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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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So . . . How Much Will You Notionally Pay Me to Live with You?

Politis v. Politis (2021), 61 R.F.L. (8th) 27 (Ont. C.A.) — Tulloch, Nordheimer, and Jamal JJ.A.

In *Politis*, the Ontario Court of Appeal upheld a rather creative approach to the issue of a support recipient re-partnering after a long-term marriage.

The parties were married for 25 years and separated in 2008. The husband was a civil engineer, and the wife had not worked outside of the home throughout the marriage. The wife contracted Lyme disease in October 2012, which impacted her ability to earn an income or to contribute to her own support.

The wife began a committed relationship with Mr. B in 2009, and they started cohabiting in 2011. The trial judge determined that, while cohabitating with Mr. B, the wife enjoyed a lifestyle comparable to, or better than, the standard of living the parties enjoyed during the marriage.

The trial judge determined that the wife was entitled to spousal support on both compensatory and non-compensatory grounds. The parties had a long-term marriage. The wife had been a stay-at-home parent, even if the husband assisted her with home and parenting responsibilities when he could. As a result of the wife's age, health, lack of education, and work experience, she would have a difficult time re-entering the workforce following separation. She was unable to achieve self-sufficiency based on her own income and assets.

Here is the interesting part. The trial judge determined that the wife received a net financial benefit of at least $3,100 a month from Mr. B based on half the amount she had sworn in her financial statement that he contributed to the household expenses. This amount was then grossed up by 19% for tax and, using this figure, the trial judge set the wife's ***income*** for support purposes at $44,628 per year. The husband's income was determined to be $193,816. With those incomes, the *SSAGs* indicated the range of support should be from $4,673 at the low end, $5,452 at the mid, and $6,185 at the high end of the range.

The trial judge determined that the husband should pay spousal support but set the amount at $3,000 (i.e. below the low end) until October 2024. The spousal support would thereafter reduce to $1,500 per month and terminate on October 1, 2026. The trial judge reduced the amount of support below the range provided by the *SSAGs* because of the wife's common-law spouse's ability to support her, and because her new spouse's support obligation would increase over time.

The trial judge also held that there would be no retroactive adjustment of support. The husband had paid interim support in accordance with an interim award dating from 2015, and the trial judge determined that it was unnecessary to adjust the support that had been paid.

The wife appealed, arguing that:

1. The trial judge erred by deviating from the amounts set out in the *SSAGs*;
2. The trial judge erred by effectively double-counting the contributions of her new spouse; and
3. The trial judge erred by not awarding indefinite support, as the wife met the Rule of 65.

The Court of Appeal dismissed the wife's appeal.

As is usual, the Court of Appeal noted that the *SSAGs* are a "valuable tool" in assessing a reasonable amount of spousal support. The ranges of the *SSAGs* are the presumptive starting point for awarding support and, while not binding, should not be lightly departed from. Any departure requires adequate explanation.

The Court of Appeal determined that the wife's position incorrectly equated the principled guidance offered by the *SSAGs* as a whole, with the values generated by the formulas. The formulas are just tools and, in accordance with the *SSAGs*, cannot be applied automatically and unthinkingly in every case. The *SSAGs* must be applied as a whole, and parties cannot just focus solely on the numbers and formulas: *Mason v. Mason* (2014), 47 R.F.L. (7th) 173 (Ont. S.C.J.), rev'd (2016), 83 R.F.L. (7th) 1 (Ont. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.).

The Court of Appeal then cited the *SSAGs* themselves regarding the impact of re-partnering. Citing section 14.7:

> **Where the recipient remarries or re-partners with someone who has a similar or higher income than the previous spouse, eventually — faster or slower, depending upon the formula adopted — spousal support would be extinguished**. We have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations, despite considerable feedback that a formula would be desirable. In this final version, we still have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making. [emphasis added]

And section 13.8:

> Entitlement may then be revisited for any number of reasons — the recipient finding employment, the recipient's remarriage or re-partnering, the payor's retirement or loss of employment, etc. — and support may be terminated if entitlement has ceased.

Finally, the Court of Appeal cited the *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice 2016) for the proposition that while re-partnering does not mean the *automatic* termination of spousal support, it does often result in support being reduced, and *sometimes* terminated. This depends on whether spousal support is compensatory or non-compensatory, as well as the length of the first marriage, the age of the recipient, the duration and stability of the new relationship, and the standard of living in the recipient's new household — the typical fact-specific inquiry into the factual matrix of the old relationship and the new relationship.

In *Politis*, the Court of Appeal determined that the trial judge's decision to deviate from the range provided by the *SSAGs* was not an error, but rather was consistent with the *overall* guidance offered by the *SSAGs*. In addition, the trial judge specifically considered the wife's compensatory claim when setting support. At the time of trial, the husband had been paying support (in one form or another) for nine years. As this had not fully compensated the wife, the judge set up a structure where additional support (albeit on a reduced basis) would be paid until 2026.

The Court of Appeal found that the trial judge's approach was consistent with the overall guidance of the *SSAGs* and saw no reason to interfere.

The wife also argued that the trial judge erred in ordering time-limited spousal support. She met the "Rule of 65" as set out in section 3.3.3 of the *SSAGs*. The length of cohabitation in years plus the wife's age at the date of separation was greater than 65. The wife argued that as a result, she was entitled to indefinite support (or, more properly, support with "duration not specified").

The Court of Appeal stated that the wife's position failed to consider the "more nuanced" explanations provided in the *SSAGs* and specifically at section 7.5.3:

> The *without child* support formula provides that indefinite (duration not specified) support will be available even in cases where the marriage is shorter than 20 years **if the years of marriage plus the *age* of the support recipient *at the time of separation* equals or exceeds 65.** In a shorthand expression, we described this as the "**rule of 65**". [emphasis in original]

In addition, the *SSAGs* make it clear at section 13.8 that indefinite support is ***not*** permanent support:

> Under the Advisory Guidelines duration of spousal support will be indefinite, under both formulas, where the parties have been married for 20 years or more, or where the "rule of 65" applies. But indefinite support, under the Guidelines as under the current law, does not necessarily mean that support is "permanent" or "infinite", only that the duration has not been specified. We have purposely changed the language in this final version to convey that notion; our new terminology is "indefinite (duration not specified)". **Duration may be specified at some point in the future and support terminated, if entitlement ceases.** [emphasis added by the Court of Appeal]

Finally, the *SSAGs* set out at section 7.5.3 that the "Rule of 65" is "intended to respond to the situation of older spouses who were economically dependent during a medium length marriage and who may have difficulty becoming self-sufficient given their age."

With these considerations in mind, the Court of Appeal determined that the trial judge had properly applied the Rule of 65. The wife's re-partnering allowed her to enjoy a standard of living comparable to, or higher than, what it was during the marriage, thereby addressing the very concern that underpinned the Rule of 65 — here, there was no concern that the wife would remain economically dependent on the husband as she had a new partner to support her.

The Court of Appeal found no reason to depart from the trial judge's reasons in terms of the duration of support.

Finally, the wife argued that the trial judge had double-counted Mr. B's contributions — first as a source of income, and secondly by using the support provided by Mr. B as a reason to depart from the *SSAGs* formula ranges. The Court of Appeal disagreed. The Court of Appeal interpreted the trial judge's decision as taking into account and considering the contributions made by Mr. B to the wife's lifestyle, rather than double-counting. The Court of Appeal stated that the *SSAGs* require a case-by-case analysis when dealing with the issue of re-partnering. Given this contextual analysis, and the deference due to the trial judge, the Court of Appeal found no reason to disturb the trial judge's decision.

Encore Les Chiens

A Dog-Napping

Duboff v. Simpson, 2021 CarswellOnt 10364 (S.C.J.) — Papageorgiou J.

Contempt of Dogs

M.J. v. T.J. (2021), 58 R.F.L. (8th) 335 (P.E.I. S.C.) — Clements C.J.

Duboff v. Simpson

Disclaimer: Epstein Cole LLP represented one of the parties in *Duboff v. Simpson*.

Given the number of "COVID puppies" out there, it was only a matter of time before we were blessed with some new canine litigation. (It is entirely understandable why people do not fight about cats; and in any case, that would be a much different fight: "You take it! . . . No, you take it! . . . ")

At law, a dog continues to be an indivisible piece of property. The court may determine ownership, provide compensation for harm to property interests, and order property returned to the rightful owner: *King v. Mann*, 2020 CarswellOnt 178 (S.C.J.) at para. 19. But the court cannot (will not?) grant access to a dog or determine a shared residential schedule for a dog in the event of a separation: *Warnica v. Gering*, 2005 CarswellOnt 3989 (C.A.), affirmed 2004 CarswellOnt 5605 (Ont. S.C.J.).

Regular readers will recall that two approaches have developed in the case law for determining the ownership of dogs: the more "traditional" approach in cases like *Warnica*; *Baker v. Harmina* (2018), 7 R.F.L. (8th) 283 (N.L. C.A.); and *Brown v. Larochelle*, 2017 CarswellBC 1034 (Prov. Ct.), and the "more pet-focussed" approach in cases like *Coates v. Dickson*, 2021 CarswellOnt 1430 (S.C.J.).

The traditional approach focuses primarily on a dog as a piece of property: who paid for the dog and did ownership change after purchase? [See *Duboff* at para. 17]

Courts applying the more traditional approach emphasize that a finding of joint ownership is the "worst" outcome given that the legal system is not equipped to deal with the problems that come with joint dog ownership: *Baker* at paras. 12, 18, and 23-26.

The more pet-focussed approach generally arises in cases where the party with legal ownership is not the same party that actually generally cared for the dog. While this more sensitive approach still focuses on legal ownership, it also considers a number of other factors in determining "ownership":

- Whether the dog was brought into the relationship by one of the parties;
- Any express or implied agreement as to ownership, made either at the time the dog was acquired or after;
- The nature of the relationship between the people contesting ownership at the time the dog was first acquired;
- Who purchased and/or raised the dog;
- Who exercised care and control of the dog;
- Who bore the burden of the care and comfort of the dog;
- Who paid for the expenses related to the dog's upkeep;
- Whether at any point the dog was gifted by the original owner to the other person;
- What happened to the dog after the relationship between the litigants changed; and
- Any other indicia of ownership, or evidence of agreement relevant to who has or should have the ownership of the dog.

In *Duboff*, Justice Papageorgiou applied both approaches to determine the ownership of Layla the Boxer. Her Honour found that under either approach, Duboff, the Applicant, was Layla's lawful owner. She ordered the immediate return of Layla to his care, which also follows the legal doctrine of Replevin as it applies to the return of personal property, which is codified in the Ontario *Rules of Civil Procedure*, but which has not been similarly codified in the *Family Law Rules*.

The parties in *Duboff* were both young lawyers who had lived together for four years. They never married, and they did not have any two-legged children. They settled all other issues arising from their separation amicably. The vast majority of ownership documentation supported Duboff, who also paid for virtually all of Layla's expenses.

Duboff settled into his new apartment following separation, and Layla went to live with him full time. Simpson, the Respondent, would occasionally look after Layla when Duboff was unable to — as did his friends and members of his family.

After Duboff started a new relationship (around the beginning of the COVID pandemic), the relationship between the parties soured, and Simpson did not see Layla for five months. Then things got a bit strange.

In October 2020, while driving in a car along St. Clair Avenue with her co-worker, Simpson saw Layla walking with a stranger — who turned out to be Duboff's new girlfriend. Simpson pulled over and engaged with the person and Layla. She then grabbed Layla's leash, ran across the street to the waiting vehicle, and drove away with Layla. Duboff called the police, but was ultimately told this was a civil matter. He started proceedings, and the case proceeded by way of a summary trial. By the time of trial, Duboff had not seen Layla in over seven months, and by the time of the decision had not seen Layla in over nine months.

Justice Papageorgiou concluded that, as in *Warnica* and *King*, the amicable and occasional possession of Layla by Simpson after separation was totally dependent on the parties' relationship and did not change the ownership of Layla, who had always been returned to Duboff's care. Her Honour declined to determine if Simpson's constructive trust claim to a canine was tenable in law (a similar claim was rejected as a waste of time/nuisance in *Warnica*) because Simpson had not established unjust enrichment.

Justice Papageorgiou also noted that a constructive trust was a discretionary remedy that, for policy reasons, would not be appropriate to impose on the parties. Consistent with previous cases, Justice Papageorgiou also found that courts are not equipped to supervise the sharing of a pet as would be required should there have been a determination of joint ownership.

M.J. v. T.J.

This is another spin on a dog case. Remember in *Marcovitz v. Bruker* (2007), 46 R.F.L. (6th) 1 (S.C.C.), the Supreme Court of Canada opined that while the court cannot adjudicate on religious obligations — once a religious obligation was converted into a civil obligation, the court may enforce it? This case represents a similar situation: even where courts may not be inclined to adjudicate the ownership of a pet, once an obligation is housed in a separation agreement or Order of the court, it will be enforced. And, as a bonus, the case also deals with issues of contempt in Prince Edward Island.

The parties married in 2013 and separated in 2018. Prior to the marriage, the wife owned one dog, "M.A." During the marriage, the parties acquired three additional dogs, "R.", "M." and "P."

The parties entered into a Separation Agreement in February 2020. The Agreement addressed numerous issues including the family dogs, providing that:

> • the husband would continue to care for M.A. and would provide the wife with reasonable time with M.A. upon request;
>
> • the wife would continue to care for the dogs, R., M. and P.;
>
> • the wife would provide the husband with at least one overnight period with R., M. and P. every other Friday from 6:00 p.m. until Saturday at 6:00 p.m. or such other times as agreed to between the parties.

Before the ink was barely dry on the Separation Agreement, the wife started to breach her obligations by withholding the dogs from the husband, or only providing one or two of the dogs. A month after the Agreement was signed, the wife told the husband that he would no longer be getting the dogs.

The wife then advised the husband that P. had died. The husband was devastated. The wife then admitted that P. was not necessarily dead, but had run away and was "presumed" dead. And then the wife admitted that this information was also incorrect: P. was neither dead nor had P. run away; rather, the wife had given P. away to another individual, K.P. The husband asked that K.P. return P. to him, and K.P. refused.

In August 2020, the husband issued a Petition for Divorce and a Notice of Motion for a contempt order against the wife, and an order enforcing the terms of the Separation Agreement.

At the pre-motion conference, the wife agreed to allow the Husband to have his time with the two remaining dogs, R. and M. However, she failed to substantively comply, and with few exceptions, the wife continued to withhold the dogs.

Interestingly, acknowledging the confidential nature of pre-motion conferences, Her Honour allowed evidence in relation to the pre-motion conference in the circumstances.

The wife then made matters worse by posting negative comments about the husband on social media. Dogged behaviour, indeed.

The matter was scheduled for a further pre-motion conference for May 2020. Although the wife testified that she did not remember being served with the Notice of Pre-Motion Conference, Justice Clements was quite satisfied she had been. As the wife did not attend the pre-motion conference in May 2020, the pre-motion conference judge:

- ordered that the parties comply with the Separation Agreement (and specifically the clause regarding the dogs) pending further order of the court;
- vested possession of R. and M. with the husband every other weekend from Friday at 6:00 p.m. until Saturday at 6:00 p.m.;
- scheduled the husband's contempt motion; and
- ordered the wife to pay the husband costs in the amount of $500 payable within 30 days.

Of course, the wife did not comply. She then actively evaded service of the Order and the Notice of Motion for the contempt hearing. And she continued to refuse to deliver the dogs.

As predicted by her previous conduct, the wife not attend the contempt motion, and Justice Clements issued a warrant for the wife's arrest to compel her attendance at the continuation of the contempt hearing. The wife *did* attend the continuation of the contempt motion on June 18.

At the continued contempt hearing, the wife confirmed that P. was still with K.P. — but she denied knowing K.P.'s address. She also testified that she had returned R. and M. to the breeder in Nova Scotia in April — the same day she was served with the Notice of Pre-Motion Conference.

Justice Clements noted that a finding of contempt is, and should be, extraordinary, and that Rule 60.12 of the P.E.I. *Rules of Civil Procedure* set out the procedure for a contempt order and associated penalties, including an order that the wife be imprisoned; pay a fine; do or refrain from doing an act; pay such costs as are just; or, comply with any other order.

Her Honour then set out the three elements of civil contempt, all of which must be established beyond a reasonable doubt, from the Supreme Court of Canada in *Carey v. Laiken*, 2015 CarswellOnt 5237 (S.C.C.):

- The order alleged to have been breached must state clearly and unequivocally what should and should not be done.
- The party alleged to have breached the order must have had actual knowledge of the order.
- The party's actions must be intentional: the party must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

And, again, the Supreme Court discouraged using the contempt power to force compliance with court orders; rather, the power should be used with restraint and as a last resort — a principle with which we do not always agree. If a party not accidentally — but wilfully — disobeys an Order of the court, without lawful excuse, there should be a finding of contempt and a penalty should

follow quickly. It is simply too dangerous for a party — especially in family court — to think that "minor disobedience" is permissible. It is a recipe for frustration, disaster, reciprocal breaches, and injures the administration of justice. Compassionate justice is one thing. But if parties do not respect the court, the rule of law is undermined.

Her Honour also referred to *Sickinger v. Sickinger* (2009), 69 R.F.L. (6th) 299 (Ont. S.C.J.), aff'd (2009), 75 R.F.L. (6th) 1 (Ont. C.A.), which principles were adopted by the P.E.I. Court of Appeal in *M. (D.E.) v. M. (J.M.)* (2011), 4 R.F.L. (7th) 1 (P.E.I. C.A.).

Here, the wife's actions caused the husband significant emotional and financial damage. There was also an allegation that the wife had "doctored" veterinary records to suggest that the husband was responsible for injuring one of the dogs — while the dog was in the wife's care. Given some peculiarities in the records, that allegation had teeth.

The husband argued that non-compliance was non-compliance and that the wife's conduct was no less condemnable because the subject matter of the order was dogs. The wife also offered little by way of excuse or justification for her conduct. She basically testified that she and a friend discussed the matter and decided it would be best for her to not attend court. And her testimony left her with little credibility in any event.

Justice Clements had little trouble holding the wife in contempt. The wife clearly had knowledge of the terms of the Separation Agreement, including the husband's entitlement to access time with the dogs. She failed to abide by those terms in the Separation Agreement and actively withheld the dogs from the husband. She also had knowledge of the May 2021 court order enforcing the Agreement. And then there was her wilful conduct in lying about what had happened with P. and returning R. and M. to the breeder — all with notice of the upcoming hearing. And her failing to attend the first hearing. And evading service. And . . . and . . . and . . .

On to the issue of remedy.

The husband was not asking that the wife be imprisoned. (We're not sure we would have been that benevolent.) However, the husband also argued that for the court to simply re-order what had been ordered in the past — that the wife comply with the Order — was neither practical nor sufficient to denounce the wife's conduct here. While the object in civil contempt is primarily remedial with a goal of coercing compliance (*Sickinger* at para. 24), the wife, by her conduct, had made it clear that she had no intention of complying.

Counsel for the husband urged the court to Order the wife to return all three dogs to the husband and argued that, until that happened, the husband's obligation to pay spousal support pursuant to the terms of the Separation Agreement should be suspended. Alternatively, the husband argued that the wife should be fined $90,000 (based on the husband's monthly spousal support of $1,250 for six years).

When pressed as to what she would do should the Court order her to return the three dogs to the husband, the wife responded that she would "try", given she no longer had the dogs in her possession.

Perhaps making Her Honour's decision a bit easier, several days after the contempt hearing the Court received an unsolicited communication from the breeder in Nova Scotia confirming R. and M. were there and that the breeder would cooperate fully with the Court's decision and would help connect the dogs with their rightful owner.

Therefore, Her Honour ordered that, within 45 days, M. and R. be returned to the husband, and that they remain in his sole possession. Cleverly, Justice Clements reserved her decision on any further remedy and costs until the dogs were returned.

In setting a further hearing date, Justice Clements noted her concern for the wife's "total disregard for the judicial system and the rule of law." Her conduct was to be denounced in the strongest terms.

The lesson? If pet possession or ownership is an issue — include it in a separation agreement or Court Order. And it wouldn't hurt to be in Prince Edward Island. It will be interesting to see how this contempt story ends.

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