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

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## The Important Stuff Is Always in the Fine Print or Schedules

*Liu v. Xie*, 2021 CarswellOnt 17134 (S.C.J.) — Kimmel J.

This is a fairly run-of-the-mill motion for interim support, but it raises several points about imputing income that are worth discussing.

The parties separated in May 2019, after an 8-1/2-year marriage. They had two children, the eldest of whom was almost eight. At the time of the motion, the children were in a 50/50 shared parenting schedule with the parents.

The parties married in China and moved to Canada shortly afterwards. In Canada, the mother became a successful mortgage broker and her income over the previous three years averaged about $450,000 a year. She was the primary source of support for the parties and the children. The father had not been able to advance his employment in Canada and struggled with English. He recently secured employment, but was only earning about $24,000 a year.

During the marriage, the family enjoyed a comfortable lifestyle but had significant debt.

The main issue of interest (for our purposes, anyway) on the motion was the claim by each party to impute income to the other for support purposes.

The father, as noted, was only earning $24,000 a year — so there was an argument that he was underemployed. He also had a property in China that his mother was living in rent-free — so there was an argument that he was not reasonably using his assets to earn income.

For her part, the mother claimed a number of deductions from her income for business expenses.

With respect to the mother's expenses, Justice Kimmel states as follows:

> [29] Income is determined for support purposes under the *Federal Child Support Guidelines* ("Guidelines"), SOR/97-175, ss. 16-20. Pursuant to s. 16, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the TI General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III. Under Schedule III, s. 1 of the *Guidelines*, it states that employment expenses can be deducted from income for support purposes for: 'sales expenses', 'travel expenses', 'motor vehicle travel expenses', 'concerning dues and other expenses of performing duties', 'motor vehicle and aircraft costs' and 'salary reimbursement'. **The court may, but is not bound, to reduce a spouse's income level for child support purposes on the same basis as the CRA**: see *Cole v. Dixon*, 2016 NSSC 26, at paras. 36-39. [emphasis added]

This, respectfully, is an inaccurate statement that emanated from *Cole v. Dixon*, 2016 CarswellNS 54 (S.C.). It is true that what is or is not income for tax purposes does not determine the question of what should or should not be considered income for support purposes: *Clegg v. Clegg* (2000), 9 R.F.L. (5th) 290 (Ont. S.C.J.); *McDonald v. McDonald* (1997), 33 R.F.L. (4th) 425 (Ont. C.A.). And it is true that proper expenses for income tax purposes are not necessarily proper deductions from income for support purposes: *Egan v. Egan* (2002), 26 R.F.L. (5th) 288 (B.C. C.A.); *Edwards v. Edwards*, 2005 CarswellBC 3524 (S.C.); *Wilcox v. Snow* (1999), 3 R.F.L. (5th) 171 (N.S. C.A.); *Cook v. Cook*, 2011 CarswellOnt 10276 (S.C.J.); *Marquez v. Zapiola* (2013), 36 R.F.L. (7th) 22 (B.C. C.A.); *Ludmer v. Ludmer* (2014), 52 R.F.L. (7th) 17 (Ont. C.A.); *Hauger v. Hauger* (2000), 9 R.F.L. (5th) 46 (Alta. Q.B.); *Ricafort v. Ricafort* (2006), 35 R.F.L. (6th) 210 (Ont. C.J.); *Cunningham v. Seveny* (2017), 88 R.F.L. (7th) 1 (Alta. C.A.).

But those statements do not apply to the specifically listed deductions from total income in s. 1 of Schedule III of the *Guidelines*. If the adjustments listed in s.1 of Schedule III are properly proven, then enumerated expenses are deducted from income. Such expenses do not fall into the general rule that what is good for CRA is not necessarily good for the *Guidelines*.

Section 16 of the *Guidelines* states as follows:

> Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency **and is adjusted in accordance with Schedule III**. [emphasis added]

The Schedule III adjustments are not stated to be discretionary.

Section 1 of Schedule III then states:

> Where the spouse is an employee, the spouse's applicable **employment expenses** described in the following provisions of the *Income Tax Act* ***are*** deducted . . . [emphasis added]

Again, there is no suggestion that these *specific* deductions for employment expenses are discretionary. They "**are**" deducted.

The listed employment expenses are to be deducted — *if* they are properly proven — and the onus is on the employee to prove the expenses, as explained by Justice Braid in *Haras v. Camp* (2018), 12 R.F.L. (8th) 392 (Ont. S.C.J.):

> [34] Schedule III of the *Child Support Guidelines* states that certain specified employment expenses described in paragraph 8 of the *Income Tax Act* are deducted from income for purposes of calculating support. Not all employment expenses are deductible from total income for support purposes. In this case, the husband states that he incurred sales expenses; travel expenses; and motor vehicle travel expenses that should be deducted pursuant to Schedule III.
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> [35] When a taxpayer seeks to claim employment expenses to reduce their taxes, they must file a T2200 Declaration of Conditions of Employment. This form is completed by the employer and describes the types of employment expenses that are necessary for the employee to incur as part of the employment and that are not reimbursed by the employer. The employee must also confirm that their contract of employment requires the employee to pay employment expenses.
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> [36] Deductions accepted by CRA are not automatically accepted as deductions from income for the purpose of determining a payor's income for spousal support. There should be some evidence that would justify a conclusion that the employment expenses qualify as a deduction pursuant to s. 8(1) of the *Income Tax Act*: see *Bentley v. Gillard-Bentley*, 2013 ONSC 722 (Ont. S.C.J.) and *Chase v. Chase*, 2013 ONSC 5335 (Ont. S.C.J.).
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> [37] The onus is on the husband to establish, on a balance of probabilities, that his Schedule III deductions are appropriate employment expenses before they can be deducted: see *Pollitt v. Pollitt*, 2010 ONSC 1617 (Ont. S.C.J.) at para. 140.
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> [38] In this case, I draw an adverse inference from the failure of the husband to file the following evidence . . .

 

> [39] . . . However, having failed to provide copies of those records in court, the husband has not provided a satisfactory basis for this court to determine whether the Schedule III deductions are appropriately deducted from his line 150 income for support purposes.
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> . . . . .
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> [42] The husband has failed to satisfy the court that the employment expenses are appropriate deductions for support purposes. As a result, I find that it would not be appropriate for the husband to deduct any employment expenses, either for the purposes of calculating retroactive or ongoing support.

The mother also argued that the father should be imputed with $18,000 per year ($1,500 per month) of rental income from a property the father owned in Wuhan, China. Alternatively, the mother argued that the property could be sold for $500,000, and this level of income ($18,000 per year) could be generated on the capital from the sale proceeds.

While there is some precedent for imputing income on this basis, as noted by Justice Kimmel, none of those cases involved circumstances where the property in question had been occupied by a family member since before marriage (as was the case here). Good point. This made the case before Justice Kimmel different from cases such as *P. (M.) v. P. (W.)*, 2014 CarswellOnt 13658 (S.C.J.) at para. 67; *Lefebre v. Lefebre* (2020), 38 R.F.L. (8th) 421 (Ont. S.C.J.) at para. 353-361; *Wilton v. Myhr* (2019), 23 R.F.L. (8th) 383 (Ont. S.C.J.) at paras. 107-109; and *Silver v. Silver* (2015), 71 R.F.L. (7th) 299 (Ont. Div. Ct.).

Justice Kimmel was also rightfully concerned that she did not have sufficient evidence before her upon which she could decide that the father's mother should be "evicted" from the apartment and, if so, what the husband might be able to rent it for. Ultimately, her Honour was not prepared to attribute income on this basis on an interim support motion.

**There But for the Grace of God Go We — Ineffective Assistance of Counsel**

***CB v. BM* (2021), 60 R.F.L. (8th) 1 (Alta. C.A.) — Khullar, Pentelechuk, and Feehan JJ.A.**

***Bors v. Bors* (2021), 60 R.F.L. (8th) 36 (Ont. C.A.) — Feldman, van Rensburg, and Sossin JJ.A.**

Appeals based on ineffective assistance of counsel are relatively common in the criminal context. But until recently, they were quite rare in family law cases. That may be changing, as illustrated by these two decisions from the Alberta Court of Appeal and the Ontario Court of Appeal, both of which involved appeals based on allegations of ineffective assistance of counsel. [For further discussion about the test for ineffective assistance of counsel, see our discussion of *JEWISH FAMILY AND CHILD SERVICE OF GREATER TORONTO v. E.K.B.* (2019), 34 R.F.L. (8th) 180 (Ont. S.C.J.) in the 2020-11 (March 23, 2020) edition of *TWFL*.]

Neither appeal was successful (come to think of it, we are not yet aware of any family law appeals based on ineffective assistance that were actually successful). And, fortunately for those of us who practice family law, both of these decisions make it clear that appellate courts will not entertain allegations of ineffective assistance lightly. There but for the grace of god . . .

However, it would not surprise us were we to start to see an increase in the number of appeals involving allegations of ineffective assistance over the next few years for a number of reasons, including:

- There is a growing tendency amongst family law litigants to blame their lawyers instead of accepting responsibility for their own circumstances or their own decisions. Alleging ineffective assistance of counsel gives these types of clients a perfect opportunity to try to prove that they are actually right.
- It is becoming increasingly difficult for new family law lawyers to get trial experience and mentoring.
- It is becoming increasingly common for lawyers to "dabble" in family law — very dangerous.

 

• In the criminal context, provincial governments have created specific rules for dealing with allegations of ineffective assistance that prevent appellants from being able to make these types of allegations lightly. In Ontario, for example, Schedule 1 of the Criminal Proceedings Rules for the Superior Court of Justice (Ontario) provides, among other things, that before raising allegations of ineffective assistance of counsel, "appellate counsel has an obligation to satisfy themselves as soon as possible, by personal inquiry or investigation, that there is some factual foundation for the allegation, apart from the instructions of the appellant[.]". No such rules currently exist in the civil (or family) law context in Ontario.

### *CB v. BM*

The parties and their two young children lived in France. They separated in April 2015, and the father commenced divorce proceedings in France in October 2015.

Shortly after the father started his proceeding, the mother alleged that he had abused one of the children. As a result, the court in France restricted the father to supervised visits. The French police completed their investigation in January 2017, and decided not to lay charges against the father.

In July 2017, in the middle of the litigation, and without the father's knowledge or consent, the mother removed the children from France, and took them to Edmonton.

It took the father until March 2018, to locate the mother and the children. Upon locating the children, the father started an Application in Alberta under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*") to have the children returned to France.

The hearing was delayed significantly because of COVID-19, but was finally heard in early 2021. The Application judge, Justice Kiss, found that the mother had wrongfully removed the children from France. She also rejected the mother's claims that the father had consented to and/or acquiesced to their removal, and that the children should not be returned to France because they were settled in Canada and/or would be at grave risk of harm if they were required to return to France — the usual *Hague Convention* defences.

After Justice Kiss released her decision, but before the order was issued, the mother applied to reopen the hearing on the basis of ineffective assistance of counsel. Her request was dismissed.

The mother appealed.

The Court of Appeal quickly disposed of the mother's submission that Justice Kiss had erred in rejecting her arguments about consent/acquiescence, grave risk of harm, and that the children were now settled in Canada, as the mother had not established any legal errors or palpable or overriding factual errors.

Of greater interest for our purposes, the mother also argued that she had not received a fair hearing because of her lawyer's incompetence, and asked for a new hearing. In support of her appeal, the mother filed affidavits from herself and various family members alleging that her lawyer made a number of errors, including:

1. failing to communicate in a timely manner with the mother;

2. failing to discuss trial strategy and evidentiary needs with the mother;

3. preparing for the hearing very late, including late preparation of the mother's written and oral evidence;

4. failing to understand the evidence required to prove that the father had given his written consent to the children remaining in Canada and that the children were well-settled in Canada;

 

5. failing to prepare an affidavit following the February 2020 decision of Ouellette J. to address the deficiencies he identified in the evidence on whether the children were settled in Canada;

6. failing to gather evidence to prove the existence of the consent letter;

7. failing to cross-examine the father effectively about the consent letter and other matters like his cell phone records;

8. failing to prepare the mother to give evidence;

9. failing to request an interpreter and to realize that the mother's difficulties speaking English might be misunderstood as evasiveness bearing on her credibility.

10. Binding the mother to an agreed statement of facts without receiving instructions from the mother.

11. The lawyer's dog ate her homework. (OK, we threw that one it to see if you were paying attention.)

In dismissing the mother's appeal based on ineffective assistance, the Court of Appeal started by agreeing with the Ontario Court of Appeal's comment in *W. (D.) v. White*, 2004 CarswellOnt 3379 (C.A.) at para. 55, that the availability of this ground of appeal should be limited to the "rarest of cases", and by confirming that, "[t]here is a strong presumption that a former counsel's conduct falls within the range of reasonable professional assistance."

The Court then summarized the applicable test, which requires the appellate to show that his or her lawyer was incompetent, and that the incompetence resulted in a miscarriage of justice:

> [74] **To establish ineffective assistance of counsel as a ground of appeal, the appellant must establish that: (1) the representation of counsel was incompetent (including the facts underlying that claim) and (2) that the incompetent representation resulted in a miscarriage of justice**: *B(GD)* at para 26. There are two types of miscarriage of justice: substantive (where the incompetence of counsel made the outcome of the trial unsafe), and procedural (where the incompetence made the trial process unfair). Here, the mother argues ineffective representation by her former counsel led to a procedural miscarriage of justice because she was denied a reasonable opportunity to make her case at the January 2021 hearing. [emphasis added]

With respect to the "incompetence" part of the test, the Court of Appeal determined that the mother and her lawyer had made a reasonable strategic decision to focus primarily on the argument that the children were settled in Canada, and there was no basis for it to second guess that decision on appeal:

> [83] **We cannot say that adopting a strategy that focussed on a key issue, whether the children were settled in Canada, was unreasonable. Indeed, focussing on other topics such as the written consent or the alleged abuse would have created risks of its own**, given difficulties of proof and the fact that the mother was under the cloud of extradition proceedings. Having adopted a strategy, former counsel focused on marshalling evidence and arguments in support of that strategy. The strategy also drove questioning of the witnesses. Under this strategy, neither the credibility nor past conduct of either the mother or father were key. **Having concluded that former counsel's strategy was a reasonable one, it follows that various "failures" on the part of counsel — such as failure to gather evidence about the written consent or ask about cell phone records — do not constitute incompetent representation**. Not focussing on those issues was the flip side of choosing to focus on whether the children were well settled in Canada. [emphasis added]

While the Court agreed with the mother that her former lawyer "may not have communicated with the mother as much as the mother would have liked or expected, or perhaps would have been reasonable in the circumstances", it was not satisfied that the mother had shown "that any lack of communication amounted to an error or omission that impacted the trial strategy."

The Court also concluded that the mother had not met the "miscarriage of justice" part of the test. Although the mother may have thought that her case could have been handled better, "[a] fair opportunity to present one's case does not require perfect

 

legal representation, or a lawyer who raised all the issues she could have raised or a lawyer who obtained a successful outcome for her client." If not being successful was the hallmark of substantive or procedural unfairness, every case would have one litigant claiming ineffective assistance.

Furthermore, any possible unfairness associated with the mother's argument that her former lawyer had not led all of the necessary evidence had been cured by the Court of Appeal considering that evidence as part of the appeal process.

Finally, the Court made it clear that when considering allegations of ineffective assistance in cases under the *Hague Convention*, appellate courts must consider the fact that these types of hearings are to be conducted and completed as quickly and in a summary manner to the extent possible:

> [78] **The principle of finality is particularly important in *Hague Convention* proceedings because one of its core objectives is to secure the prompt return of children to their country of habitual residence so that custody issues can be resolved in the appropriate jurisdiction without delay**. This context is relevant when considering standards for establishing incompetence of counsel and a miscarriage of justice in the *Hague Convention*.
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> . . . . .
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> [86] . . . 4. Determining whether ineffective assistance of counsel deprived the mother of a reasonable opportunity to make her case must be sensitive to the context of *Hague Convention* proceedings. **What counts as a "reasonable opportunity" is informed by the crucial objective of ensuring the prompt return of children wrongfully removed to their country of habitual residence**. In this appeal, the mother did not establish that the quality of her representation at the January 2021 hearing so impaired her right to a reasonable opportunity to make her case that the decision must be overturned and a new hearing ordered. [emphasis added]

### *Bors v. Bors*

The parties had two children together. After an 8-day trial, the trial judge, Justice Van Melle, concluded that the evidence was overwhelming that the children were alienated from their father and that their mother was responsible. She granted the father sole custody of the children, significantly restricted the mother's contact with them, and ordered the parties and the children to engage in reconciliation therapy.

The mother appealed on a number of grounds, including on the basis that she was deprived of a fair trial because of ineffective assistance of her trial counsel.

The Ontario Court of Appeal provided a similar summary of the law that applies in these types of cases to the one that the Alberta Court of Appeal set out in *CB v. BM*, with the sole exception being that instead of using the term "incompetent", the Ontario Court of Appeal used the term "conduct [that] fell below the standard of reasonable professional assistance[.]"

In support of her argument, the mother alleged that "her trial counsel aligned himself entirely with the position of the father, that he refused to follow her instructions and declined to lead relevant evidence", and that he "acted outside his mandate and instructions." However, unlike in *CB v. BM* where the appellant at least filed affidavit evidence to support her claim of ineffective assistance of counsel, the mother only made these sweeping allegations in her unsworn factum. This omission was fatal with respect to this particular ground of appeal. As the Court noted in its decision:

> [49] We do not give effect to this ground of appeal. The mother did not file any affidavit evidence to support the bald allegations in her factum of ineffective assistance of counsel. She has not provided any evidence in support of her allegations that trial counsel failed to follow her instructions, that he failed to lead relevant evidence that would have changed the result, or that he acted contrary to her interests.

That being said, even if the mother had made these allegations in a sworn form instead of in an unsworn factum, it seems unlikely that would have changed the result, as the Court was satisfied that there was "nothing in the transcript to suggest that the mother's counsel was ineffective or incompetent."

 

As a result, the appeal was dismissed.

As we noted at the beginning, it appears that claims of ineffective assistance of counsel may be on the rise. So we make this request. If you are appellate counsel, and if you are asked to appeal based on the alleged ineffective assistance of counsel in the court below, consider the situation very carefully. Maybe get a second opinion. It is an extremely serious allegation to make. Consider being guided by the quote from Schedule 1 of the Ontario Criminal Proceedings Rules for the Superior Court of Justice (Ontario), quoted above and paraphrased here: appellate counsel has an obligation to satisfy themselves by personal inquiry or investigation, that there is *some factual foundation* for the allegation, *apart from the instructions of the appellant*. Zealous advocacy is one thing. But do not make such allegations lightly and without serious thought and consideration.

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