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— Franks & Zalev - This Week in Family Law

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Contents

NOTE: We'll be off for next week, but will be back with the next edition of *TWFL* on Monday, May 30th. Happy Victoria Day to all.

Cross-Examining on a Voice of the Child Report — and Running Out of Hands

M. v. F. (2022), 67 R.F.L. (8th) 57 (Ont. S.C.J.) — Kristjanson J.

This was a high-conflict parenting case. The question on the motion was whether the Court should appoint a lawyer to represent the 13-year-old child, C., at the centre of the dispute, and if so, whether the Court should ask that the Office of the Children's Lawyer (the "OCL") provide a legal representative, or otherwise approve the retainer of private counsel for C. The father was seeking increased decision-making responsibility and increased parenting time.

A clinician with the OCL had completed a Voice of the Child Report in August 2021. In the report, the clinician reported that C. was exercising independent thought and wanted to live with his mother. It was reported that C. wanted to set his own schedule and holiday schedule with his father.

On the motion before Justice Kristjanson, the mother asked to have the OCL appointed as C.'s legal representative. Furthermore, the father wanted to cross-examine the clinician on the Voice of the Child Report. He was of the view that C.'s stated views and preferences were the product of significant interference from the mother, and wanted to argue that the stated wishes of C. were not really his own. The father opposed the appointment of a legal representative, and the appointment of the OCL. Rather, he sought the appointment of private counsel for C.

This was a sad story. C. had been in the middle of his parents' high-conflict custody litigation for most of his life. The parents were never married, and they separated before C. was born. The original custody trial in 2010 lasted for 34 days. [Of interest: in the appeal of that original trial decision, the Ontario Court of Appeal first approved of courts not using the "loaded" words of "custody" and "access" (*M. v. F.* (2015), 58 R.F.L. (7th) 1 (Ont. C.A.)), and this was the precursor to the recent *Divorce Act* amendments.]

The father had been to court or arbitration half-a-dozen times since the original trial in an attempt to enforce the step-up parenting rights awarded to him at trial.

The Voice of the Child Report was produced by the OCL on August 19, 2021.

On November 24, 2021, the father's counsel wrote to the OCL giving notice of his intention to cross-examine the clinician who had prepared the Voice of the Child Report stating concern with respect to the "veracity" of the Report:

> Admittedly, I do not agree with the contents of the report or its conclusions, but the veracity of the report and the weight to be given to it can be dealt with at trial after cross-examination of the clinician. My concerns with the Report are: (i) C. parrots the Applicant Mother's position; (ii) his answers appear to be coached; and (iii) the views and preferences expressed by C. in the report were not freely given.

The mother argued that since the father was challenging C.'s expressed views and preferences by cross-examining the author of the Voice of the Child Report, C. should have a legal representative. The father argued that appointing counsel for C. would place him squarely in the middle of the dispute.

On the variation application, the Court would, of course, have to consider all factors relating to the best interests and circumstances of the child, including "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained": s. 24(3)(e) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*"). Section 64(1) of the *CLRA* provides that, "[i]n considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them." And then, of course, there is Article 12 of the United Nations *Convention on the Rights of the Child*, of which Canada is a signatory. It specifically mandates that children who are capable of forming their own views have the right to express those views in all matters affecting them.

Of some concern to Justice Kristjanson was the fact that the cross-examination proposed by the father would be specifically focussed on the only evidence the Court would have about C.'s views and preferences:

> [15] . . . [a]s stated by the Honourable Donna J. Martinson & Caterina E. Tempesta in "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," 31 Can. J. Fam. L. 151 (2018). at pp. 167-168:
>
> > In most cases, it is the fact of the conflict that is harmful, not the expression of the child's views. Even in the few true "parental alienation cases", efforts should be made to enable children to share their views, **although the court may have to determine the weight to be assigned to those views.** In addition, in many cases where alienation is alleged, children may have legitimate affinities for one parent over the other, or may have had experiences with the "alienated" parent that justify the estrangement. In such cases, **it would not be desirable to exclude the child's perspective** from the decision-making process.
> >
> > Even in cases where parents are careful to avoid influencing their children's views, it is inevitable that children will be influenced by the words and actions of those around them. **The possibility of parental influence on its own should not be a basis for excluding children's participation** nor for discounting their expressed views. **An approach that considers the extent to which the child's views are rooted in reality, or might reasonably be perceived as such by the child, is preferable, as it considers the situation from the child's perspective.** Reviewing the substance of a mature child's reasons where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child's views will be harmful is **unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to her views.** [emphasis added]

Stated alternatively, the views and preferences of an alienated child may be warped and misconceived — but they are nonetheless real to the child: *L. (N.) v. M. (R.R.)* (2016), 88 R.F.L. (7th) 19 (Ont. C.A.). Or as recently noted by Justice Mandhane in *S.S. v. R.S.*, 2021 CarswellOnt 3796 (S.C.J.) at para. 27, "[a] human rights-based approach to the new *Divorce Act* calls on courts to recognize, respect and reflect each child as an individual distinct from their parents, and to empower children to be actors in their own destiny."

There are, of course, opposing views. Some courts have suggested there is no point in getting the predictable views of a child that has been alienated: *Haywood v. Haywood* (2010), 94 R.F.L. (6th) 396 (Ont. S.C.J.); *L. (J.K.) v. S. (N.C.)* (2008), 54 R.F.L. (6th) 120 (Ont. S.C.J.); *B. (M.) v. Q. (R.)* (2015), 60 R.F.L. (7th) 59 (N.L. C.A.); *Letourneau v. Letourneau*, 2014 CarswellAlta 702 (C.A.); or that the court need not give any weight to the view of an alienated child: *Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.).

Which view is preferable? Fortunately, we need not decide. On one hand, there is certainly something to be said for the futility of getting the views and preferences of a child that has been alienated. On the other hand, although those views may appear to be an artificial construct to others, to the child those views may be very real. On the other hand, if everyone just accepts the views of an alienated child, the relationship with the target parent may never be fixed. It seems we've run out of hands.

In this case, as considered by Justice Kristjanson, C. had an interest in the cross-examination of the author of the Voice of the Child Report, and the submissions that would later be made about his views and preferences. In the circumstances, her Honour found it to be in C.'s best interests to have a legal representative to ensure that the Court had evidence and argument relevant to C.'s views and preferences on the variation application. Therefore, her Honour requested that the OCL provide a legal representative for C. If the OCL declined, then either parent was permitted to bring a motion to appoint private independent counsel.

Her Honour also allowed for the cross-examination of the clinician that prepared the Voice of the Child Report. This is not something that happens regularly. And whether you agree or disagree with it likely depends on which of the "other hands" you subscribe to above.

Litigation About Litigation

Anderson v. Forsyth, 2022 CarswellSask 58 (Q.B.) — Goebel J.

This was a case about whether or not the parties had a binding settlement.

The parties were married for 28 years, and separated in 2013. They attended a pretrial conference in 2018 at which they signed handwritten minutes of settlement that provided:

> Property Division
>
> 1. [The husband] shall retain all assets in his sole name and [the wife] shall retain all assets in her sole name.
>
> 2. [The wife] shall provide a registerable transfer authorization transferring the Home Quarter (SW 23-44-21 W2nd), and the quarter legally described as NE 21-44-21 W2nd to [the husband], forthwith. Said transfer authorizations shall be held in trust by [the husband's] lawyer until the entire equalization payment as set out below is received by [the wife], at which time they may be utilized.
>
> 3. [The wife] shall sign any documentation necessary to allow [the husband] to retain Langrobb Farms Inc. as his sole and exclusive property, including any assets and debts held by the company, except as provided herein.
>
> [The husband] shall be responsible for all debts in his sole name and in the names of both parties jointly. With respect to the joint debts, [the husband] shall ensure that [the wife's] name is removed from the same forthwith.
>
> 4. [The wife] shall be responsible for all debts in her sole name.
>
> 5. Equalization Payment:
>
> > 1) $305,500 shall be paid by [the husband] immediately to [the wife];
> >
> > 2) The following property shall be sold:
> >
> > . . .
> >
> > One half of the sale proceeds shall be payable to [the wife]. A further $300,000 shall be payable to [the wife] from [the husband's] one-half share of the sale proceeds.

Spousal Support

6. [The husband] shall pay [the wife] spousal support in the amount of $1750.00 per month beginning June 1, 2018 for a period of 10 years at which time it shall terminate. No variation shall be sought by either party regardless of any unforeseen change in circumstances. Payments shall be made on the 1st of every month. [The husband] shall provide [the wife] with post-dated cheques one year in advance.

Divorce

7. [The husband] shall be responsible for applying for a divorce and shall be responsible for all fees associated with the same. Such application shall be made within 30 days from today's date.

The pretrial judge endorsed "settlement reached on both division of property and spousal support".

Unfortunately, when the parties tried to implement them, a dispute arose about how the payments the husband would be making to the wife would/should be treated for tax purposes. Although the reasons do not say exactly what was in dispute, presumably the husband was taking the position that he should be able to deduct some or all of the payments he would be making to the wife for tax purposes, and the wife disagreed.

In any event, further litigation (actually, litigation about the purported end of litigation) ensued.

The husband wanted judgment in accordance with the Minutes and directions from the Court about the tax issues. The wife, on the other hand, claimed that the Minutes of Settlement were not based on informed consent, were unconscionable, did not represent a meeting of the minds, and/or were made upon mistaken belief and/or fraud.

As the parties could not agree on how the matter should proceed or what issues the Court would need to decide, they sought directions about the following issues:

1. Does the court have jurisdiction to grant judgment in a summary fashion in a family law matter where minutes of settlement were concluded at a pre-trial conference?

2. What legal issues are raised by the s. 29 application and the materials filed?

3. Is evidence respecting what occurred in the course of the pre-trial conference admissible?

4. Is there sufficient uncontroverted evidence on material issues to determine the material issues on affidavit evidence or is a trial of the issues warranted?

The answer to the first question — whether the Court had jurisdiction to grant judgment on minutes of settlement — was clearly "yes". One way or another, whether under the *Rules*, a statute, or at common law, courts in Canada always have jurisdiction to determine whether a settlement has been reached. In Saskatchewan, case law has determined that s. 29 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, is the statutory basis for courts to decide whether a settlement has been reached and/or whether a settlement should be enforced. It provides that:

29(1) The court shall grant to the parties to an action or matter all remedies to which the parties appear to be entitled with respect to any legal or equitable claims that they have properly brought forward so that:

(a) all issues in controversy between the parties are determined as completely and finally as possible; and

(b) a multiplicity of legal proceedings concerning the issues is avoided.

With respect to the second question — the legal issues raised — Justice Goebel started by reviewing some of the leading authorities about settlements in family law, including the Supreme Court's decisions in *Miglin v. Miglin* (2003), 34 R.F.L. (5th)

255 (S.C.C.) and *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.), and the Saskatchewan Court of Appeal's recent decision in *Anderson v. Anderson* (2021), 61 R.F.L. (8th) 265 (Sask. C.A.), which is discussed further below.

After considering the applicable legal principles, Justice Goebel provided us with a helpful test/framework for analyzing whether a settlement has been reached in a family law case, and whether judgment should be granted:

> 1. Step one: Has the [moving party] satisfied the court that the minutes of settlement represent a *prima facie* enforceable agreement between the parties? This involves the determination of the following issues:
>
> a. Was there a meeting of the minds?
>
> b. Was there a consensus on all essential terms?
>
> c. Was the agreement conditional upon or subject to the execution of a formal document?
>
> 2. Step two: If the court is satisfied that the minutes of settlement are an enforceable agreement, the burden of persuasion shifts to [the responding party] to satisfy the court of the following:
>
> a. The agreement should be set aside having regard to allegations respecting material non-disclosure and/or misrepresentation;
>
> b. The agreement should be given no weight because it is not in substantial compliance with the general objectives of the governing legislation. As noted in *Anderson* citing *Miglin*, only a significant departure from the general objectives of the governing legislation will warrant the court's intervention; or
>
> c. There is evidence of new or changed circumstances such that the agreement no longer reflects the parties' intentions at the time of execution or renders the agreement no longer in substantial compliance with the general objectives of the governing legislation. Again, as noted in *Anderson* citing *Miglin*, if the change in circumstance can be said to have been within the contemplation of the parties at the time of execution, then the agreement may be given great weight.

This framework will be useful for family law practitioners across Canada, as it provides a clear and straightforward way to analyse whether a settlement has been reached, and if it has, whether it should be enforced.

A word of caution, however. Although the Supreme Court of Canada thought otherwise in *Rick v. Brandsema*, the *Miglin* test and principles do not comfortably sit with the idea of setting aside property settlements. While steps 2(b) and 2(c) above, which are based on *Miglin*, apply throughout Canada with respect to spousal support agreements, the same cannot really be said for property agreements.

Whether a court can consider "evidence of new or changed circumstances" when considering a property agreement must depend on the wording of the applicable provincial family law property legislation. In Ontario, for example, s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3, only gives a court authority to set aside a property agreement based on circumstances that existed *at the time the agreement was made*. Therefore, a subsequent change in circumstances is largely irrelevant to whether a property agreement in Ontario should be set aside.

And, in that vein, it is not presently clear whether *Miglin* actually applies to property settlements in Saskatchewan. As we discussed in the 2022-14 (April 18, 2022) edition of *This Week In Family Law*, in *Anderson*, the Saskatchewan Court of Appeal conducted a *Miglin* analysis in considering a family law property agreement that did not meet the formal requirements of Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3. However, as the Supreme Court of Canada granted leave to appeal in *Anderson* on April 7, 2022, we will have to see if the Supreme Court agrees with the Court of Appeal's approach on this issue — or whether the folks in Ottawa might be prepared to reconsider the applicability of *Miglin* to property settlements.

As for the third and fourth questions — whether evidence respecting what occurred in the course of the pre-trial conference was admissible, and whether a trial was necessary — Justice Goebel found that the evidence was simply too conflicted for the

issues to be addressed on a paper record. Her Honour also determined that it should/would be up to the judge hearing the matter to decide whether to allow the parties to introduce evidence of the discussions that occurred during the pre-trial. However, she also noted that, evidence about settlement discussions is generally *admissible* when a court is deciding whether a settlement was actually reached:

> [41] Given the issues in play in this matter, in general terms it is reasonable to expect that otherwise privileged and protected communications, including communications and materials exchanged in the course of the statutorily protected pretrial process, are admissible to determine the existence of a valid agreement, as well to properly examine the wife's allegations of misrepresentation, fraud and material non-disclosure. It is also arguable, as was the case in *Comrie*[*v. Comrie* (2001), 17 R.F.L. (5th) 271 (C.A.)], that an exception may be necessary to allow the court to properly consider statutory objectives and factors underlying the settlement.

In *Crawford v. Crawford*, 2018 CarswellOnt 16489 (C.A.), the Ontario Court of Appeal also confirmed that settlement communications are admissible for the purpose of determining whether or not an agreement was reached. [For further discussion about the admissibility of settlement discussions when a court is deciding whether a settlement was reached, see our discussion about the Supreme Court of Canada's decision in *Association de médiation familiale du Québec v. Bouvier* (2021), 64 R.F.L. (8th) 1 (S.C.C.) in the 2022-02 (January 17, 2022) edition of *This Week In Family Law*.]

It makes absolute sense that evidence of settlement discussions should be admissible to prove a settlement. Because if there was a settlement, the very purpose of the settlement privilege — to prevent the court from learning of compromises — is spent. (It is for this reason that evidence of settlement discussions — and even offers to settle — are admissible with respect to costs.)

There is an important lesson here. To ensure that parties are actually *ad idem*, make sure to clearly state in the settlement document how any payments and transfers are to be treated for tax purposes. For example, had the Minutes in *Anderson* said that the money that the husband would be paying to the wife would be paid on a net basis, it would have been impossible for the husband to subsequently claim that the deal permitted him to pay some or all of these funds in pre-tax dollars.

While including this type of language will not bind the CRA or override the provisions of the *Income Tax Act* (e.g. you cannot make child support payments tax deductible by including wording to that effect in a court Order or agreement and you cannot make periodic spousal support payments *not* taxable/deductible), it will at least help to ensure that the parties' intentions are clear so that there can be no ambiguity later if any tax issues subsequently come up.