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Michel v. Graydon*, 2020 SCC 24 – Retroactive Child Support Claims and *D.B.S.

Marty! We have to Go Back! Back to the future!!

-Doc Brown

Family lawyers are going to become spoiled from all of the attention the Supreme Court of Canada has been lavishing on family law. This matter is particularly ripe for clarification, as different provincial Superior Courts and Courts of Appeal have come to different conclusions to the question of whether or not a claim for retroactive child support can be made for a child that is no longer a "children of the marriage" at the time of the application.

We now have *some* clarity.

Graydon dealt with a couple in a common law relationship in British Columbia. The parties had their only child, A, in 1991. After M and G separated in 1994, A lived with their mother. M and G agreed that G would pay child support based on his stated annual income. The parties entered into a Consent Order formalizing the terms in 2001. However, G had materially understated his income from the time of the Consent Order (with the exception of 2004) until his child support was terminated by Court order in 2012, when the child was no longer entitled to child support. After discovering this, M applied under section 152 of the British Columbia *Family Law Act* to retroactively vary child support for the period between April **2001** and April **2012** to reflect what G should have paid based on his true income for that period.

Section 152 reads:

> (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.
>
> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
>
> (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
>
> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

The trial judge allowed M's application and G was ordered to pay $23,000.00 in retroactive child support. The Supreme Court of British Columbia allowed G's appeal and set aside the trial judge's order, finding that it contradicted the decision of the Supreme Court of Canada in *D.B.S v. S.R.G.*, 2006 SCC 37, such that the retroactive claim for child support needed to be commenced while the child was still a child of the marriage, regardless of the fact that the current claim was under the *Family Law Act* and *D.B.S.* was under the *Divorce Act*.

The British Columbia Court of Appeal dismissed M's appeal. The Court of Appeal found that the question as to whether there was jurisdiction under the *Family Law Act* to order a

retroactive variation of a child support order after the child has ceased to be a "child" within the meaning of that *Act* had been recently answered in *Dring* v. *Gheyle*, 2018 BCCA 435 – by a 5-member panel of the Court of Appeal, specifically convened to answer that very question.

M was granted leave to appeal to the Supreme Court of Canada, which granted the appeal from the bench, with "reasons to follow" in November of 2019. We now, at long last, have those reasons.

While the nine-member bench of the Supreme Court of Canada unanimously allowed the appeal, the reasons were quite split. The majority, (Justices Moldaver, Côté, Rowe, Brown and Kasirer) held that when deciding an application for retroactive child support, a court must analyze the specific statutory scheme under which the application was brought. In *D.B.S.*, the Supreme Court was considering section 15.1 of the *Divorce Act* and concluded that a court has no authority to grant a retroactive award of child support when the child is no longer a "child of the marriage" at the time of the application. However, *D.B.S.* did not consider or decide the issue of retroactive Variation Orders under section 17 of the *Divorce Act* or provincial legislation.

The majority stated in no uncertain terms that *D.B.S.* does *not* stand for the broad, general principle, that courts can only vary child support while the child is a "child of the marriage" or a dependent child (in the case of provincial legislation). Instead, when considering a retroactive application, a court must consider the specific legislation under which the application has been brought. Courts should not be quick to recognize impediments that bar applications for retroactive support. The majority also stated that jurisdictional constraints are "inimical" to the principles and policy objectives articulated in *D.B.S.* and should only be imposed where the legislature has clearly intended that they be imposed. Unless compelled by the applicable legislative scheme, courts should avoid creating any incentive whatsoever for payor parents to avoid meeting their child support obligations.

The *Family Law Act* defines "child" in different ways. However, the core of its definition is that children who are dependent on their parents are eligible to receive child support. Section 152 empowers a court to change, suspend or terminate an order respecting child support on a prospective or retroactive basis. There is no reference to the defined term "child" that might serve to limit the court's jurisdiction to order retroactive child support. The majority stated that the text of section 152 indicated that the legislature had intended to allow for retroactive claims made irrespective of whether the child was a dependent child and irrespective of whether the order continues to require payment.

The majority also found that the original hearing judge was correct to conclude that s.152 gave him authority to order retroactive child support. The hearing judge applied the factors under *D.B.S.* regarding retroactive child support, including the reasons for the payee's delay in bringing her application, the hardship suffered by the child as a result of G's failure to meet his support obligations, and the absence of hardship on G in making a retroactive award. The hearing judge's finding that G's failure to disclose his income for 11 years consisted of blameworthy conduct was also upheld. Finally, the majority also stated that the

hearing judge was right to award retroactive support back to the 2001 Consent Order, as the date of effective notice if not relevant when a payor parent has engaged in blameworthy conduct.

Chief Justice Wagner and Justice Martin agreed with the result, but applied a different set of considerations to get there. Justice Martin set out that the required contextual and purposive reading of section 152 requires the Court to look at its wider legislative purposes, societal implications and actual impacts. Seen this way, a jurisdictional bar preventing retroactive child support cases from being heard not only rests on unsound legal foundations, it is inconsistent with the bedrock principles underlying modern child support and contributes to systemic inequalities. (Notably, Justice Martin seems to suggest that child support is a common law right, which is not correct; child support is a creature of statute.)

Child support obligations arise upon a child's birth or the separation of their parents. Retroactive awards are a way to enforce pre-existing, free-standing obligations and recover monies that are owed but yet unpaid. A retroactive child support debt is a continuing obligation which does not "evaporate or fade into history upon a child's 18th or 19th birthday or their graduation from university." Under s. 152, a debt exists if the child qualified as a beneficiary at the time the support was due, irrespective of their status at the time of the application. Justice Martin stated that this reading was not only in accordance with the text, legislative scheme and purpose of section 152, but also promoted the best interests of children, enhanced access to justice, and reinforced that child support is the right of the child and the responsibility of the parents. In addition, it encouraged the payment of child support, acknowledges that there are many reasons why a parent may delay in making an application and recognized that the underpayment of child support leads to hardship and contributes to the feminization of poverty.

Justice Martin emphasized, as did the majority, that *D.B.S.* dealt with s.15.1 of the *Divorce Act*. And there was nothing in *D.B.S.* that would impose a jurisdictional bar on the hearing of a variation application for historical child support under section 152 of the *Family Law Act*.

Justice Martin set out that s.152 must be interpreted and applied in accordance with first principles. Justice Martin interpreted section 152 in a "fair, large and liberal manner" as this would best ensure the attainment of the objectives that underpin child support. Justice Martin found that a procedural bar to historical child support claims prevents access to justice, is counter to the best interest of many children, gives rise to an "under-inclusive" outcome and reinforces patterns of socio-economic inequality. The courtroom doors should not be closed because certain categories of debts "owed to children" are classified as coming "too late." Justice Martin stated that unmet child support obligations that have not yet been judicially recognized are a valid debt that must be paid, similar to any other financial obligation.

Justice Martin also opined that preventing historical claims for child support under s.152 of the *Family Law Act* would ignore that family law calls for an approach that takes into account the broader framework in which family dynamics operate. Gender roles, divorce, separation and lone parenthood contribute to child poverty and place a disproportionate

burden on women. A bar against applications for historical child support means children went without their due, and the law provides no remedy for the hardship this would create for the children and their caregivers, most of whom are still women.

Justice Martin also held that the factors in *D.B.S.* should be "re-framed." There are many reasons why even a person in need might delay making an application. Sometimes parents delay their application for child support to protect the children from harm or because making an application is impractical in their circumstances. The focus should be on whether the reason provided is understandable rather than whether there is a reasonable excuse, taking into account an appreciation of the social context in which the claimant's decision to seek child support was made.

With respect to the conduct of the payor parent, the Court must recognize that the failure of a payor to disclose their actual income, a fact which is within their knowledge, is a failure of a significant obligation and is often the root cause of a delayed application. The primary focus needs to be on the payor's actions and their consequences. The payor's subjective intent is rarely relevant. Blameworthy conduct is not necessary to trigger the payor's obligation to pay the claimed child support. While hardship on a child would weigh in favour of extending the temporal reach of an award, it is not necessary to show any kind of hardship to justify an award of retroactive child support.

The final factor, the hardship the award may cause for the payor, takes into account the ease with which the payor might be able to pay the award. This hardship must be considered after taking into account the hardship that would be caused to the child and/or the recipient parent from *not* ordering the payment of sums owed but unpaid.

Finally, Justice Martin set out that child support awards should be retroactive to the date when the support ought to have been paid. Effective notice to the payor parent is a broad concept going well beyond actual knowledge of a filed variation application. Payor parents are aware of the *Child Support Guidelines* and they are aware they are liable in accordance with their actual income and should be held accountable for missed payments and underpayment.

In a true "Fiddler on the Roof Moment,"[1] Justices Abella and Karakatsanis agreed with both the majority and the policy considerations set out by Justice Martin.

[1] Rabbi to A: "You're right."
Rabbi to B: "Your' also right"
C: "But, Rabbi…how can they both be right??"
Rabbit to C: "You know? You're also right!"

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*, 2007 ONCA 218, 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, father, on account of her own improvident conduct and choices.

Harsh. Probably the right decision. But harsh.

***Climans v. Latner*, 2020 CarswellOnt 12505 (C.A.) – What does it mean to Cohabit?**

I see. You can "cohabit continuously" without "cohabiting continuously."

Perfectly clear.

In this case, the Ontario Court of Appeal affirmed the decision of the trial judge, Justice Shore, that the parties were, in fact, common law spouses, having continuously cohabited in a conjugal relationship for at least three years.

So, who is a common law spouse, and what exactly is "continuous cohabitation"?

This question continues to vex all common law provinces, and the finding of a spousal relationship can be very significant, resulting in standing to claim spousal support and, in some provinces, property relief.

In Ontario, the *statutory* answer is easy. A "spouse" (we are not concerning ourselves with married spouses here) includes either of two persons who have ***cohabited continuously*** for a period of not less than three years.

From there, things get a *bit* more challenging. What does "cohabit" mean? Well, in Ontario, the *Family Law Act* provides a definition: "cohabit" means to live together in a conjugal relationship.

What does "continuous cohabitation" mean in the year 2020? In *Climans*, the Ontario Court of Appeal considers exactly that. Specifically, where parties are in a long-term romantic relationship but never marry, do not have children together, and choose to maintain their own homes rather than live together, was the time they spent together sufficient to amount to "cohabiting" or "living together" in a conjugal relationship?

Lisa Climans and Michael Latner were in a romantic relationship from October 2001 to May 2015 - almost 14 years.

When the parties met, Lisa was 38 years old. She was separated from her husband. She had two children, aged 8 and 11. She worked in sales and marketing for her brother's construction business, earning about $60,000 a year.

Michael was 46 years old. He was also divorced, and he also had children from his marriage. Michael was also ***very*** wealthy.

They quickly began a relationship, and by November 2001 (a month or so after they met), Lisa began sleeping at Michael's home on alternate weekends (when her children were with their father). She eventually quit her job to be available to run errands for Michael, travel with him, and spend time with him.

In the early years of their relationship, Lisa and Michael interacted daily. They usually ate dinner together at one home or the other's, often with whichever of their children were around. They had coffee together in the morning, walked their dogs together, and talked on the phone frequently. However, during this period, Lisa only slept at Michael's home on alternate weekends when her children were with their father (she stayed over at his Toronto home with even less frequency when her children were older).

Despite a few temporary break ups during the relationship, they had a committed relationship. In 2002, Michael gave Lisa a 7.5 carat diamond ring. He also proposed to her more than once - which proposals Lisa accepted. They each wore rings gifted by the other. They celebrated the anniversary of the day that they met each year. They exchanged cards. Michael often referred to Lisa by *his* last name. When Michael was in the hospital dealing with a health issue, Lisa slept at the hospital, occasionally alternating with Michael's children. She drove him to his medical appointments. They were sexually active throughout their relationship. While they introduced each other to their respective children early on, there was no melding of their children into one family. The parties also attended extended family functions together, went out socially, and held themselves out as a couple.

The quality of their relationship changed in 2006, after which Lisa slept only infrequently at Michael's home. On Lisa's evidence, between 2006 and 2013, she slept over at Michael's Toronto home no more than 10 to 20 times. Throughout the relationship, Michael rarely stayed over at Lisa's home.

The parties never merged their finances. They had no joint bank accounts. They did not own property together. However, starting in 2001, shortly after they met, Michael gave Lisa $5,000 per month (later $6,000). And in 2002, Michael started covering Lisa's home expenses and gave her a credit card for other expenses. He later paid off a mortgage on her home and paid for renovations to it. He was extremely generous. He was also extremely generous with her children, who were afforded a very generous lifestyle.

The parties always maintained their separate residences in Toronto. They never married or "moved in" together, but they stayed together when they travelled outside of Toronto. They spent July and August together each year in Michael's Muskoka cottage. In the winter months they spent time together in Florida - from Thursday until Monday morning on alternate weeks when Lisa's children were with their father, and sometimes during the winter school break. They also frequently vacationed together.

Early in the relationship, Michael told Lisa that he would not marry her or live with her unless they entered into a Domestic Contract. While he, at times, prepared and presented draft contracts to her, no contract was ever signed.

When their relationship ended in mid-2015, Lisa was almost 52 years old. She became qualified as a yoga instructor and was expected to earn $24,000 from teaching yoga. She was 55 at the time of trial. She sought indefinite support.

Michael was 63 at the time of trial. He acknowledged a romantic relationship with Lisa and described her as his girlfriend and travel companion - but they had never married or lived together and, at least in Michael's view, they were not spouses.

When the relationship ended, Lisa brought an action in the Ontario Superior Court of Justice for spousal support. Michael resisted the claim, arguing that Lisa was not his "spouse".

After an 8-day trial before Justice Shore, the parties were declared to be spouses within the meaning of s. 29 of the *Family Law Act*. Michael was ordered to pay Lisa spousal support of $53,077 per month starting on January 1, 2019. Support was indefinite in form based on the "Rule of 65" in the *Spousal Support Advisory Guidelines*, for which Lisa *just* qualified (by five

months).

As the successful party at trial, Lisa was found to be entitled to costs. The trial judge ordered costs on a substantial indemnity basis for two reasons. First, she viewed Michael's position that he and Lisa had not been spouses to be unreasonable. Second, she found that Michael had not been "forthcoming" in his financial disclosure. As a result, Michael was ordered to pay costs of (gulp) $324,179.

Michael appealed. He argued that Justice Shore erred in finding a spousal relationship. He argued that Justice Shore erred in finding that the Rule of 65 applied (which was the basis for indefinite support). And, he argued that Justice Shore erred in ordering costs on an increased scale.

The Court of Appeal dismissed the appeal with respect to the finding of a spousal relationship. However, in an interesting twist, the Court of Appeal found that her Honour erred in concluding that the Rule of 65 applied as cohabitation had not started at the beginning of the relationship. And, finally, the appellate court varied the costs award, substituting costs on a partial indemnity basis.

THE TRIAL DECISION

Justice Shore's analysis focused on whether the parties had "cohabited continuously." Again, "cohabit" means "to live together in a conjugal relationship."

There are few decisions about incidents of "cohabitation" that do not refer to and consider *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), and its non-exhaustive list of *indicia* of a conjugal relationship: shared shelter, sexual and personal behaviour, services, social activities, economic support, children as well as the social perception of the couple. This list of considerations was later adopted and affirmed by the Supreme Court of Canada in *M. v. H.* (1999), 46 R.F.L. (4th) 32 (S.C.C.) at paras. 59-60.

Based on a consideration of the *Molodowich* factors, the trial judge had "no doubt" that the parties had been in a conjugal relationship. At para. 120 of the trial reasons, Justice Shore wrote:

> They were in a long term committed relationship. Michael treated Lisa as his wife. Their relationship was sexual in nature. They held themselves out as a committed couple and were perceived as a couple by their family and friends. Lisa was considered family by the extended Latner family. The parties participated in social activities as a couple. Michael supported Lisa financially. They travelled extensively together. They lived together at the cottage each summer.

The only consideration that gave Justice Shore any pause was the consideration as to "shared shelter": Had Lisa and Michael "lived together", even though they unquestionably maintained separate residences in Toronto?

By now, it seems to be accepted in most jurisdictions that it is not always necessary to live together in order to cohabit. In *Stephen v. Stawecki* (2006), 32 R.F.L. (6th) 282 (Ont. C.A.), for example, the Ontario Court of Appeal declined to rule that two people must move in together to be considered as living together or cohabiting. The specific arrangements made for shelter are, apparently, properly treated as only one of several factors in assessing whether or not the

parties are "cohabiting" at law. However, Justice Shore did hold (at para. 128) that " . . . there needs to be *some element of living together* under the same roof. The very definition of 'cohabit' requires that the parties live together in a conjugal relationship." (emphasis added). Therefore, it is clear that parties can, in a consideration of the full factual matrix, be "cohabiting" without actually "living together" - a neat trick, given the above-mentioned definition of "cohabit" includes the idea of "living together."

Justice Shore's conclusion on this issue was repeated and adopted by the Court of Appeal:

> [139] I find that [Lisa] and [Michael] were spouses for the purpose of spousal support having regard to all the factors. The dynamic of their relationship was such that all of the elements were present to some degree or another, but when viewed all together, lead to the conclusion that they were spouses:
>
> a. Committed relationship: The parties were in a committed [14-year] relationship, as set out in more detail above, having exchanged rings (even if only "commitment rings", as described by [Michael]), celebrated their anniversary each and every year, exchanged numerous love letters with expressions of deep commitment, [Michael] calling [Lisa] Mrs. Latner (or other similar names), and [Lisa] caring for [Michael] during hospital stays. There was an expectation that [Lisa] be available to [Michael], and run errands for him.
>
> b. Financial Arrangements: [Michael] paid for [Lisa's] expenses for the entirety of the relationship, provided her with a lavish lifestyle, paid off one of her mortgages and created a financial dependency.
>
> c. Extended Family and Social Perception: [Lisa] was treated as family by the extended Latner family. The parties held themselves out as a couple in a long-term committed relationship to both family and friends. They have referred to each other as spouses in public. [Lisa] participated in the extended Latner family lifecycle events and even walked down the aisle with [Michael] at his daughter's wedding, standing under the chuppah (canopy) with him.
>
> d. Living together:
>
> > i. I find that every summer, [Michael] and [Lisa] moved up to and lived together at the cottage. This was their summer home, where they could be located throughout the summer for almost the entire 14 years.
> >
> > ii. I also find that for the first several years of the relationship, [Lisa] was residing at [Michael's] home on a regular basis, when her children were not in her care, being alternate weekends. I accept that she maintained a separate home for her children, to be close to their school, and by the time they graduated the parties were already in the process of building a home together. This may have changed later in the relationship but was certainly present in the first few years.
> >
> > iii. The parties also lived together as spouses when in Florida.
>
> Had these been the only factors, I would not have concluded that they were spouses. However, when taken into account along with all the other dynamics in this relationship (summarized above), I conclude that they were common law spouses.

Therefore, the Court of Appeal seems to be adopting the idea that "living together" should be interpreted to mean: "living together *sometimes* in a conjugal relationship along with other meaningful indicia of cohabitation."

Having found a spousal relationship, her Honour then concluded that Lisa was entitled to both non-compensatory and compensatory spousal support - although the compensatory claim was weak given that Michael was already well-established when they met. Therefore, Lisa's need, viewed through the lens of the standard of living during the relationship, was the driving factor in determining the amount of spousal support.

With respect to duration, her Honour noted that under the SSAGs, spousal support was payable for between seven and 14 years unless the Rule of 65 applied (where the years of cohabitation plus Lisa's age at separation total to 65 or more) such that spousal support was payable indefinitely.

Lisa was 51 years, 9 months, and 13 days old when the relationship ended. Her position was that she and Michael started cohabiting on November 1, 2001, and separated on May 11, 2015. By that counting, Lisa met the Rule of 65 by 5 months and was "entitled" to indefinite spousal support. We pause here, however, to remind everyone that the SSAGs are not law. They are advisory. The SSAGs may *suggest* indefinite support, but they do not, and cannot, *mandate* indefinite support - especially in the case of a close call.

The trial judge accepted that, while the parties may not have started living together as early as November 1, 2001, they started "cohabiting" within the first five months of the relationship.

After weighing the relevant factors and considerations - including lifestyle, ages, contribution to expenses, a weak compensatory claim, the duration of support and length of the relationship - the trial judge concluded that Lisa was entitled to indefinite ("without defined termination date") spousal support of $53,077 per month.

THE COSTS DECISION

In her reasons for the Costs Order (the "Costs Reasons"), the trial judge considered *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.), which emphasized the need for reasonableness and proportionality in the exercise of discretion when making a costs award and Rule 24 of the *Family Law Rules* regarding costs.

Having been the successful party, Lisa was unquestionably entitled to costs. However, while the trial judge refused the invitation to find that Michael had acted in bad faith, she did find his conduct to have been "unreasonable" in two ways: (1) his position that Lisa "was nothing more than a travel companion or girlfriend"; and (2) he had not been "forthcoming" in his disclosure. And, as a result, she ordered costs in favour of Lisa on a substantial indemnity basis, fixed at 70 percent of actual costs: an award of $324,179.

THE APPEAL

On appeal, Michael argued the trial judge had erred:

1. In concluding that he and Lisa met the definition of "spouse" in s. 29 of the *Family Law*

Act;

2. In concluding that the parties began cohabiting in the first five months of their relationship so as to meet the Rule of 65; and

3. Awarding Lisa costs on a substantial indemnity basis

Cohabitation

On the issue of cohabitation, Michael first argued that the parties had a long-term relationship, but that the did not "live together" in a conjugal relationship.

Indeed, in *Stajduhar v. Wolfe* (2017), 99 R.F.L. (7th) 401 (Ont. S.C.J.[Estates List]), aff'd (2018), 10 R.F.L. (8th) 32 (Ont. C.A.), leave to appeal refused, 2019 CarswellOnt 1825 (S.C.C.), the Ontario Court of Appeal found that to "live together" means to have a "common abode" in the sense of a "readily identifiable" place "where both are ordinarily to be found most of the time when they are at 'home.'" Therefore, Michael's position was hardly without legal support. As the parties maintained separate residences throughout their relationship, argued Michael, the evidence did not support a "common abode." And no "common abode" meant no "cohabitation." Summers at the cottage and alternating weekends in Florida during the winter did not "cohabitation" make. In *Stajduhar*, the Court of Appeal also accepted that absent some element of cohabitation and a "common abode", a long-term romantic relationship is not enough.

Second, Michael argued that the trial judge had improperly merged the (admittedly somewhat overlapping) concepts of "cohabitation" and "conjugal relationship" - and Lisa had to show both. He argued that the trial judge accepted that their conjugal relationship was essentially a proxy for cohabitation, and that was not permitted by the plain language of the statute. A conjugal relationship did not make up for the fact that he and Lisa did not, in fact, "live together."

The Court of Appeal was not receptive to Michael's arguments, again emphasizing that *lack of a shared residence is not determinative of the issue of cohabitation*, as evidenced by the cases that find "cohabitation" on only intermittent cohabitation. It would have been helpful, however, had the Court of Appeal taken the opportunity to distinguish the results in *Stajduhar*.

Ultimately, this was a case of deference to the trial judge. The Court of Appeal accepted that whether the parties lived together, despite having chosen to maintain separate residences, was a question for the trial judge, who grappled with the issue at length. But, ultimately, she found that the intermittent periods during which the parties shared a roof - including Lisa's overnight stays, the summers at the cottage, and the time spent in Florida - in all the circumstances, constituted living together in a conjugal relationship. And the Court of Appeal could find no error.

So, what does this mean for counsel? It means we *must be vigilant in advising our clients*. When a lawyer asks a client, "how long have you been living together," the answer usually provided is the date the parties actually moved in together. It is incumbent on counsel, however, to press further and to explain that "legal cohabitation" sometimes starts before parties actually move in together - and sometimes starts regardless of the fact that the parties have *never* actually

lived together. Sometimes a Cohabitation Agreement is needed far earlier than anticipated, depending on the factual matrix. See also *Hazlewood v. Kent*, [2000] O.J. No. 5263, where cohabiting on weekends was found to be sufficient for a finding of "cohabitation".

The Rule of 65 Met?

Again, the "Rule of 65" applies where the length of cohabitation plus the recipient's age at the date of separation equals or exceeds 65. If the Rule of 65 applies, indefinite spousal support is appropriate: *Djekic v. Zai* (2015), 54 R.F.L. (7th) 1 (Ont. C.A.), at para. 9.

The trial judge concluded that Lisa satisfied the Rule of 65 based on her finding that the parties began cohabiting at some point in the first five months of their relationship (that is, prior to March 17, 2002). However, Michael argued that the trial judge erred in so finding. He argued that in mid-March 2002, the parties had not yet spent any time together at his Muskoka cottage, which first occurred in July 2002. Further, in the first five months, given Lisa's responsibilities to her children, they had spent only a few nights together at his home in Toronto. In the early years of their relationship, Lisa slept at Michael's Toronto home only on alternate weekends when the children were with their father (although this was sufficient in *Hazlewood v. Kent*). And, as the trial judge found, Michael did not stay over at Lisa's home.

Despite agreeing that the date of commencement of cohabitation was a finding of fact, attracting the highest standard of appellate review, the Court of Appeal determined that the trial judge had erred in finding that cohabitation started within the first five months of the relationship. In fact, found the Court of Appeal, the trial judge gave no reasons and did not refer to any legal principles or evidence to support her conclusion that the parties began cohabiting within the first five months of their relationship. Accordingly, the conclusion was the result of palpable and overriding error.

The Court of Appeal noted that the trial judge offered no timeline for her findings with respect to cohabitation, but that those findings reflected the trial judge's general findings about the relationship over its duration of almost 14 years. While some aspects of their conjugal relationship began right away - for example, its sexual nature - many others did not. In fact, found the Court of Appeal, many of the incidents of cohabitation on which the trial judge relied to find "cohabitation" had specifically not taken place in the first five months of the relationship. For instance, the first time the parties lived together at the Muskoka cottage was in the summer of 2002 - after March 2002. The proposal was in October 2002 - after March 2002. Other incidents progressed over time.

Therefore, the parties did not begin cohabiting within the first five months of their relationship, and the Rule of 65 did not apply. Accordingly, it was an error in principle to find that it did. Consequently, time-limited support was warranted.

We pause here to note the significance of this reasoning. Justice Gillese, writing for a unanimous Court of Appeal, went to great analytical lengths to show why the trial judge erred in determining that the cohabitation started within the first five months of the relationship, such that the "Rule of 65" did not apply. But, again, the *Spousal Support Advisory Guidelines* are just that - *advisory*. They are not law. The "Rule of 65" is not a legal rule. It is a recommendation in advisory *Guidelines*. It would have been an easy thing for the Court of

Appeal to take the opportunity to make that clear, and to simply state that, regardless of when cohabitation may have started, the facts of this case - a close call at best - did not support indefinite support. Having not done that, the Ontario Court of Appeal has come one step closer to conferring on the SSAGs the force of law. If that was intentional, we take no issue with it. But we're not sure it was.

In any case, as the "Rule of 65" was not met, spousal support under the SSAGs was payable for between seven and 14 years. And, having regard to the purposes of a support order set out in s. 33(1) of the *Family Law Act*, Justice Gillese ordered that spousal support be paid for a period of 10 years.

On the issue of duration, there is one point that requires some clarification. The Court of Appeal ordered that Michael pay support for 10 years from January 2019, presumably meant to be mid-range-duration between the seven and 14 years. However, as a result of the interim support Michael paid (from May/15 to December/18), the result of the Court of Appeal order is that Michael will actually pay support for 14 years. It is unlikely this was their intention. When considering duration under the SSAG, it is imperative to consider any periods of interim support paid.

THE COSTS APPEAL

Michael sought leave to appeal the Costs Order on the basis that the trial judge erred in principle in awarding costs against him on a substantial indemnity basis. He argued that neither his position on the spousal relationship nor his position on financial disclosure were unreasonable.

The Court of Appeal first emphasized that leave to appeal the Costs Order was not required. When "the disposition on appeal changes the decision under appeal, leave to appeal from a costs order is not necessary": *Tadayon v. Mohtashami*, 2015 CarswellOnt 17315 (C.A.), at para. 70; *Beaver v. Hill* (2018), 17 R.F.L. (8th) 147 (Ont. C.A.), at para. 2, leave to appeal refused, 2019 CarswellOnt 10896 (S.C.C.).

The Court of Appeal then found that the trial judge had erred in principle in finding that Michael acted unreasonably. It was not unreasonable for Michael to take the position that Lisa was nothing more than a girlfriend and travel companion:

> [90] A basic principle in our legal system is that a defendant is entitled to require the plaintiff to prove its claim - something more than advancing a reasonable position at law is required to attract heightened costs consequences. Thus, an unsuccessful party will not incur heightened costs consequences if his or her conduct, including the legal position advanced, is reasonable: *Hunt v. TD Securities Inc.*, 66 O.R. (3d) 481 (Ont. C.A.), at para. 153; see also *Foulis v. Robinson*, 21 O.R. (2d) 769 (Ont. C.A.), at p. 776.

Importantly, this basic principle does not result in a party being able to litigate with impunity. Where one party forces the other to prove its case and is unsuccessful, the length of the trial will be reflected in the bill of costs of the successful party. Therefore, when determining whether to make an elevated costs award, the question for the trial judge was whether Michael's conduct, including his legal position, was reasonable. And, according to Justice Gillese, it was.

First, the trial judge acknowledged that she struggled with whether the time the parties spent together during their relationship was sufficient to find that they "lived together" in a conjugal relationship. Second, a review of the case law demonstrates that where parties neither marry nor move in together, it is an open question as to whether they will be found to have cohabited. The fact that Michael lost on the issue of whether the parties had been spouses did not mean his legal position was unreasonable.

Also, in considering whether Michael acted reasonably "in relation to the issues", Justice Gillese noted that Michael entered into a Consent Order in which he agreed to provide Lisa with significant financial support, with which Order he fully complied, providing Lisa with over $620,000 between May 2015 and December 2018.

The Court of Appeal was also of the view that the trial judge also erred in principle in finding that Michael acted unreasonably in terms of his disclosure. The trial judge had opined at para. 18 of the Costs Reasons:

> Michael was not forthcoming in his disclosure. There is an absolute obligation in family law to provide reasonable disclosure. Michael's response to his lack of disclosure was that [Lisa] did not bring a motion asking for the disclosure. This is not an acceptable excuse. [Michael's] unreasonable behaviour will increase the costs award.

Justice Gillese agreed that Michael had an obligation to make "reasonable disclosure". The question is whether he did.

While the trial judge was critical of Michael's position that his annual income was not relevant because he conceded from the outset that he had the ability to pay any amount of spousal support, Justice Gillese found that position was not unreasonable. Michael had disclosed the standard items used to establish annual income, such as his income tax returns from 2012 to 2017. And he also candidly admitted that, in any given year, his actual annual income was substantially higher than that shown on the tax returns.

Michael had also made extensive financial disclosure to Lisa and her lawyers during their relationship, especially when they attempted to negotiate a domestic contract in 2002 and again in 2013 and 2014.

The amount of support to which Lisa was entitled was based largely on her need. There was no question that Michael was a person of extraordinary means, and financial disclosure beyond that which he provided was not necessary to demonstrate that. Further, Lisa played no role in Michael's financial success. Any compensatory claim was very weak, as found by the trial judge. Accordingly, Michael's means - beyond his ability to continue to support Lisa at the level he had during the relationship - were not relevant.

As a result, Michael's position regarding disclosure was not unreasonable. Reasonableness and proportionality are to be judged in context.

In conclusion, after factoring in the result of the appeal, Lisa was still the more successful party at trial and, consequently, was presumptively entitled to costs - but not to an elevated level of costs. Justice Gillese ordered costs in Lisa's favour on a partial indemnity basis. Her total legal

fees at trial were $463,114. On what Justice Gillese referred to as the "usual approach" of treating partial indemnity costs as 60 percent of full indemnity costs (there is no concept of "partial indemnity" or "substantial indemnity" under the *Family Law Rules*), she awarded Lisa her trial costs of $277,868, all inclusive.

Aubin v. Petrone, 2020 ABCA 13 – Piercing the Corporate Veil

"You're going to do **WHAT**???"

-Minority Shareholder

In *Aubin v. Petrone*, the Alberta Court of Appeal considered whether and when a court can pierce the corporate veil to secure an equalization payment.

The husband and wife were married in 1993 and separated in 2014. They had three adult children together. During the marriage, the husband started a research company, Quantiam, that was worth more than $15,000,000 when the parties separated. The husband owned 84.66% of Quantiam, the wife owned 3.99%, and 20 third-party investors owned the remaining 11.37%.

After determining the value of all of the parties' assets and their respective incomes, the trial judge, Justice Khullar, ordered the husband to pay the wife an equalization payment of $5,570,394, and indefinite spousal support of $7,200 a month. As the husband did not have sufficient liquidity to satisfy the significant judgment against him, the trial judge also reserved jurisdiction to deal with potential remedies under s. 9 of the *Matrimonial Property Act*, which provides, among other things, that to give effect to an equalization payment, the court can:

> (b) order a spouse to give security for all or part of any payment;
>
> (c) charge property with all or part of a payment to be made under the order and provide for the enforcement of that charge;
>
> . . . . .
>
> (j) make any other order that in the opinion of the Court is necessary.

As the husband and wife were unable to agree on how the husband was to satisfy the equalization payment he owed, the parties and Quantiam made further submissions to Justice Khullar. Justice Khullar determined that the equalization payment should be secured against the husband's shares in Quantiam. Additionally, based on the following conduct by the husband, her Honour concluded that it would also be appropriate to pierce the corporate veil and secure the husband's personal obligations to the wife against a multi-million dollar building that Quantiam owned in Edmonton:

- The husband had failed to make arrangements to pay the wife the money that he owed her voluntarily.
- He had caused Quantiam to call a loan on a property in which the wife had an interest "in retaliation for [the wife] commencing matrimonial litigation". He also threatened to foreclose on the property if the wife did not consider his settlement proposal.
- He had terminated the wife's employment by Quantiam and removed her as a director of the company.
- He had sought legal advice about establishing a new company to avoid his obligations to the wife.
- He had a history of being "irrational" when it came to the wife.

Justice Khullar also enjoined the husband from seeking relief under the *Bankruptcy and Insolvency Act* until he had executed a security agreement in favour of the wife for his shares in Quantiam and the company's building in Edmonton.

The husband appealed almost every aspect of Justice Khullar's decision to the Alberta Court of Appeal (the decision indicates that the husband raised 23 separate grounds of appeal).

The Court of Appeal had no difficulty upholding Justice Khullar's decisions on both spousal support and the amount of the equalization payment as the husband had failed to establish any errors that warranted appellate intervention.

However, the husband did raise three grounds of appeal that required consideration by the Court:

> (a) that Justice Khullar had erred by ordering the husband to pay the equalization payment in cash instead of by transferring shares in Quantiam to the wife;
>
> (b) that she had erred in piercing the corporate veil in order to secure the equalization payment that the husband owed the wife against Quantiam's building; and
>
> (c) that she had erred in prohibiting the husband from seeking relief under the *Bankruptcy and Insolvency Act*.

(a) *In Specie* Divisions In Alberta

The husband argued that Justice Khullar had erred by not allowing him to satisfy the equalization payment by transferring some of his shares in Quantiam to the wife. Justice Khullar rejected this request, and ordered the husband to make the equalization payment in cash, because a share transfer:

> • was prohibited by the terms of Quantiam's Unanimous Shareholder's Agreement;
>
> • would have had to be approved by Quantiam's directors, and the evidence showed that they would not have done so; and
>
> • most importantly, would have left the wife in the highly vulnerable position of being a minority shareholder in a private company that was completely controlled by the husband.

In dismissing this aspect of the appeal, the Court of Appeal confirmed that a monetary judgment is typically how matrimonial property disputes in Alberta are resolved:

> [161] **There is nothing incorrect at law in ordering a money judgment. That is the usual method of resolving a matrimonial property dispute**. In this case, the trial judge exercised her discretion to utilize this usual method of relief rather than an *in specie* transfer of shares. **A high degree of deference is given to a trial judge's findings in family law cases, and her decision was not clearly wrong, nor does it disclose error in principle or amount to an injustice**. Her decision to provide a money judgment as opposed to an *in specie* transfer of shares is therefore upheld. [emphasis added]

That being said, the Court also indicated that it did not necessarily agree with Justice Khullar's conclusion that she could not have ordered an *in specie* division of the husband's shares because that would have been contrary to the terms of the shareholder's agreement. However, it ultimately declined to decide the issue one way or the other for now because it was not necessary to do so to resolve the case at hand:

> [153] For a thorough review of the nature and effect of a Unanimous Shareholder Agreement, see *Duha Printers (Western) Ltd. v. R.*, [1998] 1 S.C.R. 795 (S.C.C.), paras 42, 61, 66-68, (1998), 159 D.L.R. (4th) 457 (S.C.C.); *Sumner v. PCL Constructors Inc.*, 2011 ABCA 326 (Alta. C.A.), paras 39-43, (2011), 51 Alta. L.R. (5th) 266 (Alta. C.A.), leave to appeal refused, 34630 (June 28, 2012) [2012 CarswellAlta 1115 (S.C.C.)]. **I have found no express legislative provisions nor binding authorities preventing a court from overriding the provisions of a Unanimous Shareholder Agreement in ordering a share transfer**. While courts have been reluctant to do so (see *C. (D.B.) v. W. (R.M.)*, 2004 ABQB 954 (Alta. Q.B.), para 71, (2004), 12 R.F.L. (6th) 14 (Alta. Q.B.); *Peregrym v. Peregrym*, 2015 ABQB 176 (Alta. Q.B.), para 359, (2015), 608 A.R. 340 (Alta. Q.B.); *Phillips v. La Paloma Sweets Ltd.* (1921), 51 O.L.R. 125 (Ont. H.C.)), **there may be some legislative authority for the courts having discretion to override constating documents** (see *Business Corporations Act*, RSA 2000, c B-9, s 242 on oppression or unfairness and s 248 on compliance or restraining orders).
>
> . . . . .
>
> [155] Given my decision below, **I need not resolve this issue, but only point out that although a corporation's constating documents should not be lightly overridden, it is left for another day, whether, with appropriate facts, this may be an appropriate remedy**. [emphasis added]

(b) <u>Piercing The Corporate Veil</u>

The husband also argued that Justice Khullar erred by securing the significant equalization payment against the building owned by Quantiam.

In deciding this issue, the Court of Appeal engaged in a thorough review of the law on piercing the corporate veil, starting with the Supreme Court of Canada's 1987 decision in *Kosmopoulos v. Constitution Insurance Co. of Canada*, 1987 CarswellOnt 132 (S.C.C.). In *Kosmopoulos*, Justice Wilson confirmed that a corporation is a separate legal entity from its shareholder(s), but that a court can lift the corporate veil in order to prevent an injustice between the parties. However, the Supreme Court did not establish a test to help the lower courts determine whether to lift the corporate veil in a particular case. Instead, it simply noted that the law on this issue "follows no consistent principle", and that "[t]he best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue[.]'"

Nine years later, in the seminal case of *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1996 CarswellOnt 1699 (Gen. Div.) at paras. 22-23, aff'd 1987

CarswellOnt 132 (S.C.C.), Justice Sharpe (as he then was) established the following two part test to help guide a court when determining whether to exercise its very narrow discretion to pierce the corporate veil:

> • "The first element, 'complete control', requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently[.]"
>
> • "The second element relates to the nature of the conduct: is there 'conduct akin to fraud that would otherwise unjustly deprive claimants of their rights?'"

See also *Yaiguaje v. Chevron Corporation*, 2018 CarswellOnt 7942 (Ont. C.A.), where the Ontario Court of Appeal recently reaffirmed the *Transamerica* test, and reiterated that while "corporate separateness is the rule", it is also "important that courts be rigorous in their application of the *Transamerica* test because the rule is provided for in statute and stakeholders of corporations have a right to believe that, absent extraordinary circumstances, they may deal with the corporation as a natural person." The same court confirmed that the corporate veil cannot be pierced simply because it may be "just and equitable" to do so.

Other cases, such as *Arsenault v. Arsenault* (1998), 38 R.F.L. (4th) 175 (Gen. Div.), have also clarified that the test for piercing the corporate veil should also require the claimant to establish that the misuse of the corporation must have actually caused the claimant a loss:

> [24] In the area of corporate and commercial law, the Courts are generally reluctant to look behind the corporate veil unless there are circumstances in which it is appropriate that this be done. In general, the following circumstances must be present:
>
> 1. The individual exercise complete control of finances, policy, and business practices of the company.
>
> 2. That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights.
>
> 3. The misconduct must be the reason for the third party's injury or loss.

In 2006, the Ontario Court of Appeal was called upon to decide whether the *Transamerica* test applied in the family law context in *Wildman v. Wildman* (2006), 33 R.F.L. (6th) 237 (Ont. C.A.). In answering this question *resoundingly* in the affirmative, Justice MacPherson, for a unanimous Court, determined that if the *Transamerica* test is met, the corporate veil can unquestionably be pierced in family law cases:

> [25] The crucial question in this appeal is whether the exception to the principle of separate legal personality for corporations set out in *642947 Ontario Ltd. v. Fleischer and Transamerica Life Insurance* should be injected into family law. **Should the courts in appropriate family law cases disregard the separate legal personality of a corporate entity where, in the words of Sharpe J. in the latter case, "it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct"? In my view, the answer to this question is a resounding**

'Yes'. . . .

. . . . .

> [49] In the end, although a business person is entitled to create corporate structures and relationships for valid business, tax and other reasons, the law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law. In appropriate cases, **piercing the corporate veil of one spouse's business enterprises may be an essential mechanism for ensuring that the other spouse and children of the marriage receive the financial support to which, by law, they are entitled**. The trial judge was correct to recognize that this was such a case. [emphasis added]

In *Aubin*, there was no dispute that the husband exercised complete control over Quantiam. The question, however, was whether he had engaged in conduct akin to fraud that would otherwise unjustly deprive the wife of her rights.

In a 2-1 split decision, Justice Antonio and Justice Martin upheld Justice Khullar's decision to use Quantiam's building to secure the significant equalization payment that the husband owed the wife - even though the husband was not the sole owner of Quantiam. Although Justice Khullar had not made a specific finding of fraud or conduct akin to fraud, she had made a number of serious findings about the husband's misconduct that, taken together, warranted piercing the corporate veil in this case. Furthermore, the husband's failure to pay the wife the money she was entitled to was a clear deprivation of the wife's rights:

> [52] The trial judge recited a non-exhaustive list of wrongs committed by [the husband] as the controlling mind of Quantiam. Quantiam quarrels with the characterization of these actions as "wrongs", and submits that none of them, taken alone, resulted in a loss to [the wife].
>
> **[53] I decline to interfere with the trial judge's interpretation of the evidence and findings of fact. Her findings are not undermined because she intentionally refrained from casting those findings in legal terms** - for example, whether [the wife's] termination and removal as a director were improper: Merits Decision at para 126. This was appropriate judicial restraint in the face of the extant oppression and foreclosure actions and the potential for other litigation. In any event, **it would have been neither correct nor sufficient to examine each wrongful action to determine whether it, alone, occasioned a loss. The trial judge correctly assessed the whole of the circumstances to determine whether it revealed flagrant injustice**.
>
> . . . . .
>
> [69] . . . [the wife] has been unjustly deprived of her rights and an inequity has resulted. The point of the equalization payment is not to enrich [the wife] with [the husband's] money. It is to ensure that she regains what is already hers. [The husband] and [the wife] were equal partners in their marriage and are equal owners of the wealth accumulated during its course. The trial judge correctly started from this frame of reference, applied the law correctly, and made orders for spousal support and property division. This court has unanimously upheld those orders. **[The wife] was and is the**

> **owner of 50% of the family's property. That equates to $7,459,088.00, of which $5,570,394.00 remains outstanding. [The husband] has the ability to return it to her but has chosen not to. He is withholding over $5 million of [the wife]'s money. That is an unjust deprivation, and it is the very basis for exceptions to corporate separateness**. [emphasis added]

The fact that Quantiam had other minority shareholders did not dissuade the majority from using corporate assets to secure an equalization payment. Justice Khullar's decision to use Quantiam's building as security achieved an appropriate balance between the need to protect the wife and the rights of Quantiam's other shareholders:

> [58] I do not accept Quantiam's suggestion that the presence of shareholders prohibits the lifting of the corporate veil in the family law context. **Such a rule would invite abuse, in that the owner of a company could avoid his or her legal obligations merely by issuing one share to a third-party shareholder, whether or not in exchange for bona fide value**.
>
> [59] At risk of oversimplification, protection of shareholders is the reason for the corporate veil. It is therefore obvious that **the presence of other shareholders is an important factor to be considered in deciding whether to lift it. It will also be relevant to consider the nature of the company (for example, family business versus publicly traded corporation), the reasonable expectations of the shareholders about how the company will be used by its principals, whether the shareholders were *bona fide* purchasers for value, and any other relevant factors**.
>
> [60] In this case, **the trial judge was alive to the interests of the minority shareholders**, as shown at para 26 of the Remedy Decision:
>
> > Quantiam is a private company with minority shareholders. This is certainly a complicating factual distinction; **the court must be cognizant of the rights of minority shareholders if a remedy is to be fashioned. But, again, the factual distinction is not a principled basis for not following the general approach in *Wildman***.
>
> **I agree. This conclusion finds further support in s 8(b) of the *Matrimonial Property Act*, which instructs that a spouse's contributions to a business "owned or operated by one or both spouses or by one or both spouses *and any other person*" are to be considered when effecting a distribution of property**. [emphasis added]
>
> [61] Unlike other cases, the **trial judge did not transfer assets out of Quantiam** (as in *Lynch v. Segal* (2006), 219 O.A.C. 1, 82 O.R. (3d) 641 (Ont. C.A.)) **and did not secure the matrimonial debt against all of Quantiam's assets** (as in *Wildman*). **Rather, "to recognize and protect the interest of the minority shareholders", she chose the more moderate remedy of using Quantiam's building as security for [the husband's] debt**: Remedy Decision at para 31.
>
> [62] If [the husband] satisfies the debt, Quantiam's building will not be affected. Meanwhile, the charge acts as a brake on any attempt by [the husband] to void

> Quantiam of its assets, to the advantage of all Quantiam's shareholders. The trial judge's sense of balance in crafting this remedy should be respected. [emphasis added]

Justice Feehan, on the other hand, in dissent, would have set aside the security orders as he was not satisfied that the husband's conduct rose to the level of fraud or "conduct akin to fraud" that is required before the corporate veil can be pierced, and he was concerned that the Justice Khullar's order could have an adverse impact on the rights of the 20 innocent minority shareholders:

> [192] **This is a corporation with 20 minority shareholders, approximately 30 employees and significant contractual obligations to arm's length third parties. It is subject to restrictive articles of association and a Unanimous Shareholders Agreement, and there has been no allegation of fraud or actions akin to fraud**. The wrongdoings alleged include Quantiam calling its demand loan on 159 and threatening to foreclose on the Nixon Road property in Summerland, BC, terminating [the wife's] employment, removing her as a director of Quantiam, and seeking legal advice as to the establishment of a subsidiary corporation to acquire BASF Qtech for the purpose of raising equity financing and offloading from BASF all residual obligations to stakeholders. **The cases clearly say that the wrongdoing involved must be "akin to fraud" or "grave misconduct employed to cause harm"** (*Yaiguaje v. Chevron Corp.*, 2017 ONSC 135 (Ont. S.C.J. [Commercial List]), paras 64-66, (2017), 410 D.L.R. (4th) 409 (Ont. S.C.J. [Commercial List]); *UBG Builders Inc (Re)*, 2017 ABQB 401 (Alta. Q.B.), para 71, (2017), 59 Alta. L.R. (6th) 255 (Alta. Q.B.)). **None of the wrongs alleged amount to fraud, behaviour akin to fraud or grave misconduct employed to cause harm**.
>
> . . . . .
>
> [197] **[The wife] does not present a rare and exceptional circumstance where a claimant has been unjustly deprived of her rights so as to create an inequity and justify piercing of the corporate veil, particularly when statutory and corporate remedies are available to her**. Instances in which piercing the corporate veil has been acceptable in family law are cases aligned with the "agent" or "puppet" situations. **I would not expand the remedy of piercing more broadly simply because this is a family law case**. Drawing a line as to how many other shareholders, directors, creditors or employees of the company might be sufficient to take the equities of the case away from piercing the corporate identity merely because the case involves family law is not a manageable standard.
>
> [198] I find there are no grounds sufficient to disregard the separate legal personality of Quantiam and to pierce the corporate veil for the collateral purpose of granting [the wife] a security interest or security agreement with respect to the Quantiam building, an asset of Quantiam and not [the husband]. I would have allowed the appeal on this issue. [emphasis added]

Justice Feehan makes a fair point. Can you imagine being a shareholder in a closely held company, only to find out that a major corporate asset has been placed at risk because the

majority shareholder owes his former spouse a significant equalization payment? By all accounts, Quantiam was a *bona fide* company, doing *bona fide* business, and with *bona fide* arm's length, innocent, third-party investors. This was not the case of the husband giving a few close friends a few shares in an attempt to thwart his equalization obligation. And then adding to this the majority's "musings" about overriding Unanimous Shareholder's Agreements and corporate constating documents? It was the husband that owed the wife money and it was the husband's conduct that was being impugned - not that of innocent minority shareholders. That is not a risk they bargained for. This is only going to make it more difficult and/or expensive for small companies to raise capital.

As for other provinces, the question remains unsettled. For example, in British Columbia, there seem to be competing principles. Some cases suggest that the court cannot tie up corporate assets because those assets are not owned by the shareholder: *Kirk v. Kirk* (2006), 25 R.F.L. (6th) 161 (B.C. S.C.); *Davidson v. Davidson* (March 17, 1983), Doc. Vancouver CA000253, [1983] B.C.J. No. 646 (B.C. C.A.); and *Rohani v. Rohani* (2004), 8 R.F.L. (6th) 179 (B.C. C.A.).

In *Rohani*, the British Columbia Court of Appeal suggested that as the wife enjoyed the benefits of incorporation during the marriage, she could not, on separation, escape the burden of its existence. Other cases, allow it: *Wu v. Sun* (2011), 97 R.F.L. (6th) 104 (B.C. C.A.).

(c) <u>The Bankruptcy Injunction</u>

The husband claimed that Justice Khullar had erred by enjoining him from seeking relief under the *Bankruptcy and Insolvency Act* until he had signed security agreements in the wife's favour.

Although Justice Khullar had not given reasons or cited any authority for granting this relief, the majority nevertheless upheld the decision as it "was literally 'textbook', as it mirrors the wording of a template Order Charging Property and Requiring the Execution of Security set out in Robert A. Klotz, *Bankruptcy, Insolvency and Family Law*, 2nd ed. (Toronto: Thomson Carswell, 2001) (loose-leaf updated 2001) at 22-18 to 22-19." Furthermore, given the husband's financial position, it was unlikely that he was going to go bankrupt in any event.

Justice Feehan, however, would have allowed the appeal and overturned the injunction, as the husband's conduct did not warrant such extraordinary relief, and this was an issue that could be dealt with later if need be on the basis of a fully matured matrix of evidence."

Unfortunately, neither the majority nor the dissent addressed the question of whether a court can actually prohibit someone from seeking relief under the *Bankruptcy and Insolvency Act* and, if so, when it might be appropriate to make such an order. It seems to us that a court cannot prohibit someone from availing of remedial legislation such as the *Bankruptcy and Insolvency Act*. And in the event of abuse, bankruptcies can be contested and annulled.

<u>Conclusion</u>

The Supreme Court of Canada rejected the husband and Quantiam's request for leave to appeal on June 25, 2020, so it looks like the majority's decision will remain good law (at least in Alberta) for the foreseeable future. However, we will have to wait and see whether the decision

to uphold the trial judge's decision will ultimately incentivize the husband to find a way to pay the wife the money he owes her voluntarily, or whether it is just going to lead to further litigation as the wife tries to enforce her security, and as Quantiam's minority shareholders and other creditors start to realize that their rights vis-à-vis the company may have been severely prejudiced by the family court's decision.

A.B. v. C.D. 2020 BCCA 11 – Parental Interference in child's medical decisions

How to win the Parent-of-the-Year" Award

In this fascinating case, the British Columbia Court of Appeal confirmed that a parent cannot interfere with a minor child's decision to undergo medical treatment if the minor child is capable of giving, and has given, informed consent, and the child's doctor agrees that the treatment is in the child's best interests.

The case also deals with using protection Orders and conduct Orders to prevent a parent from communicating with a child in a manner that could be harmful to him or her and from publishing information about the child.

The Facts

AB was a transgendered teenager who was biologically female. However, AB started identifying as male at 11 years old, and started socially transitioning when he was 12.

After he started socially transitioning, AB saw a psychologist who concluded that he met the diagnostic criteria for gender dysphoria, and was a good candidate for hormone therapy. AB's psychologist referred him to a pediatric endocrinologist, who also agreed "that masculinizing hormone treatment was both reasonable in the circumstances and in AB's best interests." AB and his mother signed the necessary consents for hormone treatment, but the father refused to do so.

After several months of trying to communicate with the father without success, AB's pediatric endocrinologist advised him that, pursuant to s. 17 of the *Infants Act*, minors are permitted to consent to their own medical treatment without a parent's permission and that, as AB's doctors had concluded that AB was capable of consenting, the father's permission was not required.

The father responded to this letter by starting a proceeding in the Provincial Court, and bringing an *ex parte* motion to prevent AB from pursuing treatment. The motion was granted, and a temporary Order was made prohibiting AB from seeking treatment.

After the *ex parte* Order was granted, AB and his mother commenced a proceeding in the Supreme Court for an Order confirming that AB was entitled to make his own medical decisions. The father responded by seeking a further injunction against AB, the mother, AB's lawyer, AB's doctors, the Ministry of Education, AB's school district, and various counsellors and officials at AB's school.

The matter came on for a hearing before Justice Bowden, who made an Order confirming that AB was capable of making his own medical decisions, and dismissing the father's request for an injunction. Justice Bowden also made freestanding declarations that:

- It was in AB's best interests to be "acknowledged and referred to as male, both generally and with respect to any matters arising in these proceedings, now or in the future and any references to him in relation to this proceeding, now or in the future, employ only male pronouns"; and to be "identified, both generally and in these proceedings by the name he has currently chosen, notwithstanding that his birth certificate presently identifies him under a different name."

- "AB is exclusively entitled to consent to medical treatment for gender dysphoria and to take any necessary legal proceedings in relation to such medical treatment[.]"

- "Attempting to persuade AB to abandon treatment for gender dysphoria; addressing AB by his birth name; referring to AB as a girl or with female pronouns whether to him directly or to third parties; shall be considered to be family violence under s. 38 of the *Family Law Act*." (The father had been engaging in these activities).

After Justice Bowden released his decision, AB's doctors started receiving threatening phone calls, and threatening posts started appearing online "analogizing AB's medical treatment to child abuse, perversion and even pedophilia", and advocating violence against AB's doctors. As a result of these threats, Justice Marzari granted a publication ban for the protection of AB's doctors.

When the father did not comply with the publication ban, AB applied for, and obtained, a protection Order restraining the father from trying to persuade him not to pursue treatment, referring to him as a girl directly or to third parties, or publishing or sharing any "information or documentation relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies", with certain enumerated exceptions such as his lawyer.

The father appealed to the British Columbia Court of Appeal. The Attorney General of British Columbia and six other organizations intervened on the appeal (the Provincial Health Services Authority of B.C., Justice Centre for Constitutional Freedoms, the Association for Reformed Political Action, Egale Canada Human Rights Trust, the West Coast Legal Education and Action Fund, and the Canadian Professional Association for Transgender Health).

Preliminary Issues

Before delving into the merits of the appeal, the Court of Appeal had to deal with two preliminary questions:

1) Whether the Court should refuse to hear the father's appeal because he had repeatedly breached the Orders under appeal, including giving interviews in breach of the publication ban; and

2) Whether the appeal was moot because AB had already begun hormone treatment and had gone through changes he said were irreversible.

The Court of Appeal recognized that it could, in appropriate circumstances, refuse to allow a party who was in breach of a court order to proceed with an appeal: *Larkin v. Glase* (2009), 2009 BCCA 321, 70 R.F.L. (6th) 263 (B.C. C.A.) at para. 34; and *B. (K.P.) v. R. (A.S.)*, 2016 CarswellBC 2611 (C.A.) at para. 37. However, it declined to exercise its discretion in this case "given the importance of the issues raised in this appeal and the fact that our focus at all times must rest on the best interests of AB, we would not decline to hear from [the father] on the appeal."

The Court also declined to exercise its discretion not to hear the appeal on the basis that it was moot because of the importance of the issues, and because the appeal dealt with more than just the question of whether AB should be able to continue receiving hormone therapy:

> [79] Turning to the mootness issue, we acknowledge that the evidence indicates physical and mental health risks associated with a discontinuance of treatment by AB at this time. However, **we would decline to make a determination as to whether this case is moot, given that we would regardless consider this an appropriate case to hear in an exercise of the court's residual discretion in the mootness analysis**: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) at 358-363; *R. v. Rajaratnam*, 2019 B.C.CA 209 (B.C. C.A.) at para. 117.
>
> [80] In any event, **the order impacting [the father]'s interactions with AB and others touching the issue of AB's transition are not moot and the appeal in any event would proceed in respect of those matters**. [emphasis added]

The Declarations

The Court of Appeal determined that Justice Bowden had erred in making the bald declarations referenced above (e.g. that it was in AB's best interests to be "acknowledged and referred to as male, both generally and with respect to any matters arising in these proceedings"), and that courts should generally not make freestanding declarations about a child's best interests:

> [119] If we view s. 37 of the *FLA* as countenancing the making of a bald "best interests" declaration in the matter of the provision of "health care services", we are risking the court's interference with the best interests determination, which is, by statute, entrusted to the child's "health care provider". **In our view, s. 37 deals only with considerations to be taken into account in "the making of an agreement or order . . . respecting guardianship, parenting arrangements or contact with the child". The provision does not contemplate freestanding judicial declarations as to the "best interests of the child" that are unconnected with agreements or orders respecting guardianship, parenting arrangements, or contact**. In particular, where a child has consented to health care in accordance with s. 17 of the *Infants Act*, s. 37 of the *FLA* does not furnish a court with authority to enter upon a de novo consideration of the child's best interests in respect of medical treatment. [emphasis added]

AB's Ability to Consent to Health Care

The main issue that the Court of Appeal had to grapple with was whether Justice Bowden had erred in allowing AB to undergo hormone therapy. The starting point for the Court's analysis was s. 17 of the *Infants Act*, which provides that:

> 17(1) In this section
>
> > **"health care" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose, and includes a course of health care**;
> >
> > "health care provider" includes a person licensed, certified or registered in British Columbia to provide health care.
>
> 17(2) Subject to subsection (3), **an infant may consent to health care** whether or not that health care would, in the absence of consent, constitute a trespass to the infant's person,

> and **if an infant provides that consent, the consent is effective and it is not necessary to obtain a consent to the health care from the infant's parent or guardian**.
>
> 17(3) **A request for or consent, agreement or acquiescence to health care by an infant does not constitute consent** to the health care for the purposes of subsection (2) unless **the health care provider providing the health care**
>
> > (a) **has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks** of the health care, and
> >
> > (b) **has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests**. [emphasis added]

The evidence in the court below satisfied Justice Bowden that AB's consent to hormone therapy met the requirements of s. 17(2) of the *Infants Act*, and that AB's doctors had explained the benefits and risks of the treatment and correctly. Accordingly, the Court of Appeal had no difficulty concluding that, based on the evidence, there was absolutely no basis to interfere with his Honour's decision:

> [129] Critically, in the context of s. 17 of the *Infants Act*, **Bowden J. found that AB's consent was sufficient for the treatment to proceed** (at para. 54). He then concluded (at para. 56):
>
> > Having considered the form of consent signed by A.B. and the evidence of I.J., G.H. and A.C., **I am satisfied that A.B.'s health care providers have explained to A.B. the nature and consequences as well as the foreseeable benefits and risks of the treatment recommended by them, that A.B. understands those explanations and the health care providers have concluded that such health care is in A.B.'s best interests**.
>
> [130] **Essentially, and correctly in our view, Bowden J. approached the review of the s. 17 issue - whether AB had the capacity to consent under s. 17(2) of the *Infants Act* - with a deferential review of the actions and determinations of the health care providers** in purported compliance with the prerequisites to a valid consent set by s. 17(3).
>
> [131] **On the record here we see no basis to suggest that the judge's conclusion in this regard was in error** - as we indicated at the conclusion of argument. [emphasis added]

With respect to AB's doctor's conclusion that hormone therapy would be in AB's best interests, the Court of Appeal accepted that a court could, in appropriate circumstances, overrule a health care provider's decision about a minor's best interests under s. 17(3)(b) of the *Infants Act*. However, it also determined that courts are required to give these types of decisions *significant* deference, "given the legislative intent behind s. 17 to recognize the autonomy of mature minors and the expertise and good faith of the health care providers." And in this case, the Court found that there was no basis to interfere with AB's doctor's decision:

> [133] The larger question, however, is whether a consent given under s. 17 of the *Infants Act*, and in particular whether s. 17(3) has been complied with, is open to review by a court. In our view, the answer must be "yes". **The issues encompassed by s. 17 must be justiciable, but the jurisdiction is limited**.
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> . . . . .
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> [135] **Clearly "subject to s. 17" means subject to a lawful exercise of the rights accorded to mature minors under s. 17**. The lawful exercise of those rights requires a health care provider to assess whether the "infant" understands the nature, consequences, benefits, and risks of the proposed treatment, and whether the treatment is in that individual's best interests.
>
> [136] **The court's approach to that review must be deferential given the legislative intent behind s. 17 to recognize the autonomy of mature minors and the expertise and good faith of the health care providers.**
>
> [137] As referenced above, the relief sought in [the father]'s petition is vastly beyond the scope of permissible review of a s. 17 determination. **The *Infants Act* has made it clear that health care professions, not judges, are best placed to conduct inquiries into the state of medical science and the capacity of their patients when it comes to questions of minors' medical decision-making. The statutory deference accorded to health care providers appropriately protects minors' medical autonomy by providing a limited scope of review**. In this case, Bowden J.'s ultimate finding on this issue was made in accordance with this principle and within his limited jurisdiction. [emphasis added]

<u>The Protection Order</u>

The other substantive issue that the Court of Appeal had to decide was whether Justice Marzari had erred in making a protection Order against the father to try to control his behaviour.

Section 183 of the *Family Law Act* gives courts in British Columbia broad authority to make protection Orders to prevent family violence, which is defined in s. 1 as including:

> 1 . . . (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
>
> (b) sexual abuse of a family member,
>
> (c) attempts to physically or sexually abuse a family member,
>
> (d) psychological or emotional abuse of a family member, including
>
> (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
>
> (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

If a court is satisfied that family violence is likely to occur against an at-risk family member, which s. 182 defines as "a person whose safety and security is or is likely at risk from family violence carried out by a family member", it can then make one or more of the following Orders to protect the at-risk person:

183(3) . . . (a) a provision restraining the family member from

(i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,

(ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,

(iii) following the at-risk family member,

(iv) possessing a weapon, a firearm or a specified object, or

(v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;

(b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;

(c) directions to a police officer to

(i) remove the family member from the residence immediately or within a specified period of time,

(ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or

(iii) seize from the family member anything referred to in paragraph (a) (iv) or (v);

(d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(e) any terms or conditions the court considers necessary to

(i) protect the safety and security of the at-risk family member, or

(ii) implement the order.

The Court of Appeal concluded that Justice Marzari had erred in making a protection Order

because, although the father's conduct had been inappropriate and contrary to AB's best interests, the evidence was insufficient to establish the existence of "family violence" within the meaning of s. 1 of the *Family Law Act*:

> [171] **There is evidence that [the father's] refusal to acknowledge AB's gender is clearly hurtful to AB, but there is insufficient evidence in the record before both Bowden J. and Marzari J. that [the father]'s conduct was grounded by an intent to hurt AB or that his refusal to agree with AB's decision about the treatment was ultimately unresponsive to AB when AB wished to disengage**.
>
> [172] **Without more, there was insufficient evidence in the unique circumstances here to ground a finding of family violence - that is, emotional or psychological abuse - as defined in the *FLA***. Significantly, neither judge conducted an analysis of whether [the father]'s conduct in relation to the name and pronouns he used with AB, and his discussions of AB's treatment choices, were sufficiently intentional or unresponsive to AB's communications with him to ground a finding of family violence. Bowden J. simply made a declaration that this constituted family violence without analysis (perhaps inadvertently as discussed above), and Marzari J. based this part of the protection order on this declaration.
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> [173] **It is not our intention to minimize in any way the pain that AB feels due to his father's refusal to accept his decision to identify as male and proceed with hormone treatment. It is also not our intention to condone [the father]'s conduct in refusing to engage with the medical professionals responsible for AB's care and refusing to engage in a more constructive way to communicate his views to AB**.
>
> [174] **However, [the father] is entitled to his views and he is entitled to communicate those views to AB. As difficult as this is, this difference of opinion alone cannot justify a finding of family violence**. As set out above, the evidence shows that AB is a mature minor with the capacity to make his own decision about the medical treatment recommended at this stage, and such capacity includes the ability to listen to opposing views. It also includes the ability to disengage in conversations that he finds uncomfortable or offensive. In fact, the evidence available suggests that AB has done just that, and that [the father] has generally respected this decision to disengage.
>
> [175] **In circumstances that do not fit squarely within the more obvious parameters of the family violence provisions in the *FLA*, it is our view that some caution should be exercised in identifying "psychological or emotional abuse" as constituting "family violence"**. This is especially important in cases such as this, which involve a complex family relationship stemming from a profound disagreement about important issues of parental roles and medical treatment. Moreover, a finding of family violence in such circumstances is inconsistent with the continuation of [the father]'s parenting responsibilities. [emphasis added]

We pause here to note that the main reason offered by the Court of Appeal here - the fact that the father's conduct was not grounded by an intent to hurt AB - does not, itself, appear to be

grounded in the statute, which does not speak of "intent." It seems odd to, on the one hand, speak of the "pain that AB feels due to his father's refusal to accept his decision to identify as male" and to specifically refuse to condone the father's conduct, and then suggest that a protection Order is not warranted for lack of intention. It seems that the father here was doing far more than just "communicating his opinions" to AB.

In any case, as a result, the Court of Appeal set aside the protection Order. But that was not the end of the matter, as ss. 222, 225, and 227(c) of the *Family Law Act* allow courts in British Columbia to make conduct Orders without the need to establish family violence. These provisions of the *Family Law Act* provide that:

> 222. At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:
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> (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
>
> (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
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> (c) to prevent misuse of the court process;
>
> (d) to facilitate arrangements pending final determination of a family law dispute.
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> . . . . .
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> 225. Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.
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> . . . . .
>
> 227. A court may make an order requiring a party to do one or more of the following:
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> . . . . .
>
> (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purposes for which orders respecting conduct may be made].

Even though AB had not requested a conduct Order in either the court below or on appeal, the Court of Appeal concluded that it would be appropriate to make a conduct Order that required the father not to "directly or indirectly through a third party, publish information or provide documentation relating to AB's gender identity, physical and mental health, medical status or treatments" except with his own lawyer, AB's lawyer, the mother's lawyer, AB's doctors, his own doctors, and any other person authorized by AB or the court. The Court of Appeal also ordered that the conduct Order would remain in place for a year, but that its term could be extended if necessary.

The father argued that this type of Order would be inconsistent with his *Charter* rights and

Charter values. The Court of Appeal disagreed with him because the *Charter* does not apply to private disputes and, as the Supreme Court of Canada confirmed in *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.), "the *Charter* guarantee of freedom of expression does not protect conduct that violates the best interests of the child test." Furthermore, while courts must always interpret legislation in a manner consistent with *Charter* values, unstructured and ad hoc appeals to "*Charter* values" are not appropriate: *E.T. v. Hamilton-Wentworth District School Board*, 2017 CarswellOnt 18540 (C.A.); *Gehl v. Canada (Attorney General)*, 2017 CarswellOnt 5673 (C.A.).

We agree with the Court of Appeal's decision not to allow the father to interfere with AB's ability to consent to a medical treatment that his doctor concluded would be in his best interests. Given the father's conduct, we also certainly understand why the Court made the conduct Order that it did. However, in our opinion, it should have allowed the protection Order to stand.

***Bisaillon c. Bouvier*, 2020 QCCA 115 – Settlement Privilege**

Repeat after me: "True Condition Precedent"

In *Bombardier inc. c. Union Carbide Canada inc.*, 2014 CarswellQue 3600 (S.C.C.) ("*Union Carbide*"), a unanimous Supreme Court of Canada determined that a confidentiality clause in a commercial mediation agreement will generally not displace the common law exception to the rule that settlement discussions are inadmissible, and found that evidence about what had happened during a mediation in this case was admissible to prove that a settlement had been reached:

> [3] . . . For the reasons that follow, I find that **parties are at liberty to sign mediation contracts under which the protection** of confidentiality is different from the common law protection. This enables parties to secure the safeguards they deem important and fosters the free and frank negotiation of settlements, thereby serving the same purpose as settlement privilege: the promotion of settlements. **However, I reject the presumption that a confidentiality clause in a mediation agreement automatically displaces settlement privilege, and more specifically the exceptions to that privilege that exist at common law**. The exceptions to settlement privilege have been developed for public policy reasons, and they exist to further the overall purpose of the privilege. **A mediation contract will not deprive parties of the ability to prove the terms of a settlement by producing evidence of communications made in the mediation context unless a court finds, applying the appropriate rules of contractual interpretation, that that is the intended effect of the agreement**. [emphasis added]

In *Bisaillon c. Bouvier*, the parties attended five mediation sessions to try and resolve the issues arising out of the breakdown of their relationship. At the end of the process, the mediator prepared a summary of what the parties had agreed to (the "Summary"). However, the parties did not sign the Summary or prepare a written agreement.

Litigation ensued when Mr. Bouvier decided that he did not want to abide by the settlement. During the litigation, an issue arose about whether the Summary was admissible, or whether it was protected by the confidentiality provisions of the mediation agreement and/or settlement privilege.

The majority of the Quebec Court of Appeal determined that, in accordance with the Supreme Court's decision in *Union Carbide*, the Summary was admissible to prove that the parties had reached a settlement during the mediation. The majority also upheld Justice Moore's decision in the court below that the parties had, in fact, reached a binding settlement.

In dissent, Justice Doyon distinguished *Union Carbide* on the basis that it had involved a commercial dispute, and concluded that in the family law context, the common law exception to settlement privilege does not apply unless the evidence shows that the parties intended otherwise. As a result, he determined that the Summary should be inadmissible. However, he reached the same result as the majority because the evidence about what happened after the mediation ended was sufficient to show that an agreement had been reached.

The Association de médiation familiale du Québec, which intervened in the Court of Appeal,

sought leave to appeal the Quebec Court of Appeal's decision to the Supreme Court of Canada. Its application for leave was granted on July 6, 2020, (hence the new style of cause of *Assoc. de médiation familiale du Québec c. Bisaillon* instead of *Bisaillon c. Bouvier*).

It will likely be some time until the appeal is heard and a decision is released. But whatever the Supreme Court ultimately decides, you can avoid this type of dispute entirely by ensuring that when engaging in settlement discussions (whether by correspondence, mediation, or direct negotiations), you make it clear at the outset that a written agreement signed by ***both parties*** is a ***true condition precedent*** to a binding settlement.[2]

[2] *Turney* v. *Zhilka*, [1959] S.C.R. 578; *Ball* v. *Ball*, 2002 CanLII 42022 (ONCA)

Kyle v. Atwill, 2020 ONCA 476 – Limitation Periods and Marriage Contracts

It's not a claim; it's a "gateway".

Is a "claim" to set aside a marriage contract a "claim" to which the *Limitations Act, 2002*, applies?

Whatever one calls a request to set aside a marriage contract under section 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Family Law Act*"), the Court of Appeal for Ontario has now unanimously confirmed that a separate limitation period, and specifically the two-year general limitation period in section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"), does not apply to it.

In this case, the husband and wife signed a "kitchen table" marriage contract one week before their wedding, in July 2005, after living together for a year. The wife found a template on the Internet for a "prenuptial agreement" and presented it to the husband for signing. The agreement purported to waive "alimony or support obligations" and provided that the parties would be separate as to property in the event of a breakdown of their marriage. Neither party consulted with a lawyer before signing the agreement or exchanged financial disclosure, even though the agreement says that they did.

The parties separated in August 2012, and began negotiations that were later abandoned by the husband due to issues with his mental health. In the spring of 2015, the husband's lawyer contacted the wife's lawyer to advise that the husband was going to commence an Application. However, no proceeding was commenced until August 25, 2017, when the husband brought an Application for, among other things, spousal support and equalization of net family properties.

In his Application, the husband did not specifically request an Order setting aside the marriage contract under section 56(4) of the *Family Law Act*, but referred to the contract and pled that it was signed with no legal advice, no financial disclosure and under duress.

In her Answer, the wife relied on the marriage contract as a defence to the husband's claim for equalization of net family properties and spousal support.

Four weeks before the scheduled trial date, the wife brought a summary judgment motion to dismiss what she argued was the husband's "claim" to set aside the marriage contract, because it was brought after the expiry of the basic two-year limitation period.

The motion judge agreed with the wife. He concluded that a request to set aside a marriage contract is a claim "to remedy an injury, loss or damage caused by an act or omission" within the meaning of s. 1 of the *Limitations Act* and was, therefore, subject to a two-year limitation period, unless the *Limitations Act* provided otherwise. While the husband did not raise this argument at the motion, the motion judge considered whether the husband's claim was a "proceeding for a declaration if no consequential relief was sought" under s. 16(1)(a) of the *Limitations Act* to which no limitation period would apply. However, the motion judge concluded it was not because the husband *was* seeking consequential relief - equalization and spousal support.

Since the motion judge found that the husband had "discovered" his claim by October 17, 2012, more than two years before he commenced his application, the husband was, therefore, statute-barred from asking to set aside the marriage contract, and, effectively from claiming

equalization and/or spousal support (notwithstanding that there is actually no limitation period governing a claim for spousal support under the *Divorce Act* or the *Family Law Act*).

The husband appealed. The issue for the Court of Appeal was what, if any, limitation period applied to a request to set aside a marriage contract (or to claim relief contrary to a marriage contract)? Was it the two-year limitation period in the *Limitations Act*? Was it the two- or six-year limitation period in the *Family Law Act* that applied? Was there no limitation period that applied? It was a novel issue and primarily one of first instance.

The Court of Appeal unanimously agreed with the husband that setting aside the marriage contract was not barred by the two-year limitation period in the *Limitations Act*, and overturned the motion judge's decision. However, the panel was divided in its reasons for so deciding.

Justice Feldman, with Justice Zarnett agreeing, concluded that the husband's "plea" to set aside the marriage contract was, in fact, a request for a "declaration where no consequential relief is sought" and therefore, pursuant to section 16(1)(a) of the *Limitations Act*, no limitation period applied:

> [49] As this is a limitations statute, as a matter of statutory interpretation, the question is: what is the meaning of consequential relief in this section and what is the intent of limiting the circumstances when there will be no limitation period to when the request for a declaration does not also claim consequential relief?
>
> [50] To answer this question, one must be careful not to confuse procedure with substance in interpreting and applying s.16(1)(a) of the *Limitations Act*. The *Limitations Act* is not concerned with procedural issues: the purpose and effect of its provisions is to govern the time limits for commencing actions and proceedings. Whether the parties have combined different claims or causes of action into one or more proceedings will not alter the time periods that govern. Put differently, different limitation periods may govern different claims in the same action.
>
> [51] The key, therefore, is not whether consequential relief in the form of a claim for a remedy against another party is sought procedurally in the same proceeding or in a subsequent proceeding. The key is whether the request for a declaration coupled with a claim for enforceable relief is, in substance, a claim for a remedy against the other party and not merely a request for a declaratory order.
>
> [52] This is because, if it is a claim for a substantive remedy against another party, then the limitation period applicable to the substantive remedy will apply to the claim. Similarly, if a declaration is necessary as a prelude to a claim for a remedy against another person, no limitation period applies to the proceeding for a declaration, but the applicable limitation period for seeking the remedial order may still bar the claim.

When isolated from the husband's claims for equalization and spousal support, his "plea" to set aside the marriage contract was a "significant obstacle" to claiming this relief, and not a claim for the relief in itself. Therefore, it amounted to a proceeding for only declaratory relief, with no consequential relief, and subject to no limitation period.

However, the husband's claim for equalization was still subject to a limitation period under the

Family Law Act - in this case six years. And the husband's claim for spousal support had no limitation period pursuant to s. 16(1)(c) of the *Limitations Act*.

While Justice Feldman's interpretation of "consequential relief" is quite narrow, it does make sense in light of the apparent purpose of s. 16(1)(c) of the *Limitations Act* - to prevent parties from circumventing the two-year limitation period by cloaking a claim for relief as a declaration. In this case, held Justice Feldman, there was no circumventing of any limitation periods because the *Family Law Act*'s six-year limitation period still applied to the husband's claim for equalization, and regarding the husband's claim for spousal support, there was no limitation period, as was intended by the legislature.

Therefore, it is unlikely that this narrow interpretation of "consequential relief" will open the floodgates and allow parties to circumvent limitation periods. Parties to a civil proceeding will not be able to use this decision to get around a two-year limitation period by seeking a "declaration", for example, that a contract is invalid or has been breached.

In concurring reasons, Justice Brown disagreed with Justices Feldman and Zarnett. While he acknowledged that a proceeding that sought only to set aside a marriage contract without claiming anything else *might* fall within s. 16(1)(a) of the *Limitations Act*, such a proceeding "would be a rare bird", and, in any event, did not apply to this case:

> [72] A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs - it is restricted to a declaration of the parties' rights and does not order any party to do anything: *Starz (Re)*, 2015 ONCA 318, 125 O.R. (3d) 663, at para 102. However, the present case is not one where the husband's request for an order setting aside the marriage contract is for an "existential judgment that considers rights to be or not to be" or where "the parties are not even called upon to take the next step in accommodating the declaration" so that the "failure of the parties to abide by its guidance will inevitably lead to independent subsequent proceedings claiming consequential relief", all hallmarks of a proceeding for a declaration in which no consequential relief is sought: Lazar, Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016), at pp. 7 and 54.

Since the husband was claiming equalization and spousal support - consequential relief - according to Justice Brown, s. 16(1)(a) of the *Limitations Act, 2002* could not apply.

Instead, Justice Brown, in accepting the husband's argument, took a different approach. He concluded that setting aside a marriage contract was just a "gateway" to claiming (in this case) equalization of net family properties and spousal support, and not a stand-alone "claim" to which a separate limitation period applied. Therefore, the limitation periods that applied to the husband's claims were:

> a. the *Family Law Act*'s six-year limitation period, in the case of the husband's claim for equalization of net family properties; and
>
> b. no limitation period, in the case of the husband's claim for spousal support.

Justice Brown also disagreed with Justice Feldman that the *Limitations Act* applied to the issue of setting aside a marriage contract in this case:

[95] In my view, the statutory language governing claims for equalization payments and spousal support indicate that any related "set aside request" in a proceeding be treated as one falling under the limitation periods that apply to the requests for an equalization payment and spousal support asserted in the proceeding.

[96] Dealing first with a proceeding that seeks spousal support, s.16(1)(c) of the *Limitations Act* states that:

> There is no limitation period in respect of . . . **a proceeding to obtain support** under the *Family law Act* or to enforce a provision for support or maintenance contained in a contract or agreement that could be filed under section 35 of the *Act*. [emphasis added]

[97] The statutory language of a "proceeding to obtain support under the *Family Law Act*" is broad enough to include a proceeding that couples a request to set aside the provisions of a domestic contract that limit or waive spousal support for reasons set out in *FLA* s.56(4) with a request for an order to provide spousal support under *FLA* s.33(1). The bars to relief contained in the domestic contract would have to be set aside in order for the applicant "to obtain" support under the *FLA*.

[98] Such an interpretation does not undermine the recognition *given* to domestic contracts by *FLA* s.2(10). It is consistent with the policy of allowing courts to set aside waivers of support in domestic contracts that result in "unconscionable circumstances": *FLA*, s. 33(4). It is also in step with the approach under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) that a domestic contract is a factor that a court must consider on an application for spousal support: *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 3030, at paras 68-78.

[99] So too, the language of s.7 of the *FLA* is broad enough to include a proceeding that couples a request to set aside the provisions of a domestic contract that limit or waive an equalization payment for reasons set out in *FLA* s.56(4) with a request for an order determining a spouse's entitlement to an equalization payment under *FLA* s.5 . . .

. . . . .

[100] . . . The husband's request for an equalization payment is "based on subsection 5(1)". The language in *FLA* s.7(1) that authorizes a court to "determine *any matter respecting the spouses' entitlement under section 5*" (emphasis added) is broad enough to include a concurrent request to set aside, for the reasons set out in the *FLA* s.56(4), the provisions of a domestic contract that limit or waive the right to an equalization payment. In other words, determining whether the provisions of a domestic contract validly limit or waive a spouse's entitlement to an equalization payment falls within the language of determining "any matter respecting the spouses' entitlement under section 5".

Although the panel was clearly doctrinally divided in its reasons, the Court acknowledged the "unique" nature of family law and were alive to the impractical consequences that could arise from a two-year limitation period. Justice Feldman commented that the special and often more generous limitation periods in family law, "account for the need to allow spouses more time to try to resolve their property issues without having to go to court, and the fact that a spouse or former spouse's support needs can change over time and may be addressed whenever they do."

(para. 32)

Justice Brown was also concerned that applying a two-year limitation period to a request to set aside a marriage contract would overcomplicate family law proceedings, and could even lead to the absurd requirement that a spouse move to set aside a marriage contract before separation and while the parties were happily married.

This is an important and welcome decision for family law litigants and their lawyers because it clarifies a limitation period issue that has been, surprisingly, unresolved to date. Parties and lawyers do not need to worry about a separate two-year limitation period when their application involves a claim contrary to the provisions of a marriage contract or to set aside a marriage contract.

However, to be very, very clear, it is not the case (as reported by some news outlets) that "there are no more limitation periods in family law." That is simply a mis-statement. The limitation periods within the *Family Law Act* that apply to equalization *still govern claims for equalization*. That has not changed.

This decision does leave three interesting question unanswered, however.

First, *Kyle v. Atwill* dealt with a claim made in the face of a marriage contract (or to "set aside" a marriage contract). But what of a claim to set aside a separation agreement? Will the same logic and considerations apply? There is an argument to be made that, as determined by the Supreme Court of Canada in *Miglin* and *Hartshorne*, marriage contracts and separation agreements are different contracts. Once parties reach the terms of a separation agreement dealing with the equalization and/or the division of property, should the general two-year limitation period in the *Limitations Act* then apply to a claim to set aside the separation agreement? Or is a claim to set aside a separation agreement also merely a claim for a declaration without consequential relief - a necessary "prelude" to the "real claim"?

Presupposing that the underlying limitation period of the "real claim" has not expired, it is hard to see why a separation agreement would be treated any differently than a marriage contract. Again, to use Justice Feldman's words:

> [52] If it is a claim for a substantive remedy against another party, then the limitation period applicable to the substantive remedy will apply to the claim. Similarly, if a declaration is necessary as a prelude to a claim for a remedy against another person, no limitation period applies to the proceeding for a declaration, but the applicable limitation period for seeking the remedial order may still bar the claim.

Second, and perhaps more troubling: if a request to set aside a separation agreement is also a "proceeding for a declaration where no consequential relief is sought" such that no limitation period applies, does that mean a party can apply to unwind a deal forever after the agreement was signed? For example, if 10 years after a separation agreement was signed, a spouse decided that he or she overpaid on an equalization payment, can the spouse apply to set aside the contract, rescind the deal, and get his or her money back? Justice Feldman specifically finds that the "husband's plea for *rescission* of the marriage contract is a proceeding for a declaration where no consequential relief is sought . . . no limitation period applies to that pleading." (emphasis added) (para 5). Therefore, one could argue, that a "plea" for rescission of a

separation agreement, which, effectively means a plea to be put in the position the party was in before the contract was made, does not attract a limitation period.

It is likely that the plea to unwind a deal and for the return of monies paid under the terms of the deal (arguably restitution or possibly unjust enrichment) is a "claim for a remedy against the other party" that attracts its own, two-year limitation period.

The answers to these questions? We will have to wait and see.

Barry v. Barry, 2020 ONCA 321 – Rights of First Refusal

A Right of First Refusal is Wrong

In *Barry v. Barry,* the Ontario Court of Appeal reminds us that *Martin v. Martin* (1992), 38 R.F.L. (3d) 217 (Ont. C.A.) and *Laurignano v. Laurignano* (2009), 65 R.F.L. (6th) 15 (Ont. C.A.) remain good law. A right of first refusal is a substantive right that has economic value. Such a right distorts the market for the sale of a property by eliminating competition among prospective purchasers, and thereby risks potentially devaluing the property. Absent consent, a court cannot simply grant one spouse a right of first refusal to purchase the matrimonial home. The spouse must bid on the property along with other prospective purchasers.

Albeit with good intentions, that is what the trial judge did in this case. The Appellant wanted to sell the matrimonial home and divide the net proceeds of sale, while the Respondent wanted to purchase the Appellant's interest. The current value of the home was not established at trial, but the trial judge still granted the Respondent the right to purchase the matrimonial home within 30 days from the release of the trial decision, after obtaining a fair market value assessment.

This was no different than granting the Respondent a right of first refusal, and the appeal was, therefore, allowed.

While it could not be clearer that a court cannot order a right of first refusal (absent consent), there are a few caveats or "carve outs" to this rule that we wanted to bring to your attention.

A right of first refusal may be permitted where the parties agree on the current value of the home: *Willemze-Davidson v. Davidson*, 1997 CarswellOnt 700, [1997] O.J. No. 856 (C.A.). It was also a factor in *Davidson* that the best interests of the children were linked to the continued occupation of the home. See also *Watson v. Watson*, 2015 CarswellOnt 4510 (S.C.J.) and *Silver v. Clow*, 2014 CarswellOnt 8555 (S.C.J.). The theory is that if the parties agree on the value of the property, then no one is prejudiced.

In addition, an owner can be ordered to accept a buyout where that party is frustrating a previously court-ordered sale: *Jeffrey v. McNab* (2019), 35 R.F.L. (8th) 135 (Ont. S.C.J.).

To try to get around the rule regarding rights of first refusal, some spouses choose to "lie in the weeds", wait for an offer the other spouse wants to accept, and then make a marginally better offer. This tactic was not allowed in *Murchison v. Sheriff*, 2011 CarswellOnt 11501 (S.C.J.). In that case, the Court noted that the obligation (in a previous court order) was to accept the "first reasonable offer". If the conniving spouse only offered marginally more, then the previous third-party offer was, by definition, the first reasonable offer.

Canada v. Colitto, 2020 FCA 70 – Section 160 Family Law Considerations

If you feel you're being watched, it's probably just CRA.

Husband owes taxes. Husband transfers property to wife. Husband goes bankrupt. CRA comes after wife. Lawyer gets sued. Section 160 of the *Income Tax Act* is the sort of sweeping statutory provision that keeps lawyers up at night and makes us want to double check our excess coverage.

Section 160(1)(e) of the *Income Tax Act* (the "*Act*") imposes joint and several tax liability on a spouse or common-law partner, minor, or otherwise non-arm's length party, where that person receives any property from a transferor who has a tax liability owing at the time of the transfer to the extent that the consideration paid is less than fair market value.

This appeal from the Tax Court of Canada (the "TCC") offers a very important clarification about the application of s. 160(1)(e).

The taxpayer/husband in *Canada v. Colitto* was *not* separated from his spouse, but the lesson would be the same if the parties were separated. At the time the husband transferred some real property to his wife for nominal consideration, the corporation that he was a Director of had failed to remit source deductions. Subsection 227.1(1) of the *Act* imposes joint and several liability on a Director of a corporation for the unpaid liabilities in such circumstances. As such, the Minister certified the liability and tried to collect the source deductions from the corporation.

The Minister was unable to recover from the corporation and, almost three years later, it issued a Notice of Assessment to the husband/Director pursuant to ss. 227.1(2) of the *Act* for the corporate tax liability.

About five years after that, the Minister issued Notices of Assessment against the wife under the s. 160(1)(e) "chasing" provisions. The wife objected and the matter was heard by the TCC.

The TCC interpreted ss. 227.1(1) and (2) of the *Act* in a manner that saved the transfers from being attacked by s. 160(1)(e). It held that although s. 227.1(1) imposes liability on the Directors at the time the corporation failed to remit, it is s. 227.1(2) that specifies **when** that liability arises, being when the Minister has certified its assessment against the corporation ***and*** has been unable to recover from the corporation. It is not uncommon for such collections to take years before the Minister looks to individual Directors. Therefore, pursuant to the TCC, the wife was untouchable.

The FCA, rightly, went back to a contextual and purposive interpretation of the *Act* (including consideration of the French version of the section for guidance), and overturned the TCC decision. It held that *the liability of a Director arises upon a failure to remit*. The purpose of s. 227.1(1) is to encourage Directors to ensure that corporate tax obligations are paid. Subsection 227.1(2) was, therefore, not to set up some further condition of liability.

The Federal Court of Appeal also noted that s. 227.1(1) of the *Act* was meant to protect against double taxation - requiring the Minister to first seek to recover from the corporation before looking to the individual Directors - but does not relieve the Directors of their obligation to direct the corporation to pay its proper taxes/remittances at first instance.

The 2019 TCC decision ostensibly created a short-lived opportunity for taxpayer Directors to divest property to non-arm's length parties even though there has been a failure to remit/pay corporate taxes while the Minister was making efforts to collect from the corporation. This strategy was soundly shut down by the FCA.

We note that the term "spouse" in the *Act* generally includes even separated spouses and, therefore, transfers of property are caught under s. 160(1) even between separated spouses. This means that a transferee spouse may be at risk if consideration for a transfer is less than fair market value and the transferor owes taxes.

For this reason, family law practitioners must know how s. 160(4) of the *Act* can insulate transferee clients from such joint and several liability, especially when consideration is not clearly set out in the context of various "trades" that may be part of a complete matrimonial settlement. Subsection 160(4) states:

> **Special rules re transfer of property to spouse or common-law partner**
>
> 160(4) Notwithstanding subsection 160(1), where at any time a taxpayer has transferred property to the taxpayer's spouse or common-law partner **pursuant to a decree, order or judgment of a competent tribunal** *or* **pursuant to a written separation agreement** *and*, **at that time, the taxpayer and the spouse or common-law partner were separated and living apart as a result of the breakdown of their marriage or common-law partnership**, the following rules apply:
>
> (a) in respect of property so transferred after February 15, 1984,
>
> (i) the spouse or common-law partner shall not be liable under subsection 160(1) to pay any amount with respect to any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (ii) for the purposes of paragraph 160(1)(e), the fair market value of the property at the time it was transferred shall be deemed to be nil, and . . .
>
> but nothing in this subsection shall operate to reduce the taxpayer's liability under any other provision of this Act. [emphasis added]

Accordingly, counsel must exercise extreme caution if separated parties are transferring assets *prior to an Order or written separation agreement for nominal consideration*, because joint and several liability can descend upon the transferee if the transferor is liable for taxes, known or unknown, and does not pay them. For assets of significance, transfers should occur pursuant to written separation agreements or orders to guard against this unanticipated result.

Van Delst v. Hronowsky, 2020 ONCA 329 – How to Value Federally Regulated Pensions

Well ***that's*** more clear. But I *still* hate pensions.

There is an old Billy Crystal routine where he plays Howard Cosell interviewing Marvin Hagler, Thomas Hearns, Larry Holmes, Muhammad Ali (all of whom are also perfectly voiced by Billy Crystal). It's available on YouTube. In answer to one of Cosell's questions, Larry Holmes answers, "Well, Howard . . . I like eggs . . . I loooove eggs."

What does that have to do with pensions? Well, we hate pensions ("hate" is such a strong word - let's say "really dislike"). They are complicated. They are confusing. There are rules for valuing them. There are rules for dividing them at source. They are complicated by things like "joint survivor" pensions; elections; and survivor benefits. They are a major cause of solicitor's negligence claims. They often require an actuary (especially in dealing with division options) in all but the most basic cases, and we then need to retain a translator to translate the advice from the actuary into English. So, as much as Larry Holmes loves eggs, we hate pensions.

However, this recent decision from the Ontario Court of Appeal makes us hate pensions just a *little* bit less, by clarifying how interests in Federally regulated pensions are to be valued (in Ontario).

How to Value a Federal Pension

In 2012, to simplify the valuation of pensions for the purposes of property division, the Ontario government amended the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*") and the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"). The amended Acts set out standard rules to follow for pension valuations (such as age of retirement, etc.), and valuations became the responsibility of pension administrators as opposed to privately retained actuaries. Gone were the days when each party retained their own expert actuary to opine on the value of a pension, and standard valuation rules were implemented that offered generalized "pension justice" that allowed for exceptions in only the most outlying cases (cases of imminent death, for example). To paraphrase Justice Hourigan, the amendments allowed courts to get out of the pension valuation business.

However, the standardization of pension valuations in the *PBA* and *FLA* only applied to pensions administered pursuant to the *PBA*. The amendments did not clearly speak to the valuation of other pensions - Federal pensions under the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 ("*PSSA*") or foreign pensions, for example. Therefore, the question remained as to how to value these other pensions for equalization purposes, and it is this question the Ontario Court of Appeal answered in *Van Delst*.

The parties were married in October 1995, and they separated in September 2016. They each worked for entities governed by the *PSSA*. The appellant husband became a pension member on December 4, 1984, and retired on December 17, 2016. The respondent wife started working for the Royal Canadian Mounted Police in 2008, and was still employed there when the trial started.

The wife started an application in May 2017, for spousal support, child support, custody, and equalization of net family properties. In August 2017, the husband filed his answer. In September 2018, the wife amended her application to include a claim for divorce. The parties

were able to resolve all issues except equalization, which proceeded to trial. The most significant component of the net family property calculation was the value of the parties' pensions.

According to s. 10.1(1) of the *FLA*, the "family law value" of a spouse's interest in a pension plan is determined in accordance with s. 67.2 of the *PBA*. However, where the pension is not governed by the *PBA*, s. 10.1(2) of the *FLA* requires that the *PBA* approach be used, "with necessary modifications". One element of the valuation calculation under the *PBA* is the "normal retirement date" under the pension plan. *PBA* pension plans are *required* to provide a normal retirement date, which then allows for a straightforward valuation calculation. The *PSSA*, however, does not set a normal retirement date.

Both parties retained experts (actuaries) and tendered reports valuing their respective pensions. The wife's expert used 65 as her "normal retirement date" because, although retirement with an unreduced pension was possible at 60, a "fair amount" of civil servants work past 60. The husband's expert calculated the value using ages 60 and 65. He used 60 because this is when all members who joined prior to 2013 were entitled to unreduced benefits. The husband's expert also opined that 65 was reasonable for several reasons, including because it was not unusual for members to retire after 60, and the majority of pension plans in Canada define the normal retirement age as 65. Notably, this is *precisely* the sort of argument the pension-related amendments to the *PBA* and *FLA* were meant to avoid.

Based on pre-separation evidence of the parties' intended retirement dates, and relying on the pre-*PBA* amendment case of *Di Francesco v. Di Francesco*, 2011 CarswellOnt 5265 (S.C.J.), the trial judge concluded that the "normal retirement dates" for the husband and wife were ages 60 and 65, respectively (the trial judge found that the wife continued to work and intended to do so until age 65, while the husband planned to retire when he was entitled to an unreduced pension).

In calculating the parties' net family properties, the trial judge also did not include the wife's survivor benefits under the husband's pension in her net family property because she would lose her entitlement to those benefits on divorce. The value of the husband's survivor benefit was not provided and was not included in his net family property. Contingent survivor benefits were included in the net family property calculation, over the husband's objection.

On appeal, the main issue was the valuation of the parties' federally regulated pensions for equalization purposes. With respect to that main issue, three aspects of the trial judge's reasons were challenged:

(a) The determination of the parties' normal retirement dates;

(b) The decision not to include in the wife's net family property the contingent interest she held in the husband's pension; and

(c) The inclusion of a contingent survivor benefit in valuating the parties' pensions.

The Court of Appeal held that the trial judge had reached the right conclusions on the survivor benefit and contingent survivor benefit issues, but that she had erred in her approach to all three issues by failing to heed the requirement of s. 10.1(2) of the *FLA* that, in valuing pensions that

are not provincially regulated, the Ontario method of valuation should be applied, with only necessary modifications.

Ultimately, Justice Hourigan, for a unanimous Court of Appeal, decided that the correct approach to pension valuation issues for non-*PBA*-regulated pensions is to follow the scheme of the *PBA* as closely as possible, getting valuations from their pension administrator where possible. Only where this is not possible, or where issues remain as to the proper application of the Ontario regime to a federal pension plan, should parties refer such issues to a trial judge for determination - preferably with the aid of a jointly appointed expert.

Generally, the rules for valuing pensions are set out in s. 67.2 of the *PBA* and the regulations. They comprise a "rule book" for pension valuations, setting out standard valuation assumptions such as "normal retirement date" and life expectancy, etc.

As noted above, the other relevant legislative provisions are found in sections 10.1(1) and 10.1(2) of the *FLA*:

> 10.1(1) The imputed value, for family law purposes, of a spouse's interest in a pension plan to which the Pension Benefits Act applies is determined in accordance with section 67.2 or, in the case of a spouse's interest in a variable benefit account, section 67.7 of that Act. 2009, c.11, s. 26; 2017, c. 8, Sched. 27, s. 21 (1).
>
> 10.1(2) The imputed value, for family law purposes, of a spouse's interest **in any other pension plan** is determined, **where reasonably possible, in accordance with section 67.2** or, in the case of a spouse's interest in a variable benefit account, section 67.7 of the Pension Benefits Act ***with necessary modifications***. 2009, c.11, s. 26; 2017, c. 8, Sched. 27, s. 21 (1). [emphasis added]

Justice Hourigan held that the phrase "with necessary modifications" in s. 10.1(2) indicated a specific legislative intent that the substance of s. 67.2 of the *PBA* be applied, while recognizing that some details may require modification. His Honour then noted that the words, "with necessary modifications" are a "contemporary reformulation of the Latin phrase *mutatis mutandis*": *R. v. Penunsi*, 2019 CarswellNfld 268 (S.C.C.), at para. 49, meaning that the rules to be applied are read with necessary changes in points of detail, while the matter remains the same (*mutatis mutandis* is a personal favourite of ours; it says so much with so little).

Any departure from the *PBA* methodology must be justified as necessary by the party seeking that departure: *Kelly v. Kelly*, 2017 CarswellOnt 21320 (S.C.J.), at paras. 161-162. Justice Hourigan adopts this statement. Therefore, if one of the parties can show that, because a plan is not regulated under the *PBA*, a modification to the approach is necessary, departure will be warranted. Otherwise, the default position is that the *PBA* approach must be used.

This is undoubtedly correct because, as noted by the Court, it is consistent with the legislative intent in reforming pension valuation on marital breakdown - to create a uniform approach to create certainty. Therefore, a non-Ontario pension is to be valued, for family law purposes, the same way as would an Ontario regulated pension. The valuation rules and formula in the *PBA* and regulations must be applied to a non-Ontario pension with modifications only where necessary. *PBA* pensions, Federal pensions and foreign pensions are to be valued in the same manner, to the extent reasonably possible.

Therefore, the error in the judgment below was that the trial judge had not defaulted to the requirement that a federally regulated pension should be valued as would be a *PBA*-regulated pension, unless a departure from that method was necessary in the circumstances. Instead, the judge below applied a pre-legislative-reform "tailoring" of the valuations to the parties' specific circumstances.

What is the "Normal Retirement Date"?

The "normal retirement date" is one of the variables included in the pension valuation methodology prescribed under the *PBA* (this is because the value of a pension is nothing more that the present value of a stream of payments - the earlier the retirement, the longer the payments, and the higher the value of the pension). However, while every *PBA*-regulated pension must specify a "normal retirement date" (see ss. 1(1) and 10(1)(4) of the *PBA*), the Federal plans in this case did not so specify.

Therefore, to calculate the value of the parties' pensions in this case in accordance with the *PBA* methodology, the parties' expert actuaries had to fix a value for this variable.

The question for the Court of Appeal, then, accepting that the details of the plan at issue did not "map perfectly" into the *PBA* valuation regime, was "what modification was necessary"?

Relying on definition of "normal retirement date" in the *PBA* and in several provincially regulated pension plans, along with guidance from the Financial Services Commission of Ontario, Justice Hourigan held that the "normal retirement date" for an extra-provincial pension does not result in a case-specific inquiry. Rather, it is a functional value representing **the date at which the pension plan entitles any given member to unreduced pension benefits**. The question does not result in a case or party-specific inquiry. This was a "necessary modification." And in the case of the *PSSA* pensions at issue in this case, the terms of the *PSSA* made it clear at what age all contributors were entitled to retire with an unreduced pension, which is equivalent to the "normal retirement date" in the provincial plans.

As a "functional equivalent" to the "normal retirement date" was apparent on the face of the parties' pension plan, it was not necessary to engage in a party-specific inquiry about the date of anticipated retirement. Applying an approach based on the terms of the pension plan rather than the intentions of the parties, the normal retirement date for *these* parties was determined to be **age 60** (this followed from a somewhat detailed and complicated review of the terms of the *PSSA*). However, a caution is required: given the different pension regimes within the *PSSA*, while the "normal retirement date" will always be the date a person can retire with an unreduced pension - it does not necessarily follow that the "normal retirement date" for all people in a *PSSA* plan will be age 60. Rather, some investigation and careful reading of the *PSSA* (or an actuary) will be required.

Justice Hourigan then offers this advice:

> [41] I add the following regarding the process to be followed when valuating non-Ontario pensions. Generally, the same process should be followed as with a provincially regulated plan. The parties should request that the pension administrator generate a value based on the Ontario law. If a pension administrator, who is not regulated by the provincial legislation, refuses to calculate the value, or if issues arise regarding the necessary

modifications to be made, directions from the court may be sought. The preferable approach is that a single jointly-appointed expert provides expert evidence. The appointment of competing valuators should be avoided because it encourages the type of costly valuation litigation that the new legislation was designed to avoid.

The Survivor Pension

Should the trial judge have included the survivor pension in the wife's net family property?

The husband argued that the trial judge erred by *not* including the contingent interest the wife had in the husband's pension (valued at $392,000) in her net family property (even though it would only be available to the wife if the husband died **while they were still married**). The husband argued that, as of the date of separation, there was no intention to divorce (the wife did not claim a divorce in her original application). The wife argued that she was not entitled to a survivor pension if she was not his spouse at the time of his death. She ultimately sought and was granted a divorce.

While the Court of Appeal agreed that the survivor pension should not be included, they did not agree with the reasoning below. The trial judge reasoned that the wife had ultimately asked for a divorce, which was consented to by the husband, and therefore would not fall within the definition of a "survivor" within the *PSSA*.

The correct approach, opined Justice Hourigan, was to ask the same question as asked on the valuation issue and the issue of "normal retirement date": What would the law require if this were an Ontario pension - and were there any "necessary modifications" to that approach in the circumstances?

The *PBA* only mandates a value for a survivor pension payable to a former spouse of the member if the separation occurs *after* retirement. However, under the *PSSA*, a separated spouse is entitled to a survivor pension if the parties are still married (i.e. not divorced) when the member dies.

Justice Hourigan pointed to the fact that no modification to the "usual approach" in the *PBA* regime was necessary. He again emphasized the expectation that the Ontario regime must be applied where reasonably possible, "unless there are **compelling** reasons not to." In these circumstances, however, where entitlement to the survivor benefit terminates upon divorce, and the parties consented to a divorce early in the proceedings, there was no "compelling reason" to depart from the requirements of the standard rules so as to force the wife to include the value of an asset she would never realize upon.

We have one issue with this rationale. Under the *PBA*, a spouse is entitled to a survivor pension if s/he is the spouse on retirement. Under the *PSSA*, a separated spouse is entitled to a survivor pension, as long as she is still married to the member on the date of death. Ultimately, the court must consider whether, on the date of separation, there is any basis to think that the parties will not actually divorce. While we would think that, in most cases, the answer will be "no", using the fact of a subsequent divorce as justification for not including the survivor pension, respectfully, uses hindsight, offending general valuation principles: *Ross v. Ross* (2006), 34 R.F.L. (6th) 229 (Ont. C.A.); *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.). However, the "Hindsight Rule" admits many exceptions, Justice Hourigan is not a Chartered Business

Valuator, and the result is correct.

The Contingent Survivor Benefit

Did the trial judge err in including a contingent survivor benefit in the husband's net family property?

Under the *PSSA*, a contingent survivor benefit is payable to a pension member's future potential spouse. Some value for a contingent survivor benefit is included in the value of a pension based on the probability of the member having an eligible spouse at death and based on the age of the spouse. At trial, the Court included the value of the contingent survivor benefit in the husband's net family property. The husband argued that the trial judge had erred doing so.

Again, the Court of Appeal found that the trial judge reached the correct result but for the wrong reason. And, again, the Court stated that the correct approach was to determine what the law would require if this were an Ontario pension, and then determine whether any modifications of that approach are necessary in the circumstances.

For a *PBA* pension, the Financial Services Commission has mandated that pension plan administrators must include the value of contingent survivor benefits in the family law value of a pension - this, notwithstanding that the member will never actually receive the contingent survivor benefit (they would be dead).

Any unfairness aside, however, that is how a *PBA* pension would be valued, and absent any "necessary modification" that is how a *PSSA* pension is to be valued for family law purposes in Ontario. To do otherwise would be a modification of the standard valuation methodology, and there was no "compelling reason" to do so. To address the possible unfairness, Justice Hourigan noted (and he is probably right) that "[t]he ability to confer a survivor benefit on a future partner is of value to a pension member even if the member does not receive these funds personally." No changes were necessary for the Court to apply the usual provincial approach to these federal pensions.

The only problem we have with this is what appears to have been a "throw-away" line in his Honours decision: "The appellant's retirement was a post-separation event, and such events generally will not affect the valuation of assets on valuation day according to the standard methodology." However, if that is the case, why did the post-separation divorce impact the value of the wife's survivor pension?

All-in-all an excellent judgment and some long-needed clarification.

…still hate pensions.

***Noriega v. Litke*, 2020 ONSC 2970 – Restraining Orders**

Go away.

This was a motion by the mother for "an urgent restraining order" against the father, and offers an excellent review of the test for a restraining order.

In her Notice of Motion, the mother listed a series of somewhat general allegations about the father's conduct. Of course, noted Justice Price, allegations in a Notice of Motion are not evidence.

In her supporting Affidavits, the mother offered some further details, including that:

> (a) The father refused to give the parties' adult daughter funds which she had been saving for school;
>
> (b) In 2018, the father sent bullying emails to the mother's former lawyer;
>
> (c) The father allegedly attended at the mother's home and moved her garbage can and recycling from her yard toward the door and then tried to open the front door;
>
> (d) The father allegedly had committed acts of violence years ago against people in Peru, where the parties met, during the early years of their relationship

There was also evidence that the father had a historic record of a conditional discharge from 2008, according to which the father had been found guilty of criminally harassing the mother over a period of three days in 2007.

Based on this evidence, the mother claimed that she was "extremely scared of the [father's] unstable behaviour" and afraid that he may try to hurt her, any member of her family, her pets, and her property.

The evidence of both parties made it clear that this was an unhappy marriage from the very beginning. However, "unhappiness" does not comprise any part of the test for a restraining order.

The current litigation involved the father's request to terminate child support for their youngest child, who was 19 years old.

The father acknowledged that he attended at the mother's property on February 28, 2020, for the purpose of serving her with the Trial Record - probably not the best choice - but he denied the balance of mother's allegations about what occurred on that date (although he did acknowledge ringing her doorbell in order to try to serve her personally).

In Ontario, the authority of the court to make a restraining order is set out in s. 46(1) of the *Family Law Act*. That section (which is similar to like provisions in other provinces) provides:

> **46** (1) On application, the court may make an interim or final restraining order against a person described in subsection (2) if the applicant has **reasonable grounds** to fear for his or her own safety or for the safety of any child in his or her lawful custody.
>
> **46** (3) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court

considers appropriate:

> 1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating **with the applicant or any child in the applicant's lawful custody**. [emphasis added]

That is, a party seeking a restraining order must establish "reasonable grounds to fear for . . . **his or her own safety or for the safety of any child in his or her lawful custody**."

As noted by Justice Price, the mother's request for a restraining order based on her claimed fear that the father may hurt her pets and her property failed because they did not fit under the enumerated considerations that are set out in ss. 46(1) and 46(3)(1).

Similarly, because the parties' children were then adults, none were "in the lawful custody" of the mother. As a result, the mother's request for a restraining order based on her claimed fear that the father might hurt a member of her family also failed.

As a result, that left the mother to establish that she "has reasonable grounds to fear for . . . her own safety."

This is a failing of the restraining order provisions of the *Family Law Act*. Notably, in the upcoming amendments to the *Divorce Act*, "family violence" is defined to specifically include "threats to kill or cause bodily harm to any person"; "threats to kill or harm an animal or damage property; and the killing or harming of an animal or the damaging of property." Hopefully, when Ontario amends its legislation to bring it in line with the amendments to the *Divorce Act*, the legislature will include similar provisions to the ones that the British Columbia legislature included when it amended its *Family Law Act* [see the definition of "family violence" in s. 1 of the B.C. *Family Law Act*, S.B.C. 2011, c. 25]. See also, for example, s. 6.1 of Manitoba's *Domestic Violence and Stalking Act*, C.C.S.M. c. D93.

The question then arose of whether the mother's "reasonable grounds" should be assessed objectively - from the point of view of the mythic "reasonable person"; or subjectively - from the point of view of the mother herself.

The Ontario Court of Appeal, however, took serious issue with the motion judge's decision to grant partial summary judgment.

This question was thoroughly discussed by Justice McDermot in *Fuda v. Fuda*, 2011 CarswellOnt 146 (S.C.J.):

> [31] The test for whether a restraining order?should be granted is, under both s. 46(1) of the *Family Law Act* and s. 35(1) of the *Children's Law Reform Act*, whether the moving party "has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody." This test was considered in *Khara v. McManus*, 2007 ONCJ 223 (CanLII), [2007] O.J. No. 1968 , 2007 CarswellOnt (C.J.) which was a trial of an application for a restraining order. Justice P.W. Dunn stated, at para. 33 as follows:
>
> > When a court grants a restraining order in an applicant's favour, the respondent is restrained from molesting, harassing, or annoying the applicant. **It is not necessary**

> **for a respondent to have actually committed an act, gesture, or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. However, an applicant's fear of harassment must not be entirely subjective, comprehended only by the applicant. A restraining order cannot be issued to forestall every perceived fear of insult or possible harm, without compelling facts**. There can be fears of a personal or subjective nature, but they must be related to a respondent's actions or words. A court must be able to connect or associate a respondent's actions or words with an applicant's fears. [emphasis added]

Therefore, as Justice Price correctly noted, the notion of "reasonable grounds to fear" has both a subjective and an objective component. This makes good sense. Subjectively, a spouse that has lived with an oppressive or abusive domestic partner may know the signs of an anticipated incident of family violence. There may be a regular cycle of behaviour or "special words" used by a responding party that, historically, have given an applicant good reason to be scared, but that might not seem at all sinister to a third party. On the other hand, statements and behaviours that cannot, without subjective interpretation, support "reasonable grounds to fear" should not be sufficient to support a restraining order.

That said, subjective fear with proper and detailed evidence may be sufficient, as long as the evidence convinces the court that a reasonable person in the shoes of the party requesting the restraining order would have reason to fear for his/her psychological or physical safety: *McCall v. Res*, 2013 CarswellOnt 5865 (C.J.) - sort of a "modified subjective test". This makes sense because a reasonable person armed with the history of the matter may very well have reason to fear something that might not give an uninformed reasonable person a basis to be fearful.

In this case, there was not much beyond the bare assertions of the mother that she feared the father. In considering what Justice Price found to be conclusory and mostly unsupported statements, his Honour made an analogy to the process of obtaining a search warrant, and cited the Ontario Court of Appeal case of *R. v. Debot*, 1986 CarswellOnt 135 (C.A.):

> . . . a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found at a certain place would be an insufficient basis for the granting of the warrant. **The underlying circumstances disclosed by the informer for his or her conclusion must be set out**, thus **enabling the justice to satisfy himself or herself that there are reasonable grounds for believing** what is alleged. **I am of the view that such a mere conclusory statement made by an informer** to a police officer **would not constitute reasonable grounds** for conducting a warrantless search or for making an arrest without warrant. [emphasis added]

By analogy, Justice Price concluded that he could not just rely on the mother's bare assertions of fear. More was required for her to establish, from a subjective perspective, "reasonable grounds to fear" for her safety.

Helpfully, Justice Kristjanson very recently considered the type of evidence required for an applicant to establish a subjectively held "reasonable grounds to fear" for his or her safety in

Yenovkian v. Gulian, 2019 CarswellOnt 21614 (S.C.J.):

> A restraining order will be made where a person has demonstrated a lengthy period of harassment or irresponsible, impulsive behaviour with the objective of harassing or distressing a party. There should be some persistence to the conduct complained of and a reasonable expectation that it will continue without court involvement. See: *Purewal v. Purewal,* 2004 ONCJ 195.

In this case, Justice Price found, correctly in our opinion, that the mother's evidence was lacking. A restraining order is a serious remedy with potentially serious repercussions and implications on the liberty of a person restrained. Here, the mother's evidence lacked the specific, detailed evidence that is (and should be) required to obtain a restraining order.

Justice Price then turned to consider the matter from the objective standard - did the mother have objectively reasonable grounds to fear for her safety?

In considering the objective test, Justice Price again considered *R. v. DeBot, supra*, in which Justice Martin wrote:

> On an application for a search warrant, the informant must set out in the information the grounds for his or her belief **in order that the justice may satisfy himself or herself that there are reasonable grounds for believing what is alleged** . . . The standard of "reasonable ground to believe" or "probable cause" is not to be equated with proof beyond a reasonable doubt or a prima facie case. **The standard to be met is one of reasonable probability**. [emphasis added]

Based on the very dated and general evidence offered by the mother, she also failed the objective test. On the one specific incident, the father had a valid reason to attend at the mother's residence - to deliver the Trial Record. Again, it may not have been wise, but it was not, in and of itself, sufficient to meet an objective fear. Notably, the incident took place on or around March 7, the motion for the restraining order was dated May 7, and the mother offered no explanation for the two-month delay.

As a result, the mother's motion for a restraining order was dismissed.

***Leitch v. Novac*, 2020 ONCA 257 – Family Law, Disclosure and Conspiracy**

You're not paranoid if they're really out to get you.

This is an important appellate case about family law, disclosure, and conspiracy. As the Supreme Court refused leave to appeal on November 12, 2020, it deserves particularly close attention.

Since the Supreme Court of Canada's decision in *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.), there has been a general feeling that most torts should not extend into the family law realm given the "undesirability of provoking suits within the family circle." See, for example, *Waters v. Michie* (2011), 3 R.F.L. (7th) 273 (B.C. C.A.); *P. (P.) v. D. (D.)* (2016), 73 R.F.L. (7th) 108 (Ont. S.C.J.), aff'd, (2017), 90 R.F.L. (7th) 1 (C.A.); *Saul v. Himel* (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), aff'd (1996), 22 R.F.L. (4th) 226 (C.A.); *Lo v. Lo* (2009), 70 R.F.L. (6th) 309 (S.C.J.); and *Jeerh v. Jeerh*, 2014 CarswellBC 2796 (S.C.).

And this seemed to be particularly true of the tort of conspiracy: *Hughes Estate v. Brady*, 2006 CarswellAlta 1668 (C.A.). Even in *Waters v. Michie* (2011), 3 R.F.L. (7th) 273 (C.A.), where the British Columbia Court of Appeal suggested that a claim for conspiracy in a family law case should not necessarily be *automatically* struck as a matter of policy, use of the tort was tightly circumscribed at best.

But with the release of *Leitch v. Novac*, 2020 CarswellOnt 5201 (C.A.), the Ontario Court of Appeal breathed new life into the tort of conspiracy, and with a shockingly simple rational that seems to have otherwise eluded courts for decades: sometimes a claim in conspiracy is necessary to do justice between the parties.

The appellant wife, Leitch, commenced an application for a divorce and corollary relief from the respondent husband, Novac. She later amended her application to seek damages in conspiracy from Novac, his parents, certain family trusts, and a related corporation, Sonco Group Inc. ("Sonco"). Leitch alleged that the respondents had conspired to keep money out of Novac's hands specifically for the purpose of reducing her family law entitlements.

The respondents to the conspiracy claim (apart from Novac) brought a motion for partial summary judgment. In response, Leitch sought summary judgment on the conspiracy claim in her favour, with damages to be assessed at trial. The *summary judgment* hearing lasted nine days (perhaps a hint that these motions were not particularly well-suited to summary judgment).

The motion judge granted partial summary judgment in favour of the added respondents, as she found that Leitch's conspiracy claim did not raise a genuine issue requiring trial (2019 CarswellOnt 1432 (S.C.J.)). The motion judge also concluded that while Leitch could not succeed in her conspiracy claim, she could still pursue a claim to impute additional income to Novac for the purpose of determining support at trial.

The motion judge also ordered Leitch to pay a total of $1,200,000 in costs for the motions (2019 CarswellOnt 3402 (Ont. S.C.J.)), and ordered her to preserve all of her assets as security for those costs (2019 CarswellOnt 3651 (S.C.J.)).

Leitch appealed the order granting partial summary judgment, as well as the very significant costs award against her. She also obtained leave to appeal the order that required her to post

security for costs.

Ultimately, the Court of Appeal determined that the motion judge erred in law by allowing partial summary judgment, bifurcating the issues, and in her analysis of the tort of conspiracy; and that she had also made palpable and overriding errors of fact about critical evidence that Leitch had relied on in support of her conspiracy claim.

While this is a factually complex case (another hint that the case was ill-suited to summary judgment), for the purpose of this summary, the facts can be distilled to this: Leitch alleged, and there was evidence capable of supporting, that the added respondents had conspired with Novac to purposefully and very materially reduce his income for support purposes. The evidence of the alleged conspiracy included two memos drafted by Sonco's external accountant generally referring to keeping money "out of Novac's hands."

The motion judge held that the conspiracy claim was appropriate for partial summary judgment. In addition to the extensive record that was before her after a nine-day hearing that included five days of cross-examination on Novac and Novac's father's evidence, the motion judge was of the view that all parties had put their best foot forward, and that summary judgment would allow the parties to streamline the remaining issues.

The motion judge set out the elements of the tort of conspiracy and then referred to *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.), in which the Supreme Court of Canada ruled that the tort of conspiracy did not apply in the context of custody or access claims. Her Honour then stated that the same policy concerns from *Frame* applied to support claims, and that the comprehensive legislation and guidelines contained in the *Divorce Act*, *Family Law Act*, *Child Support Guidelines*, and the *Spousal Support Advisory Guidelines* offered a comprehensive code for dealing with both child and spousal support issues. That is, the tort of conspiracy was not necessary because the family law statutes could provide relief by, for example, imputing income to Novac.

The motion judge also found that there was no genuine issue requiring a trial because, "apart from any policy considerations, [Leitch] has failed to meet the required threshold with respect the tort of conspiracy."

The Ontario Court of Appeal, however, took serious issue with the motion judge's decision to grant partial summary judgment.

In several previous cases, the Ontario Court of Appeal has been quite firm in the position that partial summary judgment is reserved for issues that may appropriately be bifurcated without creating a material risk of inconsistent outcomes, and that may be dealt with expeditiously and cost-effectively: *Butera v. Chown, Cairns LLP*, 2017 CarswellOnt 15856 (C.A.); *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.*, 2019 CarswellOnt 273 (C.A.); *Baywood Homes Partnership v. Haditaghi*, 2014 CarswellOnt 7670 (C.A.); *Mason v. Perras Mongenais*, 2018 CarswellOnt 20502 (C.A.); *Toor v. Toor*, 2018 CarswellOnt 11403 (C.A.); and *Service Mold + Aerospace Inc. v. Khalaf*, 2019 CarswellOnt 6869 (Ont. C.A.).

But in this case, the motion judge did not actually engage with the question of whether bifurcating the issues was appropriate. Specifically, noted the Court of Appeal, the reasons were "conspicuously silent" as to whether there is an inherent risk here of inconsistent findings.

Even though the parties both took the position that partial summary judgment was appropriate, the motion judge was still required to consider whether summary judgment was, in fact, appropriate in this case, and to turn her mind to the material risk of inconsistent outcomes: *Aird & Berlis LLP v. Oravital Inc.*, 2018 CarswellOnt 2375 (C.A.).

Here, Leitch submitted that the risk of inconsistent outcomes was genuine because, "the factual footprint of the conspiracy claim is substantially the same as the support issues that remain for trial." The Court of Appeal agreed: the very same evidence brought in support of the conspiracy allegation would be relevant to a request to attribute additional income to Novac for support purposes. The risk of inconsistent outcomes, therefore, was very real.

The Court of Appeal also determined that the motion judge erred in law in her analysis of the tort of conspiracy. And this is where the Court of Appeal made significant, and we suspect mostly welcome, advances in the law.

The Court of Appeal first clearly summarized the motion judge's stated concern about importing the tort of conspiracy into family law:

> [41] The motion judge articulated a concern about the far-reaching implications of extending the tort of conspiracy where family members are involved. She worried that if the damages Jennifer requested were permitted, policy concerns would arise about claims for damages in every case where a payor spouse, in conjunction with a new spouse/relative/business partner, did not fully disclose income, unreasonably deducted expenses, or received income in the form of cash or goods. Her concern was that conspiracy claims would "become the new norm." She concluded that, given the existing mechanisms for recovery, damages for conspiracy "would effectively be a form of punitive damages". According to the motion judge, any concerns about bad faith conduct can be remedied by imputing income to the payor for the purposes of calculating support obligations or through costs awards.
>
> [42] In rejecting the availability of the tort of conspiracy in the family law context, the motion judge was clearly motivated by the view that the family law statutory scheme creates a complete code for addressing all issues related to support and that there are sound policy reasons not to permit additional tort claims. In my view, it is not accurate to say, as the respondent does, that the trial judge's analysis of the availability of the tort was obiter. In fact, it obviously motivated her analysis of whether the tort had been established. Despite her stated acceptance that the case law does not preclude the application of the tort of conspiracy in family cases, her approach was that all claims should be determined under the family law regime and this approach imbued her analysis of whether the tort had been established.

These are the "classic" concerns advanced in cases such as *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.) (referring to the "undesirability of provoking suits within the family circle"); *Waters v. Michie* (2011), 3 R.F.L. (7th) 273 (C.A.) (as a matter of public policy a claimant should not be permitted to entangle an ex-spouse's new partner in family law litigation); *P. (P.) v. D. (D.)* (2016), 73 R.F.L. (7th) 108 (S.C.J.), aff'd (2017), 90 R.F.L. (7th) 1 (Ont. C.A.); and *Saul v. Himel* (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), aff'd (1996), 22 R.F.L. (4th) 226 (Ont. C.A.).

However, the Court of Appeal found an overriding public policy concern, in what are surely to become four regularly quoted paragraphs in future family law cases:

> [44] As the Supreme Court suggested in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34, **nondisclosure is the cancer of family law**. This is an apt metaphor. **Nondisclosure metastasizes and impacts all participants in the family law process. Lawyers for recipients cannot adequately advise their clients, while lawyers for payors become unwitting participants in a fraud on the court**. Judges cannot correctly guide the parties to a fair resolution at family law conferences and cannot make a proper decision at trial. Payees are forced to accept an arbitrary amount of support unilaterally determined by the payor. Children must make do with less. All this to avoid legal obligations, which have been calculated to be a fair quantification of the payor's required financial contribution. **In sum, nondisclosure is antithetical to the policy animating the family law regime and to the processes that have been carefully designed to achieve those policy goals**.
>
> [45] **There is a related malady that often works hand-in-hand with nondisclosure to deny justice in family law proceedings. The problem is what I will call "invisible litigants." These are family members or friends of a family law litigant who insert themselves into the litigation process. They go beyond providing emotional support during a difficult time to become active participants in the litigation. Usually their intentions are good, and their interference makes no difference in the ultimate result. However, sometimes they introduce or reinforce a win-at-all-costs litigation mentality. These invisible litigants are willing to break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income**.
>
> [46] If we were to accept the analysis of the motion judge, co-conspirators who engage in such behaviour could do so with impunity. Contrary to the observation of the motion judge, conspiracy is not a "blunt instrument" to respond to this misconduct. It is a valuable tool in the judicial toolbox to ensure fairness in the process and achieve justice. **If the tort of conspiracy is not available, then co-conspirators have no skin in the game. Their participation in hiding income or assets is a no-risk proposition. If their conduct is exposed, all that happens is that the payor will be forced to pay what is appropriately owing. If there is to be deterrence, there must be consequences for co-conspirators who are prepared to facilitate nondisclosure**.
>
> [47] There is a further practical reason for permitting the use of the tort of conspiracy in family law claims. Where income or assets have been hidden with the assistance of a co-conspirator, often the family law litigant will be effectively judgment-proof. **That, after all, is the whole purpose of the conspiracy. In those circumstances, the imputation of income or the inclusion of hidden assets into the net family property calculation will be a futile exercise, as the recipient cannot collect on what is owing**. A judgment against a co-conspirator will often be the only means by which a recipient will be able to satisfy a judgment. [emphasis added]

Finally, the Court of Appeal dispensed with the motion judge's concerns regarding the possibility of double-recovery. The motion judge was concerned that a claim in conspiracy

"would effectively be a form of punitive damages" because the claimant would already have an imputation remedy under the family law framework. But that was not a fair statement of the law of damages. It is not overlapping remedies that are a concern; it is double-recovery. Overlapping remedies arising out of the same loss are always subject to the limiting principle of double recovery. However, the risk of double recovery does not arise simply because there are two damages awards: *SFC Litigation Trust v. Chan*, 2019 CarswellOnt 10809 (C.A.), at para. 133.

In the end, the Court of Appeal was of the firm view that the case should proceed to trial, and that Leitch should be free to pursue her conspiracy claim at trial. The Court of Appeal also set aside the motion judge's costs order and her order that required Leitch to preserve all of her assets as security for costs, and indicated that it was troubled by both the size of the costs order against Leitch, and the motion judge's decision to order her to preserve all of her assets:

> [58] Nothing in these reasons should be considered an approbation of the quantum of costs awarded or of the motion judge's ancillary costs orders. There are aspects of these orders that are troubling. In particular, **it is concerning that in making the order for security for costs and preservation of assets, the motion judge did not consider the justice of the case and whether [Leitch] would be able to pursue her claims, including those on behalf of her children, in light of the order made**.
>
> [59] As stated in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 23, in a discussion of orders for security for costs, "Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits". In considering an order for security for costs, "the correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made": see *Yaiguaje*, at para. 25. [emphasis added]

Some will surely argue that the Court of Appeal is courting disaster in opening up the tort of conspiracy in family law. We do not agree. Most cases will not involve claims of conspiracy. But where over-zealous family and friends might otherwise tend to become involved in hiding assets and/or income for a litigant - conspiring - perhaps fear of potential consequences will discourage that behaviour. Up until now, as noted by the Court of Appeal, it could be done with impunity. So, prospectively, they may be "invisible", but as a result of the Court of Appeal's decision, they will no longer be "untouchable."

***Miaskowski v. MacIntyre*, 2020 ONCA 178 – Reconciliation and Separation Agreements**

Maybe love ***isn't*** better the second time around?

This important case from the Ontario Court of Appeal considered the impact of a reconciliation on a prior Separation Agreement and 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. The wife used the equalization payment to set-off part of the cost of buying out the husband's interest in the matrimonial home. In the Separation Agreement, the wife specifically waived the right to share in the husband's pension:

> 19.3 The wife specifically releases any rights or claims she may have to a share of the husband's Canada Post pension.

Keep that wording in mind, and note the "specific" release.

The Separation Agreement also included the somewhat standard clause that, should the parties reconcile and cohabit for 90 days, the provisions of the Separation Agreement would become **void**, but the reconciliation would not "affect or invalidate any payment, conveyance or act made or done pursuant to the provisions of [the] agreement."

The parties reconciled on March 1, 2006, only to separate again nine years later (on December 7, 2014). At trial, the main issue was how to value the increase in value of the husband's pension. The husband argued that his pension should be valued from the date of reconciliation to the date of the *second* separation. On the other hand, the wife argued that the pension should be valued from the date of marriage to the date of the second separation. Therefore, the ultimate issue was the extent of the wife's entitlement to share in the value of the husband's pension, given the reconciliation provision and the two above-noted clauses in the Separation Agreement (the waiver by the wife of her rights to share in the husband's pension, and the payment exception to the clause that makes the separation agreement void on reconciliation for more than 90 days).

At trial, the wife argued that once the parties had reconciled and cohabited for 90 days, the terms of the Separation Agreement, including the release/waiver with respect to the husband's pension, were void. She argued that the Separation Agreement implied that its terms - including the pension waiver - would be null and void if 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 after they reconciled. If the husband wanted to protect his pension at that point in time, argued the wife, he should 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 reminding him of the potential impact of the 90-day clause.

The trial judge considered *Sydor v. Sydor* (2003), 44 R.F.L. (5th) 445 (Ont. C.A.), a 2003 Ontario Court of Appeal decision, and one of the leading cases on the impact of reconciliation on Separation Agreements. The common law rule, as correctly noted by the Court of Appeal, is that a Separation Agreement is void upon reconciliation, "subject to a specific clause in the agreement that would override the common law." The Court of Appeal in *Sydor* 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 trial judge determined that the releases in the Separation Agreement were in the nature of a "specific release" as referenced 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 share of the pension, or at least an amount with which she was satisfied. The trial judge did not explicitly deal with the fact that the parties had not valued the husband's pension, as the husband had not been contributing to it for long before the first separation. This would turn out to be an important fact on appeal.

The trial judge found that the parties' post-separation conduct also corroborated his conclusion that the Separation Agreement contained the type of "specific release" that was not voided by their reconciliation. There was no indication that the husband acted contrary to the belief that the portion of the pension from before the parties' first separation was protected by the Separation Agreement. The fact that, after reconciliation, 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 Separation Agreement and, as a result, the terms were a complete answer to the wife's claim to share in the pre-reconciliation value of the husband's pension.

The wife appealed.

The wife's initial argument on appeal, that the trial judge failed to consider the *Pension Benefits Act*, was dismissed because she did not advance that argument at trial. However, the Court of Appeal still found that there were two mistakes in the trial judge's decision that were significant enough to warrant granting the appeal and overturning his decision.

The Court of Appeal found that the trial judge had erred in his interpretation of the Separation Agreement by failing to give effect to the reconciliation clause. The reconciliation clause voided the agreement upon a reconciliation that lasted more than 90 days. Since the parties had reconciled for more than 90 days, their Separation Agreement was void, but "any payment, conveyance or act made or done pursuant to the provisions of the agreement" was not.

The first error the trial judge made, according to the Court of Appeal, was that he misapprehended the evidence. He did not consider the wife's uncontradicted evidence that the parties had not assigned a value to the husband's pension in the Separation Agreement. No specific amount of money was paid by the husband to the wife in exchange for a release of any claim she would have against his pension. Consequently, this fell outside the definition of a "specific release." Therefore, voiding the pension release did not invalidate any conveyance, payment, or act that was made or done under the Separation Agreement. Since there was no money paid to the wife in exchange for the release, the pension release was covered by the voiding provision in the reconciliation clause.

There are two issues with this view:

1. The Court of Appeal in *Sydor* 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" [emphasis added]. But the Court of Appeal in *Sydor* did not refer to a requirement for a specific payment for the release. All that was required was a "specific release." And, pursuant to the Separation Agreement in this case, "the wife specifically releases any rights or claims she may have to a share of the husband's Canada Post pension." It is hard to be more specific than that.

2. Again, in *Sydor* the Court of Appeal found 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" [emphasis added]. But the corollary is not necessarily true. It is not a given that a non-specific release cannot be viewed as evidence that the parties considered the disposition as final and binding. Such might be the case in a global Separation Agreement that resolves all property and support issues for one lump sum, along with extensive, though general, releases.

What was likely driving the Court of Appeal here was a desire to not see the wife lose out on the subsequent nine years of growth in the husband's pension.

In any case, this should be of significant importance to practitioners. The effect of this result may very well be that general releases that are part of a "global deal" will often fall outside the definition of a "specific release." Much clearer wording is now necessary when drafting releases and reconciliation clauses.

The second error that the trial judge made was in his interpretation of the Separation Agreement's reconciliation clause. When interpreting an agreement, a court is attempting to discern the intention of the parties from the language they used. According to the Court of Appeal, the language of the voiding clause in the Separation Agreement clearly demonstrated that the parties' intention if they reconciled was to return themselves to the position they were in prior to separation. The bargain they made on separation, where they released one another from future rights and obligations, would be set aside and become void, and they would regain all of the rights as spouses they had bargained away in the Separation Agreement.

However, the reconciliation clause also provided that it was not necessary, in order to give effect to the parties' intent, to unwind and undo conveyances or transfers that had already been completed. The Court of Appeal set out that there could be situations where the spouses could not undo a conveyance, such as after the sale of property to a third party.

At trial, and on appeal, the parties focused on potential unfairness. The husband argued that it would be unfair to leave intra-spousal transfers in place when the consideration for the transfer was not a payment, but a release of future rights. The spouse who received the payment may be ultimately overcompensated if he or she does not release the other spouse from the corresponding obligation. Essentially, the husband argued that he had paid the wife for the pension release, he could not get his money back, so it was unfair that he be deprived of that for which he bargained.

The Court of Appeal determined that the husband's concern would only arise in exceptional cases. Under the equalization regime in the *Family Law Act*, there would be no unfairness in normal cases. That is because the value of the spouses' net family property is equalized upon separation. Therefore, it will not ordinarily matter in whose name a particular asset is held. If

the wife received a $10,000 payment from the husband, she would have $10,000 more in her net family property that she would need to share with him as a result of the equalization regime. In this case, if the wife had been paid money for the pension release, that money would form part of her net family property and the husband's pension would form part of his net family property.

The Court of Appeal set out that unfairness would need to be considered on a case-by-case basis, and the court would need to use one of its many tools to deal with these situations, such as order an unequal division of net family property under s. 5(6)(h) of the *Family Law Act*.

The Court of Appeal noted that while the specific reconciliation clause in the Separation Agreement had been part of the general Ontario Separation Agreement precedent for more than 30 years, in the future, counsel may need to be more specific. To put it simply, if the parties had intended the pension release to continue after a reconciliation, they should have said so:

> [44] I note that the reconciliation clause used in the separation agreement in this case has been a precedent for over 30 years: see e.g., James C. MacDonald et al., "Precedents and Principles: A Comprehensive Review of Domestic Contracts", Canadian Bar Association - Ontario, Continuing Legal Education Program, Family Law for the Specialist, February 7, 1986. In order to clarify the intent of the parties, it may be helpful in future for such reconciliation clauses to address what the parties intend will occur upon reconciliation with respect to specifically contemplated transfers. For example, if the parties intend any transferred property to be treated as property that is to be excluded from the net family property under s. 4(2)6 of the FLA, that should be explicitly provided.

Therefore, to be safe, going forward reconciliation clauses should specifically address what the parties intend upon a reconciliation with respect to specific transfers and release. Say what you mean, and mean what you say. If not, ready thine deductible.

Marley v. Salga, 2020 ONCA 104 – Severing a Joint Tenancy through a Will

Shhhhhhh…it's a secret…

Karen Marley and Leslie Salga were married for about 15 years. It was a second marriage for Mr. Salga. They owned their matrimonial home as joint tenants from the date of purchase in 2004 to the date of Mr. Salga's death - or so they thought.

When they purchased the property, their lawyer's reporting letter indicated that it was held as joint tenants and that "when title is held as joint tenants, if one owner dies, the survivor automatically becomes the sole owner of the property". No change was made to the registered title during Mr. Salga's lifetime. However, one month before his death, Mr. Salga made a new Will in which he directed the estate trustee to give Ms. Marley a life interest in the property but, upon her ceasing to use the property, to sell it and give one-half of the proceeds to each of his two daughters. The new Will was clearly inconsistent with a joint tenancy and a right of survivorship.

Mr. Salga's daughters sought an order that they were entitled, as residuary beneficiaries of the estate, to a half interest in the property.

To the surprise of real estate, estate, and family law lawyers, the lower court found that the joint tenancy had been severed after Mr. Salga's death as a result of a "course of dealing". For a refresher as to the ways to sever a joint tenancy, see *Hansen Estate v. Hansen* (2012), 9 R.F.L. (7th) 251 (Ont. C.A.). In *Hanson*, the Ontario Court of Appeal adopted the following statement:

> . . . And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, **it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested**. [emphasis added]

Therefore, in *Hanson*, the Court of Appeal confirmed that a "course of dealing" could not be a clandestine arrangement, such as a unilateral, behind-the-back changing of a Will.

That said, the lower court reviewed the evidence and found that there was, in fact, a course of dealing by the parties that severed the joint tenancy.

What was the accepted "course of dealing"?

First, the daughters relied on the new Will. However, according to *Hanson*, a testimony disposition cannot sever a joint tenancy. However, a provision in a Will is a piece of evidence that can be used to help determine a common intention to treat the joint tenancy as severed, if the provision in the Will was known to the other party.

Second, the daughters relied on a recorded conversation that was said to have taken place between the parties while the husband was essentially on his deathbed. In the conversation, which was apparently surreptitiously recorded, Mr. Salga stated his desire to leave half of the property to his daughters, but that his wife would have a life interest in it. The lower court accepted this conversation as evidence that Ms. Marley understood she was to receive a life interest in the property, and that Mr. Salga's estate would get the remaining half interest and it

would ultimately go to Mr. Salga's daughters. As a result, it concluded that the joint tenancy had been severed by a "course of conduct."

As noted, this decision took many in the estate, real estate, and family law bars by surprise, and it was widely anticipated that the Court of Appeal would set aside the decision.

Not so much. The appeal was recently dismissed.

Unfortunately, the reasoning of the Court of Appeal was rather sparse. The substantive part of the judgement, in its entirety:

> [1] We reject the appellant's argument that the recording on which the application judge relied was inadmissible. The appellant did not raise this as a ground of appeal. Further, the appellant pointed to no authority to support this position. We are satisfied that the recording was relevant to a material issue and admissible. In particular, it corroborated the respondents' position on the applications.
>
> [2] The application judge set out the proper test for determining whether a joint tenancy has been severed. This is a fact specific inquiry. We see no basis on which to interfere with the application judge's decision. The appeal is dismissed.

This is unfortunate. As a secretly changed Will can now be used as evidence of a "course of dealing" sufficient to sever a joint tenancy, we may see this sort of behaviour occur more in the future. What we permit, we promote.

Richardson v. Richardson, 2019 ONCA 983 – Judicial Approval of Parenting Settlements

Letting the "Custody Genie" out of the bottle

Most times, courts are pleased to accept and endorse settlements - especially settlements on the verge of, or in the middle of, trial. But issues with respect to the best interests of children are different. Given the *parens patriae* jurisdiction of the Court, a court need not just "accept" a settlement. And sometimes they don't.

Litigation about the best interests of children has always been somewhat "special." For example, where the best interests of children are concerned, the trial judge can generally intervene as much as necessary to clarify facts, confirm expert testimony and make sure appreciation of the evidence is correct: *Gordon v. Gordon* (1980), 23 R.F.L. (2d) 266 (Ont. C.A.); *Metis Child, Family & Community Services v. M. (A.J.)* (2008), 50 R.F.L. (6th) 233 (Man. C.A.); and *Children's Aid Society of Waterloo (Regional Municipality) v. C. (R.M.)*, 2009 CarswellOnt 7411 (Ont. C.A.). It is part of the court's inherent jurisdiction in custody matters to act on its own motion rather than remain "mute" where the best interests of the children are at stake: *Greenough v. Greenough* (2003), 46 R.F.L. (5th) 414 (Ont. S.C.J.). This, of course, is different from other litigation where the trial judge will generally intervene as little as possible.

Although it may happen infrequently, it is clear that courts have the authority to review settlements and to reject them if they are not in the best interests of the children: *Martin v. Martin*, 1981 CarswellBC 773 (C.A.), at para. 7; *G. (C.T.) v. G. (R.R.)*, 2016 CarswellSask 778 (Sask. Q.B.), at para. 11; *Harper v. Harper*, 1991 CarswellOnt 1001 (Ont. Gen. Div.), at p. 553; and *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.). In fact, courts can even prevent litigants from withdrawing or discontinuing claims that touch upon the best interests of a child. For example, in *Laliberte v. Jones*, *supra*, the Court would not allow a party to withdraw a custody application once the jurisdiction of the Court had been invoked.

Similarly, in making a custody/access/parenting Order, the court is not limited to the positions put forward by the parties. In *Fox v. Schwinghammer*, 1999 CarswellSask 746 (Sask. Q.B.), for example, as one party sought sole custody and the other sought joint custody, one of the parties argued that the Court was restricted to these two choices when rendering judgment. The Court disagreed, noting that s. 16 of the *Divorce Act* required that, in making a custody/access order, the only consideration was the best interests of the children. Again, the law is clear: once the issue of custody is a matter to be decided by the court, the court is not restricted by the positions enunciated by one or other of the parties.

Notwithstanding this special treatment, rarely do counsel consider that the court *rejecting* a settlement is a real possibility. But that is ultimately what happened in *Richardson*.

In 2016, the wife asked the court's permission to move with the children from the Niagara region to Ottawa. The children were 12 and 6 years old, and the court appointed assessor determined that the children should remain in the Niagara region. The parties initially accepted the recommendations and, in 2016, they entered into a consent Order that the children would remain in the Niagara region, and that the parties would share time with the children equally. Both parties maintained residences in the Niagara region. The mother also had a home in Ottawa, where she lived with her new spouse.

In July 2017, the mother was appointed as a Justice of the Peace in the Ottawa region. She sold her home in the Niagara region, moved to Ottawa, and brought a motion to change the consent Order on the basis that it would be in the children's best interests to reside primarily with her in Ottawa. The trial began on April 1, 2019, before Justice Ramsay.

On the second day of trial, after the wife had presented her evidence, the parties told the presiding judge that they were attempting to negotiate a settlement. On April 3, 2019, the parties presented the judge with Minutes of Settlement. The father consented to the children moving to Ottawa, but there were a number of conditions, including granting the father final decision-making authority over the children.

The trial judge reviewed the proposed settlement but refused to accept it. Justice Ramsay told the parties that he was not "prepared to sign off on it" but also noted that he could not "really say why." He directed that the trial continue, and no one objected. Ultimately, the judge ordered that the children remain in the Niagara region with the father and ordered costs against the mother.

The mother appealed.

The Majority of the Court of Appeal determined that judges have the authority and, in fact, the ***duty*** to review such settlements and to reject them if they are not in the best interests of children. However, this authority must be exercised with caution - mere disagreement with the terms of a settlement does not afford the court the authority to intervene. A court must consider whether a settlement is in the child's best interests, taking into account not only the settlement terms, but also the other potential benefits to a child that might come from compromise or settlement of the parties' dispute (as opposed to continued litigation).

The Majority concluded that when a judge rejects a settlement, the reasons for rejecting the settlement should be provided. Further, a judge should, if possible, take steps to facilitate the settlement. It may be that the judge can provide comments as to their specific concerns, and then send the parties away to speak or arrange a Settlement Conference with another judge. Without explaining the basis upon which the parties' settlement was rejected, explained the Majority, the parties have no way of knowing what, if anything, they could do to address the court's concern.

While the Majority noted that Justice Ramsay's reasons for rejecting the settlement were extremely limited, this was an exceptional case. The settlement was reached mid-trial. As a result, the reasons for rejecting the settlement needed to be brief so as to avoid any possible appearance that the judge had a bias in favour of one party. In a case where a settlement is negotiated mid-trial, it may be sufficient that the judge is not prepared to find the settlement to be in the child's best interests until hearing all of the evidence. In this case, the findings of the trial judge were made after a full hearing on the merits, and the reasons made clear that there were logical reasons for rejecting the settlement:

> [17] The trial judge found that the [father] was essentially credible but expressed concerns about the mother's credibility and motivations. He considered it unreasonable of her to think that the children could share residence between parents who lived so far apart, and found that she had made demands the [father] could not possibly meet. The trial judge

> described the [mother's] attempt to justify some of her actions as "baffling" and stated that her "strong desire to win seems to have clouded her judgment".
>
> [18] The trial judge detailed several incidents that concerned him. He was particularly concerned with the [mother's] decision to ask the police to carry out a welfare check when the children were with the [father] and her involvement of the Children's Aid Society without having any legitimate basis for doing so.
>
> [19] The most important finding made by the trial judge concerned the daughter and her expressed wish to move to Ottawa. The trial judge found that this wish arose primarily out of the parental conflict rather than from independent considerations. He found, further, that her real wish was to end the conflict between her parents, and that she understood - correctly in the trial judge's view - that the mother was the source of the conflict. . . .
>
> [20] . . . [The trial judge] found that the respondent had established a change in circumstances: the [mother's] move had made equal sharing impractical; the children had undergone too many tiring trips; and they had missed too much school. The trial judge described the [father] as "essentially under siege", which had weakened his ability to fulfil the needs of the children.
>
> [21] The trial judge conducted a fresh inquiry into the best interests of the children, concluding that their principal residence in the Niagara region should not change. The children had lived in the Niagara region since birth; they were physically and emotionally close to their paternal relatives, who also reside in the region; they were well established at school and with friends; and they were doing well academically. The trial judge found that school had become the daughter's refuge from family conflict and that it would be a bad time to uproot her.
>
> [22] In summary, the trial judge concluded that a move to Ottawa was not in the best interests of the children, but that a change to the access schedule was. He adopted more or less the [father's] draft proposal. The children would remain in the Niagara region. Their primary residence would be with the [father]. However, the trial judge made several amendments to the [father's] draft proposal, namely in the provision for time sharing so as to reduce travel. This had the effect of reducing the [mother's] access to the children.

The mother also argued that the trial judge erred by continuing to hear the trial after reviewing the Minutes of Settlement. Rule 17(24) of the *Family Law Rules* precludes a judge who has heard a Settlement Conference from hearing the trial of the same matter. In this case, however, the trial judge had not, in fact, heard a Settlement Conference. Rather, he had been provided with Minutes and then rejected them. The Majority noted that, as a result, Rule 17(24) did not apply. Further, neither side made any kind of claim of bias or objected to the trial judge continuing the trial. Both sides were content to let the matter continue after the Minutes were rejected. Neither side requested more details as to why the Minutes were rejected.

On appeal, the Mother also advanced the very difficult argument of "ineffective assistance of counsel" due to her trial lawyer's failure to raise an objection. The test for ineffective assistance of counsel is twofold:

1. That the alleged incompetent representation caused a miscarriage of justice and the

complainant was prejudiced as a result; and

2. That the counsel's actions were unreasonable in the circumstances as they existed at the time.

However, as the mother did not provide any evidence about the advice she received or the instructions provided to counsel, she could not make out either branch of the test.

Regardless of what the trial judge may have learned from reading the proposed Minutes, he was *required* to reach a decision following the trial as to the best interests of the children. The Majority was satisfied that he had done so. It also noted that if anyone's position at trial was undermined, *it was the father's*. The father's position was that the children should not move - but, after reading the Minutes, the trial judge then knew that he would be willing to allow the move if certain conditions were present.

Finally, the Majority dismissed the mother's claim that there was a reasonable apprehension of bias on the part of the trial judge. The mother made this claim based on historic interactions she had with the judge prior to their being appointed to the bench. This was not claimed at the time of the trial, and the Majority determined that it was far too late in the day for the mother to raise it on appeal. Having been content to continue with the trial, the mother could not now reverse that decision because the result was not one she liked.

Justice Nordheimer wrote a *very* strong dissent that emphasized the importance of settlements. If the trial judge was going to reject the Minutes, he should have provided guidance about why he had done so. And upon such rejection, the trial judge should have recused himself from the matter. He was now aware of confidential information about the parties' settlement positions. The trial judge was "irretrievably compromised" as a result of this knowledge.

While these are fair points, as noted above, if anyone was compromised here, it was the father, as upon reading the Minutes, his settlement position was known.

Justice Nordheimer also thought that the majority's interpretation of Rule 17(24) was too narrow. While this was not a Settlement Conference, the intention of the *Family Law Rules* is to allow parties to discuss settlement opportunities with judges who would not be the same judges to rule on the matter. Otherwise, parties cannot have confidence that the judge has not pre-judged the matter. Even if the judge sets aside or ignores the information provided, it may have the appearance of impropriety. The court must be impartial and objective - but must also appear objective and impartial to the parties before it. This was irretrievably lost when the trial judge read the Minutes.

Again, while this is a fair point, evidence at trials is regularly excluded and ignored. Courts regularly hear and then "disabuse" themselves of relevant and important evidence that is ultimately ruled inadmissible. If a trial judge can hear and then "ignore" a confession in a criminal case - surely a trial judge can ignore the terms of proposed Minutes of Settlement.

Justice Nordheimer would have allowed the appeal and given effect to the Minutes of Settlement.

While reasonable people can debate whether or not Justice Ramsay should have rejected the

Minutes in this case or recused himself after rejecting them, one thing is not up for debate. Once parties invoke the custody jurisdiction of the court, they may lose the ability to end the court's involvement.

We can do no better than to quote the colourful language of Justice Danyliuk in *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.):

> [15] It is the duty of both of these parents to facilitate Ethan's growth and development. It is their duty to put aside their personal agendas and interests, their own selfishness, and to do what is in Ethan's best interests. **It is counsel's duty to sedulously foster these attitudes in their respective clients**. And, often, it is the court's sad duty to intervene when parents fail to act as they should, so as to try to bring order to the chaos. [emphasis added]
>
> . . . . .
>
> [17] First, I note this is a family law matter. It is not a criminal trial, nor a commercial dispute. **This is an action involving a child's interests. The court is not obligated to sit idly by and act only as a referee**. In family law matters this court frequently exercises its inherent or *parens patriae* jurisdiction to attempt to do real justice between the parties and for the children, and to ensure that the interests of children (who cannot speak for themselves in these proceedings) are protected. Family law requires a somewhat different perspective than what is required for other legal disputes, not only for adjudicators but for counsel and the litigants as well.
>
> . . . . .
>
> [35] . . . it is my view that **having released the custody genie from the procedural bottle, the petitioner cannot unilaterally seek to shove it back inside** . . . [emphasis added]

We will be pitching our new movie, "The Custody Genie" to Disney Studios next week. It's about a parent that finds a magic lamp during a morning court recess. The lamp is rubbed and . . . well . . . never mind . . .

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.[3] If a party persists in an unreasonable claim, they cannot later complain about the amount of costs spent to defend

[3] See: Kirshenblatt v. Kirshenblatt, 2008 CarswellOnt 6163

those claims.[4] 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.

[4] See: : *Fielding* v. *Fielding*, 2019 ONSC 833

Wyatt v. Reindl, 2020 SKCA 36 - An Exceptional Parenting Schedule

The best interests of ~~the~~ this child.

Conventional wisdom tells us that children - especially young children - should generally not go for extended periods of time without seeing a parent. For example, in its recently released Parenting Plan Guide, the Ontario Chapter of the Association of Family and Conciliation Courts ("AFCC-O") recommended that even in cases where the parents are involved in a shared parenting arrangement, they should still ensure that "separations from each parent [for children under 3] are not too long (no more than two to three days or two nights for example)", and that while "it may be appropriate to have an arrangement with roughly equal care" for three to five year olds, they should still not be spending "more than 3 nights away from either parent." AFCC-O's Parenting Plan Guide is available at: https://afccontario.ca/parenting-plan-guide-and-template/. It is an excellent resource.

Accordingly, it is exceedingly rare for a court to order a schedule for a very young child whereby the child goes for a week or more without seeing one of his/her parents. And, it is even more rare for such an order to be made on an interim basis, and then upheld on appeal. But in *Wyatt v. Reindl*, that is precisely what happened.

The parties had a young daughter who was born in the summer of 2016. Although the child initially lived primarily with the mother, by January 2019, she was spending approximately equal time with both of her parents.

In January 2019, the father started a new job in Alberta that resulted "in him being unavailable to parent for eleven consecutive days, but being available to parent full-time for the next nine days." The father attempted to negotiate changes to the schedule with the mother, but they could not reach an agreement, and the mother unilaterally and significantly reduced the father's time with the child. She also told the father that the child could not attend his wedding, although this issue was, fortunately, resolved on consent prior to the wedding.

After the wedding issue was resolved, the father brought an interim motion to have the court determine the parenting schedule pending trial. The Chambers judge ordered a shared parenting arrangement whereby the child would spend 11 consecutive days with the mother (while the father was unavailable because of work), and would then spend nine consecutive days with the father while he was off work (with a 3-1/2 hour visit with the mother in the middle of the father's time).

The mother appealed the Chambers judge's decision. In dismissing the mother's appeal, the Saskatchewan Court of Appeal noted that, "[w]hen reviewing an interim parenting order, considerable deference is accorded to the discretionary decision made by a Chambers judge", and that it "has consistently attempted to discourage parties from appealing such orders barring exceptional circumstances." The Court also reiterated that:

> • An "Appellate Court is not entitled to simply re-make a custody and access decision from the ground up along the lines that it might have preferred or thinks best". [(*Bolan v. Bolan*, 2013 CarswellSask 644 (Sask. C.A.)]
>
> • "In most cases, the interests of the parties, and the children, are best served by proceeding quickly to the pre-trial settlement conference stage rather than expending time and scarce

resources on an appeal from an interim order". [*Hall v. Hall*, 2011 CarswellSask 499 (C.A.)]

The mother tried to get around the high standard of review for appeals from interim parenting orders by arguing that the matter was "exceptional" because the order was inappropriate for a young child and represented a drastic change from the prior parenting arrangement. The Court of Appeal disagreed. In doing so, the Court accepted that the schedule the Chambers judge had ordered for the parties' young child was unusual, and acknowledged that it might have reached a different result at first instance. However, the Court determined those facts alone to be insufficient to warrant interfering with the Chambers judge's decision:

> [12] . . . [The mother] is correct that shared parenting schedules for pre-school children usually involve relatively shorter periods of time with each parent and more frequent exchanges: see, for example, *Chaisson v. Williams*, 2012 NSSC 224 (N.S. S.C.) at paras 9 and 16, and *Bromm v. Bromm*, 2010 SKQB 85 (Sask. Q.B.) at paras 39-40, 353 Sask. R 198 (aff'd 2010 SKCA 149, 91 R.F.L. (6th) 268 (Sask. C.A.)). However, each inquiry into a child's best interests is child-centered, focussed on the best interests of the specific child and based on the evidence in relation to that child's circumstances. **Generalizations regarding parenting schedules do not trump specific and compelling evidence that supports a shared parenting order different than the type typically made for pre-school children. While the length of parenting time ordered for each parent in this matter is unusual for a child of this age, and might not be the order I would have been inclined to make, that does not mean the Chambers judge made a reviewable error by deciding as he did**. [emphasis added]

The mother also tried to argue that the Chambers judge "impermissibly disturbed the status quo and changed a situation where she was the primary parent into a shared parenting arrangement." The problem with this argument, however, was that, in the words of the Court of Appeal, "prior to [the mother's] move to restrict [the father's] parenting in 2019, the arrangement had evolved into a situation where there was a near-shared parenting arrangement in place and that [the mother] supported shared parenting. The only dispute was about setting a schedule for such parenting."

While literature and generalizations about parenting schedules for young children do not (and should not) trump the evidenced best interests of the specific child before the court, we do have some concerns about the outcome of this case. While the 11-day on/9-day off shared parenting schedule that was put in place certainly made sense from the father's perspective because it fit with his new job, the father's best interests and conveniences are irrelevant. The only thing that mattered was the child's best interests, and there does not appear to have been sufficient evidence to establish whether it was actually in this child's best interests to regularly keep her away from a parent who was ready, willing, and able to care for her for nine days at a time. The child was going to be away from the father for extended periods of time, and that was going to be the case no matter how much time she was able to spend with him while he was actually in the province.

We wonder if the outcome of this case might have been different had the mother not significantly, and unilaterally, restricted the father's time with the child, and had not tried to prevent him from taking the child to his wedding. In the view of the Court, this may have been a bad "signal" of things to come.

We find that, more and more frequently, courts are taking action to prevent "parental gatekeeping." See, for example, *J.Y. v. L.F.-T.* (2019), 22 R.F.L. (8th) 272 (Ont. Div. Ct.); *Brissett v. Coughlan*, 2019 CarswellOnt 11513 (S.C.J.); and *Teeple v. Millington* (2020), 37 R.F.L. (8th) 355 (Ont. S.C.J.) (also awarding approximately equal time for a 3-year-old child to prevent gatekeeping). Sometimes, courts will order an equal residency schedule to protect a child's relationship with a parent: *Cojbasic v. Cojbasic* (2008), 52 R.F.L. (6th) 191 (Ont. S.C.J.); *Mikan v. Mikan*, 2004 CarswellOnt 772 (S.C.J.); *Baker-Warren v. Denault*, 2009 CarswellNS 402 (S.C.); and *Bushell v. Griffiths* (2013), 30 R.F.L. (7th) 306 (N.S. S.C.).

While the Court of Appeal did not expressly say so in its reasons (and the Chambers judge's reasons have not been reported), we suspect that both levels of court were concerned that the mother's behaviour showed that she could not be trusted to ensure that the child was able to have maximum contact with her father pending trial without the type of Order that was ultimately made in this case.

H.M.S v. M.H., 2019 SKQB 311 – Determining Income Based on historic Practice

Sometimes the past is the future.

The parties had a child together, K.H.

The father also had another child, J.L. The father's case with J.L's mother had previously gone to trial, and Justice McIntyre had ordered the father to: (a) provide the mother with his personal income tax return and the financial statement for his medical professional corporation by July 1st; and (b) adjust his child support payments based on the prior year's information as of September 1st of the current year.

While the father's income had typically been in the range of $315,000 a year, he only earned about $140,000 in 2018 because he had been suspended from practice for part of the year. Although the reason for the father's suspension is not mentioned in the judgment, the Court accepted that there were legitimate reasons for the reduction in his income and that it would not be appropriate to impute additional income to him for 2018.

The issue that Justice Brown had to decide was what income should be used to calculate the father's child support obligations for K.H.

Even though the motion was argued on December 5, 2019, and even though the father knew that his income in 2019 was going to be in the range of $315,000 (more than double what it was in 2018), the father argued that he should be able to pay support on his 2018 income of $140,000 because he did not yet know exactly what he was going to earn in 2019.

In Saskatchewan, although the prior year's income tax return is a useful source of information, it should not be used if the evidence shows that a person's current income is going to be materially higher or lower than that amount: *Fawcett-Kennett v. Kennett*, 2016 CarswellSask 216 (Sask. Q.B.); *Kelln v. Mryglod*, 2017 CarswellSask 431 (Sask. Q.B.); and *Peterson v. Peterson* (2019), 30 R.F.L. (8th) 341 (Sask. C.A.). This conclusion is consistent with appellate authorities from across the country: *Vanos v. Vanos* (2010), 94 R.F.L. (6th) 312 (Ont. C.A.) at paras. 14-15; *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.) at paras. 17-31; *R. (M.K.) c. R. (J.A.)* (2015), 74 R.F.L. (7th) 47 (N.B. C.A.) at paras. 25-27; *Lee v. Lee* (1998), 43 R.F.L. (4th) 339 (Nfld. C.A.); *L. (R.E.) v. L. (S.M.)* (2007), 40 R.F.L. (6th) 239 (Alta. C.A.); and *MacDonald v. MacDonald*, 2009 CarswellNS 879 (N.S. S.C.).

The complicating factor in this case was that the parties had been informally following the regime/formula that Justice McIntyre had put in place for the father's other child. Justice Brown was concerned that it would not be fair to the husband to depart from the approach that the parties had taken to date. It has been suggested, in other cases, that a recipient cannot argue to use current income where there has been an established pattern of basing support on income from the previous year: *Burrell v. Robinson* (2009), 78 R.F.L. (6th) 351 (Ont. S.C.J.); *Thomson v. Richardson* (2011), 4 R.F.L. (7th) 357 (Ont. S.C.J.); and *Schmidt v. Schmidt*, 2017 CarswellOnt 8161 (Ont. S.C.J.).

Justice Brown was also satisfied that the amount of support that the mother would receive based on the father's reduced income in 2018 was still sufficient to let her meet the child's reasonable needs pending trial, and made it clear that his decision "in no way affects [the mother's] ability or capacity to seek arrears should there be more owing dating back in time over the course of K.H.'s childhood."

This sensible result ensures that the mother will have adequate funds pending trial, while leaving it open to the trial judge to determine the most equitable way of dealing with the temporary decrease in the father's income, and whether or not the parties should continue following the regime that Justice McIntyre had put in place for the father's other child.

Boechler v. Boechler, 2019 SKCA 120 – Setting Aside Contracts for Non-Disclosure

Sometimes a deal really is a deal.

In *Boechler*, the wife wanted to set aside a separation agreement that the parties had negotiated 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 the loan was shown from one year to the next led to confusion on the wife's part. The day after the matter was settled, the wife claimed that the husband had materially misrepresented his financial circumstances to the extent of $310,000 and that the Separation Agreement should be set aside.

Unlike, say, British Columbia and Ontario, the Saskatchewan *Family Property Act*,[1] basis of a lack of disclosure (nor for that matter, does the Manitoba *Family Property Act*). However, the Court did determine that a court in Saskatchewan has the authority to set aside an "inter-spousal contract" (as they are called in Saskatchewan) if it is unconscionable or grossly unfair. Such a situation might arise from a failure to adequately disclose relevant information.

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.

The Court of Appeal set out that the husband had a duty to provide financial disclosure that was full and forthright so that the wife could genuinely decide for herself whether the 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 and, in fact, the wife's expert had flagged the issue during the negotiations and the wife specifically told him to not follow up with it. Not only did the wife have all of the appropriate information, but she used the documents that had been disclosed to her to argue that she had been misled. She simply realized the difference after the separation agreement had been signed.

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

The wife's case to set aside the agreement was even more difficult because the agreement was a "global settlement" wherein the precise value of the company or the associated loans were not specific factors.

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 so as to take advantage of the mistaken party. Again, the Court rejected this argument

once more because the agreement was a global settlement. In the end, the parties did not agree on the value of the corporate assets (or a number of other assets), but agreed 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.

An agreement usually involves compromise. One party cannot later try to isolate specific terms that s/he believes, in retrospect, to be a problem: *Sawiak v. Wybrew* (2011), 4 R.F.L. (7th) 382 (Ont. S.C.J.). Furthermore, when a court reviews an agreement, especially in the context of a global settlement, it must review the *entire* agreement and not only some isolated part of it; a court cannot make adjustments to a single number. The Agreement either stands or it does not: *Zavarella v. Zavarella* (2013), 40 R.F.L. (7th) 352 (Ont. C.A.); *Giffin v. Giffin* (2018), 12 R.F.L. (8th) 360 (Ont. S.C.J.); and *Grimes v. Grimes* (2012), 25 R.F.L. (7th) 295 (N.L. C.A.).

***Yared v. Karam*, 2019 SCC 62 – When Does a Trust Property Count as "Family Patrimony"?**

"Trust me."

This recent decision from the Supreme Court of Canada confirms that assets owned by a trust can, in some circumstances, be included as part of the matrimonial property (i.e. family patrimony in Quebec) divided between spouses when they separate. As the decision involves the interpretation of the Civil Code of Quebec, the details of how the Supreme Court reached its conclusion may be of limited use to courts and counsel in common law provinces. However, the case provides an example where, in dealing with family law cases, the Supreme Court of Canada interprets legislation so as to give trial judges sufficient discretion to be able to do justice between the parties.

During the marriage, the husband set up a trust that he used to purchase a home in which the family then lived. The husband was the trustee of the trust, and the wife and the parties' four children were discretionary beneficiaries. The husband was not a beneficiary of the trust, but had the ability to add or remove beneficiaries and had complete discretion to decide what should happen to the trust's income and capital. That is, having sole control over the identity of the beneficiaries and as to the use of the trust's capital and income, the husband was not well-placed to argue that he did not solely "control" the trust.

Article 415 of the Civil Code of Quebec provides that the family patrimony includes "the residences of the family or the rights which confer use of them."

The Quebec Court of Appeal found that the trust, and therefore the home, should *not* be included in the family patrimony because there was no evidence that the trust had been established to defeat the wife's claims and, "in the absence an intention to avoid the rules of the family patrimony, the contractual freedom of spouses who decide to reside in a property held in a trust for investment purposes ought to be respected."

The majority of the Supreme Court of Canada disagreed with the Quebec Court of Appeal's reasoning, and held that trial judges should have broad discretion to include a family residence that is "controlled" by one of the spouses as part of the family patrimony even if it is not directly owned by one of the spouses, and even if there is no evidence of improper intent:

> [37] **What may or may not constitute a "right which confers use" within the meaning of art. 415 C.C.Q. is therefore dependent on the circumstances and will generally be determined in relation to the level of control exercised by either spouse with respect to the residence.** As such, I agree with my colleague that simple occupation of a property not owned by the spouses will not automatically give rise to "rights which confer use" within the meaning of art. 415 C.C.Q. However, **given the purpose of the family patrimony and the rationale for including the "rights which confer use" in the text of art. 415 C.C.Q., it is preferable to accord wide discretion to the trier of fact** when making such a determination. . . .
>
> . . .
>
> [52] When applying art. 415 C.C.Q. to a family residence not directly owned by the spouses, the question is therefore relatively simple: **Does the record support a finding of rights which confer use of the residence? If so, the fact that the spouses were pursuing a legitimate objective in organizing their affairs the way that they did is not a bar to**

inclusion of the residence in the partition of the family patrimony.

> [53] **This is not to say that the intention of the spouses is never relevant** when applying art. 415 C.C.Q. to a family residence. In fact, the intention of the spouses is essential to characterize a property as a "residence of the family" within the meaning of art. 415 C.C.Q. (see, for example, *J. (Y.) c. B. (M.)* [1999 CarswellQue 3330 (C.S. Que.)], 1999 CanLII 10838, at paras. 32-39, conf. on appeal by 2000 CanLII 10021 [2006 CarswellQue 9035 (C.A. Que.)], at paras 17-19). **But in so far as the intention to use a property as a residence of the family has been established, art. 415 C.C.Q. does not require any further demonstration of intention**. [emphasis added]

This interpretation of the Quebec Civil Code mirrors s. 18(2) of the Ontario *Family Law Act*. That section specifically designates as a "matrimonial home" a property that is owned indirectly by a spouse through a corporate intermediary that would otherwise be a matrimonial home. Specifically, ownership of a corporation that entitles the owner to occupy a matrimonial home owned by the corporation is deemed to be "an interest" in a matrimonial home. It is a statutorily mandated piercing of the corporate veil.[5]

While it does makes sense that ownership by a trust would not be treated differently, somewhat ironically, it is not entirely clear that the same result would arise in Ontario (or the other common law provinces) given the result in *Spencer v. Riesberry*.[6] In *Spencer*, the Ontario Court of Appeal held that, unless the terms of a trust so provide, a beneficiary has no actual property interest in any specific asset of the trust - even where the beneficiary is also a trustee.

Pursuant to the Ontario Court of Appeal in *Spencer*:

> [52] Second, to ignore or conflate the separate roles of trustee and beneficiary would be contrary to the fundamental nature of a trust and would render the trust unworkable.
>
> [53] A trust is a form of property holding. It is not a legal entity or person. A trust does not hold title to property nor can it. It is the trustee who holds legal title to the trust property.
>
> [54] A trust is also a type of relationship, namely, the fiduciary relationship that exists between trustee and beneficiary. The foundation of the trust relationship is the separation of roles between the trustee and beneficiary with the trustee being the legal owner of the trust property and the beneficiary being the equitable owner of the trust property. The trustee holds legal title to the trust property so that it can manage, invest and dispose of the trust property solely for the benefit of the beneficiaries. A trust can only exist when there is a separation between legal ownership in the trustee and equitable ownership in the beneficiaries.
>
> [55] If the court were to ignore or conflate the separate entities, it would destroy the foundation of the trust relationship. Put another way, absent the separate entities, there is no trust relationship and, therefore, no trust. That is not the case when the corporate veil is pierced. In that situation, the corporation as a separate legal entity remains - it is simply that the court can look through the veil, in very limited circumstances, to attribute ownership to the corporation's alter ego.

As a result, in *Spencer*, a beneficiary of a trust that owned what would otherwise have been a

[5] *Debora v. Debora* (2006), 33 R.F.L. (6th) 232 (Ont. C.A.)
[6] (2012), 17 R.F.L. (7th) 94 (Ont. C.A.)

"matrimonial home" was found to not have an interest in the actual property so as to meet the statutory definition of "matrimonial home", even though she was also a trustee. The decision in *Spencer* was based on the distinction between trustees and beneficiaries, such that absent the separate entities, there would be no trust relationship.

Therefore, the result in *Yared v. Karam* must, to a large extent, have been driven by the complete and total control the husband had over the trust, the beneficiaries, and the assets of the trust. And that is probably the way it should be.

A.M. v. C.H., 2019 ONCA 764 – Parental Alienation, Expert Evidence and 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;[7] 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.[8]

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 the court below, Justice Nicholson had opined that, "parental alienation is a legal concept as opposed to a mental health diagnosis" such that "the court can make a finding of alienation based upon an analysis of the facts alone without expert evidence."[9] He then proceeded to refers to "markers" of alienating conduct opined upon by experts in previous cases.

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.

[7] Compare *Leelaratna* v. *Leelaratna*, 2018 ONSC 5982 and *Barrett* v. *Huver*, 2018 ONSC 2322
[8] S.O. 1996.
[9] *A.M. v. C.H.*, 2018 ONSC 6472 at para. 107ff

> Those factual findings logically led to certain remedies being appropriate or not. The trial judge did not need expert evidence before choosing the remedy that was in the best interests of the child.
>
> Further, judges deciding custody cases do so in places as diverse as Cochrane, Ontario and downtown Toronto. It cannot be assumed that comprehensive parenting capacity assessments are 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.
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> 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 "There are often no legal solutions to family problems…Courts cannot fix every problem."

This case has an interesting ending. At first, 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.

After that, however, with therapy, the relationship between the father and son improved – and the son now lives primarily with the father.

This decision stands in stark contrast to the British Columbia Court of Appeal's decision in *Williamson v. Williamson*,[10] wherein the British Columbia Court of Appeal determined that a trial judge ***cannot*** make a finding with respect to alienation without expert evidence.

[10] 2016 BCCA 87

OM v. ED, 2019 ABCA 509 – The Hybrid Approach under the *Hague*

‘Tis better to beg for forgiveness than to ask for permission?

Until 2018, when the Supreme Court of Canada released its decision in Office of the *Office of the Children’s Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) (”*Balev*”), most courts in Canada were of the view that a child’s habitual residence under the *Hague Convention on the Civil Aspects of International Child Abduction* (the “*Hague Convention*”) should be determined based on parental intention. In most cases, according to the Court in *Balev*, this meant that decisions about habitual residence would largely turn on the “the last mutually shared intent of the parents (or of the persons entitled to fix the child’s residence) as to where the child was to be habitually resident.” And, respectfully, that approach made a great deal of sense, allowing for predictability, avoiding uncertainty, and generally discouraging child abduction.

In the vast majority of cases, the parental intention approach allowed courts and parties to predictably determine whether a child had been wrongfully removed to or wrongfully retained in Canada for the purposes of the *Hague Convention*.

For better or for worse (and, again respectfully, we are in the “for worse” camp), the majority of the Supreme Court of Canada in *Balev* determined that instead of determining habitual residence based on parental intention, judges should apply what it called the “hybrid approach”, which involves determining “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”, and considering “all relevant links and circumstances - the child’s links to and circumstances in country A; the circumstances of the child’s move from country A to country B; and the child’s links to and circumstances in country B.”

In their vigorous dissent in *Balev*, Justices Côté, Rowe, and Moldaver expressed significant concerns about the implications of the majority’s decision to reject the parental intention approach in favour of the hybrid approach:

> [152] **The result of this approach, we fear, is to grant judges unbridled discretion to consider or to disregard whatever they deem to be appropriate, leading to outcomes that may be as inconsistent as they are unpredictable**. The effects will be felt most acutely by parents and potential litigants who will lack any discernable guidance as to how they should order their family affairs. This is particularly important in the context of educational exchanges, family visits, or other forms of international travel, where the majority’s approach effectively vitiates the purpose of time-limited consents. **If one parent can override such an agreement by presenting competing evidence based on “all relevant factors”, then the certainty provided for by time-limited consent agreements is only ever illusory**. Other courts have discussed this problem at length:
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> . . . . .
>
> [153] In summary, we view the majority’s approach as embedding indeterminacy in a context that simply cannot tolerate it. **Multi-factor balancing tests can play a helpful role in certain contexts. Unfortunately, this is not one of them: the Convention requires swift and predictable decisions, and the hybrid model provides neither**. As

> we turn to below, this case convincingly illustrates the comparative advantages of the parental intention approach. [emphasis added]

OM v. ED offers an example of the application of the hybrid approach and some of the very significant problems with it, and animates the concerns of the dissent in *Balev*.

The parties in *OM* started living together in Calgary in 2009. They had a son together in 2015. The mother had Dutch and Canadian citizenship. The father had French and Canadian citizenship. The son had Canadian citizenship, and was eligible for Dutch and French citizenship, but had not yet obtained either.

In 2015, the father took a job that required him to spend every other month in Chad, and in 2018, the parties decided to move to Europe to be closer to the father's work. They shipped most of their belongings to Europe, sold their cars, and rented their condo in Calgary to the mother's sister for six months.

On November 1, 2018, the mother and child (along with the family dog) flew to Amsterdam on a return ticket that had a May 6, 2019 return date to Calgary. From Amsterdam, they drove to Normandy, and stayed at the father's house there. The parents registered the child in school in Normandy, opened a bank account, purchased two vehicles, and started the process of registering the mother as a French resident.

After only a few months in France, the family decided to move to Spain. The mother signed a one-year lease in Alicante, packed up all of the family's belongings, and advised the child's school in Normandy that "[w]e will officially be moving [to Spain]." The mother and child arrived in Spain on March 11, 2019, while the father travelled to Chad for work.

When the mother arrived in Spain, she registered as a Spanish resident, opened a bank account, and enrolled the child in school. The father came to Spain from Chad on April 2, 2019, and lived at the leased house with the mother and child until he had to return to Chad on April 30, 2019. They had no discussions about the mother returning to Canada during this time.

On May 5, 2019, without any notice or warning to the father, the mother surreptitiously removed the child from Spain and brought him back to Calgary on the return ticket that she had originally purchased before she left Canada back in November 2018. [In our view, a surreptitious removal speaks volumes. People that have consent to move their children need not do so secretly.]

When the father learned that the mother had left Spain and returned to Canada, he immediately started an application in Alberta under the *Hague Convention* to have the child returned to Spain. The father's application was heard almost immediately. The application judge rejected the mother's argument that she had only moved to Spain on a trial basis, found that Spain was the child's habitual residence, and ordered that the child be returned to Spain immediately:

> [29] **The mother's submission that the wording of Article 3 would allow me to consider that Calgary was the child's habitual residence, on the basis that "immediately" before the removal or retention" could refer back to the situation seven months before the move to Europe, does not withstand analysis**. This theory places undue focus on parental intention, requiring that I accept that there was an intention that the move was

> temporary or on a trial basis, and gives rise to the problems of a strict parental approach to habitual residence as outlined in *Balev*. . . .
>
> [30] **The suggestion that an analysis of habitual residence can encompass a jurisdiction left by the family seven months before, on the basis of a contested and unproven allegation of an agreement on a time-limited stay, defeats the purpose of the hybrid approach**.
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> . . . . .
>
> [33] While the test in Canada is now the hybrid test of both parental intention and the child-centered focus and not the previous tests, **the evidence in this case establishes an actual change in geography and time sufficient for acclimatization. Given the child's age, the fact that he moved to Spain with both parents and his dog, and that they set up a regular home and enrolled him in school, combined with the fact that he had all the things important to a four-year old, confirms that the period was long enough to establish habitual residence**. Other cases, including *Singh* which was decided post-*Balev*, have also found relatively short periods of time sufficient for this purpose. While the specific facts of these cases may be distinguishable, the principle that habitual residence requires evidence of the child's acclimatization in the jurisdiction remains valid. Despite the fact that the child had only lived in Spain for two months, there is sufficient evidence of that acclimatization. [emphasis added]

The mother appealed.

The objective evidence certainly supported the application judge's finding that the family intended to move to Spain, and she had referred to and considered the hybrid approach in her reasons. Nevertheless, the Alberta Court of Appeal concluded that the application judge had erred in rejecting any possibility that the child was habitually resident in Calgary solely because he had not lived in Calgary for seven months at the time of the removal from Spain. There was a significant amount of uncontroverted evidence in the record, including that the child was born in Alberta, had Canadian citizenship, and had spent almost all of his life in Calgary, which the Court of Appeal thought the application judge should have specifically considered when determining whether Calgary was still the focal point of the child's life:

> [27] In this case, the chambers judge's approach erroneously led her to disregard Alberta as a potential habitual residence for the child. Indeed, her analysis shows that she seriously considered only Spain as a potential habitual residence, notwithstanding several recent moves by the family. This elevated Spain to a presumed habitual residence, rather than merely the most recent. This was an erroneous application of the test. The links to Calgary were considerable, and should have been considered.

Having found that the application judge had erred, the Court of Appeal then considered the appropriate remedy. Given the urgent nature of the proceeding, the Court of Appeal chose to decide the case based on the record before it, instead of sending it back for a new hearing. And, notwithstanding the objective evidence of parental intent that the application judge had relied on, the Court of Appeal concluded that the child had still been habitually resident in Calgary when he and the mother left Spain and returned to Canada on May 6, 2019, because Calgary

had still been the focal point of the child's life at that point:

> [32] **When all of the relevant considerations and connections are taken into account, the child's connection to Alberta takes on greater import**. Many of those connections have already been discussed. The child is Canadian; he was born in Calgary in 2015 and lived there his whole life until the fall of 2018, when he moved to Europe with his family. While he lived in Calgary, his aunt and uncle also lived there, although his aunt has since moved to British Columbia. He lived away from Calgary, in Europe, for the seven months immediately preceding his removal back to Canada (in May 2019). Of those seven months, most of the time was spent in France, where the child briefly attended preschool. He spent less than two months in Spain, and the whole family was together in Spain for only one month. **The child's connection with Spain was of very short duration and, given the recent frequency of family moves, it is not likely that it had taken on the character of a consistent home for him in the brief time that he spent there**. The child has some paternal extended family in Spain, but at least as much maternal extended family in British Columbia and Alberta. **As with most young children, the child's environment is essentially a family environment and, in this case, that environment is very much tied to his mother, who has been his primary caregiver and who has no real connection to Spain. The connections that this child has known in his young life are primarily in Alberta**.
>
> [33] **Considering the entirety of the child's situation, and given the frequency of the family's recent moves, in our view the child is best characterized as being habitually resident in Alberta**. He was, therefore, not habitually resident in Spain at the time of the alleged wrongful removal, and there was no basis on which to order his return to Spain pursuant to the *Hague Convention*. [emphasis added]

While this outcome is somewhat surprising, it is nevertheless justifiable based on *Balev* and the evidence that was before the Court, particularly since the family had been in Spain for less than two months when the mother took the child back to Canada. This result also had the added benefit of avoiding the need for the mother and child to return to Spain and litigate the question of whether and when she should be able to return to Canada in circumstances where neither party had any real connection to Spain, and the father was only going to be physically present in Spain, at most, 50 percent of the time (with the rest of his time being spent in Chad).

That being said, it is ultimately hard to see this case as doing anything other than metaphysical violence to the objectives of the *Hague Convention*. *OM* also illustrates the significant problems with *Balev*. The *Hague Convention* worked well in Canada because lawyers and parties knew that there was a clear and strict test for determining a child's habitual residence, and in most cases there would only be one objectively correct answer to the question of where a particular child had been habitually resident at the time of the removal or retention. We are reminded of the concerns expressed by the Ontario Court of Appeal in *Balev v. Baggott* (2016), 84 R.F.L. (7th) 291 (Ont. C.A.) (a view that was arguably rejected by the Supreme Court of Canada): Although a given case may involve the interests and needs of specific children, it raises issues that transcend their interests and that affect the interests of countless other children and their parents.

The hybrid approach has sacrificed certainty at the alter of judicial discretion - something that

is very dangerous when dealing with child abduction. Outcomes are going to become increasingly difficult to predict. And, unfortunately, the less certainty there is in *Hague Convention* cases, the more incentive there is for at least some parents to wrongfully retain or remove children to Canada, and roll the dice at trying to persuade a court to let them stay here. Some parents will think it more strategic to ask for forgiveness than to beg for permission.

Alberta Union of Provincial Employees v. Alberta Health Services, 2020 ABCA 4 – Evidence of Negotiations in Interpreting Agreements

Subjective intentions? We don't need no subjective intentions!

Even those reading this in front of the television will notice that this is not a family law case. However, in this case, the Alberta Court of Appeal offers some guidance on the limited role that the negotiations leading up to an agreement may play in interpreting the actual contract between the parties. And while this case is about the interpretation of collective agreements, the general principles of contract interpretation apply to domestic contracts: *Dutton v. Davies*, 1997 CarswellOnt 4040 (Ont. Gen. Div.); *Campbell v. Campbell* (2013), 28 R.F.L. (7th) 298 (B.C. C.A.); *Turner v. DiDonato* (2009), 63 R.F.L. (6th) 251 (Ont. C.A.); *Moses Estate (Trustee of) v. Metzer*, 2016 CarswellOnt 4177 (Ont. S.C.J.); *MacDougall v. MacDougall* (2005), 19 R.F.L. (6th) 103 (N.S. S.C.); and *Holm v. Holm* (2013), 35 R.F.L. (7th) 255 (Alta. C.A.). As a result, and given the less-than-clear nature of the case law as to the use that can be made of pre-contract negotiations, we thought this case might be of interest.

Given that the case deals with labour arbitration, the facts are not terribly useful. But by way of both review and general principles:

- Courts must always consider the surrounding circumstances (the "factual matrix") known to both parties at the time a contract was made. Specifically, the Supreme Court in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.) ("*Sattva*") at paras. 47 and 58 determined that contractual interpretation requires the decision-maker to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." The Supreme Court also required courts to consider the "surrounding circumstances" known by the parties at the time the contract was made.

- Evidence regarding the negotiation of a contract is generally inadmissible as an aid to the interpretation of a contract, unless the contract is found to be ambiguous (*Sattva* at para. 59). Surrounding circumstances do not include evidence of the parties' subjective intentions, and cannot be used to add to, detract from, vary or otherwise "overwhelm" the written words. As a result, the parol evidence rule is not offended: *Sattva* at paras. 59-60.

- These principles can contradict each other. In practice, what the parties communicated to each other while negotiating a contract is often relevant to establishing the background facts that were known to both parties when the contract was made.

- Evidence of negotiations, including prior drafts, is generally inadmissible as part of the surrounding circumstances. Even though evidence of the surrounding circumstances and evidence of the parties' negotiations may overlap in some instances, evidence of the parties' subjective intentions is **always** inadmissible. [Para. 27]

- The surrounding circumstances are an objective interpretive aid. A court must always consider the surrounding circumstances, to ensure that the words of the contract are "not looked at in isolation or divorced from the background context against which the words

were chosen." [Para. 28]

• Evidence of subjective intention is inadmissible because it is irrelevant. There would be no dispute if there was consensus as to intent, so the lack of consensus does not aid in interpretation. Such evidence would also simply allow parties to create self-serving evidence. [Para. 30]

• If the pre-contractual negotiation evidence does not meet the test for surrounding circumstances, then its admission requires ambiguity. For several reasons, the Court of Appeal rejected the idea that surrounding circumstances should be defined "so broadly as to include all pre-contract negotiations, so long as evidence of subjective intentions is excluded." [Para. 32]

While the phrase "subjective intention" is often mentioned when dealing with the interpretation of contracts, few cases actually explain its meaning, and that is why this case is useful. According to the Alberta Court of Appeal, "subjective intention" refers to a party giving direct evidence to the effect of: "I think that the phrase means X", or "at the time we entered into the contract, I thought that the provision meant Y". This sort of evidence is *always* inadmissible to help interpret a contract. However, the Court noted that inadmissible evidence about "subjective intention" can also include *indirect* evidence about what a party thought the language in a contract meant. For example, a party testifying that he or she proposed language in a draft agreement to resolve a specific problem that it would have resolved only if the language had a certain meaning. It is in this way that inadmissible evidence about subjective intent can sometimes improperly creep into the interpretation exercise.

These interpretive tools and admonitions are important to keep in mind when dealing with the negotiation of domestic contracts where parties are often inclined to lead evidence as to the supposed purpose and meaning behind specific provisions of a contract. However, when it comes to interpreting a contract, courts are more interested in the putative understanding of the reasonably objective bystander than the subjective evidence of the parties themselves: *Lacroix v. Loewen*, 2010 CarswellBC 1125 (B.C. C.A.).

Bredenkamp v. Bredenkamp (2020), 41 R.F.L. (8th) 129 (B.C. S.C.) – Is the Passage of Time a Material Change?

> Time, time, time, See what's become of me…
>
> -Simon & Garfunkel

Bredenkamp is yet another case about a payor who has either retired or wants to retire, and is seeking to end a long-standing spousal support obligation (for a discussion of some other recent cases that have dealt with this issue, see the August 5, 2019, October 14, 2019, November 11, 2019, and March 16, 2020 editions of *TWFL*).

The parties in *Bredenkamp* were married in 1973 in South Africa. They moved to Canada in 1987, and separated in either 1993 or 1994 when they were both in their early 40s. They had two children together, both of whom were adults.

During the marriage, the husband worked as a psychiatrist, while the wife took care of the children and the home.

The husband started paying support to the wife when they separated. In 2000, Justice Ritter made a final order that the husband pay the wife $2,500 a month in spousal support on an indefinite basis, based on the husband's then-income of more than $150,000 a year, and the wife's then-income of less than $10,000 a year. In making this order, Justice Ritter found that the wife was entitled to compensatory support based on her role as a homemaker, but that she should also be encouraged to become self-sufficient and obtain employment.

Although the wife had earned a university degree before the parties moved to Canada, and she made some efforts to upgrade her education after the parties separated, she never actually made a serious attempt to enter the workforce or earn income. She also spent a significant amount of time in South Africa. The husband, on the other hand, continued working, and was ultimately able to increase his income to approximately $250,000 a year.

In 2017, the husband filed a petition under s. 17 of the *Divorce Act* to terminate Justice Ritter's order on the basis that his obligation to the wife had terminated. The wife responded with a cross-application to retroactively increase the husband's support payments.

Justice Shergill was satisfied that the husband had established a material change in circumstances that would allow the 2000 order to be varied because of the passage of time:

> [54] The parties were in their early 40s when they separated. By November 2017, 17 years had transpired since the making of Justice Ritter's Order and over 23 years had passed since the parties' separation. Thus, ***simply by the passage of time, there has been a material change of circumstances***.
>
> [55] In addition, **[the husband's] circumstances have also changed. He is almost 70 years of age, in ailing health, and on the cusp of retirement**. He has since remarried, and has financial obligations to his new spouse and stepson. While he has continued to enjoy a lucrative career, since the separation his current wife has aided him significantly in this regard. [emphasis added]

Keep the italicized sentence in mind for later.

After finding that there had been a material change in circumstances so as to give her

jurisdiction under s. 17 of the *Divorce Act* to vary Justice Ritter's order, Justice Shergill had to decide what variation, if any, "is justified by that change": *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.) at para. 47.

In determining that the change in circumstances warranted a complete termination of the husband's support obligation and a dismissal of the wife's claim for a retroactive increase, Justice Shergill confirmed that "indefinite support does not mean permanent", and that the support payments should end because:

- The wife had already been adequately compensated for the sacrifices that she had made during the marriage;

- While the wife had contributed to the husband's career, his success was also attributable to his own hard work and the assistance of his current spouse who worked with him in his practice; and

- Any financial difficulties that the wife was experiencing arose out of her own failure to make reasonable efforts to become economically self-sufficient many years earlier.

At first glance, an immediate termination may seem harsh, especially as the wife may never have been able to become fully self-sufficient, even had she made reasonable efforts to do so. However, the potential harshness is tempered by the fact that:

- Based on the husband's significantly reduced income in retirement, and the wife having at least some minimal income on her own - whether real or imputed - the husband's obligation under the *Spousal Support Advisory Guidelines* would have been nominal in any event (e.g. based on the husband having an income of $57,000 a year and the wife having an imputed income of $30,000 a year, the husband's obligation would have only been between $102 and $493 a month).

- The husband's retirement appeared to be reasonable and justified in the circumstances, and there was no suggestion that he was retiring in order to avoid having to pay support.

- The wife received spousal support from the husband for more than 25 years even though they were only married for just over 20 years.

We largely agree with Justice Shergill's decision. However, we do want to point out that her comment that the "passage of time" can, in and of itself, constitute a material change in circumstances, is not without controversy, and is inconsistent with another line of decisions, including, for example, *Rushton v. Rushton*, 2002 CarswellAlta 1579 (Q.B.) where Justice Slatter (now Slatter, J.A.) stated as follows:

> [27] **Section 17(4.1) requires that there be a change in circumstances before a variation of a spousal support order can be made**. This change of circumstances must be one that was not reasonably anticipated at the time the original order was made. Obviously **the mere passage of time cannot suffice, as that would render the subsection meaningless**. In addition, **the normal process of aging, and the maturation of the family unit would not suffice as a change of circumstances, as such changes are universal**. [emphasis added]

See also *Rondeau v. Rondeau* (2011), 90 R.F.L. (6th) 328 (N.S. C.A.); *Kenyon v. Kenyon*, 2011

CarswellBC 1344 (S.C.); *Favero v. Favero*, 2013 CarswellOnt 8414 (S.C.J.); *Hess v. Hamilton* (2018), 5 R.F.L. (8th) 287 (Ont. S.C.J.); and *MacLeod v. MacLeod* (2017), 100 R.F.L. (7th) 87 (N.S. S.C.).

That being said, Justice Shergill's conclusion that there had been a material change in circumstances was likely still reasonable given her other findings that the husband was in poor health and was going to retire imminently, and that his income would decrease to only $57,000 a year when he retired. Since the original order was based on the husband earning more than $150,000 a year, an imminent decrease to only $57,000 a year clearly constituted a material change in circumstances. And while courts do not particularly like variation applications *in advance* of a change (see, for example *Vaughan v. Vaughan* (2014), 44 R.F.L. (7th) 20 (N.B. C.A.)), there may be an exception for imminent retirement: *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.).

The more interesting question, however, is what would have happened had the evidence been that the husband's income in retirement was still going to be in the range of $150,000 a year (i.e. what he was earning when the initial order was made). Or what if the husband was not planning to retire?

On the first question, it is clearly income, not retirement status, that determines whether there has been a material change: *Winseck v. Winseck* (2008), 49 R.F.L. (6th) 296 (Ont. Div. Ct.) at para. 18.

And what of the second question - if the husband was not, in fact, planning to retire? If the mere passage of time cannot be a material change, support would never end, and "indefinite" support would, indeed, become "permanent" support. With respect to courts that have found that the mere passage of time cannot be a material change, that cannot be correct. Compensatory support should continue until compensation for the economic disadvantage has been achieved: *Tedham v. Tedham* (2005), 20 R.F.L. (6th) 217 (B.C. C.A.); *Chutter v. Chutter* (2008), 60 R.F.L. (6th) 263 (B.C. C.A.); *Zacharias v. Zacharias* (2015), 66 R.F.L. (7th) 1 (B.C. C.A.); and *Miolla v. Miolla* (2016), 79 R.F.L. (7th) 1 (B.C. C.A.).

Stated another way, continuing entitlement is always in issue in a variation proceeding - or at least it *should* be - and once compensation has been achieved, there is no more entitlement, and support should terminate: *Price v. Price* (2010), 92 R.F.L. (6th) 1 (B.C. C.A.); *Eichen v. Eichen*, 2012 CarswellBC 148 (C.A.); *Rozen v. Rozen* (2016), 86 R.F.L. (7th) 56 (B.C. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Hancock v. Rutherford*, 2018 CarswellOnt 757 (Div. Ct.); and *Choquette v. Choquette* (2018), 8 R.F.L. (8th) 414 (Ont. S.C.J.), aff'd (2019), 25 R.F.L. (8th) 150 (Ont. C.A.). It seems intuitive that support should be subject to termination when the basis for entitlement disappears: *Broaders v. Broaders*, 2017 CarswellNfld 10 (C.A.).

The suggestion that the "mere passage of time" is not a material change appears to have actually been imported from variation cases involving parenting, such as *Wiegers v. Gray* (2008), 47 R.F.L. (6th) 1 (Sask. C.A.); *Brown v. Lloyd*, 2015 CarswellOnt 790 (C.A.); *D. (H.) v. D. (L.M.)* (2016), 81 R.F.L. (7th) 357 (B.C. S.C.); and *Coppin v. Arboine*, 2018 CarswellOnt 19895 (Ont. S.C.J.). But if the "mere passage of time" is not a material change, that can become a problem in a significant number of parenting cases, as an appropriate parenting plan for a 3-year-old

will often be very different than what is appropriate for an 8-year-old.