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— Franks & Zalev - This Week in Family Law

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The ICRC of the CPSO Under the *RHPA* and the *CLRA* — OK?

K.K. v. M.M. (2022), 67 R.F.L. (8th) 1 (Ont. C.A.) — Paciocco, Nordheimer, and Coroza JJ.A.

In *K.K. v. M.M.*, the Ontario Court of Appeal considered s. 36(3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the "*RHPA*"). This section of the *RHPA* provides that documents prepared in relation to proceedings under the *RHPA* are inadmissible in evidence in civil proceedings. A similar provision of the *Police Services Act*, R.S.O. 1990, c. P.15, was considered in *Hewitt v. Doyle* (2021), 62 R.F.L. (8th) 149 (Ont. S.C.J.), which we discussed in the 2022-14 (April 18, 2022) edition of *TWFL*.

The parties were married in 2003. They had two children, a daughter and a son. They separated in 2013, and the proceedings were hotly contested.

Initially, the daughter lived primarily with her mother, and the son lived primarily with the father. However, after finding on an interim motion that the mother had engaged in alienation, an interim order was made granting primary care of both children to the father.

In making the finding of parental alienation, the motion judge relied on expert evidence from Dr. Goldstein, a court-appointed assessor under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*").

Dr. Goldstein was of the opinion that the daughter had been alienated from the father by her mother, and that the mother and daughter were conspiring to alienate the son from the father as well. Dr. Goldstein also expressed the view that the daughter's mental health was being seriously compromised by the mother's influence, and recommended that the daughter be removed from the mother's care.

The father summonsed Dr. Goldstein to give evidence at trial — but he failed to attend. The father then sought to admit Dr. Goldstein's reports, and asked the trial judge to consider (and to give weight to) his opinions and recommendations.

The mother objected to Dr. Goldstein's reports being admitted into evidence. Her objection was based on findings the College of Physicians and Surgeons of Ontario (the "CPSO") had made as a result of complaints the mother filed against Dr. Goldstein. To support her objection, she sought to admit several items into evidence: a copy of the decision of the Inquiries, Complaints and Reports Committee ("ICRC") of the CPSO; copies of documents put before the ICRC; and a print-out of the CPSO's online Public Register, indicating Dr. Goldstein's member status and his undertakings to the Discipline Committee of the CPSO.

The ICRC decision expressed serious concerns about Dr. Goldstein's approach to the s. 30 assessment and concluded that he would benefit from remediation. The public undertakings restricted Dr. Goldstein's practice such that he could not conduct any new assessments of individuals he believed had been subject to or had engaged in parental alienation *and* to terminate any ongoing practice related to parental alienation.

Dr. Goldstein also undertook not to provide opinion evidence about parental alienation to any third party, whether orally or in writing, with respect to individuals he had assessed or treated, except as required by law (in which case he was to advise the relevant parties in advance of providing such opinion evidence to consult the CPSO's Public Register for information about his practice).

In short, his ability to deal with allegations of alienation was shut down.

The father objected to the CPSO documents being admitted based on s. 36(3) of the *RHPA*. That section provides:

> No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act*.

The trial judge, Justice Petersen, noted that s. 36(3) did not render inadmissible the fact that a complaint was made, and did not prevent the website information referring to the undertaking given by Dr. Goldstein from being admitted into evidence.

The trial judge then considered whether the family law proceeding fell within the meaning of "civil proceeding" under s. 36(3). The trial judge drew several distinctions between "traditional" civil proceedings and family law litigation, the interests at play and remedies available in each. She concluded that family law proceedings involving the best interests of the child were not "civil proceedings" within the meaning of s. 36(3), in part because applying s. 36(3) would lead to an absurdity: it would have required her to ignore the ICRC's findings, which were clearly relevant to the validity of Dr. Goldstein's opinion evidence. She noted that excluding this evidence would force the mother to admit expert evidence and prove the deficiencies in Dr. Goldstein's reports from "square one," which would cause more delay and expense in the litigation.

Accordingly, the trial judge admitted the evidence from the ICRC proceeding into evidence in the family law proceeding, which in turn resulted in her concluding that Dr. Goldstein's report was not entitled to any weight.

Off to the Ontario Court of Appeal . . .

The Court of Appeal noted that a plain reading of s. 36(3) created a blanket, non-discretionary prohibition against the admissibility of the documents specifically listed: a record of a proceeding, a report, a document or thing prepared for or statement given at such a proceeding, or an order or decision made in such a proceeding.

However, the Court of Appeal also made it clear that anything not specifically listed in the section *is* admissible. Accordingly, the Court of Appeal agreed with the trial judge that s. 36(3) did not prevent admission of the fact that a complaint was made, or that the CPSO's website referred to an undertaking given by Dr. Goldstein. Furthermore, the fact that a complaint was launched, an investigation held, and a decision rendered by the ICRC are not listed as inadmissible in s. 36(3) of the *RHPA*, and may be otherwise provable in court, albeit without reference to a prohibited document.

Regarding the undertaking entered into by Dr. Goldstein, the Court of Appeal noted that — clearly — public undertakings are not meant to be confidential. Such undertakings were meant to give notice to the public, and their admission in civil proceedings where a trial judge deems them relevant does not undermine the purpose of s. 36(3).

This thinking was in line with that of Justice Summers in *Hewitt v. Doyle* regarding the *Police Services Act*: investigation and reports are not admissible; but the underlying facts are.

However, the Court of Appeal disagreed with the trial judge's conclusion that family law proceedings involving the best interests of a child were not "civil proceedings" within the definition of s. 36(3).

Private family law disputes, while distinct from other civil litigation in many respects, remain "civil proceedings" in the ordinary sense of the word: they concern private relations between members of the community in contrast to criminal or child protection proceedings, which both involve state action.

Furthermore, a global exemption from s. 36(3) for all family law cases would erode the provision's very purpose:

> [52] As this court explained in [*F. (M.) v. S. (N.)*, 2000 CarswellOnt 2301 (C.A.)], at para. 29,
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> > The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings — a health professional, a patient, a complainant, a witness or a College employee — fearing that a document prepared for College proceedings can be used in a civil action.

Given the incidence of litigation involving the best interests of children, it is not at all uncommon that one (or more) of the many participants in an *RHPA* proceeding would, at some point in time, become involved in a family law proceeding involving the best interests of children.

The Court of Appeal agreed that absurdity should be avoided and that relevant evidence should not be ignored. However, the Court found that absurdity could be avoided and the ordinary meaning of s. 36(3) preserved in two ways.

First, although the documents listed in s. 36(3) (a record of a proceeding; a report, a document or thing prepared for a proceeding; a statement given at a proceeding; or an order or decision made in a proceeding) are inadmissible, there is no evidentiary privilege over the information or evidence (i.e. the facts) used to prepare such orders, decisions, reports, documents, things or statements. There is nothing to prevent the parties from selecting and presenting such background evidence or information so that a trial judge is not deprived of probative evidence regarding the validity of relevant opinions and recommendations.

Second, s. 36(3) does not exclude from evidence the fact that the complaint was made, the fact that an investigation was conducted, and the fact that a board decision was rendered and undertakings given.

The Court also reiterated the purpose and usefulness of s. 36(3), which is to ensure that members of the public are encouraged to report complaints of professional misconduct against members of a health profession without fear that the information that is admitted in CPSO proceedings will be used in civil actions. However, the CPSO's public protection mandate (which includes listing important information on the public register) remains a priority.

Given the frequency with which best interests litigation is likely to involve *RHPA* proceedings, *K.K. v. M.M.* is one of those cases you should keep on a shelf somewhere . . . just in case.

Relocation, Notice and Family Violence

A.J.K. v. J.P.B., 2022 CarswellMan 74 (Q.B.) — Dunlop J.

Pursuant to ss. 16.8(1) and 16.9(1) of the *Divorce Act*, parents are generally required to notify each other if they intend to change their place of residence, or want to relocate with the child(ren). However, ss. 16.8(3) and (4) and ss. 16.9(3) and (4) permit the court to modify or dispense with the notice requirement in certain circumstances, "including where there is a risk of family violence."

In *A.J.K.*, Justice Dunlop was required to interpret and apply ss. 16.8(3) and (4) and ss. 16.9(3) and (4) as part of determining whether to grant the mother's request to change the children's residence and/or relocate with them without notice to the father. This is one of the first reported decisions to consider these provisions of the *Divorce Act*.

The mother and father separated in or around 2015, and had two young children together. Although the children's ages are not stated in the reasons, they were both less than five years old when their parents separated.

In 2016, the Court ordered that the children would reside primarily with the mother, but that the father would have "reasonable access . . . with the dates, times, and conditions to be determined as the parties may agree[.]"

In or around 2017, the father started threatening the mother, and his behaviour towards her and the children became increasingly aggressive, frightening and concerning. As a result of the father's conduct, the mother applied for and obtained a Protection Order against the father from a Justice of the Peace pursuant to *The Domestic Violence and Stalking Act*, C.C.S.M. c. D93, (the "*DVSA*"). The Protection Order provided, among other things, that for the next three years (the maximum period of time allowed under the *DVSA*), the father was prohibited from following the mother, having contact with her, or being within two city blocks of her. However, it did not prohibit the father from having contact with the children.

The father applied to a judge to set the Protection Order aside. In February 2019, Justice Kroft dismissed the father's application, but agreed to shorten the Protection Order's duration to 18 months.

Despite the Protection Order, the father continued threatening the mother, and was arrested at least twice for breaching the Order. The father also stopped seeing the children in or around September 2019, and did not request further contact with them after that time. However, he continued acting in ways that caused the mother to be afraid for both herself and the children.

In December 2019, the mother applied for a Protection Order against the father on behalf of the children. A Justice of the Peace granted the Order, and determined that it should be in place for three years. The mother also obtained a further Protection Order for herself against the father for another three years shortly before the first Protection Order was set to expire.

Despite the Protection Orders and the involvement of the police, the father continued harassing and threatening the mother. He also started threatening other people, and was even charged with uttering threats against both the Premier of Manitoba and the Chief Medical Officer of Manitoba.

As all of the mother's efforts to force the father to leave her alone had failed, in early August 2021, she brought an *ex parte* motion pursuant to ss. 16.8(3) and (4) and ss. 16.9(3) and (4) of the *Divorce Act* to allow her to change her residence and/or relocate with the children without having to provide the father with her new address or any contact information. She also requested a sealing Order and an Order initializing the decision.

Given the extreme nature of the allegations of family violence by the father, the Court granted an interim sealing Order to protect the mother and children until the matter could be heard on a final basis.

In late August 2021, Justice Dunlop heard the mother's submissions on the *ex parte* motion, and granted the motion with written reasons to follow. The reasons were released in March 2022.

In analyzing the issues on the motion, Justice Dunlop started by explaining that, "[t]here is no actual guidance in the Act itself about how a court should exercise its discretion to either waive the notice requirements or allow an application to waive such notice requirements to be made without notice to the parent with parenting time." Accordingly, his Honour was required to consider and determine the principles that apply when one parent is seeking to change residences or relocate with the child(ren) without having to notify the other parent.

After noting that such Orders should be granted in only "exceptional cases", and considering the rules that govern *ex parte* Orders (including that the moving party must provide "full and fair disclosure of all material facts", and must serve the Order and all of the materials that were filed on the motion "on the other party 'forthwith' unless the court determines otherwise"), Justice Dunlop concluded that this case required him to answer the following questions:

1. Has the mother established that the motion should proceed without notice to the father?

> 2. Would it be in the children's best interests to allow the mother to change her residence and/or relocate with the children?

In answering the first question, Justice Dunlop was satisfied that the mother had provided full and fair disclosure, and that it would be appropriate for the motion to be heard without notice to the father because of the history of family violence:

> [48] In making my finding that a without notice motion is allowed in this case I am cognizant of the fact that the general change of residence or relocation provisions of the Act were legislated in the first place because such changes when made can serve to fracture a parent/child relationship. Relocation in particular can have severe and long-term consequences for children. **Thus, the no notice exception must be approached with caution and rigour.**
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> [49] **The section in the Act allowing for a without notice motion requires the court to both assess the risk of family violence and its impact on the children. There is ample evidence in this case that family violence is present and has been for some time.** The sealing order was put into place because of the level of family violence in this case and as discussed below in more detail, the family violence has affected the court's determination of what is in the best interests of the children.
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> [50] As a result of the past severe and escalating family violence (coercive and controlling) found in this case, **it is fair to think that the risk of future family violence is high. This combined with the impact of the family violence on the children discussed below, justifies this hearing being authorized on a without notice basis to the father.** [emphasis added]

With respect to the second question — the best interests of the children — Justice Dunlop pointed out that where, as in this case, the children spend the vast majority of their time with the parent who is seeking to relocate, s. 16.93(2) of the *Divorce Act* places the onus on the other parent to prove that the relocation would ***not*** be in the children's best interests.

However, there is something "wrong" with the notion of applying a presumption on a motion where the party having to overcome the presumption will not be participating. But Justice Dunlop adeptly dealt with this issue. To avoid this problem, Justice Dunlop determined that s. 16.93(2) does *not* apply where, as in this case, the other party "will not have the opportunity to present his or her position on the issue at any hearing" because it is being dealt with on an *ex parte* basis. Therefore, he placed the onus on the mother pursuant to s. 16.93(3), which provides that "[i]n any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child." That is, in bringing an *ex parte* motion, the mother lost the benefit of the presumption such that she actually had to prove that the relocation met the best interests of the children.

After considering the statutory best interests factors set out in ss. 16(3), 16(4), and 16.92(1) of the *Divorce Act*, Justice Dunlop had no difficulty finding that it would be in the children's best interests to allow them to relocate with the mother in order to protect them from further family violence from the father:

> [62] **The mother has looked to the court in desperation. She sees that her only road to peace and security for herself and her children is to escape from the father and to essentially hide from him.** While a person should expect the criminal courts to prevent the father from engaging in the behaviour that he has by offering up more severe consequences (and perhaps that has happened with his threatening of the Premier and the Chief Medical Officer of the Province of Manitoba) the civil courts have had few tools at its disposal. Fortunately for this mother, the emphasis and recognition of family violence in the new Act is one step that has been taken to protect individuals who find themselves in this mother's situation. **The Act recognizes that a parent may need to move with their children without notice to the other parent with parenting time in situations involving family violence. This is her motivation for relocating and should not ever be construed as an attempt to alienate the father from the children.**
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> [63] Although the decision to waive notice is a discretionary one, the strong evidenced based definition of family violence in the Act provides significant assistance to the decision making process. **I have also taken into account the additional seven best interests factors set out in s. 16.92(1) in determining to authorize the change of residence or relocation.**

> **The reasons for the relocation, the impact that the violence has had on the children and the fact that the father has chosen not to see his children in several years are enough to allow for the move without the usual notice. I have no hesitation in this case in finding the existence of family violence and I order that ss. 16.8(1) and (2) and 16.9(1) and (2) do not apply in the circumstances of this case.** ***The mother may change her residence and relocate to wherever she wishes*** without the consent of or notice to the father. [emphasis added]

Justice Dunlop also had to decide whether to grant the mother's requests for a sealing Order, and an Order initializing the proceeding. These requests required his Honour to consider the Supreme Court of Canada's recent decision in *Sherman Estate v. Donovan*, 2021 CarswellOnt 8339 (S.C.C.), where the Court set out the following test for determining whether to limit the presumption in favour of court openness in a particular case:

> [38] . . . In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
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> (1) court openness poses a serious risk to an important public interest;
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> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
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> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

In this case, Justice Dunlop was satisfied that the mother had met the test from *Sherman Estate v. Donovan*, because:

> • Allowing public access in this case "would pose a serious risk to the important public interest of keeping the mother and the children safe from the father's escalating violent and irrational behavior."
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> • Other "reasonable alternative measures" had been tried, including multiple Protection Orders, but had not prevented the father from continuing to engage in family violence against the mother and the children; and
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> • Given the threat the father posed to the mother and the children, the benefits of the Order outweighed its negative effects. Justice Dunlop also noted that the public interest "requires the courts not to be an instrument whereby further violence is facilitated."

As a result, Justice Dunlop initialized his reasons, and confirmed that the interim sealing Order had been correctly made when it was initially granted back in August 2021. He also ordered that the sealing Order would remain in place for another 30 days.

This result is not surprising as the best interests of innocent children, and the desire to protect those children from significant harm, are regularly determined to be a value of super-ordinate importance sufficient to override the open court principle. See, for example: *Foulidis v. Foulidis* (2016), 86 R.F.L. (7th) 338 (Ont. S.C.J.); *Himel v. Greenberg* (2010), 93 R.F.L. (6th) 357 (Ont. S.C.J.); *K. (M.S.) v. T. (T.L.)*, 2003 CarswellOnt 9517 (C.A.); *M.M. v. N.M.* (2018), 20 R.F.L. (8th) 196 (Ont. S.C.J.); *A.P. v. L.K.* (2019), 29 R.F.L. (8th) 205 (Ont. S.C.J.); *Danso v. Bartley* (2018), 13 R.F.L. (8th) 341 (Ont. S.C.J.). The court is responsible for ensuring that a court file created to protect a child's best interests does not become the instrument of harm: *K. (M.S.) v. T. (T.L.)*, 2002 CarswellOnt 3091 (S.C.J.), rev'd 2003 CarswellOnt 9517 (C.A.).

Finally, Justice Dunlop had to decide whether and when the mother would be required to serve the father with the *ex parte* Order and her motion materials. In concluding that ***the mother did not need to serve the father with any of the materials***, his Honour had this to say:

> [67] **In normal circumstances it would be unreasonable for an individual not to be given notice of an order affecting the parenting of their children.** The Rules contemplate notice being given of any without notice order but allow for exceptions based upon the discretion of the decision maker. **In the exceptional circumstances of this case and in keeping with the spirit and intent of the family violence provisions of the Act I am dispensing with the requirement that the father be served with a copy of my order herein.**

> [68] **I initially was of the view that waiting six months to release this decision and then providing the father with a copy of the order would provide the appropriate barrier that the mother required to achieve her relocation.** However, on reflection, the father's violent and escalating behavior is still too fresh not to have fear that he will immediately, if given notice at this time, do something "improper" or "irrevocable" to use the terms referred to by Arbour S.C.J. in *Ruby*. **A more appropriate remedy is for him on his own, to ask to review the court pocket at the Court Registry when he realizes that the mother has relocated with the children.** One would hope that if he proceeds in this manner that he will come before the court with reason and a renewed and purposeful desire to see his children. This may be naive thinking. However, on occasion, with distance and time come reason. **The court is always available for a full hearing on the merits should he decide to take such action.**
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> [69] **The father, does have an avenue to access justice in this case even without being served with a copy of the court order.** I am ordering that the sealing order on the court pocket be lifted within 30 days of the date of this judgment and **I will stay seized of this matter should the father wish to bring any kind of motion before the court.** The mother will also be required to take out the terms of this order within 30 days of the signing of this decision. **If the father at some point determines that he wants to see his children, he simply has to look at the court pocket to determine what has happened. This way, the service of an order upon him will not serve to trigger more violence.** [emphasis added]

Respectfully, while we certainly agree with the balance of Justice Dunlop's decision, we are somewhat troubled by this part of it. We recognize that the father's behaviour was serious and concerning, and that Justice Dunlop was satisfied that the mother had provided full disclosure (including the fact that the father had not attempted to see or contact the children since September 2019). However, in our view, *at some point* (even be it a year or 18 months later) the mother, the Court — or perhaps a lawyer designated by the Court — should at least have to inform the father that an *ex parte* Order had been made against him, and that he could obtain a copy of it from the court file should he wish to do so. There is something wrong with a person walking around for an indeterminate amount of time not knowing of an Order being made against them.

Furthermore, while we understand why Justice Dunlop waited six months to release his reasons, we wonder whether his express statement that he did this to "provide the appropriate barrier that the mother required to achieve her relocation", combined with his decision to leave it entirely up to the father to figure out that an *ex parte* Order had been made, could be problematic if his Honour's decision is ever reviewed by another court in the future.

In any case, we now have a well-written, well-reasoned decision to consider the next time the interplay of relocation and family violence arises. That said, it is clear that the results of this case should be reserved for the most concerning constellation of facts.

A Sound Bite from the Ontario Court of Appeal

Ammar v. Perdelwitz, 2022 CarswellOnt 7260 (C.A.) — Roberts, Zarnett, and Coroza JJ.A.

There's not a whole lot to this very short endorsement from the Ontario Court of Appeal — save for one very good quote that may come in handy anytime a party is causing delay.

The parties had two young children. The father, Mr. Smith, wanted to appeal the April 29, **2021** judgment of the trial judge respecting parenting, child and spousal support, and property, following a five-day trial.

The father had been granted several extensions to perfect his appeal, but had still failed to do so. He was ultimately given a final extension until December 16, 2021, and this deadline was peremptory.

The father failed to meet the December 16th deadline, and sought a further extension.

Unfortunately for the father, this was the end of the road for his appeal. After several indulgences, he had failed to meet the very deadline that he, himself, proposed.

But here's the really good quote:

[6] . . . **Delay in family proceedings is antithetical to the best interests of the children who require finality and peace.**

That is a quote that is not only applicable to extensions of time for appeals — but is useful anytime one party appears to be delaying where children are concerned.

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