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

Aaron Franks & Michael Zalev

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Lack of Notice + Lack of Procedural Fairness = Interim Relocation Allowed

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Until the general population comes to understand that, when it comes to parenting — especially relocation — unilateral actions will not be tolerated, some parents are going to continue to act unilaterally. (Of course, this does not apply in cases of significant domestic violence as in *A.J.K. v. J.P.B.* (2022), 71 R.F.L. (8th) 418 (Man. Q.B.) — see our discussion of that case in the 2022-25 (July 11, 2022) edition of *TWFL*).

The parties were married in 2006. They had a child in 2015.

When they separated on March 25, 2022, the mother obtained an *ex parte* restraining order and moved with the child to a shelter.

While the parents in *Bolan* were separated, there was no parenting order in place. The emergency protection order granted in the spring of 2022 also dealt with possession of the matrimonial home and some parenting issues. That order was varied from time to time. The key point here is that the machinery of the court had been invoked.

On about April 29, 2022 (when the child was 7 years old), the mother relocated with the child to her home community in British Columbia without complying with the relocation provisions in the *Divorce Act* — she did not give notice, and she did not get a court order allowing her to relocate without notice as required by the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

On May 26, 2022, the father was successful on a motion to have the child returned to Alberta (Edmonton) by June 4, 2022. That Order was stayed pending appeal: 2022 CarswellAlta 1662 (C.A.).

At the hearing of the stay motion, the mother stated her plan to bring an application for relocation in accordance with the requirements of the *Divorce Act*.

The Motion For a Stay — *Bolan v. Bolan*, 2022 CarswellAlta 1662 (C.A.) — Slatter J.A.

At the stay level, Justice Slatter set out the test for a stay when the best interests of a child are involved: *AF v. DS*, 2021 CarswellAlta 905 (Alta. C.A.). He noted that the "balance of convenience" factor predominates when the order under appeal has displaced parenting arrangements: *Baker v. Hunter*, 2015 CarswellAlta 1803 (C.A.) at para. 11.

He also noted that, if the *status quo* arrangements were not maintained by a stay order, but the appeal was allowed, the child may be subjected to disruptions (being treated like a ping pong ball); while, on the other hand, a stay may amount to

essentially granting the relief sought in the appeal: *Hoda v. Hoda*, 2021 CarswellAlta 783 (C.A.). See also *Wieggers v. Gray*, 2007 CarswellSask 123 (C.A. [In Chambers]); *Zhang v. Guo*, 2019 CarswellOnt 14811 (Div. Ct.); *E. (H.) v. M. (M.)* (2015), 57 R.F.L. (7th) 12 (Ont. C.A.); *Power v. Wiseman* (2012), 23 R.F.L. (7th) 282 (N.L. C.A.).

Other cases tend to focus more heavily on discouraging self-help and the resilience of children, and suggest that, to stay a parenting order pending appeal requires more than just disruption, but actual possible danger to the child if the order is not stayed: *Wieggers v. Gray*, 2007 CarswellSask 123 (C.A. [In Chambers]); *Gerski v. Gerski*, 2006 CarswellSask 389 (C.A. [In Chambers]); *Reeves v. Brand* (2018), 8 R.F.L. (8th) 1 (Ont. C.A.).

The mother's allegations of domestic violence were certainly an important factor here (the reasons do not provide any details about the nature of the allegations). However, there was a protection order in place that provided for police involvement if breached. While protection orders are certainly no guarantee of safety, as noted by Justice Slatter, the test is on the balance of probabilities, and the mere *potential* of a breach of the protection order cannot be an overriding consideration.

Justice Slatter then noted that the focus must always be the best interests of the child. But then things went a bit sideways. His Honour found that, as there was no clear evidence of risk of real and substantial harm to the child *if the child stayed* in British Columbia in the short term, the balance of convenience favoured granting the stay. Respectfully, that is looking at the matter through the wrong end of the telescope. In asking if there was a risk of harm if the child stayed in British Columbia, the Court reversed the onus. This was *the mother's* motion to stay the Order for return pending appeal. It was for *the mother* to show a risk of harm if the child was returned to Alberta, not for the father to show a risk of harm if the child stayed in British Columbia. If that was the test, stays pending appeal would regularly be granted in these cases — even in cases of unilateral action.

The Appeal — *Bolan v. Bolan*, 2022 CarswellAlta 3215 (C.A.) — Slatter, Strekaf and Feehan JJ.A.

Subsection 16.9(1) of *Divorce Act* now requires a parent to give 60 days notice before relocating if both parents have parenting time or decision-making responsibility. The other parent then has 30 days to file an objection in the prescribed form: s. 16.91(1) and (2).

The factors to be considered by the court and the burden of proof on an application for relocation are then set out in ss. 16.92 and 16.93. And, importantly, one of the factors that must be considered is whether the person seeking to relocate complied with the applicable notice requirements in the *Act* or in any agreement: s. 16.92(1)(d).

The legislation further provides that a relocation application can be made without notice where there is a risk of family violence — again, this was done in *A.J.K. v. J.P.B.* (2022), 71 R.F.L. (8th) 418.

Here, the mother had already invoked the process of the Court in getting a protection order.

The father's motion asking that the child be returned to Alberta was heard on May 26, 2022. Although the mother was self-represented at the hearing, *amicus curiae* was present. The mother requested a month adjournment at the outset of the hearing to allow her to retain counsel. This was opposed by the father.

Without expressly determining the adjournment request, the chambers judge heard submissions from the father's counsel on the merits of the father's application that the child be returned. The chambers judge indicated that he was inclined to order the child returned by June 4th, noting that the best interests of the child and further delay were the main issues. However, neither the mother nor the *amicus* were given an opportunity to make submissions on the substantive matter of whether the child should be returned to Alberta. Furthermore, it appeared that the mother's affidavit (to which the father had responded) was not before the Court.

Then, when the mother tried to make submissions, the chambers judge interrupted her, advised that there was not enough time, and again repeated that he was inclined to make the order for return. The chambers judge then stood the matter down to allow the mother, *amicus* and father's counsel to discuss arrangements. The *amicus* advised that the parties agreed to an interim without

prejudice order that the child be returned to Edmonton by June 4, 2022, that the mother have primary parenting, and the father have supervised parenting time.

After the mother said she did not really understand what was happening, the chambers judge advised the parties that he was going to order the child back to Alberta by June 4, 2022. The child would live with the mother at the matrimonial home, and would have supervised and virtual parenting time with the father.

As one might guess, the mother's appeal was primarily based on procedural fairness. She also argued that the judge did not consider the best interests of the child and family violence factors as required by the *Divorce Act*.

The appeal was addressed primarily on the issue of procedural fairness: *Edmonton (City of) Library Board v. Edmonton (City of)*, 2021 CarswellAlta 2717 (C.A.) at para. 28. It was fairly clear that the procedure at the motion did not meet the standards of procedural fairness. The mother's adjournment request was never explicitly addressed and she was not given an opportunity to make submissions on the substance of the matter.

The Court of Appeal really did not have much choice here. The lack of procedural fairness and failure of natural justice was just too great — which is somewhat ironic on a motion that was necessitated by the mother's unilateral move without notice.

The appeal was allowed, and the Court of Appeal directed that the father's application to have the child returned to Alberta be heard together with the mother's *intended* application for permission to relocate.

This result was most unfortunate; understandable, but unfortunate. As noted, the Court of Appeal did not really have much choice. But it would be inappropriate to see this case as the Court of Appeal "blessing" a move without notice. The mother's successful appeal was based solely on a lack of procedural fairness.

The *Divorce Act* amendments were a sign from Parliament that unilateral relocations are to be **strongly** discouraged. A parent who fails to comply with the notice requirements should be expected to provide the most compelling reasons to explain that failure. In this case, even in the case of alleged family violence, it is hard to understand why the mother did not properly seek court permission to relocate and ask that the motion be heard without notice. And in this case, it is unfortunate that the Court of Appeal had to allow it — at least temporarily.

Please Let This Be the Final Nail in Getting Around Section 55(1)

Greve v. Shaw (2022), 71 R.F.L. (8th) 293 (Ont. S.C.J.) — Breithaupt Smith J.

We have written a fair amount about s. 55(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, which provides that a domestic contract in Ontario is unenforceable unless it is in writing, signed by the parties, and witnessed. However, despite the clear wording of s. 55(1), some cases in Ontario have held (or at least "suggested") that courts can enforce family law agreements that do not comply with these requirements in certain circumstances.

The main exception to s. 55(1) arises out of the Ontario Court of Appeal's 1982 decision in *Geropoulos v. Geropoulos* (1982), 26 R.F.L. (2d) 225 (Ont. C.A.). While *Geropoulos* dealt with the formal requirements of domestic contracts under the *Family Law Reform Act*, which was repealed and replaced with the *Family Law Act* in 1986, its reasoning has been repeatedly applied by analogy to s. 55(1) of the *Family Law Act*.

The *Geropoulos* exception provides that a family law settlement reached *with legal advice and during the course of litigation* can be enforced even it does not meet the requirements of s. 55(1) of the *Family Law Act*. As Justice Robins explained in *Geropoulos*:

[18] In my opinion, **the section plainly is not aimed at or intended to apply to authorized settlement agreements like the present, made with legal advice during the pendency of court proceedings which, to be effective, require the intervention of the court.** Such agreements derive their effect from an act of the court; their authenticity is assured by the court's supervision and control over them; and ample protection is afforded the parties to these agreements, wholly

independent of the section. The court's jurisdiction to enforce settlements or refuse to do so, notwithstanding any agreement between solicitors or counsel, is well established; **whether they should be enforced or not, in the final analysis, is a matter for the discretion of the court and, in litigation under the *Family Law Reform Act*, a matter that would be subject to the court's overriding jurisdiction with respect to domestic contracts:** *Scherer v. Paletta*, supra; 3 Hals. (4th) 650-51, paras. 1182-83; and ss. 18(4) and 55 of the Act.

[19] **No purpose is to be served in compelling agreements of this kind to comply with the formalities of s. 54(1) and, if not, permitting parties to withdraw at will from compromises properly entered into by their legal representative before trial of their action or, if the appellant's position were to be accepted, compromises concluded even during the trial of the action.** It may well be that, given the nature of matrimonial litigation, prudence would dictate that lawyers ensure that settlement agreements are signed by the parties personally and witnessed. But I cannot construe the section as requiring that an otherwise valid compromise of an action must be rendered void and defeated on this ground alone, nor do I believe that the legislation could have contemplated or intended that result. Such a construction would be wholly inconsonant with the established policy of encouraging the settlement of disputed claims and recognizing and preserving the validity of settlements freely and properly entered into under advice. [emphasis added]

However, the law in Ontario is still entirely unclear about whether/when the *Geropoulos* exception can/should be extended to pre-litigation settlements. As we noted in our discussion of Justice Mandhane's decision in *Williams v. Williams* (2022), 73 R.F.L. (8th) 373 (Ont. S.C.J.) in the 2022-35 (September 26, 2022) edition of *TWFL*:

Although this issue was not discussed in *Williams*, the case law is still unclear about whether the *Geropoulos* exception to s. 55(1) of the *Family Law Act* also applies to settlements that predate litigation. But the weight of authority suggests not. While there are several lower court decisions that have purported to extend "the *Geropoulos* Rule" to apply to pre-litigation purported settlements, the leading decision being Justice Perell's decision in *Pastoor v. Pastoor* (2007), 48 R.F.L. (6th) 94 (Ont. S.C.J.) — it is presently unclear whether these decisions are correct in law.

When *Pastoor* was first released in 2007, Philip Epstein expressed doubts about its correctness (see the 2007-34 (August 28, 2007) edition of *TWFL*). And, more recently, in *Lindsay v. Lindsay*, 2021 CarswellOnt 9390 (S.C.J.), aff'd 2021 CarswellOnt 15489 (Div. Ct.), Justice Finlayson noted that although some cases have followed *Pastoor*, the issue has still not been considered by an appellate court, and it remains unclear whether it is, in fact, good law in Ontario.

In *Greve v. Shaw*, Justice Breithaupt Smith added her voice to this ongoing debate and, in contrast to Justice Perell's decision in *Pastoor*, concluded that *Geropoulos* does not apply to pre-litigation settlements.

The basic facts in *Greve* were as follows:

- The parties were not married, but cohabited for a number of years, and had two children together.
- After they separated, Ms. Shaw claimed that she and Mr. Greve had reached a binding agreement to resolve all property issues on the basis that Mr. Greve would transfer his interest in their jointly owned home to her, and she would pay him \$145,000.
- In support of her position, Ms. Shaw relied on correspondence between the parties' lawyers that, in her view, showed that the parties had reached a binding settlement. Mr. Greve, on the other hand, disagreed with Ms. Shaw's interpretation of the correspondence in question.

Instead of resolving the motion by deciding whether the correspondence showed that the parties had, in fact, reached an agreement, or whether they had merely made an agreement to agree, Justice Breithaupt Smith decided that, as a matter of law, *absent ongoing litigation*, it is not possible to have a binding family law agreement through an exchange of correspondence between lawyers — even if that exchange would have otherwise resulted in a binding agreement.

Justice Breithaupt Smith gave four reasons in support of this conclusion. First of all, the wording of s. 55(1) is clear that a family law agreement that is not in writing, signed by the parties, and witnessed is unenforceable. And let's face it — the section is very clear. We may *wish* it were otherwise; and it may meet the ends of justice were it otherwise. But it is not otherwise.

Second, her Honour was of the view that there "is an important distinction between the involvement of counsel retained to negotiate pre-litigation and counsel retained to conduct litigation."

Third, having the enforceability of a pre-litigation settlement turn, at least in part, on whether the parties had received legal advice was problematic, as it would require courts to delve into a number of potentially difficult questions, including the following:

- (1) What does "legal advice" look like, exactly? Is there a demarcation point compelling the announcement of the involvement of the advising lawyers if parties are otherwise negotiating smoothly between themselves? Do the advising lawyers have to communicate with one another in writing? Will this cause a chilling effect on the provision of "unbundled" legal services?
- (2) Are retainer agreements regarding the scope of pre-litigation counsel to automatically become material evidence when an alleged correspondence-based settlement is disputed? Does this mean that pre-litigation counsel must refer the client to another lawyer in every case of failed settlement negotiation lest he or she become a potential witness in the litigation?
- (3) What if only one party has legal advice? What is the assessment process around the other party's need for legal advice?
- (4) What if a party's unique vulnerabilities are not compensated for by legal advice?
- (5) What if a party alleges that he or she received bad advice?
- (6) Is there a strong public policy reason to add a legal advice factor to alleged settlements when Courts routinely uphold fully-compliant domestic contracts where no legal advice was obtained? [footnotes omitted]

Finally, her Honour was concerned that raising "an exchange of correspondence to the level of a binding domestic contract, absent clear legislative authority, would be to extend judicial involvement too far and contribute to increased uncertainty in matrimonial settlement negotiations."

Justice Breithaupt Smith also distinguished *Pastoor*, where Justice Perell found that the *Geropoulos* exception can apply to pre-litigation settlements, on the basis that the facts in *Pastoor* involved circumstances where the Court "was being asked to cure the absence of the signature of one party and a witness on a half-signed domestic contract", and did so on "the basis that the terms of settlement had been negotiated freely and with the benefit of legal advice." In contrast, the court in *Greve* was being asked "to deem an exchange of correspondence between counsel, pre-litigation, to be a valid and enforceable domestic contract."

Hopefully, this now shuts the door on this issue, unless and until s. 55(1) is re-considered by the Ontario legislature. Again, you can avoid having to deal with the issue entirely by simply making sure that both parties understand that a signed agreement is a *true condition precedent* [*Zhilka v. Turney*, 1959 CarswellOnt 81 (S.C.C.) and *Ball v. Ball* (2002), 27 R.F.L. (5th) 229 (Ont. C.A.)], and by ensuring that any agreements you are involved in comply with the formal requirements of the applicable statute in your particular jurisdiction.