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— Franks & Zalev - This Week in Family Law

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Early Retirement, Glass Houses & Stones

Hague v. Hague (2021), 55 R.F.L. (8th) 294 (B.C. S.C.) — Baird J.

The wife was 64. The husband was 65. They began cohabiting in 1976. They married on May 26, 1979, and they separated on January 27, 2011 — a 35-year traditional relationship with four (now very adult) children.

The parties were divorced on December 28, 2013, and all family property was divided, including the value of their respective pensions.

The husband agreed to pay spousal support of $3,060 per month in a Consent Order shortly after separation. However, that amount was reduced to $2,850 when the wife began receiving her portion of the husband's pension.

The husband had worked for BC Ferries for 45 years, and qualified for a full BC Public Service Pension Plan in 2010. The husband, having turned 65 on October 24, 2020, retired from BC Ferries on January 1, 2021. He gave the wife a year's notice of his intention to do so.

There were no arrears or disclosure issues, and the husband was applying for an order terminating the support Order.

The wife opposed the husband's application, arguing that she had yet to be adequately compensated for the economic disadvantages she suffered by the marriage and its breakdown. She did not agree that the husband's retirement was a material change in circumstances. She argued that the husband was neither ill, nor disabled and that his capacity to earn income had not changed. He stopped working because he wanted to, not because he *had* to. Further, the wife suggested that his decision to do so was unreasonable given her ongoing entitlement to support — all familiar arguments.

After throwing her stones, the wife retreated to her glass house. Without explanation, the wife had not worked since 2014. She offered no evidence of any disability or any efforts to become financially self-sufficient. She had an income of approximately $100,000 a year between the husband's monthly support payments, her own pension, and her share of the husband's pension. Excluding spousal support, her income was in the range of $55,000. She would also begin to collect an additional $615 a month in CPP and OAS in January 2022. She had liquid assets of around $540,000, most of which came from her matrimonial property settlement. Over the years, she had received a bit more than $362,423 in spousal support.

The husband was 65 and had remarried. His spouse worked part-time but was also about to retire. He lived on the equalized pensions and some investment income. His 2021 income was in the range of $55,000. He owned a home jointly with his spouse valued at around $963,000. He had liquid assets of about $536,000.

The wife's argument was, essentially, that after a 35-year traditional marriage, 10 years of spousal support was not sufficient.

It was unquestionable that the husband had retired voluntarily. He was neither ill nor disabled, and he could have continued working past 65. But, in the eyes of the Court — fairly we might add — this was not "early retirement", a proposition for which Justice Baird turned to the *Spousal Support Advisory Guidelines*: The Revised User's Guide (Canada, Department of Justice: April 2016) at p. 101:

> When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed.

We believe this to be a fair summary of the law, endorsed by Justice Baird. While some people decide to work past the age of 65, the husband's decision to retire after working for 45 years with a fully vested and unreduced pension could hardly be called "early retirement". It certainly did not assist the wife that she had also permanently left the workforce.

Justice Baird found the husband's retirement to be wholly reasonable in the circumstances, further noting there was no evidence that the husband had been motivated by the desire to stop paying support. However, in our view, that caveat does not matter; at age 65, save for unusual circumstances, someone should be allowed to retire, even after a long-term traditional relationship. Other cases certainly make this inquiry: *Butler v. Butler* (2013), 28 R.F.L. (7th) 90 (B.C. S.C.); *Doherty v. Doherty*, 2017 CarswellBC 99 (S.C.); *Peters v. MacLean*, 2014 CarswellBC 1582 (S.C.); but we think that should be more of a consideration in true "early retirement" situations.

It should not be that, at age 65, a payor has to liquidate assets after the parties' property has already been divided to continue paying spousal support. In *Peters v. MacLean*, above, the Court was of the view that this would amount to a form of double-recovery. In fact, in *Karges v. Karges*, 2019 CarswellOnt 17135 (C.A.), the Ontario Court of Appeal dismissed an appeal where the lower court had allowed for early retirement when the husband was 59 years old and had only been paying support for six years after a long-term marriage, on the theory that he had been working all his life, and that he should be allowed to retire.

Justice Baird was of the view that, at this point, the economic consequences of the marriage and its breakdown had been equitably shared, and that both parties had reached acceptable retirement ages. The assets accrued during marriage had been shared. They had similar liquid assets, and their future incomes would be about the same. The only real difference was that the husband owned half a home and the wife did not. But, according to Justice Baird, that was her choice, and the husband was not liable to compensate her for it.

Re support, at least for Mr. Hague . . . that's all, folks.

Rule 1(8) of the Ontario *Family Law Rules*: A Shiny New Toy from the Ontario Court of Appeal

***Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.) — Pardu, Paciocco, and Nordheimer JJ.A.**

***A. v. S.*, 2021 CarswellOnt 13819 (S.C.J.) — McGee J.**

Breaches of final parenting Orders are a serious problem in family law cases. Although some (we suggest helpful) appellate authorities such as *Gagnon v. Martyniuk* (2020), 50 R.F.L. (8th) 266 (Ont. C.A.) are of assistance, most appellate authorities suggest that the court's contempt powers should only be used as a "last resort", and are not particularly well-suited to enforcing parenting orders (*Hefkey v. Hefkey* (2013), 30 R.F.L. (7th) 65 (Ont. C.A.) at para. 3; *Vigneault v. Massey*, 2014 CarswellOnt 4027 (C.A.); *Hokhold v. Gerbrandt*, 2016 CarswellBC 13 (C.A.); *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.)). And then there is the fact that, being quasi-criminal in nature, a finding of contempt requires proof beyond a reasonable doubt and exacting levels of procedural fairness. A variation proceeding may be appropriate in some situations, but may not be appropriate if all that is being sought is compliance with a final Order that was already made.

Bouchard v. Sgovio and *A. v. S.* both make it clear that, at least in Ontario, Rule 1(8) of the *Family Law Rules*, O. Reg. 114/99, provides the court with broad authority to make almost any order — procedural or substantive — that it views as necessary to enforce an order that is being breached. Only such an interpretation can, in our view, substitute for the reticence of the court to use its contempt power to enforce parenting orders. However, that said, at some point parent litigants must know that the proverbial buck ultimately stops with a contempt motion.

Bouchard v. Sgovio

The parties had two children together, born in 2006 and 2009 respectively. They separated in 2017, and they signed an agreement that provided for a shared parenting arrangement that was ultimately incorporated into a consent Order.

The father refused to comply with the terms of the consent Order, and tried to alienate one of the children, T.B., from the mother. The Court made a number of further orders in an attempt to coerce the father to comply with the consent Order, but the situation did not improve.

By December 2019, the mother was not having any contact with T.B. outside of a therapeutic setting. As a result, she brought a motion for, among other things, an order prohibiting the father from having any further contact with the children, and allowing her to enrol the children in Family Bridges. [For further information about the Family Bridges program, see Justice Trimble's decision in *X v. Y* (2016), 88 R.F.L. (7th) 430 (Ont. S.C.J.), and Philip Epstein's discussion of that decision in the 2016-38 (September 26, 2016) edition of *TWFL*.]

The father denied the mother's allegations and claimed that he had done everything he could to get T.B. to comply with the consent Order. He argued that the Court did not have jurisdiction to grant the orders the mother had requested, and that they would not be in T.B.'s best interests in any event. He also brought a cross-motion for an assessment.

The motion judge found that the father had repeatedly breached the consent Order, alienated T.B. from the mother, and actively obstructed and undermined the various therapists who had been retained to try to repair the relationship. She also found that:

> • She had jurisdiction to grant the relief the mother had requested pursuant to Rule 1(8) of the *Family Law Rules*, which provides that, "[i]f a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter"; and
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> • It was necessary to order that the children be enrolled in the Family Bridges program, that a temporary parenting order relating to both children be given to the mother for the period of time the children are enrolled in the Family Bridges program, and that steps be taken to "prevent the [father] from sabotaging the program" by controlling "his contact with the children until his involvement is required by the leaders of the [Family Bridges] program."

The motion judge also restrained the father from having any contact with the children for at least 90 days.

The father appealed and argued, among other things, that the motion judge lacked jurisdiction to order Family Bridges, and that she had made the order without sufficient evidence about whether Family Bridges would actually be in the children's best interests.

In a 2-1 decision, the majority of the Court of Appeal dismissed the father's appeal. In doing so, the majority provided us with the most thorough analysis to date about the scope of the court's authority to deal with non-compliance with court orders under Rule 1(8) of the *Family Law Rules*, and determined that as long as the court ordered remedy addresses the failure to comply and the remedy is necessary to ensure enforcement, such relief will be *prima facie* authorized:

> [50] As a result, **even though, with the notable exception of r. 1(8)(g), each of the itemized forms of relief in r. 1(8) can be described as purely procedural, r. 1(8) has not been interpreted as being confined to purely procedural remedies.** In *Freedman v. Freedman*, 2020 ONSC 301, at para. 20, for example, the court relied on r. 1(8) to give the applicant access to account information as well as exclusive authority to deal with insurance polices and off-shore accounts in order to

> prevent the respondent from dissipating these assets in an attempt to avoid compliance with court orders to make payments and asset disclosure. In *Shouldice v. Shouldice*, 2016 ONSC 1481, at paras. 17-19, pursuant to r. 1(8) a receiver of property was appointed to manage rental property so that support obligations that were being evaded could be enforced. In *Sadlier v. Carey*, 2015 ONSC 3537, at paras. 64-67, an order was made pursuant to r. 1(8) requiring the respondent to surrender his passport to the court to prevent his flight from the jurisdiction, and he was ordered to post security after he had been evading support orders.
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> [51] **Such broad and purposeful applications of r. 1(8) are sensible.** The relevant substantive right is created by the order that is being enforced, while r. 1(8) serves to provide the means of enforcement so that those substantive rights may be realized. The rule therefore provides broad discretion to courts to make orders it considers necessary to fully address a party's failure to comply, a flexibility that is of particular importance when the orders address the well-being of children: *Children's Aid Society of Haldimand and Norfolk v. J.H. and M.H.*, at para. 127. **Stated simply, if the remedy ordered addresses or "[deals] with the failure" to comply with the substantive order and the remedy ordered is found to be necessary to achieve the enforcement of the order being breached, that remedy is *prima facie* authorized by r. 1(8).** [emphasis added]

That is an incredibly helpful statement, empowering courts to make the orders necessary to effectively address contemptuous behaviour in a world where appellate courts have evinced the preference to not do so, at least at first instance, by using the contempt power. That being said, the majority also recognized that there are limits to the types of relief that can be granted under Rule 1(8), but declined to delve into what they might be:

> [52] **I use the term *prima facie* authorized because I do not mean to suggest that there are no limits to the kinds of enforcement orders that can be made under r. 1(8).** For example, it may well be that the remedies that are provided for in r. 31(5), which is reproduced below, cannot be imposed pursuant to r. 1(8), absent a successful contempt motion as contemplated by r. 1(8)(g): see *Mantella v. Mantella*, 2009 ONCA 194. This proposition seems sensible since contempt orders require proof beyond a reasonable doubt, and although they are remedial in purpose, they are punitive in nature, and are therefore to be used as a last resort: *Hefkey v. Hefkey*, 2013 ONCA 44, at para. 3; *Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (ON CA), [2006] 82 O.R. (3d) 686 (Ont. C.A.), at para. 26. I need not resolve this specific question since the ground of appeal before us concerns only the temporary parenting order and the Building Bridges order, neither of which are remedies contemplated by r. 31(5); the father did not appeal the Hughes Order where the motion judge did impose punitive fines without making a finding of contempt against the father, nor did he raise any objections in this appeal to the motion judge's order that those fines would "remain in full force and effect". Nevertheless, this illustration demonstrates that there may be other legal limits on the kinds of orders that courts may impose under r. 1(8). [emphasis added]

It is unfortunate that the majority declined to decide whether Rule 1(8) allows a court to order monetary fines for breaches of Orders, or whether fines can only be granted as a penalty for contempt. This issue has been outstanding since at least 2009 when the Court of Appeal declined to decide it in *Mantella v. Mantella* (2009), 61 R.F.L. (6th) 259 (Ont. C.A.) because the appellant had appealed to the wrong court, and the case law about this issue since then is quite conflicted. For further discussion about this issue, see *Florovski v. Florovski*, 2019 CarswellOnt 14087 (S.C.J.), and Philip Epstein's comment on *Granofsky v. Lambersky* (2019), 26 R.F.L. (8th) 328 (Ont. S.C.J.) in the 2019-23 (June 10, 2019) edition of *TWFL*.

The majority also rejected the father's argument that, no matter how broad the court's authority under Rule 1(8) might be, by suspending the father's contact with the children, the motion judge exceeded her authority by using Rule 1(8) to vary a final order. In doing so, the majority confirmed that temporarily suspending a parent's contact with a child for therapeutic purposes is not the same as actually varying an order, and endorsed Rule 1(8) as the primary mechanism for dealing with breaches of parenting orders:

> [54] In my view, the father mischaracterizes the motion judge's order in making this argument. **The motion judge did not purport to vary the parenting terms contained in the Leef Order. Instead, she imposed an order that temporarily reassigned parenting rights to facilitate a therapeutic process that was ordered to enable the enforcement of the**

> **parenting terms set out in the Leef Order.** Put otherwise, the order made by the motion judge did not vary or replace the Leef Order. Contrarily, it was made to facilitate the Leef Order. I am satisfied that this order fell within the motion judge's remedial authority under r. 1(8).
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> [55] Moreover, the implications of the father's position are untenable. If he is correct, the proper procedural mechanism for remedying parental alienation that is frustrating a final parenting order is for the injured party to apply to reopen and vary the very order they want to enforce. If that were so, a party could provoke a new hearing on the terms of a final order by simply breaching it.
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> [56] Appropriately, **where one parent wrongfully withholds a child from the other, in violation of a court order, r. 1(8) provides quick access to a remedy, including for example, make-up time with the child. The parent entitled to court ordered time with the child should not be compelled to bring a motion to change the existing order.** The same holds true where parental alienation is frustrating a parenting order. When dealing with the best interests of a child, delay should be avoided as much as possible. Litigation about children is costly and procedural roadblocks should be avoided. [emphasis added]

This is another incredibly helpful statement and useful tool in the "enforcement arsenal."

In a vigorous dissent, Justice Nordheimer agreed with the husband that Rule 1(8) did not give the court jurisdiction to change the terms of the consent Order, even temporarily. In his view Rule 1(8) "does not provide the court with a carte blanche to make any order that it wishes", and that it did not authorize the motion judge to make an Order that, in his view, amounted to a variation of the consent Order.

While we do appreciate Justice Nordheimer's concern, it cannot be that a parent refusing to comply with a parenting order can first flout the order of the court and then consign the innocent party to a series of conferences and variation proceedings — and the children to months if not years of uncertainty. The longer a situation of alienation is allowed to fester, the more difficult it becomes to remedy. And, as noted by the majority, alienating parents would quickly learn that the best way to get a "second kick at the can" would be to simply ignore a parenting result they do not like. And that isn't good for the parties, the court, or the children.

The majority also rejected the father's argument that the motion judge had ordered Family Bridges without adequate evidence. It concluded that "[a]lthough a better evidentiary foundation can easily be imagined", the description of the program in the mother's affidavit and the information from its website that she attached to her affidavit, combined with the fact that other courts have made orders for treatment at Family Bridges, while "not ideal", was nevertheless "sufficient" such that her findings based on that evidence were entitled to deference.

Again, Justice Nordheimer dissented:

> [107] Second, when the motion judge made the order that she did, **there was no evidence before the court that the proposed intensive intervention through the Family Bridges program, including zero contact between the father and the children for a minimum of 90 days, was suitable for these particular children at this particular time.** Indeed, there was very little evidence before the court generally regarding the Family Bridges program.
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> [108] In my view, **before a judge decides to order the type of serious intervention that was made in this case, and that is inherent in imposing attendance at a program such as Family Bridges, there must be comprehensive and cogent evidence regarding the program placed before the court.** This evidence should include specific and detailed information regarding the program itself and, more importantly, specific and detailed information regarding the success rate of the program generally, and the likelihood of success in the individual case that is before the court, including with relation to the ages of the children involved, and the other specific circumstances. **The required evidence should be of a nature similar to what a court would expect to receive from an expert, who is recommending a certain course of remedial action or treatment.** No such evidence was before the court in this case. It follows that, among other concerns,

> there was no opportunity for the appellant to challenge any such evidence. **In my view, the motion judge erred in making such an intrusive order in the absence of a proper evidentiary foundation.** [emphasis added]

The man has a point. The Family Bridges program is a serious (and expensive) therapeutic intervention that is, of course, not necessarily appropriate in every case involving parental alienation (particularly where, as in this case, the children are already teenagers). It is perhaps not the type of remedy that should be imposed absent *any* expert evidence or evidence from one or more of the therapists who would be providing the treatment, and based almost entirely on printouts from the program's website and the fact that other courts have ordered parties to participate in the process. A short affidavit from an expert or one of the treating professionals would simply have made the result here more solid and in keeping with the need for appropriate expert evidence.

A. v. S.

The parties separated in September 2019. The high-conflict case that ensued involved criminal charges against the father based on historical allegations of abuse, involvement by child protection authorities, and allegations by both parties that the other was mentally ill and unfit to parent their two children — or, as known in the family law bar and courts: Tuesday.

Despite all of these issues, the parties were able to resolve their dispute, and in September 2020, they consented to a final Order that incorporated a detailed and carefully constructed parenting plan that provided, among other things, that they would have joint decision making, and that they would each have the children for 50% the time.

But the peace was short-lived, as shortly after the Order was granted, both children stopped having any contact with the father.

In September 2021, the father brought a motion for an assessment in the same proceeding that resulted in the final Order, pursuant to Rule 1(8) of the *Family Law Rules*.

Although Rule 1(8) does not expressly give a court jurisdiction to order an assessment, the father argued that the phrase "any order that it considers necessary for a just determination of the matter" was broad enough to include authority to make such an order in appropriate circumstances.

The mother opposed the motion. She argued that if the father wanted to seek an assessment, he would need to start a new proceeding, as the proceeding that resulted in the final Order was spent. She also claimed that the father was solely responsible for the breakdown of his relationship with the children. However, she did not put forward any suggestions for dealing with the situation, or seek to vary the 50-50 schedule set out in the final Order.

In rejecting the mother's argument, Justice McGee found that Rule 1(8) can, in fact, be used to *enforce* a final Order without the need to start a new proceeding, and that using Rule 1(8) will generally be the most effective and expeditious way of dealing with alleged breaches of final parenting Orders:

> [21] **The application of Rule 1(8) is not limited to temporary** Orders and it offers many advantages in a parenting dispute over that of a contempt motion. Foremost, it **is a more child-focussed approach**. It is better in keeping with the directive in Rule 2 of the *Family Law Rules*. **Rule 1(8) does not require the Court to find that the breach has been intentionally committed by a parent; only that there is a breach. The burden of proof remains the civil test of a balance of probabilities.**
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> [22] In my view, **Rule 1(8) is the preferred approach to a breach of a parenting Order.** Thrusting parents into a stressful, contentious, expensive, two-step quasi criminal contempt proceeding in which incarceration is a potential outcome rarely ends well. In contrast, **Rule 1(8) has a broader application that allows the Court to make any Order that it considers necessary for a just determination of the matter which, in parenting disputes, usually involve complex and interrelated therapeutic issues.**
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> [23] As recently set out in *Moncur v. Plante*, 2021 ONCA 462, it is especially important for courts to consider options other than findings of contempt in high-conflict family disputes. As Justice Jamal presciently observes, "[o]therwise, there is a danger that contempt proceedings may exacerbate the parental conflict to the detriment of the children". [emphasis added]

Having found that she had jurisdiction to order an assessment under Rule 1(8), and after reviewing the jurisprudence about whether and when an assessment is appropriate, including Justice Kiteley's seminal decision about assessments in *Glick v. Cale* (2013), 48 R.F.L. (7th) 435 (Ont. S.C.J.), Justice McGee concluded that an assessment was an appropriate way of dealing with the situation:

> [29] . . . Ultimately, **an assessor is the Court's witness and an Assessment can be ordered when there is a need for an in-depth assessment and a road map of recommendations to assist the Court at a level of engagement that exceeds the capacity of other tools to assist; provided that the parties have adequate financial means to afford an Assessment.**
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> [30] **This is such a case.** The situation before me is most unusual. The mother consented to terms of an Order that she no longer supports and possibly may not have supported at the time that she executed the Minutes of Settlement. She has no plan whatsoever to support the father's parenting and invites further litigation rather than therapeutic assistance. The parties have ample means to afford an Assessment as a result of the holding of the net sale proceeds of their condominium.
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> [31] **I find that, on this record, an Assessment is necessary for a just determination of this parenting dispute.** An Assessment will provide independent evidence of the children's best interests, specifically, what is preventing them from having as much time with each parent as is consistent with their best interests per section 16(6) of the *Divorce Act*. [emphasis added]

Justice McGee also determined that if the parties could not resolve the matter once the assessment was complete, either party was free to bring "a motion to convert the September 8, 2020 final Order to a temporary Order, to amend pleadings as necessary and to return the parenting issues to the balance of issues to be determined within the Application."

While we are very much in favour of Justice McGee using Rule 1(8) as she did here by ordering an assessment, respectfully, we are not aware of any authority for the proposition that a court can somehow convert what was unquestionably a final Order into a temporary one. While a court could possibly set aside the consent that underpins a final consent Order on the usual grounds (e.g. fraud, mistake, etc.), that is quite different than simply changing a final Order into a temporary one. That being said, this issue is likely academic because, if the parties cannot to resolve the matter, there is nothing to stop either one of them from bringing a variation application to change the final Order.

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