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

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**Virtual vs. in Person — Do You Prefer Live Theatre or the Movies? Part Two . . . And, "Can't We All Just Get Along?"**

*Worsoff v. MTCC 1168*, 2021 CarswellOnt 13629 (S.C.J.) — Myers J.

*Cousins v. Silbourne* (April 19, 2022), Doc. Brampton FS-20-121-00 (Ont. S.C.J.) — Ricchetti J.

In *Worsoff*, which we very briefly discussed in the 2021-39 (October 11, 2021) edition of *TWFL*, Justice Myers offered his views about some of the significant advantages associated with virtual examinations, and the potential for virtual hearings to improve access to justice for all Canadians.

In *Cousins v. Silbourne*, however, Justice Ricchetti discussed some of the practical problems that are currently limiting the court's ability to accommodate requests for virtual hearings now that the family courts in Ontario have resumed hearing matters primarily in person.

***Worsoff v. MTCC 1168***

*Worsoff* is not a family case, but it is interesting nonetheless. The parties were trying to arrange examinations for discovery. The plaintiff served Notices of Examination that required the defendants to attend their examinations for discovery *in person*. The defendants objected, as they wanted the examinations to proceed over video.

Justice Myers was asked to determine the mode of attendance.

As a result of the pandemic, Ontario's Civil Rules Committee modernized Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. One of the changes was the addition of Rule 1.08(1), which deals with the method of attendance to be used for a hearing before the court, and permits in-person, telephone, and video attendances.

Where the *method* (as opposed to the place) of attendance at an examination for discovery is the subject of objection, the process under Rule 1.08(8) applies, which essentially directs the parties to attend a judicial Case Conference to determine the issue, taking into account the factors listed in Rule 1.08(6) (although most of these factors are directed toward court hearings, and not out-of-court processes like examinations, his Honour considered them *mutatis mutandis*):

- 1.08(6) At the case conference referred to in subrule (5), the court shall make an order directing the method of attendance at the hearing or step and, in doing so, the court shall consider, as applicable,
- (a) the availability of telephone conference or video conference facilities;
  - (b) the general principle that evidence and argument should be presented orally in open court;

- (c) the importance of the evidence to the determination of the issues in the case;
- (d) the effect of a telephone conference or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
- (e) the importance in the circumstances of the case of observing the demeanour of a witness;
- (f) whether a party, witness or lawyer for a party is unable to attend by a method because of infirmity, illness or any other reason;
- (g) the balance of convenience between any party wishing the telephone conference or video conference and any party or parties opposing; and
- (h) any other relevant matter.

While some have very strong opinions as to the efficacy of video examinations, Justice Myers noted that this question is, essentially, a hyper-procedural decision that should be made quickly and with little expense. Rarely does the mode of examination actually matter. Ultimately, in most cases, the decision of which method of attendance applies to a step in a proceeding short of trial is of little consequence, and the court itself has little institutional interest in the outcome.

Justice Myers was of the considered (and reasonable) view that "a preference for remoteness while the pandemic remains with us is reasonable all else being equal."

Counsel argued that he had gone to a Toronto Blue Jays game with thousands of fans, that society was opening, and that he should be able to examine for discovery in person. He argued that in-person examinations were "the 'best' method to conduct an examination well and properly."

This was the wrong submission to make to Justice Myers, who is an incredible proponent of technology, and who had already noted as follows in *Arconti v. Smith*, 2020 CarswellOnt 6163 (S.C.J.):

[19] In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

[20] That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer. In this case, the parties cannot attend in the same location due to health concerns and governmental orders. So, the question is whether the tool of videoconference ought to be required to keep this matter moving or if the mini-trial ought to be delayed further due to the plaintiffs' desire to conduct an examination for discovery in person.

In his reasons in *Worsoff*, Justice Myers proceeded to dismantle counsel's arguments in favour of in-person examinations one argument at a time:

[24] Historically court proceedings could only take place in a courtroom or a formal venue . . . But seven years ago the Supreme Court of Canada said that the cost of civil proceedings made them inaccessible to the majority of Canadians. The court identified access to justice as the single biggest problem facing the civil justice system. Yet the existing barriers to access to civil justice have not really been addressed despite the highest court in the land calling for a "culture shift" toward modernization, decreased cost, increased efficiency, and overall enhanced proportionality in the civil justice system so many years ago. See: *Hryniak v Mauldin*, 2014 SCC 7.

[25] . . . Credibility is not really in issue during discoveries. If the cost of participation can be decreased for parties and counsel by use of remote methods, access to justice will be improved.

[26] Arrangements so that litigants do not have to take a full day off work; drive downtown and pay \$40 or more for parking; or take the bus for 90 minutes each way; are real savings that promote participation and access to justice.

[27] If a lawyer can avoid travel and waiting time because she is working at her desk until she signs-on to a virtual examination or hearing, transaction costs are decreased for clients.

[28] Avoiding paying a lawyer to come to Toronto or to go to another place is also a significant cost savings for a client through virtual proceedings. Lawyers can participate in proceedings in multiple locations on the same day virtually. The increase in efficiency in their practices is substantial.

Justice Myers did acknowledge that there can be shortcomings with virtual proceedings. Some participants are not yet used to the technology or do not have technological resources that are robust enough to allow for seamless participation in virtual proceedings. There are concerns about the "sanctity and decorum" of the process. And virtual attendances are more susceptible to abuse (see e.g. *Kaushal v. Vasudeva et al.*, 2021 CarswellOnt 769 (S.C.J.), where a party's evidence was struck when it became apparent that they were being "coached" by someone off-camera).

To this list we would add that many of the benefits of virtual attendances — especially that of saving time — are lost for examinations that are very paper intensive. In fact, we would argue that the benefits of a virtual examination decreases in proportion to the number of exhibits that ultimately need to be introduced.

Justice Myers also pointed out that a return to the "good old days" assumes that the "good old days" were actually good.

Looking at the factors in Rule 1.08(6), Justice Myers offered the following thoughts:

1. Access to technology was not an issue in this case. And in any event, if clients have known computer issues, that in no way prevents them from sitting in a boardroom at their lawyer's office with a computer.
2. In a case with serious credibility issues such that the examination would have a particular emphasis on credibility or a need to control the witness through strong cross-examination techniques, an argument for an in-person examination would be stronger.
3. Examinations for discovery are important generally. But without serious cross-examination on credibility issues, they are generally straightforward and routine affairs.
4. There is a transcript available from video discoveries. (And to this we would add that there is also a video recording, which can sometimes be important and more revealing than a transcript.)
5. Forcing a lawyer from out-of-town to attend in-person discovery is generally a waste of time and money.
6. Efficiency, affordability, and enhanced access to justice trump counsel's comfort and presumptions every time. With the current pace of change, everyone has to keep learning technology. Counsel and the court alike have a duty of technological competency. Older judges and counsel may be behind younger counsel and the rest of society who use computers with greater regularity and sophistication than the former do. In person is not just "better". The balance of convenience favours easier and more convenient processes with accompanying cost savings.

After considering these factors, Justice Myers concluded that the examinations for discovery in this case would proceed remotely.

### *Cousins v. Silbourne*

Guidelines for the presumptive methods of attendance came into effect in Ontario on April 19, 2022. The Guidelines, which are available on the Superior Court of Justice's website at <https://www.ontariocourts.ca/scj/guidelines-mode-of-proceedings/>

guidelines-family/, "set out the Court's expectations for the default method of appearance for all family events that will be applied across the province." They provide, among other things, that:

- Case Conferences, Settlement Conferences, Trial Management Conferences with a settlement focus, long motions, and trials presumptively will be held in person;
- First appearances and urgent motions presumptively will be held virtually; and
- Regular motions will presumptively be held virtually in most non-unified court sites, and regional notices will direct the presumptive method of attendance in unified court sites.

The Guidelines also provide that the presumptive mode of hearing can be changed by the court in appropriate circumstances.

In *Cousins*, Justice Ricchetti dealt with a request by the parties to have their Settlement Conference, which was presumptively supposed to take place in person, conducted virtually. He started by discussing some of the issues the courts are facing when dealing with these types of requests:

[5] The court has limited resources, namely courtrooms, court staff and judicial resources, all of which are needed for all types of hearings, in person and virtual hearings.

[6] The court schedules these limited resources well into the future. In Brampton's case, at this time, we are scheduling these limited resources well into 2023.

. . . . .

[9] . . . Having the same judge hear some matters in-person and some virtual hearings from the same daily list is simply not doable. There are not sufficient judges, courtrooms or court staff to have separate lists dependent on the mode of hearing. Hearing a mixed list is problematic for judges, staff, counsel and parties for many reasons including that time estimates for hearings are not always reliable and technology issues sometimes arise.

(Justice Ricchetti did not make a typo when he said that, in April 2022, Brampton was already scheduling dates "well into 2023".)

As a result of the Court's limited resources and scheduling issues, Justice Ricchetti determined that the presumptive mode of hearing should not be changed unless the party (or parties) seeking the change can establish a "clear and compelling reason" for doing so, and that "consent of the parties will NOT, by itself, be sufficient grounds to change the presumptive mode of hearing."

In this case, since the parties had not established a "clear and compelling reason" for changing the presumptive mode of hearing, Justice Ricchetti dismissed their request for a virtual Settlement Conference, and ordered that the matter would be heard in person.

### **Some Final Thoughts**

The "return to in-person" vs. "remain online" debate has proven to be extremely divisive between the bench and bar (and within the bench and bar). Despite all the hard work that is being done by judges, lawyers, and court staff across Canada, access to family justice remains a serious problem in Canada, and it seems to be getting worse with each passing year. Two years of COVID-19 did not help.

There are undoubtedly many reasons for the problems in the family justice system, and many things that can be done to try to improve it. But if we are going to be blunt, the fundamental problem with the family justice system is that governments across Canada have failed to provide it with the necessary resources to actually meet the needs of the public.

According to the Office of the Commissioner for Federal Judicial Affairs Canada's website (<https://www.fja.gc.ca/appointments-nominations/judges-juges-eng.aspx>), as of June 1, 2022 there were 57 judicial vacancies across Canada (including nine for the Superior Court of Quebec and 19 for Ontario's Superior Court of Justice). The courts are seriously underfunded and understaffed.

Legal aid budgets have been slashed. And the result is a system that has been left to struggle to meet the needs of the children and other vulnerable individuals that it is designed to protect, and to provide timely access to justice for families.

It is simply not acceptable that, in this day and age, family law litigants who happen to live in Brampton, which is one the largest most densely populated municipalities in Canada, cannot get a court date, whether online or in person, until some point in 2023. And these types of delays are in no way unique to Brampton. There are numerous other jurisdictions across Canada where it is basically impossible to get access to the court within a reasonable period of time. And that is a serious problem.

The federal government really must fill all outstanding judicial vacancies, and the provinces need to properly fund their respective family court systems. And they need to do it the day before yesterday.

In the meantime, infighting amongst the bench and bar (and within the bar) needs to stop. Courts have operated "in person" for hundreds of years. That does not make in-person attendance the "right" way to do things. Virtual attendances — including virtual mediations — we dare say, have worked out far better than anyone would have imagined. But that does not make virtual attendances the "right" way to do things either. There are going to be some growing pains as this all gets worked out. But some of the current "dialogue" is becoming unsettling. There are differing points of view, and they are to be respected. But the dialogue must proceed in a respectful manner. There are no "right" answers here. Perhaps, as we say in mediation, we will eventually happen upon a solution that makes everyone equally unhappy.

### **Ignorance Is Bliss (And May Just Create a Valid Marriage)**

*Jun v. Arnaud*, 2022 CarswellOnt 2321 (S.C.J.) — Aitken J.

We wrote about the Ontario Court of Appeal's decision in *Lalonde v. Agha* (2021), 62 R.F.L. (8th) 268 (Ont. C.A.) in the 2022-07 (February 21, 2022) edition of *TWFL*. In *Lalonde*, the Ontario Court of Appeal provided direction on the interpretation of s. 31 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3 (the "*Marriage Act*"), which operates to validate a marriage that was solemnized in good faith and where the parties "intended to be in compliance with the *Act*." Most Canadian jurisdictions have a similar provision, meant to ensure that a slip in what might otherwise be required to make a marriage formally valid did not prevent the creation of a valid marriage where the parties meant to be married (and have acted as so).

By way of statutory reminder, the statutory provisions at play read as follows. Under ss. 1(1)(a) and (b) of the *Family Law Act*, R.S.O. 1990, c.F.3:

"spouse" means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

And s. 31 of the *Marriage Act* reads:

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

In *Lalonde*, the Ontario Court of Appeal specifically considered whether s. 31 extended to marriage ceremonies performed *outside* of Ontario and to *purely religious ceremonies* where the parties took no steps to obtain a licence or register the marriage.

As a reminder, in *Lalonde*, the parties participated in a religious marriage ceremony at a mosque in Tennessee. Aside from participating in the religious ceremony and having it witnessed by other members of the mosque, the parties did not even try to

ascertain or comply with the formal statutory conditions of a legal marriage in Tennessee, including the requirements to obtain a marriage licence and register the marriage. The parties' evidence was that they did not know they had to obtain a marriage licence or register their marriage. However, they considered themselves legally married and conducted themselves in all aspects of their lives going forward as husband and wife.

The Ontario Court of Appeal held that s. 31 of the *Marriage Act* can apply to validate a marriage solemnized outside of Canada, and that the court can consider the subjective intention of the parties to comply with the *Act*. The Court of Appeal stated at para. 44:

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

According to the Court of Appeal, the parties in *Lalonde* "believed that they had entered into a legally binding marriage that would be legally binding anywhere, including under the laws of Ontario", and the Court found no error in the trial judge's conclusion that the provisions of s. 31 of the *Marriage Act* were met and that the marriage was deemed valid. (You may recall that we questioned how a couple can *intend* to be married in compliance with the laws of Ontario when they are married outside of Ontario.)

Justice Aitken recently had the opportunity to consider the application of s. 31 of the *Marriage Act* and the Court of Appeal's decision in *Lalonde* in *Jun*.

In *Jun*, the parties participated in a traditional Catholic wedding ceremony in Jeonju, South Korea, and the Roman Catholic Diocese of Jeonju issued them a marriage certificate.

In South Korea, marriage is a civil procedure, and the performance of a religious ceremony does *not* constitute a legal marriage. The parties were advised by the church staff in Jeonju that, in order to be legally married, they would have to submit certain documents to the City Hall in Jeonju in person, including a document they could only obtain in-person at the French Embassy in Seoul. Both parties had full-time employment in Ottawa and could not afford to extend their stay in South Korea for the three weeks it would take to receive this document. As a result, they returned to their home in Ottawa, knowingly without having completed the necessary steps to be legally married in South Korea.

In December 2019, the parties attended at Ottawa City Hall and completed a request for a civil marriage ceremony. When the clerk asked if they had ever had a wedding ceremony, they responded that they had had one in September 2019, in South Korea. The clerk refused to accept the parties' request for a civil marriage ceremony and told them that they could not have a civil marriage ceremony in Canada because they were already married. (This was not correct, and this matter would have ended here if the parties had obtained accurate information from the clerk at Ottawa City Hall.)

The parties were prevented from trying other ways to have their marriage legally registered, such as returning to South Korea for an extended period of time in order to have their marriage registered there (they did look into whether there were other ways to have their marriage legally registered), and they applied under s. 31 of the *Marriage Act* for a declaration that they were legally married as a result of the religious ceremony held in South Korea as a last resort.

One would think that with the added flexibility provided by the Court of Appeal in *Lalonde*, it would have been "a walk down the aisle" for the parties in *Jun* to secure the requested declaration. But not so. Justice Aitken identified the parties' *subjective* intention as the factor that differentiated *Lalonde* from *Jun*. In *Lalonde*, as set out above, both parties believed that the marriage ceremony in Tennessee created a legally valid marriage between them, not knowing of the formal requirements in Tennessee. In contrast, in *Jun*, both parties *knew* that the marriage ceremony they went through in Jeonju did not result in a legally binding

marriage. They knew that marriage is a civil procedure in South Korea and that, for their marriage to be legally recognized in South Korea — the *lex loci celebrationis* (and therefore in Canada), it had to be registered at the Jeonju City Hall.

On the authority of *Lalonde*, and the jurisprudence reviewed by the Court of Appeal therein, Justice Aitken reluctantly concluded that s. 31 of the *Marriage Act* was not available to assist the parties in *Jun*. The parties' knowledge that their religious ceremony was inadequate to render them legally married in South Korea, and their decision to return to Ottawa in the hope that they could get the South Korean marriage validated from afar, put the deeming provisions in s. 31 of the *Act* out of their reach. Unfortunately, the fact that the parties had attempted to have their marriage legally registered did not assist them. Although not specifically cited by Justice Aitken, this result is mandated by *Debora v. Debora* (1999), 43 R.F.L. (4th) 179 (Ont. C.A.) — another case where the parties knew the ceremony they underwent was not sufficient to create a legal marriage (in fact, in that case, purposefully so).

Justice Aitken confirmed that the fact that the religious ceremony in Jeonju was of no legal effect meant that they had not been previously married and there was no impediment based on a previous marriage standing in the way of their obtaining a marriage licence at Ottawa City Hall.

Based on the Court of Appeal's decision in *Lalonde*, it seems that s. 31 of the *Marriage Act* would have been available to assist the parties in *Jun* if only the church staff in Jeonju had *not* informed them of the requirements for a legal marriage in South Korea. The parties intended to be legally married, and made efforts to comply with the requirements for a legal marriage in South Korea, but their knowledge that they were not actually in compliance with the requirements was their downfall.

While we agree with Justice Aitken's decision in *Jun* (in light of the Court of Appeal's decisions in *Lalonde* and *Debora*), we can't help but question the logic behind validating a marriage celebrated outside Ontario where the parties made *no* attempts to learn or comply with the requirements for a legal marriage — as in *Lalonde* — but *not* validating a marriage celebrated outside Ontario where the parties clearly intended to comply with the requirements for a legal marriage, and made attempts to comply with the requirements for a legal marriage, but fell short due to reasons beyond their control — as in *Jun*. The message here — it is better to not know the formal requirement of marriage. Ignorance is bliss.