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

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Holiday Greetings

Its been another interesting and busy year in family law that included, among other things, three significant family law decisions from the Supreme Court of Canada (*F. v. N.*, 2022 CarswellOnt 17202 (S.C.C.), *B.J.T. v. J.D.*, 2022 CarswellPEI 31 (S.C.C.), and *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.)); the creation of a new tort of family violence in *A. v. A.* (2022), 68 R.F.L. (8th) 255 (Ont. S.C.J.) that will, if upheld on appeal, have a monumental impact on the family law landscape for years to come; and numerous other significant family law decisions from appellate and trial courts across the country.

But there are also signs that our already backlogged family justice system is in serious crisis. In at least one court site in the Greater Toronto Area, motions that need more than one hour for oral argument are already being booked into October 2023 at the earliest (to say nothing of the additional time it will potentially take to receive a decision once the matter has been argued). Other court sites across the province and the country are also facing similar delays. In some jurisdictions, time to motions is measured in months and time to trial is measured in years. And, despite the best efforts of the judges, court staff and lawyers who, in the face of countless challenges, have managed to keep the justice system running in these unprecedented times, the backlogs and systemic delays only seem to be getting worse. This is no way to run a railroad.

If it ain't broke, don't fix it. But what if it ***is*** broke? The status quo clearly isn't working, and it is more urgent than ever that the Federal government and their provincial counterparts finally provide the family justice system with the resources it desperately needs to be able to provide timely, efficient, and fair access to justice for families across Canada. So call your MPs and MPPs, work with your local law associations, and do whatever else you can to make sure the Federal and provincial governments understand just how dire the situation actually is.

Thank you to John Bossy, our editor at Westlaw, and to Kristy Warren, our associate, for their invaluable help with getting *TWFL* online each week. And thank you to the judges, court staff and lawyers who, in the face of countless challenges, have managed to keep the justice system running in these unprecedented times.

Any many thanks to those of you that email us about *TWFL*. It's nice to know that it is being read. Comments and constructive criticism are always welcome.

We'll be off for (at least what *we* think to be) a well-deserved break over the holidays for the next two weeks. We will be back with the next edition of *TWFL* on January 9 th .

Merry Christmas, Happy Hanukkah, Happy Kwanza, Happy New Year, and healthy, safe and Happy Holidays to all!

Aaron and Michael

***Binding* Judicial Dispute Resolution (and We're Not Talking About A Trial)**

M.D. v. C.S., 2022 CarswellOnt 17077 (S.C.J.) — Madsen J.

This is the first endorsement in Ontario we are aware of that discussed Ontario's Binding JDR process. For those interested, the pilot program is described at the following website: https://www.ontariocourts.ca/scj/practice/binding-judicial-dispute-resolution-pilot/.

The idea of Binding Judicial Dispute Resolution is quite new in Ontario, only having been around since May of 2021, with (at least anecdotally) fairly minimal uptake in the few judicial centres in which it is being piloted. And Binding JDR is wholly foreign to some provinces. But the concept itself is not new and has been in place in other jurisdictions — Alberta and Nova Scotia for example — for years, with (again, anecdotally) very good results.

In Binding JDR, a judge meets with the parties (and their lawyers, if any) to explore possibilities for resolution — essentially a form of judicial mediation. Each party is expected to explain the facts that support their position and to explain their proposal to resolve the outstanding issues.

If the parties cannot reach an agreement, the judge will hear from both parties about the orders that they are seeking. The judge may ask questions and request additional information from the parties, and will also be able to hear anything the parties consider important, *regardless of the formal rules of evidence* (this is the part that gives some lawyers — and some judges — some angst).

At the conclusion of the Binding JDR process, the judge will provide a final decision on all outstanding issues, including those that have been resolved on consent.

In Binding JDR, the parties explicitly understand that the judge who assists them in trying to resolve the issues will make a final decision on any matters that were not capable of resolution. In Ontario, the parties specifically waive Rule 17(24) of the *Family Law Rules*, O. Reg. 114/99, which ordinarily prevents a Settlement Conference judge from hearing the trial of the matter (or a contested motion).

As explained by Justice Madsen in her decision:

> [4] JDR is a court process that is intended to provide separated families with a faster, simpler, less acrimonious and more cost-effective way of resolving family law issues, as compared with a trial. In the Ontario Superior Court of Justice, JDR is currently being offered as a pilot program in certain courts, operating under local Practice Directions. This endorsement arises from the first JDR in the Kitchener Unified Family Court.

The process is designed to be more practical, efficient, and interactive, and less adversarial than a trial. It is also meant to help families create bespoke solutions where possible. The intention is that the parties, counsel, and the judge work together to craft a Consent Order that very day. As the parties have the benefit of receiving immediately actionable input from the judge, many issues can be (and are) resolved without a ruling, and any remaining unresolved issues can then be determined in a fairly focussed hearing.

The Binding JDR process is voluntary and not appropriate for all cases. At least initially, it is meant for cases with only a few issues that are not complex, where credibility is *not* a significant concern, and where disclosure is complete — things like parenting arrangements, uncomplicated child support issues, and select property and equalization issues. Cases where there are concerns about serious family violence are not appropriate.

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Once it is determined that Binding JDR is appropriate for a case, the parties must then complete a signed document for the court requesting participation in Binding JDR. That document provides, among other things, that the parties:

> (a) commit to keeping their financial disclosure up to date;
>
> (b) agree to provide to the other party and the court a comprehensive settlement proposal in the form of a draft Order, that can be used during the JDR process;
>
> (c) agree to have their case decided without a trial, in an expedited and less formal manner;
>
> (d) waive any right to the strict application of the rules of evidence;
>
> (e) acknowledge that the court may rely on reports prepared by professionals including agents of the OCL, without the attendance of those individuals at the JDR; and
>
> (f) agree and request that the same judge will preside over both portions of the process.

Parties also each serve and file brief affidavits.

It is crucial to note that *all statements* made during the process — *whether during the settlement discussions* or the adjudication phase of the hearing — *are evidence* that may be relied on if the Court is required to determine an issue.

Again, the scheduling and rules of the Binding ADR process are set out in local Practice Directions. In Kitchener, Binding JDRs are scheduled for a half-day. The intention is that between 90 minutes and two hours be allocated to the negotiation phase, during which the judge will help the parties identify their interests, consider options, and reach resolution. The Court can — and is meant to — express opinions, *and this does not preclude the Court's later determination of the issues*. In fact, as Justice Madsen noted in her decision:

> [10] . . . this is one of the main benefits of the JDR process. Parties have an opportunity to discuss with the judge who is deciding their case, what that judge's approach to the issues will be, and to receive guidance regarding the strengths and weaknesses of their respective positions. Equipped with that information, parties can usually craft their own resolution.

If any issues are left unresolved, the afternoon is then devoted to the decision-making phase. There is no formal procedure mandated, but the idea is that each party should be given a chance to make submissions. The judge may ask questions and elicit further information directly from the parties, and the parties may raise questions for the judge to consider. The process is designed to be very flexible.

If a decision is required on any issues, the idea is that the reasons should be brief and focused, and the intention is that — either through settlement, a decision, or both — the parties will reach a resolution that very day.

At the Binding JDR that was before Justice Madsen in *M.D. v. C.S.*, the parties resolved most of their issues with the assistance of counsel and the Court, and Justice Madsen then decided the remaining minor issues.

The parties — dubbed Monet and Chloe — were the parents of an eight-year-old girl, Alex. They had been separated for six years and, although they had a parenting routine, there was still a lot of conflict.

The parties came close to resolving all of the parenting issues through several Court conferences, but could never quite close the entire deal. They agreed on the larger issues — such as 50/50 parenting — but they could not agree on the actual schedule, transitions and holidays.

The next step was supposed to have been a Trial Management Conference, and then an anticipated five-day trial. But a trial did not make sense here, and likely for that reason, both parties requested the Binding JDR process.

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The issues for the Binding JDR — none of which were terribly "legal" — were as follows:

a. Transition times for the regular 5/5/2/2 schedule (mornings or afternoons);

b. How exactly to articulate the principle that major decision-making authority over health or education (the parties having already agreed to parallel parenting) does not directly implicate related section 7 expenditures, for which consent is still required;

c. How to allocate vacation time between them equally, but also in a manner that shares most holidays rather than alternates them, and recognizes that in a 5/5/2/2 schedule, one parent by default has all Mondays (and therefore long-weekend Mondays) while the other has Fridays (when most PD days fall) which are alternated, creating an imbalance;

d. How to best address Mother's Day where, as here, there are two mothers;

e. Travel provisions within Ontario, within Canada, and internationally;

f. Whether the parties should apply for citizenship and a passport for the child where she is also entitled to EU citizenship, where one parent felt this provides opportunities and the other has an underlying fear about the child's possible removal from Canada;

g. Who should keep which of the child's documents (birth certificate, passport, social insurance number, and health card); should this be alternated, or should each parent have two of them;

h. Logistics regarding exchanges of the child; and

i. Whether the parents should be permitted to attend at extra-curricular activities while in the other parent's care.

At the outset, Justice Madsen made the following clear to the parties and to counsel: if she were ultimately asked to resolve any of the issues, she would be guided by the following principles (in her considerations of best interests):

- Minimizing Alex's exposure to conflict;
- Simplicity in implementation (which also helps reduce conflict);
- Consistency and routine for Alex;
- A consideration of the existing arrangements (the status quo);
- Consideration of Alex's age and stage of development; and
- Consistency of school attendance.

The parties made good progress in the settlement phase. They both made compromises, and were able to resolve most of the issues. As a result, the settlement phase was longer than originally anticipated.

At the end of the settlement phase, only the following narrow issues were left for the Court to decide:

(a) The language required to ensure that final decision-making on an issue does not obligate the other in terms of section 7 expenses;

(b) Exchange locations; and

(c) Whether both parents could attend the child's extra-curricular activities, whenever scheduled.

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Justice Madsen heard from both parties and counsel on these issues. There was no cross-examination, *per se*, but Justice Madsen asked a range of questions, and a full airing was given to the outstanding issues.

The Court's specific determinations on each of the remaining issues in dispute is irrelevant for our purposes. It is the process that is important. What could have been a four or five day trial — and all the preparation that goes along with a four or five day trial — was collapsed into a single day, where most of the issues were resolved on consent, and the remaining issues determined judicially.

People will undoubtedly raise procedural and evidentiary concerns with the Binding JDR process. Remember, however, that this process is not meant for every case. Cases where credibility is a major issue or where there are serious evidentiary or legal issues may not be appropriate. But for cases/issues that are appropriate, this is a process counsel should consider for their clients. Sometimes, clients just need or want resolution. And this appears to be a quick way to get it.

Reun Ifica Tion Therapy

J.C. v. R.P. (2022), 73 R.F.L. (8th) 341 (Ont. S.C.J.) — Broad J.

Justice Broad's decision in *J.C. v. R.P.* provides an excellent summary and review of the law when dealing with an interim motion for reunification therapy based on an allegation of parental alienation.

The parties in *J.C.* had a 14-year-old daughter. In 2017, they consented to an Order that gave them joint custody and a 50-50 parenting schedule.

On December 31, 2020, the mother and daughter had an argument about whether the daughter could go to a New Years Eve party at the father's home during the mother's parenting time. Although the cause and details of the argument were in serious dispute, the result was that after the argument, the daughter refused to have any meaningful contact with the mother. She also refused to see or speak to her maternal family, including her younger half-brother.

As often happens when dealing with parent-child contact problems, the mother alleged the father had alienated the child from her, which as Justice Ingram explained in *Ciarlariello v. Iuele-Ciarlariello*, 2015 CarswellOnt 2791 (S.C.J.), "has been defined . . . as 'a child's strong resistance or rejection of a parent that is disproportionate to that parent's behaviour and out of sync with the previous parent-child relationship[.]'" The father, on the other hand, denied the allegations of alienation, and claimed that the parent-child contact problems had been caused by the mother's behaviour towards the daughter. The usual battle lines were drawn: In this corner, "parental alienation"; in this corner, "justifiable estrangement"; and right in the middle — a 14-year-old child.

In May 2021, the parties consented to a temporary without prejudice Order that was supposed to provide the mother with regular calls and in-person visits with the child. It also contemplated therapy for the child, and requested the involvement of the OCL. However, the child refused to go for in-person parenting time with the mother, and regularly ended their scheduled calls early. The parties were also unable to get the child into therapy and, although the OCL agreed to conduct an investigation, the clinical investigator was unable to complete her work because the child refused to participate in a visit with the mother so the investigator could observe their interactions directly.

Given the lack of progress, in August 2021, the mother brought a motion that she and the daughter attend for reunification therapy.

Although substantial Affidavit evidence was filed on the motion, neither party sought to cross-examine any of the affiants prior to the motion, and neither party filed any expert evidence.

Justice Broad started his analysis by summarizing the principles that apply when dealing with allegations of alienation and requests for reunification therapy on an interim motion, including the following:

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• " . . . parental alienation is a legal concept as opposed to a mental health diagnosis, and as such, the court can make a finding of alienation based upon an analysis of the facts alone without expert evidence." [See *Malhotra v. Henhoeffer*, 2018 CarswellOnt 18560 (S.C.J.), aff'd *A.M. v. C.H.* (2019), 32 R.F.L. (8th) 1 (Ont. C.A.) and *Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.); see also Philip Epstein's discussion of *Malhotra* and a number of other cases involving requests for reunification therapy in the 2019-06 (February 11, 2019) edition of *TWFL*]

• When deciding whether a child has been alienated, the court can consider whether "there was a prior positive relationship with the targeted parent; there is an absence of abuse by the targeted parent; there is use of many of the alienating strategies; and the child exhibits most of the alienated child behaviours." (*Fielding v. Fielding* (2013), 39 R.F.L. (7th) 59 (Ont. S.C.J.) and *O.M. v. S.K.* (2020), 42 R.F.L. (8th) 343 (Ont. S.C.J.))

• Courts can also consider whether the allegedly alienated child is displaying any of the following behaviours: "Campaign of denigration of targeted parent; Weak, frivolous and absurd rationalizations for rejection of targeted parent; Lack of ambivalence about alienating parent; Child professes decision to cut off parent as child's independent decision; Absence of guilt about treatment of targeted parent; Reflexive support of alienating parent in parental conflict; Presence of scenarios borrowed from alienating parent; and Rejection of targeted parent's extended family." (*Fielding v. Fielding* (2013), 39 R.F.L. (7th) 59 (Ont. S.C.J.))

• Although expert evidence is not necessarily required when dealing with allegations of alienation and requests for reunification therapy, "where the record consists of competing and contradictory affidavits, the failure of the party seeking an order for reunification therapy to provide expert evidence points away from making the order." (*Barrett v. Huver* (2018), 9 R.F.L. (8th) 244 (Ont. S.C.J.) and *Stavropoulos v. Stavropoulos*, 2021 CarswellOnt 13669 (S.C.J.) — see also Philip Epstein's discussion of *Barrett* in the 2018-32 (August 13, 2018) edition of *TWFL*)

• While motion judges should exercise caution before finding that a child has been alienated based on a paper record that has not been tested by cross-examination, such a finding can nevertheless be made "where the affidavit evidence is not in serious dispute or the evidence overwhelmingly supports it." (*Hazelton v. Forchuk* (2017), 93 R.F.L. (7th) 254 (Ont. S.C.J.); *MacLeod v. MacLeod*, 2019 CarswellOnt 5172 (S.C.J.); and *O.M. v. S.K.* (2020), 42 R.F.L. (8th) 343 (Ont. S.C.J.))

• If alienation is found to exist, it is critical to address it as early as possible, even on an interim motion. (*Hazelton v. Forchuk* (2017), 93 R.F.L. (7th) 254 (Ont. S.C.J.)) [We cannot emphasize this factor enough. Where alienation is found, courts really must act quickly and decisively: *Ene v. Ene* (2015), 56 R.F.L. (7th) 332 (Ont. S.C.J.) and the case should be actively managed: *Williamson v. Williamson* (2016), 74 R.F.L. (7th) 18 (B.C. C.A.); *A. (A.) v. A. (S.N.)* (2009), 66 R.F.L. (6th) 294 (B.C. S.C.); *MacLeod v. MacLeod*, 2019 CarswellOnt 5172 (S.C.J.); *Hajji v. Al-Jammou* (2020), 48 R.F.L. (8th) 401 (Ont. S.C.J.)]

• While intensive reunification therapy is a potential option for dealing with alienation, such Orders "are to be made sparingly; there must be compelling evidence that the therapy will be beneficial and there must be a detailed proposal identifying the proposed counsellor and what is expected[.]" (*Testani v. Haughton* (2016), 92 R.F.L. (7th) 226 (Ont. S.C.J.) — see also Philip Epstein's discussion of *Testani* in the 2016-45 (November 14, 2016) edition of *TWFL*)

• When deciding whether to order reunification therapy as a remedy for alienation, the Court must also consider the potential harm associated with forcing a child to participate in the process. (*Barrett v. Huver* (2018), 9 R.F.L. (8th) 244 (Ont. S.C.J.) and *Stavropoulos v. Stavropoulos*, 2021 CarswellOnt 13669 (S.C.J.))

As the evidence in this case was highly conflicted and was not tested by cross-examination, Justice Broad ultimately concluded that the mother had not met her onus of establishing alienation. He also noted that this at least *appeared* to be a case involving elements of both alienation and estrangement, and that ***both*** parents bore some responsibility for the breakdown of the daughter's relationship with the mother:

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> [65] **Based upon the conflicting evidence, it appears likely that the parents share responsibility for the breakdown in the relationship between the child and the mother.** The father may not sufficiently recognize the importance of the child maintaining a strong and healthy relationship with the mother and his responsibility to take positive steps to actively encourage it. On the other side, the mother may not recognize her own role in causing damage to the relationship through her conduct towards the child.
>
> [66] **I am not satisfied on the record before the court that parental alienation on the part of the father has been proven.** This case is unlike the cases of *Hazelton, O.M. v S.K* and *MacLeod* in which findings of parental alienation were made on paper records on interim motions. As indicated previously, the affidavit evidence in support of the finding of alienation in each of these cases was overwhelming, which is not the situation in the case at bar. [emphasis added]

Justice Broad further noted that even if he had found that the father had alienated the daughter, he was not satisfied on the record before him that reunification therapy would have been the appropriate remedy given that: (a) the daughter did not want to participate in therapy with the mother; and (b) there was no evidence to address the potential harm that forcing the daughter to participate in therapy with the mother might have.

> [68] Although **the mother's proposed therapist Ms. DeVeto is experienced and well-qualified, based upon her C.V.**, and the mother provided copies of her Client Intake Form and Family Treatment and Intervention Agreement, no case-specific information was provided respecting the type of therapy proposed. Specifically, **no information was provided by Ms. DeVeto or otherwise, respecting the risk of emotional harm to the child from being forced to participate in reunification therapy, an issue recognized by the case law** (see *Williamson* at para. 43, *Barrett* at para. 40 and *Stavropoulos* at para. 24).
>
> [69] Moreover, s. 24(3)(e) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, requires that, in determining the child's best interests, her views and preferences be taken into account, giving due weight to her age and maturity. **The child expressed reluctance to speak with any therapist and specifically a therapist focused on repairing her relationship with the mother instead of her own issues.** [emphasis added]

As a result, Justice Broad dismissed the mother's motion.

To this we add the following. The child was 14 years old, and there is nothing in the decision to suggest she lacked capacity. Therefore, it is unlikely that the mother's proposed therapist would have been willing to proceed with the process even if it had been ordered. In Ontario, the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A ("*HCCA*"), prohibits health practitioners from administering "treatment" without a patient's consent (other provinces and territories have similar legislation).

Some cases consider reintegration counselling to be "treatment" such that consent is required: *Barrett v. Huver* (2018), 9 R.F.L. (8th) 244 (Ont. S.C.J.). Other cases suggest that reintegration counselling or "deprogramming" is not "treatment" under the *HCCA* such that consent is not required: *E.T. v. L.D.* (2017), 98 R.F.L. (7th) 324 (Ont. S.C.J.). The Ontario Court of Appeal ducked the issue in *L. (N.) v. M. (R.R.)* (2016), 76 R.F.L. (7th) 428 (Ont. S.C.J.), aff'd (2016), 88 R.F.L. (7th) 19 (Ont. C.A.). And in *A.M. v. C.H.* (2019), 32 R.F.L. (8th) 1 (Ont. C.A.) the Court of Appeal held that while the *HCCA* does ***not*** prohibit a family court from ordering therapy for a child in appropriate circumstances, that would not prevent the therapist from declining to engage in therapy if the child had capacity and did not consent. (For further discussion about *A.M. v. C.H.*, see Philip Epstein's comment in the 2019-40 (October 7, 2019) edition of *TWFL*). Therefore, the current situation is that you can lead a child to therapy, but you can't make the therapist drink it — or something like that.

There are at least three important lessons we can learn from this case. First, before you bring an interim motion for reunification therapy, which will almost certainly be time consuming, expensive, and hotly contested, make sure that you can reasonably argue that the record is sufficient to allow a court to make a finding of alienation based on a paper record. And, if it isn't sufficient, either don't proceed with the motion and focus on getting the case to trial, or conduct cross-examinations prior to the motion to try to bolster the record, and to allow the judge to a least try to make the necessary factual findings.

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Second, consider whether a therapist will proceed with a therapeutic process if the child has capacity but will not consent. If the therapist will not proceed without the child's consent, and if it is unlikely that the child will consent, there is probably no point in spending time and money trying to get an Order for therapy that your client won't ever be able to implement.

Finally, make sure you lead detailed evidence from the proposed therapist about the proposed process, *and the potential risks* associated with it. There are cases where courts have ordered reunification therapy without this type of evidence. [See, for example, *Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.), and our discussion of that case in the 2022-06 (February 14, 2022) edition of *TWFL*, where the Ontario Court of Appeal upheld a motion judge's decision to order reunification therapy based on the description of the program in the mother's affidavit, printouts from the program's website that the mother attached to her affidavit, and the fact that other courts had made orders for this type of therapy in the past.] However, if you are going to bring a motion for something as complicated as reunification therapy, it is worth taking the time to marshal proper evidence so you can maximize your client's chances of success, and ensure the court has the information it needs to make a proper decision.

Let Me Get This Right: You Want it, And I Pay for it?

Endale v. Parker, 2022 CarswellOnt 4774 (S.C.J.) — Valente J.

This case isn't long, but it does help answer a question that, until now, has not been entirely clear: who has to pay the costs associated with obtaining the documents to satisfy undertakings.

This issue arises in family law all the time. It is very common for one party to ask the other to produce dated and historic documents such as bank statements, cancelled cheques, old medical records, and the like. And the cost of doing so can be significant. Recently, we heard of a bank charging $7 for each historic bank account statement and credit card statement. For three credit cards, two bank accounts and a line of credit for three years — that would be over $1,500. Who pays for that?

The usual line at examinations and questioning is "We will provide the documents if you pay for it." Well, such a condition may be no more . . .

Here, the defendant brought a motion to compel the plaintiff to answer undertakings and to pay the costs of obtaining the necessary documents. The defendant agreed to pay the cost of copying the documents, but insisted that the plaintiff pay all the other costs of obtaining them.

Somewhat surprisingly, this issue is still not clear, as noted by Justice Sloan in *Trumble v. Soomal*, 2020 CarswellOnt 19000 (S.C.J.).

In *Endale*, Justice Valente focussed on the wording of Rule 30.02 of the Ontario *Rules of Civil Procedure*, R.R.O 1990 O. Reg 194, which says that every relevant documents in the possession, control or power of a party is to be disclosed. The wording of Ontario's *Family Law Rules*, O. Reg. 114/99 is similar, as are the rules of production across the country.

Although the case law is somewhat divided, Justice Valente decided to follow Justice Cullity in *Ho v. O'Young-Lui*, 2002 CarswellOnt 3894 (S.C.J.), where the Court decided that, as a general rule, the cost of a party's productions are to be paid by that party in the first instance. He found the general rule should be the same regardless of whether the productions are required before examinations or whether the productions are in answer to undertakings given on examination. "The obligations placed on litigants by Rule 30.02 are to be unconditionally applied throughout the litigation process."

So, the next time you are questioning or examining an opposite party, and you ask for three years of bank and credit card statements — if the answer is "we will produce those statements if your client pays the cost," you can confidently respond: "Uh, no."

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