eng. H.L.)

1) The nature and strength of the child's objections;
2) The extent to which the objections are authentically the child's own or the product of the influence of the abducting parent;
3) The extent to which the objections coincides or are at odds with other considerations relevant to the child's welfare; and,
4) General Hague Convention considerations.

The Court of Appeal found that the application judge applied the hybrid model and correctly determined the children's habitual residence. Auf wiedersehen.

_Z.A. v. A.A._, 2019 ONSC 5601 – Does _Balev_ now Define "Habitual Residence" in Non-Hague Cases? Yes!

-and–

***Kong v. Song*, 2019 BCCA 84 – Does _Balev_ now Define "Habitual Residence" in Non-Hague Cases? No!**

***Smith* v. *Smith*, 2019 SKQB 280 – Does _Balev_ now Define "Habitual Residence" in Non-Hague Cases? No Again!**

Balev – The Gift that Keeps on Giving…

To refresh your memory: In *Office of the Children's Lawyer* v. *Balev*[53] (also known as *Balev* v. *Baggott*) the Supreme Court of Canada recast the test for "habitual residence" under Article III of the Hague Convention (Child Abduction).

Historically, the "parental intention approach" dominated Canadian jurisprudence and determined the habitual residence of a child by the intention of the parents with the right to determine where the child lives. But, in *Balev*, a majority of the Supreme Court of Canada decided that a court determining habitual residence in the Hague Convention must, instead, use the "hybrid approach". That is, in determining habitual residence, the court must take into account all relevant considerations arising from the facts of the case. The court must consider all relevant links and circumstances, including the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; the child's links to and circumstances in country B; the duration, regularity, conditions, and reasons for the child's stay in the jurisdiction, etc. If it is relevant – it is to be considered. While the intentions of the parents are relevant, no single factor dominates the analysis. The import of this decision is that one parent can, in some circumstances, unilaterally change a child's habitual residence.

Notably, in making this decision, at para. 46, the majority said – *and remember this part*:

> 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. (emphasis added)

The following cases, *Kong* from the British Columbia Court of Appeal and *Z.A.* (from the Ontario Superior Court of Justice) consider whether the "hybrid approach" from *Balev* modifies the test for "habitual residence" under provincial legislation such as the Ontario

[53] 2018 SCC 16

Children's Law Reform Act and the British Columbia *Family Law Act*. Unfortunately, there is dissention in the courts across the country.

Z.A. v. A.A., 2019 ONSC 5601 -

In Z.A., Justice Price considered whether the analysis under section 22 of the *Children's Law Reform Act* has been impacted, or must now be informed by,the hybrid approach in *Balev*.

In *Z.A.*, the parties began their relationship when the father was 22 and the mother was 14. The child was born when the mother was 15 years old and the mother married the father when she was 16. The mother claimed that the relationship was abusive and that the parties separated in September 2018, when the father disappeared during a family vacation to the United Arab Emirates, Iraq and Iran. The mother claimed that the father arranged for her illegal entry to Iran, where he had family, and then absconded with the child and the child's documents.

The mother tried to retrieve the child, but was unsuccessful. She returned to Ontario and reported the father's alleged abuse to the police. She commenced an application for custody of the child, the return of the child, a divorce, spousal support, child support and division of property. The father responded with an Answer seeking spousal support and a declaration that Ontario could not make any orders regarding the child as the child was habitually resident in Iraq, where she was living with the father.

The mother argued that the child was habitually residentin Ontario prior to being abducted by the father. The father claimed that it was, in fact, the mother who had been abusive and that she had "abandoned" the child to his care while they were in Iran.

As Iraq is not a signatory to the Hague Convention, the mother claimed relief under the *Children's Law Reform Act*.

Most provincial legislation specifically defines what it is to be "habitually resident" somewhere. Ontario is no exception. Section 22 of the Ontario *Children's Law Reform Act* sets out that definition (which is quite similar in provincial legislation across the country):

> 22 (1) **Jurisdiction** -- A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,
>
> (a) the child is **habitually resident** in Ontario at the commencement of the application for the order;
>
> (b) although the child is not habitually resident in Ontario, the court is satisfied,
>
> (i) that the child is physically present in Ontario at the commencement of the application for the order,

> (ii) that substantial evidence concerning the best interests of the child is available in Ontario,
>
> (iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,
>
> (v) that the child has a real and substantial connection with Ontario, and
>
> (vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario. R.S.O. 1990, c. C.12, s. 22 (1).
>
> (2) **Habitual residence** -- A child is **habitually resident** in the place where he or she resided,
>
> (a) with both parents;
>
> (b) where 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; or
>
> (c) with a person other than a parent on a permanent basis for a significant period of time,
>
> whichever last occurred. R.S.O. 1990, c. C.12, s. 22 (2); 2016, c. 23, s. 6.
>
> (3) **Abduction** -- The removal or withholding of a child without the consent of the person having custody of the child does not alter the **habitual residence** of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

Wholly relying on some recent and previous cases from the Ontario Court of Justice,[54] Justice Price held that:

> [39] While the case was decided pursuant to the Hague Convention, it applies to the present case as the definition of "habitual residence" has been held to be the same in Hague cases and in extra-provincial cases pursuant to Part II of the Act.

Therefore, his Honour did not rely on the specific definition of habitual residence under section 22 of the *Children's Law Reform Act*, but rather on the definition of "habitual residence" as set out by the Ontario Court of Appeal in the case of *Korutowska-Wooff* v. *Wooff*[55],a Hague Convention case which set out that the following:

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[54] Specifically *Maldonado* v. *Feliciano*, 2018 ONCJ 652; *A.M*. v. *D.L*., 2019 ONCJ 155. See also *Moussa* v. *Sundhu* (2018), 11 R.F.L. (8th) 497 (Ont. C.J.) and *McKay* v. *Labelle*, 2019 CarswellOnt 4524 (Ont. C.J.)
[55] 2004 CanLII 5548 (C.A.)

> • The question of habitual residence is a question of fact to be **based on all of the circumstances**;
>
> • The habitual residence is the place where the person resides for an appreciable period of time with a "settled intention;"
>
> • A "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;
>
> • A child's habitual residence is tied to that of the child's custodian(s)

This sounds very similar to the hybrid test in *Balev*, and I suspect this test was a result of counsel not making submissions on the matter.

Ultimately, after considering the circumstances of the child (including that the child had been in the Middle East for a year prior to the decision), his Honour found that:

- the parties did not have a settled intention to be in Iran or Iraq for an appreciable period of time;
- the parties intended to return to Ontario; and,
- the father could not establish a new habitual residence by surreptitiously removing the child to another country.

Therefore, Justice Price determined that the child's habitual residence was Ontario and that she had to return. Remaining in the Middle East, particularly due to the father's refusal to allow her to have time with her mother, would be harmful to the child.

This is unquestionably the correct result, but the road used to get there is of concern.

The statutory definition of "habitual residence" and the hybrid-test-influenced definition of habitual residence from the Supreme Court in *Balev* will not always lead to the same result, especially in cases of unilateral action and the passage of material time. The statutory test is also arguably easier to apply and offers more predictable results.

With great respect to courts that have used *Balev* to interpret the definition of "habitual residence" in non-Hague cases, such use of *Balev* in determining "habitual residence" in a non-Hague case is a concern. The result in *Balev* is significantly driven by the fact that the *Hague Convention* does <u>not</u> contain a test or definition for habitual residence. On the other hand, the *Children's Law Reform Act* does. Section 22 of the *Children's Law Reform Act* appears to be a complete code [as discussed in *Hopkins* v. *Kay*[56], but on another issue] as to the definition of "habitual residence" in claims under that *Act*, and the decision of the Supreme Court of Canada in *Balev* did not, and could not, have changed the legislated statutory test for "habitual

[56] 2015 ONCA 112

residence.". As such, using the *Balev* hybrid approach to the definition of "habitual residence" in a non-Hague matter offends the principles of statutory interpretation.

Above, I asked that you remember the rational (or of the rationales) used by the Supreme Court in adopting the hybrid approach. Again, in reference to the notion of parent intention, the Supreme Court suggested that:

> 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.

But in non-Hague cases, there is no legal construct to impose. We need only follow the statutory definition.

***Kong* v. *Song*, 2019 BCCA 84**

Kong involves similar considerations as to the definition of "habitual residence" under provincial legislation – this time, under the B.C. *Family Law Act* – and the B.C. Court of Appeal comes to the opposite (and in my view correct) conclusion as compared to the above-noted Ontario cases.

In this case, both parents were citizens of China. Like Iraq, China is not a signatory to the Hague Convention. The father had permanent resident status in Canada, and the child was born in British Columbia in a birth-tourism arrangement by the parties. The mother arrived in Canada just prior to the child's birth. The mother was the host of a Chinese television show, and the father was a businessman who owned numerous businesses in both China and Canada. The child spent the first six months of his life in Canada, then returned to China with the parents. The father then removed the child from China without the mother's consent, and brought him back to Canada.

The mother brought an application in British Columbia to return the child pursuant to the *Family Law Act*[57]. Similar to Ontario, the British Columbia *Family Law Act* contains a definition of "habitual residence":

> **72**(2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided
>
> a) with his or her parents,
>
> b) if the parents are living separate and apart, with one parent
> i. under an agreement,
> ii. with the implied consent of the other parent, or

[57] S.B.C. 2011, c. 25

> ii. under an order of a court or tribunal.
>
> (3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court of an extraprovincial tribunal.[58]

The lower court applied the statutory test and determined that the father had removed the child from China without the mother's consent (explicit or implied) and ordered that the child be returned to China.

On appeal, the father argued that the trial judge had erred in not applying the hybrid approach to habitual residence as set out in Balev. The British Columbia Court of Appeal set out very clearly that the facts of this case did not engage the *Hague Convention* and, consequently, the hybrid approach to the definition of "habitual residence" did not apply. The *Family Law Act* sets out a statutory test for habitual residence that focuses on the intentions of the parties. As such, the trial judge correctly applied the statutory test.

For the reasons noted above, it is hard to argue with this logic.

In *Smith* v. *Smith*, 2019 SKWB 280, the Saskatchewan Court of Queen's Bench considered both the Ontario and B.C. authorities above, and sided with the British Columbia Court of Appeal.

So let the battle begin: "In this corner, 4 cases from the Ontario Court of Justice with a Superior Court of Justice kicker…in the other corner, the B.C. Court of Appeal and the Saskatchewan Court of Queen's Bench. Maybe another province wants to break the tie?

[58] This is functionally the same as the definition of "habitual residence" under the Ontario *Children's Law Reform Act*, just with some simplified language.

***C.R. v. Nova Scotia (Community Services)*, 2019 NSCA 89 – Child Protection: Prior Conduct?**

Is History, Destiny?

The trial judge found the appellant's daughter continued to be in need of protection, and that it was in the child's best interests to be placed in the permanent care of the Minister. In making that determination, the trial judge relied on the mother's past behaviour (refusing to take anti-psychotic medication) in predicting her future behaviour.

In this short decision, the Nova Scotia Court of Appeal considered (and dismissed) the mother's appeal based on her allegation that it was an error for the trial judge to rely on her past behaviour in finding that the child was in continued need of protection.

The Court of Appeal emphasized that the test for substantial risk continues to be that set out in *M.J.B. v. Family and Children's Services of Kings County*[59]. When deciding whether there is "substantial risk", a judge must only be satisfied that: (a) the "chance of danger" is real, rather than speculative or illusory; (b) "substantial" in that there is a "risk of serious harm or serious risk of harm"; and (c) that it is more likely than not (a balance of probabilities) that this "risk" or "chance of danger" exists on the evidence presented.

Here the whole of the judge's reasons set out the real chance of future harm to the child if the mother stopped taking her medications as she had in the past.

The Court of Appeal agreed that the best predictor of future behaviour is past behaviour. While there is no legal principle that "history is destiny", a trial judge does not err if, based on the evidence, she finds that past behaviour signals the expectation of future risk.

While this is a child protection case, the discussion of "risk of harm" is generally applicable to custody/access cases where one parent alleges that a child may be in danger in the care of the other parent – such as in the case of allegations of improper sexual conduct.[60]

[59] 2008 NSCA 64

[60] For example, see *Bates v. Bates*, 2011 ONSC 3027; *Daya v. Daya*, 2015 ONSC 6240; *K.G.C. v. G.A.C.*, 2017 BCPC 199; and *G(JD) v. G(SL)*, 2017 MBCA 117.

C.P.B. v. L.M.B., 2019 SKQB 306 – Surrogacy and Parentage in Saskatchewan

Come on Saskatchewan.

Saskatchewan needs to change its provincial legislation dealing with parentage – most specifically the *Children's Law Act* 1997, SS 1997, c. C-8.2 and the *Vital Statistics Act*, 2009, SS 2009, c.V-7.21.

Although many provinces have now changed their legislation to contemplate "intended", rather than biological, parentage, in Saskatchewan, parents that resort to some forms of assisted human reproduction (availing of donors and surrogacy) must still invoke the court process to put in place proper declarations of parentage.

This is one such case dealing with surrogacy and parentage. It arises from a without notice application seeking declarations to confirm who is – and who is not – a parent of a child born with the aid of assisted reproduction.

The petitioners, C and T are a male same-sex married couple. The respondents L and D are an opposite sex married couple. Notably, there is no *lis* between the petitioners and respondents; the petitioners and respondents agree about what it to happen here.

C and T wanted to have a child. To that end, they arranged with L and D for L to be impregnated with an embryo (using sperm from C and an ova from an unidentified donor) and act as a surrogate. The parties entered into a Gestational Carrier Agreement, commonly known as a Surrogacy Agreement.

The child was born on November 6, 2019, and had been in the care of the petitioners – the intended parents – since birth. The Registration of Live Birth was submitted with L (the surrogate) as "mother", C (the biological father) as "father" and T (C's husband) as "other parent." The respondents relinquished all parental rights with respect to the child.

Obviously, all 4 parties wanted C and T to be identified as the parents and for L to be removed as "mother". But the parties had to apply to the Court to do so.

The Court first considered the law in Canada and Saskatchewan with respect to surrogacy. The court noteed that surrogacy is a matter of both Federal (the criminal power) and Provincial (property and civil rights in a province) constitutional competence and then went on to consider the *Assisted Human Reproduction Act*[61] which regulates forms of assisted human reproduction and criminalizes "commercial surrogacy" (paying for surrogate services) while, at the same time, expressly prohibits discrimination on the basis of sexual orientation [see. s.2(f)].

While the law often needs time to catch up to social constructs and changing social norms (such as the nature of "parents" and "family"), this has clearly been an issue in Saskatchewan for quite

[61] SC 2004, c.2,

some time. It was, for example, an issue in *W.J.Q.M. v. A.M.A.*[62], when Justice Ryan-Froslie (as she then was) had to rely on s. 43 of the *Children's Law Act, 1997* to declare that a gestational carrier (who was not the biological mother) was not the mother of a child, and s. 29(1) of the *Vital Statistics Act, 2009* to direct the Registrar of Vital Statistics to remove her from the birth certificate. That was 9 years ago. It is time for legislative change.

In Ontario, the process of legislative reform was started in *A.A. v. B.B.*[63], a case from the Ontario Court of Appeal that availed of the *parens patriae* jurisdiction of the Court to declare the same sex spouse of the biological mother to be a parent along with the biological father (providing for 3 parents). As a result (and although not without the Herculean efforts of some very dedicated lawyers such as Joanna Radbord), the Ontario *Children's Law Reform Act*, was recently amended so as to contemplate intended and multiple parents without the need for court intervention.

Justice Robertson noted the Final Report of the Saskatchewan Law Reform Commission which summarized the current required procedure in Saskatchewan in such cases:

> 4.7.111 Procedural Requirements
>
> [204] Currently in Saskatchewan, a court order is required to remove the surrogate from the birth certificate, and to add one or both of the intended parents on to the birth certificate. As discussed above, if the intended father's genetic material was used to create the embryo, the intended father can be listed on the registration of live birth and he will then be on the birth certificate as the child's father. The intended father's partner could also be listed on the registration of life [sic] birth as "other parent". Once the birth certificate has been acquired by the intended parents, a declaration can then be sought to remove the surrogate from the birth certificate. This process typically takes months and costs several thousand dollars.

Justice Robertson also noted that all the criteria for a declaratory order referenced in the Uniform Child Status Act (2010) developed at the Uniform Law Conference of Canada were met in this situation.

Although he was satisfied that the court has jurisdiction to grant the requested relief, Justice Robertson found himself unable, without further evidence and procedural hurdles, to grant the requested declaration (for example, the parties did not serve the Registrar of Vital Statistics; provide evidence that this was not a "commercial surrogacy"; or show that L and D had received Independent Legal Advice). Therefore, the application was dismissed, but with leave to return the matter to court after addressing the procedural and evidentiary deficiencies – with the attendant further cost of time and dollars.

Clearly, change is needed.

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[62] 2011 SKQB 317
[63] 2007 ONCA 2

Cabianca v. British Columbia (Registrar General of Vital Statistics), 2019 BCSC 2010 – Assisted Human Reproduction and Birth Registration in British Columbia

To err is human; to fix requires judicial intervention.

British Columbia is one of the jurisdictions that *has* amended their parenting legislation (in B.C., the *Family Law Act*[64] – the "BC *FLA*") to deal with issues of intended parentage and assisted human reproduction. The BC *FLA* codifies how parentage is to be decided for births resulting from reproductive technologies. But mistakes can happen, and this is a case about correcting such an error, dealing with whose names can appear on birth registrations when children are born with the assistance of reproductive technologies, in this case in the context of two sperm donations agreements.

Part 3 of the BC *FLA* is a comprehensive statutory framework for determining parentage. However, the petitioners did not strictly follow the statutory scheme such that, contrary to their wishes, one of the intended fathers was not registered at a parent for one of the children. The problem was that, contrary to s.30 of the BC *FLA*, the written Donor Agreement was not signed *prior* to conception as required. As a result, the petitioners had to seek relief from the court to direct the Registrar of Vital Statistics to correct the Birth Registration. The Registrar opposed the claimed relief because the petitioners had not strictly followed the statutory regime and was concerned that allowing the claim would discourage people from following it.

After concluding that the specific comprehensive statutory regime made reliance on *parens patriae* or inherent jurisdiction impossible, and emphasizing the importance of proper parentage and birth registration, Justice MacDonald decided that she was able to fix the problem with resort to section 31 of the BC *FLA* which allows the court to make a declaration of parentage, "if there is a dispute or **any uncertainty** as to whether a person is or is not a parent under this Part." This was over the Registrar's objection based on the fact that there was no "uncertainty" here – but a failure to comply with the statutory regime.

Justice MacDonald emphasized that a birth registration should be inclusive and reflect the *intentions* of those involved with the birth, which intentions should be given liberal interpretation. The words "any uncertainty" are broad enough to include mistakes, and should take into account the best interest of the child and the right to have all their parents listed on their birth registration.

However, to address the Registrar's concerns, Justice MacDonald, issues this caution:

> [49] …this decision should not be interpreted as a licence for parties to ignore the technical requirements of Part 3. Section 31 should not be used to circumvent the legislative scheme. This Court should not be expected to remedy every situation where an agreement regarding parentage is not executed prior to conception. While each case will be decided on its own facts, relief should not be presumed.

[64] S.B.C. 2011, c. 25

***Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316 – Child Protection and Summary Judgment**

Special Protection for Child Protection

While this case speaks to a number of extremely important issues in the context of child protection, we will be focusing on the Court of Appeal's comments surrounding summary judgment.

The Court of Appeal set out that when considering whether or not summary judgment is appropriate in a child protection case, the analysis must be viewed through the special considerations inherent in child protection proceedings. The Court of Appeal specifically discussed the fact that unlike other civil proceedings, child protecting proceedings involve the Charter of Rights and Freedoms ("Charter"). Parents' Charter rights and freedoms can be infringed and they have Charter protections, unlike in other civil law proceedings. Further, child protection proceedings disproportionately impact economically disadvantaged people, racialized groups, women and other marginalized individuals.

The Court of Appeal set out that there had been a misunderstanding by the Divisional Court of the test for summary judgment set out by the Supreme Court of Canada in *Hryniak v. Mauldin*[65]. The Divisional Court characterized the test as being that summary judgment could be ordered when there was no "genuine issue requiring a trial." The Court of Appeal stated that the proper way to consider the *Hyrniak* decision was that summary judgment is appropriate when there is no genuine issue requiring a trial ***and*** the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. A child protection proceeding must take into account a fair and just determination on the merits and engage with the Charter rights for vulnerable segments of Canadian society. The Court of Appeal set out that if a Society seeks summary judgment, it must show that there is "no chance of success" or that it is "plain and obvious that the action cannot succeed." The Court of Appeal favourably cited cases that set out the test as being when "the outcome is a foregone conclusion" or where there is "no realistic possibility of an outcome other than that sought by the applicant." The Court of Appeal stated that when dealing with summary judgment in child protection proceedings, a cautious approach is necessary.

[65] 2014 SCC 7

Divorces

Gill v. Gill, 2019 BCSC 1794 – Resisting a Divorce

An "expert report" must be an "Expert Report".

In this case, the husband brought a claim to sever the divorce from the corollary relief and have the divorce granted in advance of a trial. The wife argued that the divorce would prejudice her claims in India and, thus, it should not be granted. The parties had been separated for either 6 or 13 years – depending on whose version of events was to be believed. There were no children. The wife had made claims in both India and British Columbia regarding the divorce.

The wife tried to rely on a letter from her lawyer in India purporting to attach a court decision, make statements about Indian law, and set out that the wife's claims to a return of the dowry and other relief would be prejudiced in India. The husband, on the other hand, had an expert on Indian law provide an Affidavit and expert report to the effect that the wife's claims would not be prejudiced.

The Court set out that under either party's version of events, they had been separated for more than one year. The letter from the lawyer in India did not meet the requirements for an expert report, or even for Affidavit evidence. It was not in the form of an Affidavit, it was not sworn and its paragraphs were not numbered. The Court noted that it was not its role to grant the wife an adjournment because *she* had failed to bring the proper evidence. As there was no evidence before the Court that the wife would suffer any prejudice from the divorce, it was granted.

Novikova v. Lyzo, 2019 ONCA 821 – Recognizing a Foreign Divorce

From Russia…but without love or notice.

In this case, the Court of Appeal considered the validity of a foreign divorce. The parties were Russian citizens, but had moved to Canada in 2013 and had become permanent residents. The parties separated in 2016, and the husband returned to Russian in February of 2016 where he commenced divorce proceedings. The wife remained in Canada and was not told that the Russian divorce proceedings had been commenced, as the divorce application had been sent to her parents' address in Russia. On June 8, 2016, the divorce was granted in Russia, but the wife did not receive a copy of the divorce order until the appeal period had passed. The wife had become aware of the divorce prior to the order being granted by the Russian court, but she did not have the chance to review the documents and did not know that she would be unable to obtain spousal support in Canada once the divorce in Russia had been granted.

The wife commenced a claim in the Ontario Superior Court of Justice in October of 2016, claiming a divorce, equalization of property and spousal support. The husband brought a motion for summary judgment, seeking to have the Russian divorce recognized and to have the wife's claim for spousal support dismissed. The husband was unsuccessful at the summary judgment motion, as the motion's judge found in favour of the wife and determined that the Russian divorce was invalid due to the lack of notice to the wife.

The husband appealed, arguing that the motion's judge had made an error in law by failing to consider whether the parties had a real and substantial connection to Russia. The husband argued that if such a connection existed and the divorce was obtained in accordance with Russian law, then Ontario had no choice but to recognize the divorce (and to terminate the wife's claim for spousal support). The motion judge had not considered the real and substantial connection to Russia, as when they determined that there had been no notice – that ended their analysis before they considered it.

The Court of Appeal upheld the motion judge's decision.

Section 22 of the *Divorce Act* sets out the law governing the recognition of foreign divorces:

> **22 (1)** A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.
>
> **Idem**
>
> **(2)** A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she

> were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.
>
> **Other recognition rules preserved**
>
> **(3)** Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

The Court of Appeal determined that section 22(3) of the *Divorce Act* expressly "upholds" the following common law principles:

Canadian courts will recognize a foreign divorce:

1. Where jurisdiction was assumed on the basis of the domicile of the spouses;
2. Where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties;
3. Where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings;
4. Where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada;
5. Where the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; or
6. Where the foreign divorce is recognized in another jurisdiction with which the petitioner or respondent has a real and substantial connection.

However, in addition to those common law principles, a court may *refuse* to recognize a foreign divorce that would otherwise be valid, on the grounds of fraud, denial of natural justice (including lack of notice) or public policy.

In the case at bar, the motions judge did not need to deal with the issue of whether or not the parties had a real and substantial connection to Russia or whether the Russian divorce was valid in Russia and in compliance with Russia law. The motion judge appropriately focused on the "lack of notice" to the wife, which was a denial of natural justice. This was the reason for the refusal to recognize the Russian divorce. Once this was established by the motion judge that was the end of it.

Costs, Disclosure and Procedural Matters

Sargalis v. Sargalis, 2019 ONSC 530 – Can a Court Order a Spouse to Provide an Income Report?

To Report…or Not To Report…that, is the question.

In this case, the husband sought an order that the wife produce an income analysis showing her income for spousal support purposes as of the date of separation and the date of trial. This motion raised the interesting question of whether a self-employed party has an obligation to produce an income analysis when income is called into question, and whether the court has jurisdiction to make such an order.

Justice Tremblay of the Superior Court of Justice reviewed the case law on this important issue. He began by pointing out that a self-employed party has an obligation to satisfy the court as to their true income.[66]

Clearly, a party may fulfil this obligation by producing their own income analysis or by providing all of the necessary financial disclosure in order to make their income clear to the court and opposing party. However, a party must bear the obligation to produce all of the relevant financial disclosure at his or her own cost.

Justice Tremblay determined that an, "income analysis will be ordered where the court deems it relevant to the case, proportionate with the issues at trial and where the burden on the disclosing party does not outweigh the importance of the information."[67] Justice Tremblay made the important point that where the financial affairs of a party are not complicated, the court should first look to a more reasonable and economical way of obtaining financial disclosure before ordering an income analysis. This could be achieved by ordering additional financial disclosure or questioning.[68]

In this case, Justice Tremblay was not satisfied that the wife's financial affairs were so complicated as to require an income report. He found that a reasonable and economical way to address the disclosure issue was to order the wife to properly organize her source documents and to submit to questioning. If that process failed to satisfy the husband and the court, then the motion for an income analysis could be renewed.

At the time of the motion, the wife lived in Prince Edward Island and the husband lived in Timmins, Ontario. The wife argued that if questioning was to take place, it should be in writing, but Justice Tremblay was not satisfied that this would have been viable option. In order to

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[66] See for example *Blaney v. Blaney* (2012), 19 R.F.L. (7th) 491 (Ont. S.C.J.), *Barbini v. Edwards*, 2014 CarswellOnt 16559 (Ont. S.C.J.), *Whelan v. O'Connor* (2006), 28 R.F.L. (6th) 433 (Ont. S.C.J.), *Kozicki v. Kozicki*, 2013 CarswellOnt 18408 (Ont. S.C.J.), *Q. (G.V.) v. Q. (M.L.)*, 2012 CarswellOnt 9626 (Ont. S.C.J.).

[67] See *Burton v. Burton*, 2016 CarswellOnt 179 (Ont. S.C.J.), *Chernyakhovsky v. Chernyakhovsky*, 2005 CarswellOnt 942 (Ont. S.C.J.), *Kovachis v. Kovachis* (2013), 36 R.F.L. (7th) 1 (Ont. C.A.).

[68] See *Howell v. Wignall*, 2015 CarswellOnt 18178 (Ont. S.C.J.).

minimize the associated expenses and travel time, he ordered that the questioning be conducted in Timmins, with the respondent appearing by video link from Prince Edward Island.[69]

There has always been a bit of an issue as to whether a court has the jurisdiction to order an income report or whether a party in a support case has an obligation to produce an income analysis. This case would seem to indicate that when there is sufficient financial disclosure to enable the other side to understand the financial position, an income analysis will not be required or ordered. However, if the financial disclosure is incomplete or otherwise unclear as to the reasonable income of the party, an income analysis may be ordered.

[69] This is very straightforward and most reputable Court Reporter services should be able to facilitate this without issue, particularly as it has been done in the civil litigation sphere for many years.

Shelley v. Shelley, 2019 ONSC 2830 – Enforcing Trials Costs for Resisting Spousal Support Claims through the FRO

What ya gonna do when the FRO comes for you?

This short but important judgment by Justice Mitrow of the Superior Court of Justice dealt with the issue of whether to allow the Director to enforce trial costs to be paid by the wife to the husband in circumstances where the wife's claim at trial for increased spousal support was dismissed.

The wife was receiving spousal support pursuant to a Separation Agreement. When the husband commenced divorce proceedings, the wife sought to increase spousal support substantially in excess of the amount set out in the Separation Agreement. The wife was unsuccessful at trial and the husband continued to pay spousal support pursuant to the Separation Agreement.

The husband argued that the costs order should be enforced by the Director. Opposing this request, the wife argued that since the claim was dismissing a claim for spousal support, the attendant costs could not be enforced by the FRO.

The Ontario Court of Appeal's decision in *Clark v. Clark*[70] dealt with a similar argument wherein a husband (Gregory) argued that if a claim for child support is dismissed, the costs relating to that claim cannot be enforced by the FRO. In that case, the Court of Appeal noted:

> For his part, Gregory contends that because his claim for child support was dismissed, because no child support was awarded to Georgia at trial, and because Georgia concedes before this court that the costs of counselling and the assessment report for the children are not support-related, only those costs concerning the payment of extraordinary expenses for the children of the marriage under s. 7 of the Guidelines, at best, may properly be viewed as part of a support order under s. 1(1)(g) of the Act for the purpose of FRO enforcement.
>
> I disagree. Gregory has pointed to no authority for the contention that where a child support claim is dismissed, the costs incurred in respect of that claim cannot form part of a support order enforceable by the FRO.
>
> There is no doubt that child support was a live issue at trial. By order dated February 14, 2012, the trial judge dismissed Gregory's claim for child support and further ordered, "There shall continue to be no base child support payable by either parent to the other party".

[70] (2014), 40 R.F.L. (7th) 14

Justice Mitrow set out that, in his view, claims in relation to spousal support should also attract a broad interpretation of Section 1(1)(g) of the *Family Responsibility and Support Arrears Enforcement Act*[71] ("FRSAEA").[72].

While the Court recognized that in the vast majority of cases, s. 1(1)(g) applies where a successful support recipient receives an award of costs after successfully obtaining a support order, there was no principled reason to refuse to apply s. 1(1)(g) where a party has successfully resisted a claim for support, whether it be child or spousal support. Accordingly, the order for costs against the respondent would be enforced by the Director.

[71] S.O. 1996, c.31

[72] See *Thompson v. Drummond* (2018), 13 R.F.L. (8th) 92 (Ont. S.C.J.) wherein Justice Chappel determined that courts should interpret s. 1(1)(g) of the FRSAEA broadly in relation to child support claims.

Malik v. Malik, 2019 ONSC 117 – Failure to Obey a Disclosure Order

Hit'em where it hurts – the wallet.

This matter came before Justice Gordon Lemon of the Superior Court of Justice of Ontario as a result of a complaint that the husband was in breach of a disclosure order granted seven months earlier. At a Case Conference, the court made a lengthy order with respect to financial disclosure and set a time period for the delivery of that disclosure. Although the husband had provided some of the disclosure, he had not provided an income analysis or a business valuation (and the accompanying scope of review documents).

The wife did not seek a finding of contempt. She also did not ask that the husband's pleadings be struck, likely because the information being sought would be more helpful to the wife's case than striking the husband's pleadings. Justice Lemon found that the husband was in willful breach of the order and discussed how judges should deal with disclosure issues in family matters.

Justice Lemon referred to the Ontario Court of Appeal decision in *Mullin v. Sherlock*[73] where the Court of Appeal restated the classic statement regarding disclosure set out in *Roberts v. Roberts*[74]:

> The most basic obligation in family law is the duty to disclose financial information. This requirement is immediate and ongoing.
>
> Failure to abide by this fundamental principle impedes the progress of the action, causes delay and generally acts to the disadvantage of the opposite party. It also impacts the administration of justice. Unnecessary judicial time is spent and the final adjudication is stalled.
>
> Traditionally, striking pleadings has been considered to be a remedy of last resort. In *Purcaru v. Purcaru*, 2010 ONCA 92, Lang J.A. stated at para. 47 that in family law cases, pleadings should only be struck and trial participation denied in exceptional circumstances and where no other remedy would suffice. The same principle was reiterated in *Chiaramente v. Chiaramente*, 2013 ONCA 641, at paras. 31-33. Laskin J.A. described the relevant considerations in *Kovachis*, at para. 34:
>
> > Before striking *Kovachis*' pleadings, consideration ought to have been given to the importance or materiality of the items of disclosure *Kovachis* has not produced. Although full and frank disclosure is a necessary component of family law litigation, exhaustive disclosure may not always be appropriate. The courts and parties should consider the burden that disclosure requests bring on the disclosing party, the relevance of the request of disclosure to the issues at hand, and the costs and time to obtain the disclosure compared to its importance.

After a review of the *Family Law Rules*, Justice Lemon set out the following framework:

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[73] 2018 CarswellOnt 21609 (Ont. C.A.)
[74] 2015 ONCA 450

> First, when faced with an allegation of failure to obey a disclosure order, before granting a remedy, the judge must be satisfied that there has been non-compliance with the court order.
>
> Second, once satisfied, a judge may have recourse to the alternatives described in Rule 1(8). In assessing the most appropriate remedy, a judge should consider the following factors:
>
> > • the relevance of the non-disclosure, including its significance in hindering the resolution of issues in dispute;
> >
> > • the context and complexity of the issues in dispute, understanding that an uncomplicated case should have little tolerance for non-disclosure, whereas a case involving extensive valuation of assets may permit some reasonable delay in responsiveness;
> >
> > • the extensiveness of existing disclosure;
> >
> > • the seriousness of efforts made to disclose, and the explanations offered by a defaulting party for the inadequate or non-disclosure; and
> >
> > • any other relevant factors.

After taking these factors into account, a Court will determine the best remedy. Justice Lemon explored the various remedies and ultimately decided that striking the pleadings was not the answer, but that the husband had to be incentivized to comply with the court orders for disclosure. Accordingly, Justice Lemon required the husband to pay to the wife $5,000 per month from the date the disclosure should have been provided, being $30,000, and $5,000 on the first day of each month until the disclosure items were produced. To bring the point home even more clearly, the Court determined that this penalty constituted a separate order and may not be set off by any support or equalization claims.[75]

There will be many disclosure motions where it is not apparent that the defaulting party has easy access to the funds necessary to comply with this form of penalty. Clearly, the Court has to take into account the means of the defaulting party before a financial penalty is imposed. Of course, it ought to be clear to the defaulting party and counsel that the financial penalty does not end the quest for financial disclosure. It is always open to a party to come back and seek further penalties, such as contempt or the striking of pleadings when the financial penalty has failed to be a sufficient incentive.

[75] Also see the case of *Granofsky v. Lambersky*, 2019 CarswellOnt 8706 (Ont. S.C.J.) wherein Justice Diamond imposes a similar fine/fee/penalty structure for non-compliance with a disclosure order without a finding of contempt. But see *Shapiro* v. *Feintuch*, 2018 CarswellOnt 19129 (Ont. S.C.J.) where Justice Monahan finds that such penalties are not allowed absent a finding of contempt.

***Bouchard v. Sgovio-Bouchard,* 2019 ONSC 6158 - Penalties for Breaching Court Orders**

And again…

This was an interesting case that considered creative ways of trying to enforce compliance with a parenting order without having to resort to what Justice McDermot recently referred to as the "nuclear option of a contempt motion" in *Michener v. Carter*[76]. Notably, contempt motions in family law have also recent been eschewed by the Ontario Court of Appeal.[77]

The parties were married for almost 14 years and had 2 children together. They separated in 2017, and they signed a detailed Parenting Agreement in 2019 that was incorporated into a Consent Order. Before the ink was dry, the father started breaching the Order by over-holding the 13-year-old and by discussing "adult issues" with the children. The father also refused to take the children to their therapist as required by the Consent Order.

The father claimed that the 13-year-old did refused to see the mother because of her own behaviour and that he could not afford counselling. He also claimed that he could not physically force the child to go and that he should not be penalized, "when he is physically unable to force [the 13-year-old] to visit his mother, and it is [the mother's] own fault that the situation has come to this."

Justice Hughes would have none of this, in large part because the father's own emails showed that, contrary to the terms of the Consent Order, he had been directly involving the child in the conflict. She reviewed a number of the cases that stand for the proposition that, "[a] parent has an obligation to actively require the child to comply with the order by exhortation, reward, and even the threat of discipline, much like a parent would if a child was refusing to attend school," and confirmed that 13-year-olds do not get to make decisions about where they will live:

> [14] The law does not accept that a 13-year-old's views about access are determinative. It is not acceptable for a party to say that there has been (little or) no access because their 13-year-old child is choosing not to see the other parent. Parents governed by access orders cannot simply leave access up to the children.

Justice Hughes also rejected the father's claim that he could not afford the counselling expenses.

Having found that the father had repeatedly breached the consent parenting order, Justice Hughes then considered what to do about it. Since it appeared to Justice Hughes that the father had been breaching the Parenting Order to extract financial concessions from the mother, her Honour determined that the best way to deal with the father's non-compliance would be to impose "monetary penalties and monetary incentives" to compensate the mother, to denounce the father's poor parental conduct, to deter the father from similar conduct in the future, and to coerce the

[76] 2018 CarswellOnt 6908 (S.C.J.)
[77] See: Hefkey v. Hefkey, 2013 CarswellOnt 2986 (C.A.)

father to comply with his obligations – a penalty that was clever, practical, and directly related to the offensive behaviour.

Bearing in mind the father's lack of remorse, multiple breaches, failure to take responsibility, and support (or encouragement?) of the child's non-compliance, her Honour decided to fine the father a total of $18,000 for his 6 prior breaches ($3,000 each), and $3,000 per breach for any future breaches. Her Honour also ordered that the father could not receive any additional child support or tax benefits/credits as a result of the additional time that the child had been with him during the over-holding, and that he could not schedule any conferences or motions without leave.

While these penalties were significant, her Honour cleverly gave the father incentive to change his behaviour by allowing him to ask to have the penalty stayed if he stopped breaching the order going forward. She also scheduled a further attendance before her so that she could monitor compliance. This is exactly the sort of penalty/incentive provision that should be awarded is such cases: penalize the behaviour to be extinguished and reward the behaviour to be encouraged.

While Justice Hughes' order was clearly a sensible (and hopefully effective) way of dealing with a difficult situation, her decision does not *specifically* address whether a court actually has jurisdiction to make this type of Order (likely because it appears that the husband accepted that the court had jurisdiction to do so). While there are numerous examples of courts imposing fines pursuant to the *Family Law Rules* for things like non-disclosure,[78] there are competing authorities in Ontario about whether a court can order a monetary payment as a penalty for a breach of a court order absent a finding of contempt.[79] As these types of orders are interlocutory, we will have wait until the Divisional Court grants leave to appeal in order to get a clear answer on this important point. In the meantime, these kinds of orders accomplish the required objective without the need for a full contempt inquiry and, in my view, should be encouraged. In the words of Justice Diamond in *Granofsky v. Lambersky*[80]:

> The Court has jurisdiction to monitor and police its own case management process. In the circumstances of the case before me, it cannot lie in the respondent's mouth to interpret Rule 1(8) so strictly, while at the same time choosing to consistently not play by the rules (including the *Family Law Rules*). Rule 1(8) permits the Court to make "any order that it considers necessary for a just determination of the matter". The list of options available to the Court under Rule 1(8) is not exhaustive in nature, but inclusive. A just determination of any family proceeding is rooted in the protection of the administration of justice as a

[78] See, for example, *Mantella v. Mantella*, 2008 CarswellOnt 5632 and *Service v. Service*, 2011 ONSC 4900.
[79] For example, see Justice Monahan's decision in *Shapiro v. Feintuch*, 2018 CarswellOnt 19129 (S.C.J.), where his Honour concluded that a court can only order a monetary penalty as part of a contempt order, and Justice Diamond's decision in *Granofsky v. Lambersky*, 2019 CarswellOnt 8706 (S.C.J.), where his Honour disagreed with Justice Monahan's decision and ordered the husband to pay the wife a penalty of $500 a day until he complied with his court ordered disclosure obligations.
[80] 2019 CarswellOnt 8706 (S.C.J.)

whole, and when a party chooses to consistently disobey a court order, the administration of justice itself is called into question.

Calver v. Calver, 2019 ONSC 7317 – Costs for Weak Claims

You takes yer chances; you pays da price.

When a decision begins with, "I opened and closed my reasons for judgement in this file expressing my deep concern about the way this action has been litigated," you know the court is going to have something significant to say about the conduct and consequences of litigation, and about the need for proportionality that is sometimes lost in family law.

According to Justice Pedlar, this was a trial that should have lasted 1½ days at most. However, because of the applicant's numerous claims, the litigation took on a life of its own that was both unreasonable and unnecessarily complicated, and took a full 9 days of trial time. The proceedings were made unreasonably complex by the number of unsuccessful claims advanced and pursued by the applicant.

Neither party obtained a result better than their respective Offers to Settle.

The applicant claimed relief totaling $450,000 and was ultimately awarded just under $84,000. Justice Pedlar noted this was only about 18% of her total claim. Most of the applicant's claims, including claims for unjust enrichment, constructive trust, proprietary estoppel, loss of future income, and compensation for emotional and physical damages, were dismissed. As a result, Justice Pedlar found the matter to have been entirely "over-litigated", and that the respondent had been required to address a range of claims and review an unreasonable amount of paper in order to properly defend himself.

The applicant was ultimately successful in her claim for an unequal division of Net Family Property, but Justice Pedlar found that this portion of the trial should have taken no more than 1½ days of the 9 days of trial. Therefore, Justice Pedlar awarded the applicant costs only for that time, being approximately 16% of the trial time. As her total claim for costs was for $84,750, he awarded the applicant only $13,560 for costs.

Things then got even worse for the applicant.

The respondent was wholly successful in defending all the applicant's other claims such that he was entitled to 84% of his costs of $112,000 for a total of $95,000 in costs. Setting off those two claims, Justice Pedlar found that the "successful" applicant owed the respondent about $81,000 in costs. It is not common for courts to award costs by considering the percentage of successful and unsuccessful claims, but it appropriate cases (especially where the amount recovered is small compared to the amount claimed) this methodology may prove to be useful.

Justice Pedlar determined that, over the course of the litigation, the applicant should have re-evaluated the strength of her claims and narrowed them as appropriate. This should be a lesson for all: forcing a party to deal with claims that should not have been pursued may result in significant

costs. This is not the first time courts have forced a party to suffer the consequences of their unbridled claims. A party ought to continually assess the strength of their case and claims. If a litigant persists in a weak case and forces the other side to prepare and respond to it, then costs ought to reflect the work done by the other side to respond.[81] If a party persists in an unreasonable claim, they cannot later complain about the amount of costs spent to defend those claims.[82] All-too-frequently, parties do not re-evaluate their claims after discoveries and as trial approaches. Withdraw weak claims or persist in them and face significant cost consequences; or hope you do not appear before Justice Pedlar at trial.

As noted by Justice Pedlar at the end of the decision, "it will take time for both feelings and finances to heal." No doubt.

[81] See: Kirshenblatt v. Kirshenblatt, 2008 CarswellOnt 6163
[82] See: : Fielding v. Fielding, 2019 ONSC 833

***Davidson v. Davidson*, 2019 CarswellOnt 19152 – Provisional Orders**

And it seemed like *such* a good idea at the time…

Sections 18 and 19 of the *Divorce Act* set out the following process for dealing with support variation applications where the spouses live in different provinces:

(a) the court in the applicant's province makes a provisional order based on the evidence that it receives from the applicant;

(b) the provisional order is sent to the court in the respondent's province (seemingly most often by 3-legged donkey);

(c) the respondent is then given an opportunity to respond to the applicant's evidence; and

(d) the court in the respondent's province can either confirm the provisional order (with or without variation), refuse to confirm it, or send it back to the court in the applicant's province to give the applicant an opportunity to provide further evidence.

This incredibly slow, cumbersome, inconvenient process has been *repeatedly* criticized by courts throughout Canada.[83]

The process is described in such terms because that is exactly what it is, and it is anachronistic in these times. *Davidson* offers yet another example of the significant problems with the provisional order process.

The parties lived in Nova Scotia. In 2010, the Supreme Court of Nova Scotia (Family Division) granted a final order under the *Divorce Act* that provided, among other things, that neither party would pay child support to the other for their two children.

The wife subsequently moved to Ontario, and the husband issued a Variation Application in Nova Scotia to require the wife to start paying him child support.

The court in Nova Scotia granted the husband's Application, and ordered the wife to pay him $880 a month in ongoing child support and almost $40,000 in retroactive support. However, the court also determined that since the wife had moved to Ontario, it could only make a provisional order under s. 18 of the *Divorce Act* that would be of no force and effect until it was confirmed by a court in Ontario under s. 19.

[83] For example, see paragraph 18 of *Burgie v. Argent*, 2013 CarswellBC 1714 (C.A.) where the B.C. Court of Appeal referred to it as "unwieldy and unsatisfactory" and a "yo-yo process". The New Brunswick Court of Appeal is also not a fan of what it describes as a cumbersome, expensive, time-consuming, awkward, and ungainly process: *C.A.E. v. M.D.*, 2011 NBCA 17; *LeParque v. LeParque*, 2005 NSCA 127.

For reasons that are not entirely clear from the decision, more than 3 years passed before the confirmation hearing in Ontario took place (such delays are quite common, although the length of this delay is remarkable).

Justice Sanfilippo heard the matter, but he refused to confirm the provisional Order because of flaws with the initial process in Nova Scotia: s. 18(2) of the *Divorce Act* provides that a provisional Order can only issue *if* the respondent is ordinarily resident in another province *and* has not accepted the jurisdiction of the court in the applicant's province, *or* if both spouses have consented to the matter proceeding in the applicant's province. However, in this case, there was no evidence to show that the wife had not accepted the jurisdiction of the Nova Scotia court, and it did not even appear that the wife had been served with the husband's Application before the provisional was made. That, of course, was a problem.

This result could had been avoided had the husband simply proceeded with a variation application in the ordinary course by having the wife served personally with the Nova Scotia originating process. Then, had the wife responded by objecting to the Nova Scotia court's jurisdiction, the husband could have either properly proceeded under ss. 18 and 19 of the *Divorce Act*, or withdrawn his claims in Nova Scotia and commenced a variation proceeding against the wife in Ontario. While litigating in Ontario would certainly have been less convenient for the husband, it would have allowed him to avoid the enormous problems associated with the provisional order process (including the more than 3 years that it took for the matter to be heard in Ontario).

That being said, it does not appear that the result would have been any different had it been dealt with on the merits, as Justice Sanfillipo also indicated that he would have refused to confirm the provisional order in any event as the wife had been able to establish that there had not actually been a material change so as to have allowed the court to vary the original order in any event.

Szymanski v. Lozinski, 2019 ONSC 6968 - Certificate of Pending Litigation in Fraudulent Conveyance Cases

What's mine is mine…unless my creditors ask – then, it's yours.

This civil case dealt with the question of whether and when one can obtain a Certificate of Pending Litigation (a "CPL" – or elsewhere still known as a *lis pendens*) against a property in which your client never actually held an interest, but that may have been transferred to a third party in an attempt to defeat your client's claims.

The husband and wife transferred the husband's interest in their matrimonial home to the wife for no consideration. Two years later, the husband borrowed money from the plaintiff. When the husband defaulted, the plaintiff sued the husband to recover the money. The plaintiff alleged that the earlier transfer of the matrimonial home to the wife had been fraudulent, and asked for permission to register a CPL against the property. (Presumably the plaintiff took this position because he was concerned that the husband was judgment proof.)

Master Sugunasiri held that in order for a plaintiff to obtain a CPL against a property in which s/he has no interest other than a claim for fraudulent conveyance claim, s/he must meet the following 3-part test from Justice Smith's decision in *Grefford v. Fielding*[84]:

> (a) The CPL claimant must satisfy the court that there is high probability that s/he would successfully recover judgment in the main action;
>
> (b) The claimant must introduce evidence demonstrating that the transfer was made with the intent to defeat or delay creditors - evidence that the transfer was for less than fair market value lightens the burden; and
>
> (c) The claimant must show that the balance of convenience favours issuing a CPL in the circumstances of the particular case.

Master Sugunasiri was satisfied that the plaintiff's claim had a high probability of success as the husband had admitted that he owed money to the plaintiff. Furthermore, based on Justice Vallee's comprehensive summary of the principles that govern fraudulent conveyance claims in *Miller v. Debartolo-Taylor*[85], Master Sugunasiri accepted that it was open to the plaintiff to try to rely on the *Fraudulent Conveyances Act* even though the allegedly fraudulent transfer had occurred 2 years before the plaintiff had loaned the money to the husband.

However, Master Sugunasiri ultimately dismissed the plaintiff's request for a CPL because: (a) the plaintiff failed to adduce any evidence whatsoever to contradict or challenge the husband's evidence that the transfer had been *bona fide* as it was done based on advice that the husband and

[84] 2004 CarswellOnt 1181 (S.C.J.)
[85] 2015 CarswellOnt 5618 (S.C.J.)

wife had received from their bank; and (b) it would not be fair to the wife to let the plaintiff encumber her home when there was no evidence to suggest that she had anything to do with the loan in question.

Ultimately, however, the import for family lawyers in this case is the fact that a historic transfer can still potentially be attacked as a fraudulent conveyance. In some instances (and in some provinces), this could be an important arrow in the family lawyer's quiver, especially in the case of property transfers on the eve of separation.

Rana v. Rana, 2019 CarswellOnt 19949 (Ont. S.C.J.) - Adducing New Evidence While Decision Is Under Reserve

Stop the presses!

This high conflict parenting case considered when a court can receive new evidence after a motion has been argued, but before the decision has been released.

About a week after the parties argued a highly contested interim access motion, and while the decision was still under reserve, the wife's lawyer wrote directly to Justice Le May (without the husband's lawyer's consent) to advise that she wanted to file further evidence.

The test for introducing new evidence while a decision is under reserve is *extremely* high and, as discussed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*[86], requires the moving party to show that: (a) the evidence would have affected the outcome of the hearing; and (b) the evidence could not have been discovered prior to the hearing.

While noting the high threshold, Justice Le May also considered that, when dealing with an interim motion that is subject to later possible variation, "it is often more efficient to simply consider additional information rather than deciding to release a decision and make a party adduce the additional information at either a new hearing or at the trial of the matter." While this is certainly a worthy consideration, courts must be careful to not allow that criterion to swamp the general near-prohibition against continuing the motion after it has already been argued. If parties are allowed to continuously adduce further evidence (to try to make up for evidentiary deficiencies at the time of argument), motions will never end.

In the end, Justice Le May allowed the wife to file notes from the professionals who were supervising the husband's access about events that took place after the motion was argued, because the information was important enough to potentially affect the outcome of the motion and could not have been produced earlier (as it did not even exist when the motion was argued). In other words, the evidence met the test. His Honour clearly also wanted to avoid the possibility that one of the parties would have moved to vary his decision after it was released based on the new evidence.

I also want to briefly comment on the wife's lawyer's decision to write to Justice Le May without the consent of the husband's lawyer. This was a major "no-no," and the wife's lawyer is lucky there were no consequences.

Although his Honour did not specifically mention this issue in his decision, counsel should always remember that, as Justice Matheson noted in *Ward v. Ward*,[87] "[t]he cases are quite clear that counsel should not be in communication with a judge who has not rendered his or her decision,

[86] 2001 CarswellOnt 3358 (S.C.C.)
[87] 2009 CarswellOnt 7547 (C.A.),

without the express consent of the other parties." Furthermore, the consequences of contacting a judge without the other side's consent can be quite severe. In *Ward*, for example, the husband's lawyer's decision to write to the judge without consent while the decision was under reserve almost caused a mistrial and ultimately resulted in the husband having to pay the wife $15,000 in costs.[88]

This is now specifically addressed in Rule 1.09 of the Ontario *Rules of Civil Procedure*, which provides as follows:

> When a proceeding is pending before the court, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge, master or case management master out of court, directly or indirectly, unless,
>
> (a) all the parties consent, in advance, to the out-of-court communication; or
>
> (b) the court directs otherwise.

In a situation where you believe that it is necessary to contact the judge while a decision is under reserve, you must first ask the other side to consent. If consent is not forthcoming, the best course of action is to bring a formal motion to deal with the matter instead of unilaterally writing to the court.

[88] *Ward v. Ward*, 2010 CarswellOnt 479 (S.C.J). See also *Timleck v. Beltrano*, 2014 ONCA 585

***Janiten v. Moran*, 2019 ABCA 380 – Disclosure and Variation Proceedings**

Way too little, and way too late.

This is an interesting case about the impact of disclosure orders on variation proceedings. The parties had one child together, born in 2001. In January 2018 the mother brought an Application for child support, alleging that she had not received appropriate support for the past eight years. On January 22, 2018, she obtained an order requiring the father to provide disclosure documents to her by January 25, 2018, by e-mail.

The father did not provide the disclosure.

The mother obtained another order on January 26, 2018 setting the father's income at $200,000.00 for child support purposes and directing him to pay $1,735.00 per month as of December 1, 2017. The motions judge directed both parties to appear on February 28, 2018. On February 28, 2018, the mother appeared in court, but the father did not. The mother obtained an order imputing an income to the father of $150,000.00 per year for the period of January 1, 2014 to November 30, 2017.

Approximately one year later, the father brought his own application to vary and filed an affidavit in support containing some of the information that he had been directed to disclose a year earlier. The husband did this because the February 2018 order was being enforced against him and he was, finally "feeling it." At the application the mother was self-represented and alleged that the father's application to vary was a collateral attack on the previous orders. The mother did not file any materials, but she did advise the chambers judge of her previous materials.

The chambers judge took the position that there was no evidence before her on behalf of the mother and found in favour of the father's Application. The chambers judge refused to order any retroactive support in 2014 on the basis of the mother's delay and refused any earlier retroactive adjustment because it would occasion hardship on the father. This was in the face of requests for financial information being made in 2010 and 2012.

The mother appealed the chambers decision. The Court of Appeal found that the chambers judge had erred in failing to consider the evidence that the mother had previously adduced. Litigants can rely on previously filed materials. The mother, in this case, had specifically pointed the chambers judge to this material. The chambers judge should have considered it and the failure to do so was an error in principle.

The Court of Appeal also held that it was an error to vary the two previous orders. The only change subsequent to the February 2018 order was that the father had finally complied with his disclosure obligation. The father's application was not based on a proper change in circumstances, rather he was simply remedying his own delinquency. A litigant who ignores courts orders for disclosure and/or who fails to attend when in court when ordered to do so does so on their own peril. The father's "tardy" disclosure compliance was not a ground for a successful variation application.

The Court of Appeal varied the *ongoing* support, as the father had adduced evidence regarding his 2018 income. However, the orders for the retroactive adjustment prior to 2018 were reinstated.