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

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That's What You Want? That's What You *Get*!

Moher v. Moher — as reported in the press

Recently in the U.K., a Jewish man was jailed for 18 months for refusing to grant his wife a Get — a Jewish religious divorce. Absent a Get, the wife is unable to marry within her faith or to even enter into a relationship with another man.

The parties separated in 2016, and the husband refused to give the wife a Get which, in Jewish law, must be granted willingly. At wit's end, the wife brought a private prosecution for **controlling or coercive behaviour**. The husband was due to stand trial in February. However, he changed his plea to guilty, and was sentenced to 18 months in jail, and ordered to pay £11,000 in costs.

The wife was so distraught and worn down by the reported psychological and emotional abuse, that she, at one point, tried to take her own life. There were allegations of physical abuse as well. At the sentencing, Judge Martin Beddoe said: "You sought to manipulate and control [the wife] all in the knowledge that it would substantially impact her mental health and in some respects also impact her physical health."

Reading this, and knowing that there are sometimes recalcitrant spouses in Canada that refuse to cooperate in religious divorce, we considered if this might be a possible result in Canada. We suspect it may be.

First, we have s. 21.1(1) of the *Divorce Act*, which deals with removing barriers to religious remarriage. Generally, the provision is not particularly powerful (providing for the dismissal of an application and/or the striking of pleadings and affidavits), but it's something.

Then, there is *Marcovitz v. Bruker* (2007), 46 R.F.L. (6th) 1 (S.C.C.), which deals with denying a religious divorce, and decides (over a dissent) that by agreeing to give a Get in a Separation Agreement, a party can convert a purely religious obligation into a civil obligation.

Then we have the recent amendments to the *Divorce Act* and the newly-minted definition of "family violence":

> **family violence** means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a **pattern of coercive and controlling behaviour** or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes

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(a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;

. . . . .

(d) harassment, including stalking;

. . . . .

(f) psychological abuse. [emphasis added]

Layered on top of all of this we have recent cases from Canadian courts that seem to be prepared to offer some elasticity to the concept of "family violence." See, for example: *B. (M.W.) v. B. (A.R.)* (2013), 32 R.F.L. (7th) 116 (B.C. S.C.) (can include litigation conduct); *C.L.M. v. M.J.S.*, 2017 CarswellBC 2350 (S.C.); *Negus v. Yehia*, 2019 CarswellBC 2418 (C.A.); *L.P. v. A.E.* (2021), 64 R.F.L. (8th) 406 (B.C. Prov. Ct.); *Pereira v. Ramos*, 2021 CarswellOnt 3065 (S.C.J.); *McBennett v. Danis* (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.) (can include repeated infidelity); *Armstrong v. Coupland* (2021), 65 R.F.L. (8th) 119 (Ont. S.C.J.) (can include verbal and written abuse of opposing counsel through disrespectful and malicious communications); *S.B. v. J.I.U.* (2021), 64 R.F.L. (8th) 386 (Ont. C.J.) (includes cyber-bullying); and *Armstrong v. Coupland* (2021), 65 R.F.L. (8th) 119 (Ont. S.C.J.).

(We pause to acknowledge the P.E.I. Supreme Court decision in *J.D.M.L. v. C.M.V.T.*, 2022 CarswellPEI 10 (S.C.), where the Court expressed concern about over-extending the meaning of "family violence.")

And finally, on top, we have the recent case of *A. v. A.*, 2022 CarswellOnt 2367 (S.C.J.), where Justice Mandhane developed the tort of family violence and awarded significant damages.

Based on the foregoing, there is little doubt that a Canadian spouse refusing to grant a Get in the future will be met with this quadruple-triple-layer-cake-religious-divorce-offense. What remains to be seen, however, is whether incarceration is a possibility.

***In loco parentis* — And No Exchanges at the Cop Shop**

Spry v. Shetler (2021), 67 R.F.L. (8th) 230 (Ont. S.C.J.) — Chozik J.

(with an impassioned hue and cry from Pazaratz J. in *K.M. v. J.R.* (2022), 66 R.F.L. (8th) 35 (Ont. S.C.J.) — Pazaratz J.)

This was a motion about whether (and if so how much) the Respondent had to pay interim child support to the Applicant for a child — "M" — for whom the Respondent stood *in loco parentis*. There was also an issue as to whether access exchanges should take place at a neutral location, such as a police station.

The parties were not married. They lived together from September 1, 2013 to April 20, 2020, when they separated as a result of an alleged "incident" in the home. As a result of that incident, the Respondent was arrested and charged with uttering threats and mischief to property.

The parties had young children together: "N" (born March 9, 2014) and "A" (born September 24, 2018). Since the separation, the parties had a shared parenting arrangement for N and A on a week-about basis.

When the parties started cohabiting, M was five years old. Using our math skills, M was 12 at the time of the motion. M's biological father had not been part of the picture since M was 11 months old. The Applicant took the position that the Respondent was the only father M had ever known, while the Respondent denied that he had ever stood in the place of a parent to M. After seven years in a relationship where M called the Respondent "dad" — that argument did not look terribly strong.

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This is where it gets a bit interesting. The Applicant specifically chose to not claim child support for M from his biological father — this was actually in their Separation Agreement. M's biological father had a history of drug use, had been incarcerated for selling drugs, and had a sporadic work history. The Applicant did not want him involved in M's life. And, according to the Applicant, the Respondent knew and supported that decision.

Both parties also agreed that the Applicant's parents took an active role helping her raise M both as a single mother and after cohabiting with the Respondent. Of course, this did not prevent the Respondent from being *in loco parentis*.

In Ontario, s. 1 of the *Family Law Act*, R.S.O. 1990, c. F.3, defines a "child" as a person to whom a parent has demonstrated a settled intention to treat as a child of his or her family. The mirror definition of "parent" is a person who has demonstrated a settled intention to treat a child as a child of his or her family.

And, of course, s. 5 of the *Child Support Guidelines* provides that:

> Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these *Guidelines* and any other parent's legal duty to support the child.

The first question Justice Chozik had to decide was whether the Respondent stood *in loco parentis* to M. If so, the second question was whether the Respondent's obligation to support M should be reduced or set off by the obligation of M's biological father, and if so, by how much.

At the risk of repeating the obvious, the answer to the first question begins with *Chartier v. Chartier* (1999), 43 R.F.L. (4th) 1 (S.C.C.). In *Chartier*, the Court held that:

> • A person cannot unilaterally withdraw from a relationship in which he or she stands *in loco parentis* to a child (para. 32);
>
> • The court must look to the nature and quality of the relationship to determine if a person does, in fact, stand *in loco parentis* to a child (para. 39); and
>
> • It is in the best interests of children to be able to count on the continuation of the parental relationship after the breakdown of a relationship (para. 32).

At paragraph 39 of *Chartier*, the Supreme Court sets out some factors to consider:

> [39] . . . The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent. The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly. Once it is shown that the child is to be considered, in fact, a "child of the marriage", the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage . . .

Justice Chozik appropriately relied on the following factors to find a *prima facie* case of an *in loco parentis* relationship:

> 1. The Respondent had publicly held himself out as M's father, including submitting a "father and son" photograph to a magazine in 2018. (To be candid — that's probably enough right there. But there was more.)
>
> 2. The Respondent assumed financial responsibility for M while the parties lived together. (That would be game.)

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3. The Respondent knew the biological father was absent, and that the Applicant had not pursued him for child support for M. At the same time, the Respondent seemed to have been wholly unconcerned about the role — or financial contribution — of the biological father. From this her Honour assumed an intention to support M. (Set)

4. The Respondent included M under his work benefits as a dependent child. (And match.)

5. The Respondent participated in M's life as a father, including attending sporting events, parent teacher interviews and doing projects together. (What comes after, "game, set match"?)

6. M referred to the Respondent as "dad". (Final nail?)

The Respondent also argued that, even were he to be found to be standing *in loco parentis* to M, to determine his obligation to support M, the Court was first obliged to determine the presumptive s. 3 *Guidelines* obligation of M's biological father.

At the risk of a double-negative, it cannot be said that there is not something to that argument. The very wording of s. 5 of the *Guidelines* supports the idea that, in a step-parent situation, the amount of child support should be the amount the court considers appropriate, *having regard to any other parent's legal duty to support the child*. That is, the primary support obligation is on the biological parents. Or at least that is where the analysis should start.

In *Truong v. Truong* (2012), 24 R.F.L. (7th) 324 (Ont. S.C.J.), the Court found that the applicant mother had made a decision (as did the Applicant here) not to pursue the biological parent for child support, preferring to pursue the respondent step-parent who stood *in loco parentis*. There, Justice Bielby decided that the *in loco parentis* parent should not have to pay full *Guidelines* support because the applicant had specifically chosen to not pursue the child's biological parent for support. That is, the statute imposes an obligation to seek child support from the biological parent. Similar sentiments were expressed in *Powell v. Thomas* (1998), 38 R.F.L. (4th) 127 (Ont. Gen. Div.); *Cook v. Kilduff* (2000), 11 R.F.L. (5th) 48 (Sask. Q.B.); and *deSousa v. Wilkins*, 2001 CarswellOnt 4947 (C.J.).

There is also appellate authority for this same principle — that a claimant cannot just give the biological parent a "pass": *H. (U.V.) v. H. (M.W.)* (2008), 59 R.F.L. (6th) 25 (B.C. C.A.). See also *S. (C.) v. S. (M.S.)* (2009), 75 R.F.L. (6th) 240 (N.B. C.A.), where the B.C. Court of Appeal suggested it would be an error to not consider the obligation of the biological parent.

However, as with any good issue, there are cases to support the opposing view, or at least that the obligation of the biological parent need not actually be *determined* first: *Cook v. Kilduff* (2000), 11 R.F.L. (5th) 48 (Sask. Q.B.) (it should be part of the equation at some point).

And in *A. (L.M.) v. H. (P.)*, 2014 CarswellOnt 3410 (S.C.J.), the Court found that, while the *primary* obligation may rest on the biological parent, there may be circumstances where a step-parent will have to meet the primary obligation such as where the biological parent is absent, not able to pay support, or where support against the biological parent cannot be enforced. See also *Shen v. Tong* (2013), 40 R.F.L. (7th) 257 (B.C. C.A.).

To the extent the Respondent was arguing that the Court was obliged to first determine the absent biological father's support obligation before determining the Respondent's, Justice Chozik did not agree. As she pointed out, were that the case, it would leave M with no support for some (possibly material) time. His biological father was not a party to the proceedings. The biological father had had no contact with M or the Applicant in years. And the biological father's financial or life circumstances and ability to provide support were entirely unknown. As noted by her Honour, to postpone the Respondent's child support obligation when there is a *prima facie* case of *in loco parentis*, in favour of first determining the support obligations of an absent biological parent, would not be consistent with the "child first" aim of the *Guidelines* or M's right to support.

Therefore, while recognizing that the primary obligation to pay child support may rest on M's biological father, Justice Chozik ordered the Respondent to pay full *Guidelines* child support for all three children, including M, on an interim basis effective April 21, 2020.

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Up to this point, we're with her Honour. However, Justice Chozik then went a bit further — and perhaps a bit too far for our liking. She stated:

> [23] I also do not accept the Respondent's argument that the Applicant must find and serve the biological father with notice of these proceedings. The obligation to do so is on the person seeking a contribution. In this case, the person seeking a contribution from the biological father for [M's] support is the Respondent.

We suggest this is not correct. It is not the *Respondent* that is looking for a contribution from the biological father; it is the *Guidelines* that impose the primary obligation. Now, it may turn out that the biological parent has little or nothing to contribute. But to say it was on the Respondent to find and serve the biological father is not fair, and renders inoperative the appellate case law saying that the claimant cannot just give the biological parent a "pass." This is not an action for contribution and indemnity. This is an action for child support.

Part of this treatment is possibly explained by the fact that this was an interim motion. However, if there is to be a trial, it should be incumbent on the Applicant to find and serve M's biological father — or to at least provide information to show that any such efforts would be wasted. However, in the meantime, on an interim and without prejudice basis, the Respondent was ordered to pay Table child support for all three children in the amount of $2,922 a month.

The other notable part of this case is the Applicant's request that all access (pardon the antiquated language) exchanges take place at a neutral location. Since separation, exchanges were facilitated by the Respondent's mother, as the Respondent was living with her. Unfortunately, some bad will built between the Respondent's mother and the Applicant's mother — long story — as a result of an incident in November 2020. Even though the children were not present for the incident, the Applicant asked that the Court impose a neutral location for access exchanges.

The Applicant first suggested that the exchanges take place at the local police station. Even though she ultimately modified her request to having exchanges be in the parking lot at the local Walmart — we'd like to take the opportunity to offer Justice Pazaratz's opinion on police station exchanges from the recent case of *K.M. v. J.R.* (2022), 66 R.F.L. (8th) 35 (Ont. S.C.J.). And we quote (at length):

> [1] *Please, Please, Please* . . . don't use a police station for parenting exchanges.
>
> [2] If you think mere proximity to the cop shop will make unruly adults behave — or protect children from emotional harm — you should have sat in on any one of the 22 days of this nasty trial . . .
>
> [4] They love their son and hate each other.
>
> [5] They *really* love their son.
>
> [6] And *really* hate each other.
>
> [7] We delude ourselves if we think court orders will ever overcome such powerful and conflicting emotions . . .
>
> [8] But routinely sending combative parents with their anguished children to a police station is an abdication of responsibility.
>
> a. It's like assembling a bomb every week and driving it to the fire hall.
>
> b. Sure, it's nice to know first responders will be on the scene if there's an explosion.
>
> c. But why set the stage for predictable disaster?
>
> d. Wouldn't it make more sense to defuse the bomb ahead of time? To keep volatile ingredients — *volatile parents* — as far apart as possible?

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[9] The "safety" rationale for police station exchanges is dubious at best.

a. The police aren't equipped for this type of service.

The station is not a child-friendly environment.

b. They don't know you're coming.

c. They don't want you there.

d. They don't know anything about you, or what to watch for.

e. Generally, they're so busy with other duties, they may not notice who's doing what.

f. *At any given time, there may not even be a police officer anywhere in sight.*

[10] And if we're choosing a location intended to intimidate adults — *what about scaring the kids?*

a. By the time high conflict couples make it to family court, their children have already been exposed to far too much chaos and upset.

b. Many have experienced significant family violence (with its recently expanded definition).

c. Painful memories of officers attending their home for family trouble calls may be triggered by the dramatic and hyper-stimulating stationhouse environment (the police cars, the uniforms, the guns, the crackling radios, the commotion, the people in crisis).

d. We can't undo the unhappiness these children experienced pre-separation. But why perpetuate the trauma by exposing them to more negativity and upset in the strange and frightening environment of a police station lobby?

e. These are emotionally vulnerable children who need rescue from parental conflict. Not a ringside seat.

[11] What message do police station exchanges convey to the innocent child?

a. That the trouble's not over?

b. That their world isn't safe yet?

c. That they still need to worry?

d. That someone they love is dangerous or can't be trusted?

e. That something bad could happen every time their parents meet?

f. That officers with weapons might have to intervene?

g. That one of their parents might get taken away or hurt or punished?

h. That every transition between parents will be anxiety-producing?

i. *How is a fragile young mind supposed to process so much upsetting information?*

[12] Candidly, far too little thought goes into selecting a police station for pick-ups and drop-offs. It's a simplistic, convenient default position

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a. It's an option if you can't think of anything else.

b. It's always open.

You don't have to re-arrange your schedule

c. It's free.

d. It's quick.

e. There's no waiting list. It's available instantly and for as long as you want.

f. There's no paperwork or pre-arrangement.

g. There's usually free parking or bus service.

h. It requires little effort and not much parental insight or discipline.

i. It's open even during the pandemic.

j. *It checks off a lot of boxes for adults.*

[13] But how is any of this child-focused?

a. We are constantly told that the best interests of the child must always prevail over adult preference and convenience.

b. Why then do we gravitate toward this obviously terrible option, simply because adults lack the creativity or commitment to work at better solutions?

c. Should children suffer just because parents won't put more effort into solving the problems they created?

[14] As soon as police station exchanges are proposed, the response should be obvious:

a. If the level of conflict is so great that these parents need armed guards to keep the peace, they shouldn't be having face-to-face contact *anywhere*.

b. Even if *actual* misconduct is averted, children who have been exposed to family violence will likely experience heightened anxiety whenever they see their parents together. The presence of police officers isn't calming. To the contrary, it reinforces the child's perception of imminent danger.

[15] Why am I starting this judgment with such a strong warning? Because this trial could have been avoided — and a four-year-old boy could have had a much happier life — if only the parents had selected an exchange location better than Hamilton Police Station 30.

And that is why we quoted at length. We dare anyone to ask that parenting exchanges be at a police station ever again.

Bias Is a 4-Letter Word

Green v. Green, 2022 CarswellNS 60 (S.C.) — Forgeron J.

In *Green*, Justice Forgeron of the Nova Scotia Supreme Court provides an excellent summary of the law regarding reasonable apprehension of bias.

The parties were married in 2004 and separated in 2018. They had three children together, who ranged in age from 9 to 14 by the time of the initial trial.

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After they separated, Mr. Green alleged that Ms. Green had alienated the children from him.

Justice Forgeron heard the trial in 2020 and rejected Mr. Green's allegations of alienation. She ordered Mr. Green to pay more than $40,000 in costs. She also ordered that she would conduct a review in about seven months to see how the therapeutic process she had ordered was going.

Mr. Green was, shall we say, "not happy" with Justice Forgeron's decision (to say the least). He tried to appeal it, but he was not successful as he did not serve his materials in time, and Justice Bourgeois dismissed his request for an extension because Mr. Green failed to establish that there was at least some merit to his appeal (*Green v. Green*, 2021 CarswellNS 569 (C.A.)).

Mr. Green made two complaints about Justice Forgeron to the Canadian Judicial Council. Both were summarily dismissed. He sued Justice Forgeron and further named her judicial assistant as a defendant in a civil lawsuit that he had brought against various people who had been involved with the family, including the former Minister of Community Services, the Executive Director, the Acting Executive Directors, and social workers employed by the Department of Community Services. (We told you he was not happy.)

After the review began, but before it was completed, Mr. Green brought a motion asking Justice Forgeron to recuse herself for either actual bias or a reasonable apprehension of bias. The basis for his allegations of bias included the following allegations:

> 1. Justice Forgeron's decision from the trial in 2020 was "incorrect and fundamentally flawed" and was "harming him and the children."
>
> 2. She was in a conflict of interest because he had reported her to the Canadian Judicial Counsel and he had sued her personally.

Justice Forgeron started by summarizing the principles that apply when dealing with allegations of judicial bias, including the following:

> [37] . . .
>
> • There is a strong presumption of judicial impartiality, which is not easily displaced.
>
> • There is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias.
>
> • Assessments of judicial bias are "highly fact-specific"; the context and the particular circumstances are of supreme importance.
>
> • The impugned comments or other conduct must be considered in the context of the circumstances, and in light of the whole proceeding.
>
> • The test regarding what constitutes a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically, conclude?"
>
> • Reasonable apprehension of bias will be made out where that fully informed reasonable person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.
>
> • The fully informed reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.
>
> • The duty to be impartial does not oblige judges to have no sympathies or opinions, but only to ensure that they are receptive to other points of view.

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• Judges are not expected to be silent observers in the process.

• A trial judge is not precluded from voicing concerns about the evidence, or from directing the parties' attention to the real issues in the case.

[For further discussion about the legal principles that apply to allegations of real or apprehended bias, see our discussion of Justice Bale's decision in *CAS v. J.J., C.M. and Six Nations of the Grand River* (2021), 52 R.F.L. (8th) 306 (Ont. S.C.J.), in the 2021-31 (August 16, 2021) edition of *TWFL*]

Justice Forgeron then considered, and rejected, each of Mr. Green's allegations of real and/or apprehended bias.

It is well known that "[a]n unfavourable result or conclusion by a judge in relation to a party is not in itself a basis to conclude there has been bias or prejudice." See *Feeney v. Simon*, 2020 CarswellAlta 1977 (Q.B.). If Mr. Green disagreed with the trial decision, that was an issue for the Court of Appeal to consider, and not a basis for asking Justice Forgeron to recuse herself.

Furthermore, a complaint to the Canadian Judicial Counsel, in and of itself, is not sufficient to establish actual or apparent bias. As Justice Forgeron explained in her decision:

> [47] First, caselaw confirms that filing a complaint against a judge, on its own, will not displace the presumption of judicial impartiality. In *Doncaster v Chignecto-Central Regional School Board*, 2013 NSCA 59, Saunders, JA discussed the dangers of finding otherwise:
>
> > [13] Obviously the mere filing of a complaint with the Canadian Judicial Council does not pull the trigger for recusal. If that were the case, one could simply file a complaint and "pick off" a judge, one by one until the complainant either found one to his liking ("judge shopping") or there were no judges left to hear the case. Such a result is neither the law nor in the public interest.
>
> [48] More recently, in *Feeney*, *supra*, Rooke A.C.J. summarized the law as follows:
>
> > [12] I will first address Mr. Feeney's instruction that I recuse myself in light of him initiating a CJC complaint against myself. **The law is clear in Canada that recusal is not an automatic result when a litigant complains about the conduct of a judge, for example to the Canadian Judicial Council.** In *Taha v Williams*, 2019 PECA 11 at paras 22-23, Chief Justice Jenkins concluded: " . . . **A litigant coming before the court cannot create a reasonable apprehension of bias merely by filing a complaint with the Canadian Judicial Council.** . . . ". Similarly, in *Ayers v Miller*, 2019 SKCA 2 at paras 34-35, Justice Jackson identified the critical question for a judge remaining seized of a matter:
> >
> > > A complaint to the Canadian Judicial Council cannot result in an automatic and successful recusal application. It is for the judge to determine, based on a review of all of the relevant evidence, and applying the applicable jurisprudence, whether he or she can continue to judge impartially notwithstanding the complaint to the Canadian Judicial Council.
> >
> > [13] This is an aspect of a broader principle identified by Côté JA in *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 176 at para 72: **a litigant may not " . . . engineer perceived conflicts . . . " by taking steps, making allegations, or advancing complaints.** [emphasis in original]

There was also no evidence to show that there was any merit to Mr. Green's lawsuit against Justice Forgeron (and various other parties), to say nothing of judicial immunity. Accordingly, "a fully informed reasonable person would not conclude that either a reasonable apprehension of bias or bias arises from Mr. Green having named [Justice Forgeron] as a defendant in an action based on allegations that have no factual basis."

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Justice Forgeron dismissed Mr. Green's motion in its entirety, and directed the scheduling office to schedule dates so that the parties could complete the review process.

And now, we should imagine, Mr. Green is very, very unhappy.

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