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

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**Use a Boilerplate Arbitration Agreement at Your Peril (With Apologies to the Blue Jays)**

*Optiva Inc. v. Tbaytel*, 2022 CarswellOnt 12964 (C.A.) — Doherty, Huscroft and Harvison Young JJ.A.

This is not a family law decision. But as a decision about the conduct of an arbitration, and given how regularly family litigants opt for arbitration, it is an important case to know about.

The facts are not important. There were two contracting parties. They had a disagreement. In their contract, the parties agreed that disputes arising out of, or in connection with, the contract would be resolved by arbitration. Sound familiar?

The parties entered into an arbitration agreement, naming the arbitrator and describing the powers of the arbitrator.

The arbitrator ruled that Tbaytel could bring a summary judgment motion in the arbitration to dispose of some of the claims, and he later, in fact, held that some of the issues raised could be properly resolved by way of a summary judgment motion. On the summary judgment motion, the arbitrator concluded that Optiva had breached the contract and held that Tbaytel was entitled to terminate the agreement and recover money — a lot of money — paid under their agreement.

Optiva moved in the Ontario Superior Court for an order setting aside the arbitrator's award pursuant to ss. 17 and 46 of the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Act*"). Optiva also sought leave to appeal on questions of law pursuant to s. 45 of the *Act*. The application judge refused to set aside the arbitrator's award and dismissed Optiva's application for leave to appeal.

The Ontario Court of Appeal granted Optiva leave to appeal from the application judge's order.

Although there were four grounds of appeal, only two of those grounds are of interest to us:

1. Did the application judge err in holding that Optiva's application was governed by s. 17 of the *Act* and that Optiva had failed to challenge the ruling that Tbaytel could proceed by summary judgment within 30 days of receiving notice of the ruling, as required by s. 17(8)?
2. Did the application judge err in holding that the arbitrator could proceed by way of summary judgment motion in the first place?

Well before the proposed summary judgment motion, the arbitrator convened an arbitration management meeting at which counsel for Tbaytel gave notice of their intended motion for summary judgment. At that time, counsel for Optiva raised a

concern about the availability of a summary judgment motion in the arbitration, but made no formal objection to the arbitrator fixing a timetable for the motion for summary judgment.

In its written submissions, Optiva argued that the arbitrator had no jurisdiction to consider a summary judgment motion without the consent of both parties — and Optiva did not consent.

The arbitrator held that he had jurisdiction to proceed by summary judgment motion because the *Act* allowed him to determine the procedure and because the **Arbitration Agreement** granted the arbitrator unfettered discretion to rule on all motions and to determine the procedure to be followed in the conduct of the arbitration. Read this paragraph over again, carefully.

The first question was whether the application judge erred in holding that Optiva was required to challenge the Arbitrator's ruling that Tbaytel could bring a motion for summary judgment within 30 days.

Section 17 of the *Act* provides as follows (and this is similar to sections of the Arbitration Acts of other provinces):

#### **Rulings and objections re jurisdiction**

##### **Arbitral tribunal may rule on own jurisdiction**

17 (1) **An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration** and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement. 1991, c. 17, s. 17 (1).

...

##### **Time for objections to jurisdiction**

17 (3) A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal. 1991, c. 17, s. 17 (3).

...

##### **Time for objections, exceeding authority**

17 (5) A party who has an objection that the arbitral tribunal is exceeding its authority shall make the objection as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration. 1991, c. 17, s. 17 (5).

...

##### **Ruling**

17 (7) **The arbitral tribunal may rule on an objection as a preliminary question** or may deal with it in an award. 1991, c. 17, s. 17 (7).

##### **Review by court**

17 (8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, ***within thirty days after receiving notice of the ruling***, make an application to the court to decide the matter. 1991, c. 17, s. 17 (8). [emphasis added]

Before the Superior Court, Tbaytel argued that s. 17(8) obliged Optiva to bring an application in the Superior Court challenging the arbitrator's preliminary ruling that he could proceed by summary judgment within 30 days of that decision. Optiva did not do so, but instead proceeded with the arbitration and challenged the ruling only *after* the arbitrator had made a decision on the merits against Optiva.

The application judge agreed that s. 17(8) required Optiva to challenge the decision to proceed by summary judgment motion within 30 days of receiving notice of that decision.

At the Court of Appeal, Optiva argued (relying on *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 CarswellOnt 5276 (C.A.)) that s. 17 of the *Act* did not apply to procedural orders — like the order made by the arbitrator permitting Tbaytel to proceed with a summary judgment motion.

In *Inforica Inc.*, the responding party in an arbitration asked the arbitrator to make an order for security for costs against the claimant. The arbitrator made that order. The claimant successfully moved in Superior Court to set aside that decision on the ground that the arbitrator had no jurisdiction to make an order for security for costs. But that decision was reversed by the Court of Appeal.

The Court of Appeal held that the arbitrator's award for security for costs was not a ruling on the arbitrator's "own jurisdiction" under s. 17(1). Rather, s. 17(1) was only concerned with the arbitrator's jurisdiction to entertain the *subject matter* of the dispute, and asking the arbitrator to decide whether he has jurisdiction to order security for costs did not amount to asking him whether he had jurisdiction to conduct the arbitration. Subsection 17(1) of the *Act* deals with jurisdiction over the entire substance or subject matter of the case, not jurisdiction to make interlocutory or procedural orders that do not determine the merits of the dispute and that are made along the way.

Here, the arbitrator's ruling permitting a motion for summary judgment was no different. It was a procedural ruling, not a ruling on the merits. That ruling was, at best, incidental to the determination of the merits.

Therefore, as with *Inforica Inc.*, the award did not fall under s. 17(1), such that the other parts of s. 17, including the time limit in s. 17(8), had no application. Optiva was not out of time, and its application to set aside the arbitrator's award was properly brought under s. 46 of the *Act*.

The next question was whether the court below erred in holding that the arbitrator could proceed by way of summary judgment.

For the Court of Appeal, Justice Doherty observed that the parties drafting their own Arbitration Agreement governing the conduct of the arbitration "implied a very limited role for judicial oversight of the conduct or outcome of that arbitration."

The Arbitration Agreement here gave the arbitrator very broad powers to conduct the arbitration. One section of the Agreement specified that the arbitrator had jurisdiction to consider and rule upon *all motions* during the arbitration and to interpret the agreement that was the subject of the arbitration. And by doing so, ***the parties had left it to the arbitrator to determine the scope of his powers.*** Read this paragraph again, too.

Justice Doherty also noted that the terms of the Arbitration Agreement were subject to the *Act*, including:

#### **Procedure**

20(1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

#### **Hearings and written proceedings**

26(1) The arbitral tribunal may conduct the arbitration on the basis of documents or **may hold hearings for the presentation of evidence and for oral argument; however, the tribunal shall hold a hearing if a party requests it.** [emphasis added]

Optiva made three arguments in support of its position that the arbitrator did not have the jurisdiction to proceed by way of summary judgment. And Justice Doherty disposed of all three arguments faster than Diego Castillo disposed of the Blue Jays in the bottom of the first in the first Wildcard game against Seattle.

First, Optiva argued that the Arbitration Agreement was silent on the availability of summary judgment, and that the power to proceed by summary judgment could not be inferred from the silence in the Agreement.

This submission was easily addressed by the fact that the Arbitration Agreement specifically gave the arbitrator the authority to determine the procedure to be followed in the arbitration, and gave the arbitrator the power to hear all motions during the arbitration and to determine all procedural questions. Therefore, it was "hardly surprising" that the arbitrator would look to the advantages flowing from a properly invoked summary judgment process as permitted by the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and as discussed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.).

In light of the broad powers bestowed upon the arbitrator, it was understandable that the arbitrator would interpret his powers, not by looking for a specific grant of authority in respect of any particular procedure, but by looking for language that would remove a specific procedure from the available options. Had the parties only wanted to make a motion for summary judgment available on consent — *they would have said so in the Arbitration Agreement*.

One out.

Optiva's second argument was more interesting to us — or so it seemed.

Optiva argued that, regardless of the terms of the Arbitration Agreement, s. 26 of the *Act* gave Optiva the *right* to an oral hearing at which it could present *viva voce* evidence and cross-examine witnesses.

Again, s. 26 of the *Act*:

#### **Hearings and written proceedings**

26(1) The arbitral tribunal may conduct the arbitration on the basis of documents or **may hold hearings for the presentation of evidence and for oral argument; however, the tribunal shall hold a hearing if a party requests it.** [emphasis added]

As noted by his Honour, neither "hearing" nor "presentation of evidence" are defined in the *Act*. Notably, in the context of civil or administrative proceedings, a "hearing" refers to a proceeding which does not necessarily involve the presentation of *viva voce* evidence: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 1(1), 15(1); *Rules of Civil Procedure*, s. 1.03. For example, in civil proceedings, a "hearing" includes applications and motions, neither of which contemplate oral *evidence* (as opposed to oral *argument*).

Furthermore, there is no reason to assume that "presentation of evidence" refers only to *viva voce* evidence. Motion records and application records including affidavits (and/or transcripts) are "presenting evidence" at the hearing of the motion or application.

Ultimately, the manner in which evidence is presented at a hearing is a *procedural* question. And while s. 26 guarantees a party the right to make oral *submissions*, it does not guarantee the right to present oral *evidence*.

Two out.

Finally, Optiva argued that the summary judgment procedure was unfair, warranting setting aside the award under s. 46(1)6 of the *Act*. (When all else fails — argue unfairness.)

But because this argument was predicated on the submission that proceeding by way of summary procedure without Optiva's consent was unfair — given the conclusions above, this argument was really left without legs.

Three out. Mic drop.

What lessons should family lawyers draw from *Tbaytel*?

First and foremost — the Arbitration Agreement matters. It governs. Many people default to the arbitrator's "standard" Arbitration Agreement or the Agreement generally used in the jurisdiction. This could be a very significant mistake. If there are things you do *not* want the arbitrator to do; make it clear. If there are matters you do *not* want the arbitrator to be able to decide; make it clear. And if there are certain procedures you want to make sure happen — or that can only be jettisoned with consent; make it clear. Or your client may be very unhappy you did not.

**Girl Meets Boy. Girl Moves in with Boy. Girl Gets Sick. Boy Isn't So Nice. And the Court of Appeal Won't Let Him Forget It.**

*McGuire v. Bator* (2022), 74 R.F.L. (8th) 255 (Ont. C.A.) — Benotto, Zarnett and Copeland JJ.A.

This case offers an excellent lesson in client management and reminds us that, sometimes, bad guys finish . . . well . . . last.

The appellant ("McGuire") had a 9-year-old son, M. They lived in McGuire's condominium. M's biological father was long out-of-the-picture and had paid no child support.

The respondent ("Bator") had three children from previous relationships: a 26-year-old stepson, and two biological children, one of whom, T, was 7 years old.

When the parties met, McGuire was 50 years old and Bator was 55.

The relationship between McGuire and Bator progressed, and the couple introduced their children to each other.

McGuire and M moved into Bator's home on January 1, 2013. They lived as a family, and McGuire looked after the household chores and cared for M and T when T he was not with his mother. She also maintained her employment, as did Bator.

In 2015, McGuire sold her condo and used the proceeds to pay for household expenses (about \$65,000) and paid \$16,705 for the installation of new windows in Bator's home. (This would later form the basis for McGuire's claim for unjust enrichment.)

In 2016, McGuire became ill and unable to work. She was designated "disabled" by Canada Pension Plan, and her only source of income became her disability payment of about \$1,200 a month.

Bator was upset that McGuire was no longer able to contribute to the household — and he asked her and M to leave. When she did not leave, on February 2, 2018, Bator gave McGuire an ultimatum: either sign a contract to perform household services, pay rent of \$1,250 a month retroactive to October 2017, in which case she and M could stay until June; or be immediately evicted as a trespasser.

As McGuire did not leave and (shockingly) did not sign the contract, less than a week later, Bator gave her a document entitled "Trespass Notice and Eviction" requiring her to leave within four days (by February 12, 2018). As she and M had nowhere to go, and as she was not able to work, she could not leave.

On February 13, 2018, when M was at school, Bator called the police to have McGuire removed from his home. She did not even have time to properly pack their belongings. And Bator had no further contact with M since.

McGuire sued Bator for child and spousal support and for an interest in Bator's home.

After a 7-day trial, the trial judge concluded that:

1. McGuire was not entitled to child support because Bator was not standing *in loco parentis* to M — Bator did not have a settled intention to treat M as his own.
2. McGuire was entitled to spousal support on a non-compensatory basis given her inability to work. The trial judge ordered lump sum support for the period January 1, 2018 to June 30, 2020.

3. McGuire's claim for a constructive trust interest in Bator's home was dismissed.

The court below also ordered no costs.

McGuire appealed. While the result with respect to child support and unjust enrichment was somewhat predictable — keep reading to see what the Court of Appeal does with spousal support. It is a bit concerning. Bator sought leave to appeal the order for no costs.

### **Child Support and *In Loco Parentis***

It was not hard for the Court of Appeal to dismiss the appeal with respect to child support. Drawing on *Chartier v. Chartier* (1999), 43 R.F.L. (4th) 1 (S.C.C.) at para. 39, the Court of Appeal agreed that McGuire had not established that Bator had a settled intention to treat M as a child of his own:

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

The trial judge had clearly made her findings for what is a textbook case for no finding of *in loco parentis*:

- The parties did not share a bank account and did not pay for M's expenses from that account;
- Bator expected McGuire to pay him back for M's expenses;
- Bator did not discipline M and was not involved in M's bedtime routine;
- M did not refer to Bator as "dad", but called him by his first name;
- Bator introduced M to third parties as McGuire's son, not his son; and
- Bator treated M differently from his own children, being far more involved in their day-to-day activities.

Although not specifically referenced by the Court of Appeal, there are really two policy ends at play in the whole idea of *in loco parentis*. On one hand, once a person becomes a "step-parent" and starts to treat a child as a child of his or her own, the law does not want to simply allow that party to wholly financially withdraw from what has become a new family financial unit. But on the other hand, if courts too readily determine that new partners are standing *in loco parentis*, that will discourage repartnering: *Widdis v. Widdis*, 2000 CarswellSask 594 (Q.B.); *Watts v. Watts* (2011), 99 R.F.L. (6th) 225 (Ont. C.J.).

Bator had also relied on his "eviction" to show that he had no parental role with M. Bator actually swore an affidavit saying:

The decision to evict [McGuire] and [M] from my home without contemplating the impact it would have on [M], in my opinion, further demonstrates that I did not view [M] as my son.

Clearly, Bator was a recent graduate of the Dale Carnegie Charm School Course on "How to Win Friends and Influence People."

### **Unjust Enrichment/Constructive Trust**

McGuire argued that Bator had been unjustly enriched because she paid for the new windows to his home (\$15,705) and gave him \$65,000 after the sale of her condo. Bator argued that McGuire needed help paying her mortgage and expenses, and that she had agreed to repay him once she sold her condo.

The trial judge accepted that the \$65,000 was a repayment. She also found that there was no unjust enrichment because there was no evidence that the home improvements increased the value of the home.

The Court of Appeal saw no reviewable error here either. We note, however, that the evidence need not have shown that the improvements increased the value of the home; it would also have been relevant whether the improvements *maintained* the value of the home.

## Spousal Support

Here is where things get interesting.

The trial judge found non-compensatory entitlement to spousal support based on McGuire's disability, and she awarded McGuire lump sum spousal support "to permit the parties to move on with their lives". The trial judge made appropriate reference to the SSAGs, and based on the parties' incomes, their ages, and a 5-year cohabitation, the SSAGs suggested mid-range monthly support of \$620 a month for 2 <sup>1</sup>/<sub>2</sub> to 5 years. Using the mid-range of the SSAGS and the lowest duration, the trial judge converted the periodic support to a lump sum of \$12,248.

The Court of Appeal found "several problems" with this approach:

- (i) there was no analysis of how the award achieved the objectives of spousal support;
- (ii) there was no explanation of why, in the case of an ill and disabled spouse unable to work, a mid-range support amount for the lowest duration was appropriate; and
- (iii) a lump sum to achieve a clean break was not appropriate in the circumstances.

As a result, in addition to the amount ordered by the trial judge for spousal support (a lump sum of \$12,248), the Court of Appeal ordered Bator to pay periodic monthly support of \$620 a month.

But let's now consider the reasons offered for doing so.

First, the Court of Appeal was concerned that the trial judge offered no analysis as to how — and whether — the lump sum support award achieved the objectives of spousal support.

The Court of Appeal noted that the objectives for non-compensatory/needs-based spousal support were set out by the Supreme Court of Canada in *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.), at para. 46:

Following *Moge's* broad view of causation in compensatory support and the concomitant acceptance of the availability of non-compensatory support, courts have shown increasing willingness to order support for ill and disabled spouses. Sometimes they have done this as a "transition" to self-sufficiency. But more often, they have frankly stated that the obligation flows from the marriage relationship itself. Collecting cases, Rogerson explains in "Spousal Support After *Moge*":

The [more dominant] approach, . . . particularly in cases of earning capacity permanently limited by age, illness or disability, and the one generally supported by the developing Court of Appeal jurisprudence, has been to award continuing support without regard to the source of the post-divorce need. On this approach, which I earlier referred to as the "**basic social obligation**" approach, causal connection arguments have been rejected not only in determining entitlement to support, but also in assessing the extent of the obligation. The message coming from the cases adopting

this approach appears to be that one takes one's spouse as one finds him or her, subject to all his or her, weaknesses and limitations with respect to income-earning capacity; and a spouse with higher earning capacity has a basic obligation to make continuing provision for a spouse who is unable to become self-sufficient at the end of the marriage. One is simply not allowed to abandon a spouse to destitution at the end of a marriage if one has financial resources which might assist in relieving the other spouse's financial circumstances. [emphasis in original]

Here, as there was evidence that McGuire's disability would continue, the Court of Appeal was concerned that the trial judge ordered spousal support at the mid-range of the SSAGs formula, and at the lowest end of the SSAG duration from the date of separation. According to the Court of Appeal, "there was no explanation as to why the support terminated when the need clearly continued." Unfortunately, the trial decision is not available.

The Court of Appeal then states as follows:

[29] As stated by this court in *Gray v. Gray*, 2014 ONCA 659, 122 O.R. (3d) 337, at para. 49, "[t]he duration of support is also an issue that ought to be contemplated under the SSAG". For support to terminate there must be a realistic prospect of the spouse being able to become self sufficient: *Reisman v. Reisman*, 2014 ONCA 109, 118 O.R. (3d) 721, at para. 28 [20-year traditional marriage and 4 children]. This court has upheld an indefinite support order in the case of ongoing need due to disability (*Gray*) and has overturned a time limit for support for a disabled spouse (*Djekic v. Zai*, 2015 ONCA 25, 54 R.F.L. (7th) 1, at para. 9) [Rule of 65 met].

[30] Here the appellant remains disabled and unable to support herself. She lives on government disability payments. There is no evidence that her situation had changed or will change in the future.

[31] One of the purposes of a spousal support order is to relieve financial hardship; another is for a former spouse to fulfil a basic social obligation to provide support where they are able to do so and the recipient spouse is not. Nothing in the trial judge's reasons explains how the termination of support after only two-and-a-half years achieves these or other objectives of spousal support.

Respectfully, we are concerned about these comments. While McGuire certainly had a disability such that she was not able to work, despite the basic social obligation model, we cannot forget that this case is about a cohabitation of, perhaps, five years duration, without children. The social obligation model does not make one spouse the insurer of the other such that the payor has to meet all of the need forever: *Rayvals v. Rayvals* (2008), 51 R.F.L. (6th) 391 (B.C. S.C.).

*Gray*, *Reisman* and *Djekic* are all false comparators. *Gray* was a case about a 16-year traditional marriage with four children. *Reisman* was about a 20-year traditional marriage with four children. And in *Djekic*, the claimant met the Rule of 65. These cases do not offer comparability to a 5-year relationship without children.

Then, while *Bracklow* is certainly a governing authority with respect to non-compensatory support, *Bracklow* does not suggest a presumptive right to support based on disability. Nor does *Bracklow* suggest that the support award for a disabled spouse should equal the amount of the need. In *Bracklow*, the Supreme Court also says:

[54] Fixing on one factor to the exclusion of others leads Mrs. Bracklow to an **artificial distinction between amount and duration**. The two interrelate: a modest support order of indefinite duration could be collapsed into a more substantial lump-sum payment. It also leads her to the **false premise that if need is the basis of the entitlement to the support award, then the quantum of the award must meet the total amount of the need**. It does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need. Nothing in either the *Family Relations Act* or the *Divorce Act* forecloses an order for support of a portion of the claimant's need, whether viewed in terms of periodic amount or duration. **Need is but one factor to be considered**. This is consistent with the modern recognition, captured by the statutes, of the variety of marital relationships in modern society. ***A spouse who becomes disabled toward the end of a very short marriage may well be entitled to support by virtue of her need, but it may be unfair, under the circumstances, to order the full payment of that need by the supporting spouse for the indefinite future.*** [emphasis added]

As we will see, it is arguable that this is precisely what the Court of Appeal does — it orders Bator to meet "the full payment of that need . . . for the indefinite future." See also *Shen v. Tong* (2013), 40 R.F.L. (7th) 257 (B.C. C.A.) and *Powell v. Levesque* (2014), 38 R.F.L. (7th) 261 (B.C. C.A.).

There is also the fact that support for a totally disabled spouse is said to require a "delicate balancing" of interests such that the family, society at large, and the disabled person themselves must contribute: *Aujla v. Singh*, 2012 CarswellOnt 11695 (S.C.J.).

And, finally, focussing on Bator's ability to pay suggests a reversion to the idea that a disability entitles a recipient to support for life, just because the payor can afford it. That is contrary to *Bracklow: Bridgen v. Gaudet* (2015), 57 R.F.L. (7th) 199 (N.S. S.C.).

Next, the Court of Appeal was concerned that the trial judge offered no explanation as to why, in the case of an ill and disabled spouse, a mid-range support amount for the lowest duration was appropriate:

[33] The SSAGs are an excellent advisory guideline for typical cases. They assist in achieving consistency and predictability. They are not a substitute for judicial analysis, particularly in exceptional cases.

[34] The trial judge erred in failing to explain her choices and in failing to engage explicitly with the exceptional circumstances of illness and disability that she found as facts. Consideration was required as to whether the circumstances of illness and disability should result in a departure from the basic formula.

That is, the choice to use the basic SSAG formula required explanation. And, furthermore, the trial judge also appeared to have ignored the explicit SSAG exception with respect to disability.

However, we do not know that this criticism is warranted. (Again, it is hard to completely comment as the judgment below does not seem to be reported anywhere.) In the view of the Court of Appeal when dealing with disability, the SSAGs (Chapter 12) suggest that, "[t]he formulas are intended to generate appropriate outcomes in the majority of cases" but that cases of illness and disability often require "restructuring" of duration and/or quantum. But this is what the lower court did — it restructured the monthly payments into a lump sum. Therefore, it is not wholly clear that the trial judge ignored the SSAG disability exception.

Finally, the Court of Appeal questioned whether a lump sum was appropriate in the circumstances of this case, and suggested that the trial judge may have misunderstood the notion of a clean break. It was suggested that, without further explanation, it was difficult to see how the notion of a clean break might apply in the case of support for a person with a disability.

As a result, McGuire's support appeal was allowed, and as noted above, in addition to the \$12,248 ordered by the trial judge, the Court of Appeal ordered additional periodic spousal support (in the monthly amount set by the trial judge and used to restructure into a lump sum) of \$620 a month (indexed to inflation) in accordance with s. 34(5) of the *Family Law Act*, R.S.O. 1990, c. F.3. And the periodic support was to continue *indefinitely* "subject to review based on any material change in circumstances."

Just so we're all on the same page, to be clear, a "review based on any material change of circumstances" improperly blends two concepts. A "review" does not require a material change of circumstances. In fact, the very purpose of a review is to relieve the applicant from having to show a material change of circumstances: *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.); *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.); *Sappier v. Francis* (2004), 8 R.F.L. (6th) 218 (N.B. C.A.); *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.); *Verkaik v. Verkaik* (2020), 49 R.F.L. (8th) 69 (Ont. Div. Ct.); *Cvetkovic v. Cvetkovic-Gorovic*, 2021 CarswellOnt 4162 (C.A.).

A *variation* of support requires a material change. And herein lies the problem. McGuire is disabled. She is unable to work. She is likely to remain disabled and remain unable to work. What possible material change will there be in the future upon which Bator might be able to rely to reduce spousal support? That is, save for being able to argue that "entitlement is always in issue" and "enough is enough" — this support obligation is going to last a very long time. And based on a 5-year cohabitation, to quote the Supreme Court of Canada in *Bracklow*, ". . . it may be unfair . . . to order the full payment of that need by the supporting spouse for the indefinite future."

As for Bator's costs appeal?

Let's recall: Bator evicted McGuire and her son from his home. He took the position that McGuire was not entitled to any support. Rule 24(4) of the *Family Law Rules* can be used to deny that costs be paid to a party that has behaved unreasonably. The trial judge found that Bator behaved unreasonably. Was there a chance the Court of Appeal was going to allow the costs appeal and award costs to Bator? Not a chance. And they did not.

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