

FAMLNWS 2022-23
Family Law Newsletters
June 27, 2022

— Franks & Zalev - This Week in Family Law

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Hey! Check Out The AFCC-Ontario Parenting Plan Guidelines! They Might Just Catch On! But Should They?

Melbourne v. Melbourne, 2022 CarswellOnt 4929 (S.C.J.) — McGee J.

H. v. A. (2022), 69 R.F.L. (8th) 18 (Ont. S.C.J.) — Kraft J.

McBennett v. Danis (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.) — Chappel J.

E.M.B. v. M.F.B., 2021 CarswellOnt 8802 (Ont. S.C.J.) — Mandhane J.

There is nothing terribly significant about *Melbourne v. Melbourne*. It is a decision where parents were not able to agree on a parenting schedule. However, it is another in a line of cases where courts have placed significant reliance on social science research about child development summarized by the Association of Family and Conciliation Courts — Ontario Chapter (AFCC-O) in its Parenting Plan Guide (2021), which can be found at: <https://afccontario.ca/parenting-plan-guide-and-template/>.

This means that the AFCC-O Parenting Plan Guide is arguably gaining increasing importance when courts consider parenting plans. And this, of course, has its advantages and disadvantages. While having a "guide" or "guidelines" will certainly assist courts and enhance predictability, there is also the risk that, over time, these "guidelines" will become the default position.

The *Spousal Support Advisory Guidelines* offer a good example. Appellate courts first noted that the SSAGs are "useful" but not law. In the early years of the SSAGs, it was *not* an error to *not* apply the SSAGs where they were not fully argued: *Jessop v. Wright* (2008), 56 R.F.L. (6th) 29 (Ont. C.A.). But it *was* an error to use only the SSAGs without considering the factors and objectives in sections 15.2(4) and (6) of the *Divorce Act*, R.S.C. 1985, c 3 (2nd Supp): *Sawatzky v. Sawatzky* (2008), 59 R.F.L. (6th) 88 (Alta. C.A.); *Kynoch v. Kynoch*, 2013 CarswellMan 441 (C.A.); *Frank v. Linn* (2014), 48 R.F.L. (7th) 34 (Sask. C.A.). Courts only had to address the SSAGs if argued by counsel: *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.).

Years later, it came to be that the SSAGs had "rightly gained currency over time such that compliance is increasingly seen as typical": *Wild v. Wild* (2019), 24 R.F.L. (8th) 26 (Alta. C.A.); *Thompson v. Thompson*, 2019 CarswellAlta 26 (C.A.). The "canary in the coalmine" for a possibly unreasonable spousal support award became a departure from the SSAGs ranges in the absence of an obvious reason for doing so: *Aquila v. Aquila* (2016), 76 R.F.L. (7th) 1 (Man. C.A.); *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.). The SSAGs were, at that point, a "litmus test for reasonableness": *Rémillard v. Rémillard* (2014), 52 R.F.L. (7th) 299 (Man. C.A.); *Wild v. Wild* (2019), 24 R.F.L. (8th) 26 (Alta. C.A.).

Today, although still not law, appellate courts have expressed the view that the SSAGs should not be lightly departed from because, without them, it is very difficult to establish a principled basis for spousal support: *Slongo v. Slongo* (2017), 89 R.F.L.

(7th) 27 (Ont. C.A.). The SSAGs are now the presumptive starting point and any departure requires adequate explanation: *McKinnon v. McKinnon*, 2018 CarswellOnt 10598 (C.A.); *Politis v. Politis* (2021), 61 R.F.L. (8th) 27 (Ont. C.A.).

In other words, what started out as "guidelines" is now essentially presumptive. We all watched it happen. Some 15 years after their release, a failure to consult the SSAGs now constitutes a legal error: *Gray v. Gray* (2014), 50 R.F.L. (7th) 257 (Ont. C.A.); *M. (D.R.) v. M. (R.B.)*, 2006 CarswellBC 3177 (S.C.). The SSAGs have now essentially become the equivalent of binding judicial authority that must be distinguished if not used.

To be very clear, we are not remotely opposed to the SSAGs. We love the SSAGs. But they must be used properly, and we should not just automatically default to the mid-range levels of quantum and duration.

We are also not opposed to the AFCC-O Parenting Plan Guide. We simply make the point that it is meant to be useful and not dispositive. We should not be defaulting to the "proposed parenting plans" for children of particular ages. There is the concern that, with such guidelines, courts may unintentionally sacrifice the best interests of the specific child(ren) before the court at the altar of expediency.

In *Melbourne*, the parties were the parents of a three-year-old daughter. They agreed on joint-decision-making, but they could not agree on a parenting schedule.

The father wanted a 2/2/3/3 schedule. The mother wanted a more complicated parenting schedule, the details of which are not wholly relevant to our discussion.

In considering the opposing parenting schedules put forward by the parties, Justice McGee offered the following comments (that we quote extensively so as to include the comments of Justices Chappel and Kraft):

[18] The 2021 amendments to the *Divorce Act* and the *Children's Law Reform Act* introduced new provisions for parenting plans. The goal of a modern parenting plan is to craft a child centred schedule, an approach that has been extensively researched and advanced within the AFCC Parenting Guidelines. In the past, the use of a detailed parenting schedule was generally limited to the most difficult parenting relationships: those in which multidirectional Orders were necessary to remove as much discretion — and therefore potential conflict — as possible. The modern approach to parenting plans is to move beyond the baseline of conflict reduction and as much as practical, to map out the best childhood possible for children growing up in two (or more) homes.

[19] **The AFCC Parenting Guidelines were prepared by the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-Ontario) to assist parents and their professional advisors in specifically developing the best, child-focused, and realistic parenting plans.** As set out in its preamble,

This Guide combines knowledge gained from developmental research on the impact of parental separation and divorce on children, with practical insights about the needs of children with parents living apart. This Guide is intended to be used in conjunction with the AFCC-Ontario Parenting Plan Template, which offers suggestions for specific clauses that can be used or adapted for a parenting plan.

[20] I agree with Justice Chappel in *McBennett v. Davis* 2021 ONSC 3610 when she states in paragraph [92] that:

"The AFCCO-O Guide **summarizes basic social science knowledge** about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of children."

[21] And as further stated by Justice Kraft in *H. v. A.*, 2022 ONSC 1560:

The parenting plan guide produced by the Association of Family and Conciliation Courts — Ontario ("AFCC-O") **has been found by many courts to be of great assistance in determining parenting schedules that are in a child's best interests, depending on the age of the child and his/her developmental stage. While not binding on the**

courts, the Guide provides a great deal of helpful information and reflects a professional consensus in Ontario about the significant of current child development research for post-separation.

[22] **There are two suggestions within the AFCC Parenting Guidelines for young children that I find to be useful within this decision: that transitions occur at a neutral location such as a daycare or school (to which the parents have already agreed), and that the number of transitions for a child be minimized while ensuring that she is able to spend as much time with each parent as is in her best interests.**

[23] Transitions are stressful for children. There is a change in expectations and relationships every time that a child moves from one home to another. There are few, if any constant objects. Some of the child's belongings or a favourite activity or a pet will be left behind. Each transition requires an adjustment, the length and quality of which will depend on the child's individual temperament, the stability of the pattern of care and the demonstrated empathy of her parents. Should the parenting schedule be uneven, or not allow enough time for adjustment before the next transition, a child may never truly settle in either home, or perhaps, even be fully present. [emphasis added]

While referring to the AFCC-O Parenting Plan Guide, Justice McGee also made it clear that her decision was based on a review of the criteria in section 16 of the *Divorce Act* — and that is how it should be.

In this specific case, her Honour preferred the father's parenting plan because the transitions were always on the same three weekdays (Monday, Wednesday, and Friday), such that the plan was stable and predictable.

E.M.B. v. M.F.B. was also a run-of-the-mill parenting case. The parents could not agree as to decision-making responsibility or the parenting schedule for their 4-year-old daughter.

The father wanted joint decision-making and overnight parenting time on alternating weekends, a predictable holiday schedule, and week-about parenting time during the summer.

The mother opposed the father's request. She sought sole decision-making responsibility and wanted the father to have only six hours of supervised parenting time every week (she claimed the father had issues with alcohol).

Justice Mandhane properly started her analysis with the provisions of the *Divorce Act* (and in this instance, the United Nations *Convention on the Rights of the Child*). She further interpreted the parenting provisions in a manner that is consistent with children's rights and Canada's obligations under international law. She also noted as follows:

[51] After receiving submissions from both parties, **I relied heavily on the social science research about child development summarized by the Association of Family and Conciliation Courts (AFCC-O) in its the *Parenting Plan Guide* (2021): <https://afccontario.ca/parenting-plan-guide-and-template/>. [emphasis added]**

Then, in considering the best interests of this specific child, her Honour had this to say:

[137] I now move on to considering the Child's best interests in light of her current circumstances, and giving primary consideration to the child's physical, emotional and psychological safety, security, and well-being.

[138] At page 9 of its 2021 *Parenting Plan Guide*, the AFCC-O states that **it is generally accepted within the growing body of research** that children of separated parents do better when:

- They feel loved and cared for by both parents;
- Each parent makes a different and valuable contributions to their development;
- Their lives involve stable and meaningful involvement with both parents, including structured routines and unstructured play;
- Their parents help them to maintain positive existing relationships, routines, and activities; and

- They are permitted to bring personal possessions back and forth between homes.

[139] Research indicates that "the strength of a parent's relationship to a child is affected more by parental commitment, warmth and the ability to meet the child's needs than it is by time spent with the child": AFCC-O at page 9.

[140] Conversely, children are harmed by exposure to parental conflict. Children generally should not feel as though they must choose between parents, feel guilty about enjoying the company of the other parent, and should feel supported in their relationship with the other parent: AFCC-O, at pp. 10-11.

[141] At pages 18 and 19, the AFCC-O notes the following about the normal development of pre-schoolers aged three to five years old:

- They have a growing sense of independence, but they find security in their routines;
- Their social networks are expanding to include other children, teachers, and families;
- They are learning to interact with others and to increasingly understand rules of social engagement, but still require adult guidance, supervision, and support;
- They are prone to fears and anxiety and may have nighttime fears;
- They may have difficulties with separations or transitions, but can generally calm down and settle in; and
- They are alert to the moods and tensions of their caregivers.

[142] To assist with making developmentally appropriate parenting plans for preschoolers, the AFCC-O notes at page 17 that "preschoolers can tolerate longer absences from a parent, but a child's temperament and the pre-separation parenting arrangements must be considered." They suggest that transitional objects, such as a favorite toy, move between the two homes to help the child manage sadness and anxiety.

[143] At page 18, **the AFCC-O also recommends a more gradual increase in parenting time** where one parent has had limited involvement with the child's daily routine, where one parent has less time available for childcare, or where the child has trouble adapting to transitions. For example, they suggest that it might be prudent to order one overnight that can be extended over time to include Friday night.

[144] The **AFCC-O states that children between ages six and nine will usually start to engage with more people outside of their family and can better manage blocks of time away from each parent** because of their "more developed understanding of time": pp. 19-20.

[145] Going forward, the parents must be careful not to expose the Child, whether directly or indirectly, to conflict that might cause emotional harm. The AFCC-Ontario warns at page 18 of their *Parenting Plan Guide* that preschool aged children "may blame themselves for the anger, unhappiness, or anxiety of their parent, and they may feel that they are responsible for parental separation": at p. 18. [emphasis added]

While undeniably useful, the AFCC-O Parenting Plan Guide is, at best, equivalent to social science literature, which is something the courts have historically struggled with.

On the one hand, in *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.), the Supreme Court of Canada in considering some 50 social science articles, suggested that courts may be more willing to take into account social science literature without the need for formal proof (that said, given the concurring opinion and dissent, it is not entirely clear who was agreeing with that statement).

In contrast, in *Sordi v. Sordi* (2010), 13 R.F.L. (7th) 133 (Ont. S.C.J.), aff'd (2010), 13 R.F.L. (7th) 197 (Ont. C.A.), Justice Timms offered the following comments:

[141] I think one must distinguish between the use of academic articles for the purpose of adapting the logic of an argument contained therein, as opposed relying upon the 'findings' of any particular study. I am of course aware of what the Supreme Court of Canada did in *Young v. Young* and what other courts have done in the other cases cited by counsel for the applicant [footnote omitted]. **Candidly, I have always been troubled by the idea that the court should just accept, at face value, the contents of academic articles submitted during argument, or found by the court on its own.** Unlike any person offered as an expert witness during a trial, there is no opportunity to determine the degree of expertise [if any] of the author of the article, or to test the validity of the study, as it relates to the issues at hand. **In this post *The Inquiry into Paediatric Pathology in Ontario* [footnote omitted] world, it is my view that trial judges should be very careful about incorporating social science articles into judgments, unless they have been produced in an acceptable fashion during the trial.** I have not read any of the articles submitted by the applicant. [emphasis added]

And the British Columbia Court of Appeal offered a similar view in *Walker v. Maxwell*, 2014 CarswellBC 3744 (S.C.), aff'd (2015), 64 R.F.L. (7th) 32 (B.C. C.A.):

[63] Determining what may be in the best interests of a child is sometimes obvious (e.g. protection from violence or abuse), but often entails a more nuanced, contextual analysis and one perhaps vulnerable to "common sense" assumptions informed by stereotype, popular but not necessarily accurate social science, and even myth. This may be particularly true respecting perceptions of "good parenting" and "bad parenting" and the roles of parents as a central variable and major predictor of child outcomes. There can be diverse and opposing views, often strongly held, on such matters, which is why the court often prefers for evidence respecting the unique development needs of very young children and social/ psychological science to be presented through expert witnesses who can be cross-examined as to the value and weight to be given to the research and opinions in question.

Generally, a court should not be able to simply take judicial notice of social science literature — even articles penned by accepted authorities: *Wyatt v. Reindl* (2020), 36 R.F.L. (8th) 253 (Sask. C.A.). Social science opinion is subject to change — just consider the "Tender Years Doctrine", for example.

To be clear, the AFCC-O Parenting Plan Guide is important and should be reviewed by all. But it is on account of what seems to be a recent trend [see also *J.N. v. A.S.*, 2020 CarswellOnt 12748 (S.C.J.)] in the case law of courts considering/relying on the AFCC-O Parenting Plan Guide, that we offer the above thoughts for your consideration.

The Hague Convention, Refugee Claims and *Un Po' di Italiano*

Singh v. Kaur, 2022 CarswellMan 93 (Q.B.) — MacPhail J.

In *Singh*, Justice MacPhail was faced with competing claims for the return of a child to his habitual residence under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"), and a claim by the child (and the mother) for Canadian refugee status under the *Immigration and Refugee Protection Act* ("*IRPA*").

The father was born in India, but moved to Italy approximately 20 years ago. The mother was also born in India, and joined the husband in Italy shortly after they were married in 2010.

The parties had a son together who was eight years old at the time of the hearing before Justice MacPhail. He was born in Italy, and had Italian citizenship. *Fin qui tutto bene*.

Unfortunately, the marriage was not a happy one and, without the father's knowledge or consent, the mother left Italy with the son in September 2021, and took him to Winnipeg to stay with her cousin — *Grande problema*.

When the father learned that the mother and son had left Italy, he commenced an Application in Manitoba under the *Hague Convention*. The mother was served with the Application on November 26, 2021, and the hearing was scheduled for January 27, 2022.

The mother filed responding materials and retained counsel. However, at the start of the hearing on January 27, 2022, her lawyer requested an adjournment because the mother was planning to apply for refugee status. She also suggested that a voice of the child report was necessary in the circumstances.

Justice MacPhail adjourned the matter to February 16, 2022, to allow the parties to submit further evidence and submissions about these issues.

On February 4, 2022, the mother submitted an application for refugee protection for both herself and the child under the *IRPA* based on allegations of domestic violence against the father.

When the matter returned to court on February 16, 2022, the mother argued that the father's *Hague Convention* Application should be stayed until her claim for refugee status was decided. However, she did not provide evidence about how long the refugee process would take, or a viable explanation for why she waited until February 4, 2022, to apply for refugee status (even though she had been in Canada since September 2021).

The mother also argued that the child would be exposed to a grave risk of harm if he was returned to Italy, and that the father had consented to his removal from Italy.

Given the timing of the mother's refugee application, and her failure to explain why she waited until February 4, 2022, to file it, it should come as no surprise that Justice MacPhail found that the "refugee applications appear to have largely been made to prolong or defeat the father's Hague Abduction Convention request for return." *Questo non ha superato il test dell'olfatto*.

The mother was also not able to provide Justice MacPhail with any authority for the proposition that an application for refugee status should automatically stay a proceeding under the *Hague Convention*. And, in fact, the case law says nothing of the sort. As Justice Ferrier noted in rejecting a similar argument in *Kovacs v. Kovacs*, 2002 CarswellOnt 1429 (S.C.J.):

[124] If the position of the respondent and the MCI were accepted, the practical effect would be to nullify the Hague Convention. Ontario could become a haven for persons abducting their children and seeking to avoid the enforcement of foreign custody orders. By the time a case was returned back to the Superior Court of Justice from the federal tribunal (and the Federal Court) the child could have become settled in Canada, and a court could find, relying on Article 13(b), that an order for the return of the child should not be made because to do so would place the child in an intolerable situation.

In *I. (A.M.R.) v. R. (K.E.)* (2011), 2 R.F.L. (7th) 251 (Ont. C.A.), the Ontario Court of Appeal also confirmed that even if a child has been granted refugee status, that *alone* does not prevent a court from ordering that child returned to his or her habitual residence under the *Hague Convention*. Rather, when a child has been given refugee status, "a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence" that would be relevant to the court's analysis under article 13(b) of the *Hague Convention* (the grave risk of harm exception).

Ultimately, after considering the relevant authorities, Justice MacPhail wholly rejected the mother's request to stay the father's *Hague Convention* Application pending a determination of the refugee claims:

[62] To allow a parent's refugee application for their child to stay Hague Abduction Convention applications for the return of wrongfully removed or retained children, would, to use an oft-referred to expression, "drive a coach and four" through the Convention and gravely endanger achievement of those important objectives noted by the Supreme Court of Canada. It would significantly delay consideration of requests for return involving non-Canadian children. Even if the parent's refugee application was unsuccessful, considerable time would pass before that determination was made. A haven would be created for parental child abductors.

Her Honour was satisfied that the record before her, which unlike the mother's refugee Application included evidence from *both* parties, would allow her to fairly determine whether the child would be exposed to a grave risk of harm if he was returned to Italy:

[59] **Unlike an Immigration and Refugee Board proceeding, I have comprehensive sworn or affirmed evidence before me from both parties**, including the mother's refugee applications, in addition to the sworn or affirmed evidence of other individuals from Italy. **This Court is best placed to consider the evidence of both parties in totality and determine whether there is a grave risk that an order for the child's return to Italy would, on the basis of the domestic violence allegations of the mother, "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" within the meaning of Article 13(b) of the Convention.** The hearing can also occur promptly, a key component of the meaningful and effective operation of the Convention and addressing the best interests of children. [emphasis added]

Justice MacPhail also rejected the mother's request to adjourn the hearing to allow a voice of the child report to be prepared, because she was not persuaded that "he 'has attained an age and degree of maturity at which it is appropriate to take account of [his] views' or that it would be in appropriate or in his best interests for me to him to provide other evidence."

With respect to the mother's substantive defences to the *Hague Convention* Application, Justice MacPhail resoundingly rejected the mother's claim that the father had consented to the child's removal from Italy, and found that there "is 'clear and cogent evidence' that the father did not consent to the child being removed to Canada and that he did not consent to the child remaining in Canada indefinitely."

The mother also claimed that returning the child to Italy would expose him to a grave risk of harm under article 13(b), and alleged that the father had committed "verbal, financial and physical abuse" against her. While Justice MacPhail recognized that the mother's allegations were very serious, she was not persuaded that the mother had met her evidentiary onus under article 13(b) for a variety of reasons that are canvassed in the reasons. Her Honour also appears to have been reassured by the evidence that the Italian justice system was capable of protecting the mother and child should the need arise:

[116] The Italian Central Authority has confirmed that the Italian Court has the authority to "issue protection orders on behalf of [the mother] and her minor child, if need be." They also noted the possibility of "free legal aid" for civil proceedings and provided the legislation applicable to parental authority (including that orders be made in accordance with the child's best interests) and child support.

[117] While the alleged death threats by the father and his family, and slaps by the father and his father, described by the mother (and denied by the father and his family) are certainly serious, **the Italian Court and law enforcement agencies should be trusted to take measures to protect [the child], including protecting his mother from any domestic violence, if the evidence presented so warrants.** There was no evidence that the mother had ever asked either to do so. [emphasis added]

After rejecting both of the mother's substantive defences, Justice MacPhail ordered her to return the child to Italy by March 24, 2022. However, to provide additional protection, and based on the father's undertaking to comply with any directions her Honour gave with respect to the return, Justice MacPhail prohibited the father from having any direct contact with the mother or the child pending a further Order from the Italian Courts, or a written agreement between the parties.

We certainly agree with Justice MacPhail's decision in this case. The mother had clearly wrongfully removed the child from his habitual residence in Italy, she had not met the high threshold for establishing a grave risk of harm, and there was no evidence to suggest that the Italian justice system could not deal with the family law issues and the mother's allegations of abuse. That being said, we wonder, as we almost always do in these types of cases, whether the result would have been different if the request for return had involved some of the other signatory countries to the *Hague Convention*.

Non lo sapremo mai. La fine. Arrivederci.

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