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— Franks & Zalev - This Week in Family Law

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Marriage Invalid in Tennessee But Valid in Ontario? This Is Gonna Get Confusing.

Lalonde v. Agha (2021), 62 R.F.L. (8th) 268 (Ont. C.A.) — Brown, Roberts and Zarnett JJ.A.

Lalonde is about the scope of s. 31 of Ontario's *Marriage Act*, R.S.O. 1990, c. M.3. That provision operates to validate a formally *invalid* marriage that was solemnized in good faith. The specific question was whether s. 31 extended to marriages outside of Ontario, and to purely religious ceremonies where the parties took no steps to obtain a licence or register the marriage or to otherwise ensure formal validity.

An invalid or unrecognized marriage meant no marriage, and no marriage meant no property relief under the equalization provision of the *Family Law Act*, R.S.O. 1990, c. F.3. In Ontario, only legal married spouses or those who have "together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right" are entitled to equalization of property on marriage breakdown.

And thus the story begins.

In August of 1998, the parties participated in a religious marriage ceremony at a mosque in Memphis, Tennessee. The "husband" arranged for the ceremony to take place during the weekend that the "wife" was visiting him from Ontario. While the husband disputed the legal validity of the ceremony for the purposes of property division, he believed the ceremony was necessary to permit the parties to live together and have sex.

The mosque's Imam performed the marriage ceremony and signed the marriage certificate, which stated that they had been married pursuant to the laws of Islam. No authority issued the parties a marriage licence, and other than having the marriage solemnized by the Imam and witnessed, the parties did not try to ascertain or comply with the formal statutory requirements to make a marriage legal in Tennessee.

The parties did not know they were not complying with Tennessee marriage law. They did not know they had to get a marriage licence or register their marriage. They just considered themselves to be legally married. And until they separated in 2016, they lived openly as husband and wife in Windsor, Ontario, with their three children.

There was no doubt the parties were common law spouses. The question for the Court was whether the religious ceremony in Tennessee created a valid marriage under Tennessee or Ontario law for the purpose of the wife's entitlement to make property claims under the *Family Law Act*.

The legal experts called by the parties agreed that, in Tennessee, marriage is governed by statute. Common law marriage is not recognized, and the *Tennessee Code Annotated*, requires the issuance of a marriage licence. They also agreed that in certain

exceptional circumstances, the absence of a marriage licence does not invalidate a marriage on public policy grounds, and that the equitable doctrine of marriage by estoppel could be applied to validate an otherwise formally invalid marriage. But they did not agree on whether the doctrine of marriage by estoppel would apply in the circumstances of this case.

The trial judge found that the religious ceremony did not create a valid marriage under Tennessee law because the parties did not obtain a marriage licence. However, he determined that it was unnecessary to resolve the question as to whether the doctrine of marriage by estoppel should apply. The trial judge concluded that *Ontario law* applied because the parties had spent their entire married life in Ontario, and the wife was claiming the division of assets governed by the law of their domicile. The trial judge determined that the law of Ontario determined the legal significance of the post-ceremony events. And while not validly married under Tennessee law, the parties lived as a married couple in Ontario. Therefore, whether post-marriage events created a valid marriage should be determined by Ontario law.

In Ontario, pursuant to ss. 1(1)(a) and (b) of the *Family Law Act*:

> "spouse" means either of two persons who,
>
> (a) are married to each other, or
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

According to the trial judge, section 1(1)(b) did not apply because the "marriage" was not voidable or void — it just never happened. There was never a marriage. There was no question as to the legal capacity of either party to marry. [Please keep this in mind for later . . .]

The trial judge then considered whether the parties were "married to each other" and therefore "spouses" under s.1(1)(a). To do so he considered the criteria under s. 31 of the *Marriage Act*:

> If the parties to a marriage **solemnized in good faith** and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as a married couple, such marriage shall be **deemed a valid marriage**, although the person who solemnized the marriage was not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence. [emphasis added]

The trial judge decided that the parties had satisfied the criteria in s. 31 for a deemed valid marriage for the following reasons:

> 1. The marriage was solemnized in good faith because there was no evidence of bad faith and both parties wanted to marry and did so in a religious ceremony. [This reasoning is entirely circular — it was good faith because it was not bad faith. Furthermore, it likely reversed the burden of proof. If the wife wanted to prove the validity of the marriage, she had to prove good faith — the husband did not have to disprove good faith or prove bad faith. However, this is somewhat muddied by the competing presumption of valid marriages in *Powell v. Cockburn* (1976), 22 R.F.L. 155 (S.C.C.).]
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> 2. The parties must have intended to follow the *Marriage Act* because the wife wanted to be legally married and, therefore, intended to comply with the law. There was no intentional or deliberate non-compliance or indifference as to compliance. [Again, this reasoning is hard to understand. Why "must" the parties have intended to follow the **Ontario** *Marriage Act* when they were married in Tennessee — and when the formal validity of the marriage would be governed by the law of Tennessee — *Hassan v. Hassan* (2006), 30 R.F.L. (6th) 104 (Alta. Q.B.)? That seems to be a bit of a stretch. And furthermore, "good faith", at least in the case of a marriage in Ontario, means "intended to comply with Ontario law" i.e. in Ontario, the *Marriage Act*: *Reaney v. Reaney* (1990), 28 R.F.L. (3d) 52 (Ont. H.C.); *Debora v. Debora* (1999), 43 R.F.L. (4th) 179 (Ont. C.A.); *Bussey v. Dwyer* (2015), 65 R.F.L. (7th) 443 (N.L. T.D.), aff'd (2017), 100 R.F.L. (7th) 261 (N.L. C.A.).]
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> 3. There was no evidence that either party was under a legal disqualification to contract marriage.

4. The parties lived together and cohabited as a married couple after the religious ceremony at the mosque.

Based on these reasons, the trial judge determined that the Tennessee religious ceremony should be deemed to be a valid marriage and the parties "spouses" within the meaning of s.1(1)(a) of the *Family Law Act*.

The putative husband appealed.

On the appeal, the husband argued as follows:

1. The trial judge erred in using s. 31 of the *Marriage Act* to validate a ceremony that was formally invalid under the laws of Tennessee. The law of the jurisdiction where the marriage was performed (the *lex loci celebrationis*, for lovers of Latin) is the sole consideration in determining formal marriage validity. Section 31 only applies to marriages that were solemnized in Ontario and cannot be imported into the law of Tennessee. Under Tennessee law, the parties' marriage was invalid and could not be validated by applying the Tennessee doctrine of marriage by estoppel because the parties knew they had not obtained a marriage licence. If the marriage is invalid in the place where it was solemnized, it cannot be a valid marriage anywhere else.

2. In the alternative, if s. 31 was applicable to marriages solemnized outside Ontario, the trial judge misinterpreted its provisions by considering the husband's subjective good faith and intention as to the legality of the marriage and compliance with the *Act*. Section 31 was meant to deal with inadvertence, absences, irregularities, or insufficiencies in the process and was not intended to apply to a ceremony that totally ignored all formalities of the *Marriage Act*.

Before considering what the Court of Appeal had to say here, it is important to keep the context of the matter in mind. The parties had three children, and they acted and held themselves out as a married couple for 18 years. The husband only ever suggested they were not married when they separated. It was, in our view, inevitable that the lower court and Court of Appeal were going to, somehow, find the marriage to be valid so as to not prevent the wife from sharing in 18 years worth of property accumulation. The question is, did they do it the right way?

Does s. 31 of the *Marriage Act* apply to validate a marriage ceremony outside Ontario?

The Court of Appeal saw no error in the trial judge's conclusion that s. 31 of the *Marriage Act* applied so as to validate the formally invalid marriage, even though the marriage took place in Tennessee.

According to the Court of Appal, the husband's argument that s. 31 only applied to Ontario marriages was an "overly narrow and technical interpretation of s. 31," and contrary to the presumption that marriages entered into in good faith, anywhere, where the parties then live together as a married couple, are valid. Ironically, this statement may, in fact, be overly broad. It is true that if a marriage is valid in the *lex loci celebrationis* it is generally valid in Ontario (and arguably in most jurisdictions) even if the ceremony would not constitute a marriage according to Ontario law. However, the corollary to this is that if a marriage is not valid in the place it is celebrated, then there is no marriage anywhere: *Veleta v. Canada (Minister of Citizenship & Immigration)*, 2005 CarswellNat 1220 (F.C.); *Berthiaume c. Dastous* (1929), 1 R.F.L. Rep. 102 (Jud. Com. of Privy Coun.); *Best v. Best* (2015), 62 R.F.L. (7th) 409 (N.L. T.D.), aff'd *Best v. Best* (2016), 84 R.F.L. (7th) 22 (N.L. C.A.).

Again, s. 31 can validate a marriage that was solemnized in good faith and where the parties "intended to be in compliance with [the Marriage] Act." Therefore, the husband argued that people married in Tennessee — even those ordinarily resident in Ontario — could not have *intended* to be married pursuant to the law of Ontario. Rather, they could only have *intended* to be married under the laws of Tennessee — the place the marriage occurred — because if they did not comply with the law of Tennessee, they would not be legally married anywhere. It's not a bad argument.

The Court of Appeal addressed this argument by saying that if s. 31 of the *Marriage Act* was only intended to apply to marriages performed in Ontario, "the legislature could have easily included that requirement. Instead, such limitation is absent from s. 31."

Respectfully, this is a problem. The opening words of s. 31 refer to parties to a marriage solemnized in good faith "*and intended to be in compliance with **this Act***". When in Rome, to be legally married, one must surely intend to be married pursuant to the laws of Italy — not the law of Ontario. When in Fiji, to be legally married, one must surely intend to be married pursuant to the laws of Fiji — not the law of Ontario. And when in Tennessee, one must surely intend to be married pursuant to the law of Tennessee. It could not possibly have been the intention of the legislature that a marriage that was formally invalid pursuant to the laws of the jurisdiction where it was conducted, and therefore invalid in that jurisdiction, would be deemed valid in Ontario when the parties did not comply with the foreign law. And if the parties who were married in the foreign jurisdiction meant to (and did) comply with Ontario law but not local law, then the marriage would not be valid in the foreign jurisdiction — the *lexi loci celebrationis*.

However, the Court of Appeal took the view that whether a marriage is formally invalid in the *lex loci celebrationis* is a different question from whether it can be *deemed* legally valid under Ontario law.

The Court of Appeal also relied on the public policy and societal importance of favouring the validity of marriages and avoiding so-called "limping marriages" — marriages where parties are considered married in one jurisdiction but not in another. As stated by the Supreme Court of Canada in *Porteous v. Dorn* (1974), 17 R.F.L. 144 (S.C.C.), at para. 3:

> If persons live together as man and wife for such length of time and in such circumstances as to have acquired local repute as married, a presumption that they are legally married may arise, which can only be displaced by cogent evidence to the contrary.

See also *Powell v. Cockburn* (1976), 22 R.F.L. 155 (S.C.C.).

The Court of Appeal also relied on *Smith v. Waghorn*, 2012 CarswellOnt 3048 (S.C.J.), where the Court noted that, upon finding the requisite intention to comply for the purposes of applying s. 31 to validate a marriage celebrated in Florida, absent evidence to the contrary, "[i]t would be unusual that a person following the laws of one state intended to be married within that jurisdiction but not married in another jurisdiction": at para. 42. However, here, as previously noted, the parties did not try to ascertain or comply with the formal statutory requirements to make a marriage legal in Tennessee — so they could not have intended to follow the law. They were, at best, indifferent.

In any event, the Court of Appeal agreed that s. 31 of the *Marriage Act* can apply to validate a marriage celebrated outside Ontario.

We can't help but wonder if there may have been a better way to effect this result. Remember the part above we asked you to "keep in mind for later?"

Recall that the definition of "spouse" includes two people who have entered into a marriage that is voidable or void, in good faith. Both the trial judge and the Court of Appeal accepted that this definition of "spouse" did not apply because the marriage was not voidable or void. But why was this marriage not void for failure of formal validity? The answer can't be that there was never a marriage - because the section specifically applies to marriages that are void, and marriages that are void are void *ab initio*.

The Court of Appeal then went on to consider whether a court can consider the subjective intention of the parties to comply with the *Marriage Act*.

The husband argued that even if s. 31 applied to marriages solemnized outside Ontario, it was an error for the trial judge to consider the parties' *subjective* good faith and intention.

Rather, the Court should have read the words "intended to be in compliance with this Act" to mean that the parties *objectively* intended to comply with the *Marriage Act*. And, further, the objective nature of the parties' intention required the parties to take objectively reasonable steps to formally comply with the *Act*.

The Court of Appeal did not agree. Rather, the parties' subjective intentions to comply with the law of Ontario were relevant. Whether the evidence of a subjective intention to comply was credible or reliable was another question.

The Court of Appeal did, however, agree that the words "intended to be in compliance with this Act" require something more than the condition that the parties solemnized their marriage "in good faith" — or there would be no need to include the requirement of "intended to be in compliance" in addition to the requirement that the marriage be "solemnized in good faith". Rather, there must always be something which at least appears to amount to a proper marriage ceremony. This is why informal ceremonies such as the "ring ceremony" in *Bussey v. Dwyer* (2015), 65 R.F.L. (7th) 443 (N.L. T.D.), aff'd (2017), 100 R.F.L. (7th) 261 (N.L. C.A.) did not create a valid marriage (albeit over a very powerful dissent).

To summarize the current state of the law, Justice Roberts for the Court of Appeal stated as follows:

> [44] In my view, a marriage is "intended to be in compliance with this Act" where there is an intention to create a formally binding legal marriage, that is, one that would be recognized for civil, as opposed to only religious, purposes. That intention will not be present where the parties know of the relevant formal legal requirements and deliberately choose not to follow them, notwithstanding that their marriage is recognized as a valid religious ceremony or was solemnized in good faith. **But that intention may be found where the parties believe they are marrying for all purposes, any non-compliance was non-deliberate, and where the parties' subsequent behaviour confirms that they considered themselves, from the time of the marriage ceremony, to have become legally married.** [emphasis added]

In doing so, Justice Roberts confirmed that both *Alspector v. Alspector* (1957), 1 R.F.L. Rep. 140 (Ont. C.A.) and *Debora v. Debora* (1999), 43 R.F.L. (4th) 179 (Ont. C.A.) are good law and exemplify the current state of the law. In *Alspector*, the parties were married in a Jewish religious ceremony without a marriage licence. The husband was under the mistaken assumption that a licence was not required because the parties planned to live in Israel, and the wife relied on the husband's advice. The Court of Appeal accepted the wife's subjective intention to comply with the law of Ontario to enter into a formally valid marriage and held that her subjective intention was sufficient to satisfy "the intention to comply" provision of the predecessor to s. 31 of the *Marriage Act*.

In *Debora*, however, the parties participated in a religious ceremony in 1987 and, although aware of the requirements, deliberately did not comply with Ontario law (the husband did not want to be legally married so as to not lose his widower's pension). There, the Court of Appeal focused on the meaning of "good faith on the part of the person asserting a right" in s.1(1)(b) of the *Family Law Act*, and concluded that "spouse" under s. 1 did not include a person who participated in a ceremony in Ontario that was "clearly and deliberately" not in compliance with the *Marriage Act*, notwithstanding the marriage was solemnized in "good faith."

In *Lalonde*, the parties believed the marriage ceremony created a binding marriage in conformity with the laws of Tennessee and Ontario, and they subsequently acted on that belief for 18 years. That belief, as the trial judge found, indicated an intention to enter into a valid, legally recognized marriage. There was no evidence that either party intended not to be legally married or was deliberately not complying with the law of Ontario. Neither of them knew that a marriage licence was required to create a formally valid marriage. They believed that they had entered into a legally binding marriage that would be legally binding anywhere, including under the law of Ontario.

As summarized by the Court of Appeal:

> [66] In sum, the parties intended to comply with whatever law governs the solemnization of marriages in Tennessee that would be recognized in Ontario. Denying the parties' marriage would work an injustice on the respondent who relied on the appellant and unjustly relieve the appellant of his legal obligations in respect of the marriage that he voluntarily arranged, entered into, and derived the benefit of for 18 years. As this court stated in *Alspector*, "the law will not permit him in a subsequent action to plead his own fraud upon the bride in order to have the ceremony declared a nullity": at pp. 687-88. This would run counter to the longstanding presumption of the validity of marriage and frustrate the socially important goal of avoiding the very circumstances that s. 31 of the Marriage Act was intended to address.

Appeal dismissed. Marriage valid. Wife (now without quotes) relieved.

How Well Need We "Get Along" to "Get Along"? (And Section 9 Rides Again . . . All the Way Back to the Trial Court)

R.J. v. P.J. (2021), 59 R.F.L. (8th) 268 (N.B. C.A.) — Green, Baird, and French JJ.A.

The parties were married in 2007 and separated in 2018. They had three young children together.

The trial judge found that it would be in the children's best interests to reside primarily with the mother, as she had historically been their primary caregiver, and he was concerned that the parties' inability to communicate would make it impossible for a 50-50 schedule to work.

The trial judge ordered that the children would have time with the father from Friday after school until Monday morning in week one, and from Wednesday after school until Friday morning in week two. The trial judge also ordered that the Christmas, Easter, and March breaks would be divided equally, and that the father would have 10 additional days with the children during the summer.

In other words, the trial judge gave the father less than 50% of the time with the children during the school year (five out of 14 nights every two weeks) but more than 50% of the time during the summer.

The parties agreed that they should share joint decision-making for the children. However, the mother asked that she be given final decision-making authority in the event that the parties could not reach an agreement. Despite the lack of communication between the parties that, at least in part, led to the rejection of the father's request for a 50-50 schedule, the trial judge also concluded that there was no evidence to indicate that the parties could *not* make decisions together about the children. The mother also acknowledged that the only time the father had not agreed with what she wanted to do was when he told her that he was fine with her taking the children to church, but did not want the children to be baptized, and the mother had agreed.

Accordingly, the trial judge declined the mother's request for joint decision-making with her having ultimate final decision-making authority in the event of an impasse (which would have been no different than giving her sole decision-making). Instead, he gave the parties joint decision-making, subject to the caveat that the parties' inability to work together in the future would constitute a material change in circumstances:

> [163] The Court is proposing to maintain a joint custody scheme for a relationship where communication and trust do not currently exist. There is a real possibility joint custody will not be successful in this environment. If it is successful, it will prove to be in the children's best interests to have made the effort. So long as the parties work well together for the children, there should be few problems they cannot overcome together. If, on the other hand, the parties find they have increasing difficulty in working together for the benefit of the children there should be an opportunity to have the matter brought back to the Court to reconsider the issue of joint custody. In such a circumstance, the inability of the parties to work together for the benefit of the children will constitute a material change in circumstances that will justify a review.

While the trial judge's decision on the parenting issues may seem inconsistent (e.g. he found that the parties couldn't communicate well enough to have a 50-50 schedule, but could communicate well enough to have joint decision-making), there is a significant difference in the level of communication and cooperation required to make the occasional major decisions about, for example, where a child should attend school, and having to be able to communicate to the degree necessary to make a 50-50 schedule workable on a weekly basis.

The trial judge also ordered the father to pay full Table child support pursuant to s. 3 of the *Child Support Guidelines*, and ordered the parties to share the s. 7 expenses equally (notwithstanding the fact that the father earned slightly more than the mother).

The father raised ***17 grounds*** of appeal. Here's an advocacy tip. No judge makes 17 errors. Alleging 17 — or 10 — or even six errors usually just suggests there are not any errors. Pick your best alleged errors. It is never a good idea to "throw everything at the wall" on appeal and, not surprisingly, it didn't work for the father here.

The Court of Appeal reviewed, and dismissed, almost all of the arguments that the father raised, primarily on the basis that he was essentially asking the Court of Appeal to reweigh the evidence and retry the case. That, as we know, is not something an appellate court will do.

However, the Court of Appeal did find that the trial judge made one error with respect to the parenting issues. According to the Court of Appeal, instead of simply ordering that the parties would have joint decision-making authority, the trial judge should have made a more detailed order that made it clear that the father had the right to participate in all major decisions about the children:

> [50] To be clear, the judge did not impose an obligation on the mother to keep the father informed of the appointments she makes for the children. He did not order her to consult with the father on all major decisions affecting the children. He discussed decision-making authority in his reasons, but he did not flesh it out in the Judgment Following Hearing or Trial (Form 60A). In her testimony, the mother indicated, and the judge found, that if the father were to be granted a role in major decision-making, a process should be established in advance (paras. 153-154). **In my opinion, in this case, there should have been specific parenting responsibilities set out in the order, so it was clear the father has the right to be consulted on, and to be an active participant in, all major decisions concerning the children.** Those decisions include health and dental care, education, summer camps, vacations, educational programs, religious participation and extracurricular activities. It is not unusual for a court to regulate these issues as part of a joint custody order, in an effort to ensure both parents continue to be actively engaged (see *Muise v. Fox*, 2013 NSSC 349, [2013] N.S.J. No. 571 (QL)). I note that these children are at an age where their views and preferences will become more relevant and important in the not-too-distant future. [emphasis added]

As a result, the Court of Appeal added the following provisions to the final Order:

> 1. The parents shall consult with each other on all major decisions concerning the children. If the parents cannot agree, they shall utilize the services of a mediator in the first instance prior to returning to court.
>
> 2. The mother shall notify the father of all medical, dental, and education appointments and events concerning the children so that he can participate.
>
> 3. In the event the children are unable to attend school because of illness, school closures due to weather, or parent-teacher meetings, professional development days, and the mother is unable to care for them, the father shall be granted the opportunity to do so.
>
> 4. In addition to journal communication, the parents shall have the choice to consult with each other by telephone, text message or email.

It is somewhat surprising that the Court of Appeal thought it was necessary to expressly order the parties to consult with each other about major decisions, as by definition joint decision-making authority means that ***neither*** party can make major decisions about a child without the other parties' consent.

It is also somewhat odd that the Court of Appeal thought it was necessary to order the mother to notify the father of the children's appointments and events. While it would obviously certainly make sense for ***both*** parties to ensure that they are each kept apprised about what is going on in the children's lives, it seems somewhat unfair to impose this obligation solely on the mother. In a joint custodial regime, surely the father has an obligation to keep himself informed about what is going on in the children's lives by speaking to the necessary third parties directly instead of relying solely on the mother to do so.

Prior to the 2021 amendments to the *Divorce Act*, we also would have wondered how the Court of Appeal had authority to ***order*** the parties to mediate any custodial disputes, but that issue is now specifically dealt with by s. 16(6) of the *Divorce Act*, which provides that, when making a parenting order, and subject to provincial law, "the order may direct the parties to attend a family dispute resolution process", which is defined in s. 2(1) as "a process outside of court that is used by parties to a family

law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law[.]" See *L. v. B.* (2021), 63 R.F.L. (8th) 382 (Ont. S.C.J.) and our comment about it in the 2021-43 (November 8, 2021) edition of *TWFL*.

With respect to child support, the father argued, and the Court of Appeal agreed, that the trial judge had erred by not addressing the father's argument that s. 9 should apply in this case (and whether the children were with the father 40% of the time). The Court of Appeal also agreed that the trial judge had erred in simply ordering the parties to share the s. 7 expenses equally instead of applying s. 7 of the *Guidelines*. Given the "guiding principle" in s. 7(2) of the *Guidelines* that such expenses are to be shared by the parties in proportion to their respective incomes, that is probably fair comment from the Court of Appeal.

As the Court of Appeal was concerned that the record was insufficient to deal with the child support issues on appeal, and with the agreement of the parties, it sent the matter back to the Court of Queen's Bench to deal with those issues. While that is an unfortunate result for these parties, we understand why the Court did this.

The analysis required by s. 9 first requires the court to determine whether the 40% threshold has been crossed [see *Mehling v. Mehling* (2008), 62 R.F.L. (6th) 25 (Man. C.A.); *Gosse v. Sorensen-Gosse* (2011), 12 R.F.L. (7th) 1 (N.L. C.A.); *Berry v. Hart* (2003), 48 R.F.L. (5th) 1 (B.C. C.A.); *Cabot v. Mikkelson* (2004), 3 R.F.L. (6th) 269 (Man. C.A.); *Froom v. Froom* (2005), 11 R.F.L. (6th) 254 (Ont. C.A.); *Cherewyk v. Cherewyk* (2018), 4 R.F.L. (8th) 251 (Man. C.A.); and *L. (L.) v. C. (M.)* (2013), 28 R.F.L. (7th) 217 (Ont. S.C.J.)]. If it has been crossed, the court then has to determine what the proper amount of support should be [*Contino v. Leonelli-Contino* (2005), 19 R.F.L. (6th) 272 (S.C.C.)]. This analysis is simply impossible to do without the benefit of a complete record.

In fact, even had the parties in this case not agreed, the child support issue would likely have been sent back to the trial level for a hearing on proper evidence, it generally being an error of law for a court to not fully consider and apply the s. 9 factors. Several appellate courts have sent matters back for this exact reason: *A.S.L. v. L.S.L.* (2020), 38 R.F.L. (8th) 351 (N.B. C.A.); *F. (G.) v. F. (J.A.C.)*, 2016 CarswellNB 152 (C.A.); *J.C.M. v. M.J.M.* (2018), 12 R.F.L. (8th) 70 (N.B. C.A.); *Marchand v. Boudreau* (2012), 15 R.F.L. (7th) 7 (N.S. C.A.); *Woodford v. MacDonald*, 2014 CarswellNS 218 (N.S. C.A.); *Dyck v. Bell* (2015), 71 R.F.L. (7th) 10 (B.C. C.A.); *Conway v. Conway* (2011), 96 R.F.L. (6th) 1 (Alta. C.A.); *Verkaik v. Verkaik* (2020), 49 R.F.L. (8th) 69 (Ont. Div. Ct.). Only the Court of Appeal for Newfoundland and Labrador seems to suggest that, absent sufficient evidence regarding s. 9, the basic set-off should apply: *Burgess v. Burgess* (2016), 75 R.F.L. (7th) 259 (N.L. C.A.).

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