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

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News—Oh The Times They May Be a Chaaaaangin' . . . in the UAE

The internal divorce and family law in the United Arab Emirates (UAE) has garnered particular interest as of late on account of the Supreme Court of Canada decision in *F. v. N.* (2022), 78 R.F.L. (8th) 253 (S.C.C.), which was the subject of comment in the 2022-46 (December 12, 2022) edition of this Newsletter.

On February 1, 2023, changes in the internal Personal Status Law in the UAE came into effect. The changes are meant to allow *non-Muslim* spouses to divorce in the UAE. Before the reported changes, the legal regime based on Sharia law restricted the remedies that were available on divorce and to whom those remedies would be made available. Previously, a couple seeking a divorce had to follow a Sharia-based process. This often forced those spouses to seek redress abroad. The new Personal Status Law is applicable to the non-Muslim population of the UAE, whether citizens or ex-patriots.

The new law brings changes to the law of marriage. It will no longer be necessary for a bride's father to consent to a marriage, and there is no longer a requirement that a minimum number of Muslim males attend a wedding for it to be formally valid.

The new law also provides for civil marriage for the first time in the UAE. Non-Muslims will be able to marry without the requirement of a guardian's approval, or a premarital screening certificate. The primary conditions required for a non-Muslim marriage are:

a. Each of the parties must be at least 21-years-old.

b. Both parties must freely consent to the marriage.

c. The spouses cannot be within prohibited degrees of consanguinity.

d. Neither spouse can be party to a prior subsisting marriage.

The new provisions also recognize civil (as opposed to religious) marriage contracts.

The new law also brings in the idea of no-fault divorce such that either spouse can request a divorce without proving fault on the part of the other. Non-Muslim foreigners will be able to elect to apply the new law or the laws of their home country.

The new regime also provides for the payment of ongoing spousal support ("maintenance") and capital sums in the place thereof. When a divorced *woman* files for spousal support and there is no marriage contract that provides otherwise, the issue of support will be subject to judicial discretion based on the following factors:

a. Number of years of the marriage;

b. Age of the wife;

c. Financial status of each spouse;

d. Husband's contribution to the divorce;

e. Compensation paid by either of the spouses in lieu of damage inflicted on the other;

f. Financial loss suffered by either spouse as a result of "unilateral divorce"; and

g. Whether the wife is "diligent" towards children.

Spousal support will be forfeited if:

a. The wife remarries; or

b. The custody of the children with the wife ends

Regarding custody (or what we used to call "custody"), custody of children is a right granted to both parents equally, and it is a right of the children to have both parents raise them. There is something of a "presumption" of joint custody, but the court can override that presumption and award custody to only one parent where that parent is clearly best able to promote the best interests of the child. The primary consideration is to be the best interests of the child.

Again, to be clear, these new laws will only apply to non-Muslim citizens of the UAE and to non-Muslim expatriates and residents of the UAE, unless one of them insists that the law of their own country be applied.

From what we understand, the new law is meant to introduce and provide for equality between men and women. Time will tell . . .

How is A Court of Appeal Like a Genie?

Schafer v. Schafer, 2022 CarswellAlta 3216 (C.A.) — Pentelechuk J.A.

As we have noted in this Newsletter before, and as is readily apparent to anyone involved in family law, in many provinces, especially British Columbia, Alberta, Manitoba and Ontario, arbitration is becoming increasingly favoured as a means of dispute resolution.

The underlying applications arose out of arbitral proceedings in a family law dispute, and this was an application to the Alberta Court of Appeal for permission to appeal the denial of leave to appeal the decision of an arbitrator to the Court of King's Bench.

While the amounts involved in this case were nominal, the case raised an important question of law regarding the jurisdiction of the Alberta Court of Appeal to hear appeals from the Court of King's Bench in arbitral proceedings.

In August 2019, the parties entered into an Arbitration Agreement to determine issues of parenting and decision-making, child support, spousal support, and property division.

Following an interim award on parenting, Mr. Schafer challenged the jurisdiction of the arbitrator to continue to decide issues of parenting.

The arbitrator determined that she retained jurisdiction to address outstanding parenting issues. The arbitrator then issued a costs award in favour of Ms. Schafer arising from Mr. Schafer's jurisdictional challenge. While Ms. Schafer had claimed solicitor and client costs of $4,885 (to which she said she was entitled under the Arbitration Agreement), the arbitrator awarded costs of only $2,000.

Mr. Schafer appealed the arbitrator's costs award to the Court of King's Bench. He argued that he had an automatic right of appeal under the terms of the Arbitration Agreement. Ms. Schafer argued that Mr. Schafer needed permission to appeal and that his appeal should be struck because he was out of time to file the required application for permission to appeal.

The Arbitration Agreement provided as follows:

> **15. REMEDIES PURSUANT TO THE ARBITRATION ACT**
>
> 15.1 Any Award may be subject to Remedies under the Arbitration Act: (choose either (a) or (b) or (c))
>
> (a) In accordance with subsection 44 and/or 45 of the Arbitration Act [**Note:** This is what the parties selected];
>
> (b) A party may apply for Remedies under the Arbitration Act (choose one or more of the following)
>
> [_] A question of law;
>
> [_] A question of fact; or
>
> [_] A question of mixed fact and law;
>
> (c) The parties agree there will be no right of Remedies under the Arbitration Act from the Arbitrator's Award.
>
> . . . . .
>
> **18. COSTS OF ENFORCEMENT OF AWARD**
>
> . . .
>
> 18.3 In the event either party seeks leave for Remedies or does apply for Remedies under Sections 44 and 45 of the Arbitration Act regarding the Arbitration Award or any resulting Order, the other party shall be entitled to their solicitor and client costs of any such appeal if the party seeking Remedies is unsuccessful for any reason.
>
> 18.4 For further clarity, the parties agree that an unsuccessful appellant is 100% responsible for the Respondent's solicitor/client costs of the Remedies Application.

The motion judge agreed with Ms. Schafer and struck Mr. Schafer's Notice of Appeal.

Mr. Schafer then brought a motion to a single judge of the Alberta Court of Appeal for advice and direction as to whether he needed permission to appeal the order of the motion judge to the Court of Appeal.

Not to be outdone, Ms. Schafer also appealed, arguing that the motion judge should have awarded her solicitor and client costs as provided for in paragraph 18.4 of the Arbitration Agreement (the motion judge had only awarded Ms. Schafer $500 in costs).

Ultimately, Mr. Schafer's motion for permission to appeal engaged the broader question of the jurisdiction of the Court of Appeal to hear the proposed appeal. In turn, this question depended on the extent to which the *Arbitration Act*, R.S.A. 2000, c. A-43 (the "*Arbitration Act*") limited the broad jurisdiction of the Court of Appeal as provided in the *Judicature Act*, R.S.A. 2000, c. J-2 (the "*Judicature Act*") and the *Alberta Rules of Court*, Alta. Reg. 124/2010.

Justice Pentelechuk was of the view that, while a single judge of the Court of Appeal could opine on the question, to avoid the risk of conflicting single judge decisions and continuing uncertainty, there was merit to having the jurisdiction questions determined by a full panel — as often occurs in Ontario: *Singh v. Heft*, 2022 CarswellOnt 1585 (C.A.) at para. 7; *S.B. v. J.M.*, 2020 CarswellOnt 12917 (C.A.) at para. 14; *Shinder v. Shinder*, 2017 CarswellOnt 16290 (C.A.) at para. 4. Parenthetically, her Honour noted that Ms. Schafer was really asking that Mr. Schafer's appeal be dismissed for want of jurisdiction which was,

itself, an application that is reserved for a full panel: Rule 14.74(a); *Servus Credit Union Limited v. Unruh*, 2021 CarswellAlta 1207 (C.A.).

Justice Pentelechuk first considered the jurisdiction of the Court of Appeal. As a statutory court, the Court of Appeal does not have inherent jurisdiction as does a superior court of record; it must operate within the living space granted to it by the *Judicature Act*. (Much like the Genie in Aladdin: "**PHENOMENAL COSMIC POWERS** . . . itty bitty living space.")

Broad jurisdiction to review decisions of the Court of (now King's) Bench is found in s. 3(b) of the *Judicature Act*:

> 3. The Court of Appeal
>
> . . .
>
> (b) has jurisdiction and power, subject to the Rules of Court, to hear and determine
>
> (i) all applications for new trials,
>
> (ii) all questions or issues of law,
>
> (iii) all questions or points in civil or criminal cases,
>
> (iv) all appeals or applications in the nature of appeals respecting a judgment, order or decision of
>
> (A) a judge of the Court of Queen's Bench . . .

This broad jurisdiction is confirmed in Rule 14.4(1):

> **Except as otherwise provided**, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen's Bench judge sitting in court or chambers, or the verdict or finding of a jury. [emphasis in original]

Rule 14.5(1) then sets out where permission to appeal to the Court of Appeal is required, including Rule 14.5(1)(e) (any decision as to costs only); and Rule 14.5(1)(g) (any decision in a matter involving $25,000 or less). Therefore, if the Court of Appeal had jurisdiction to hear Ms. Schafer's appeal regarding costs, she would first need permission to appeal. Mr. Schafer's proposed appeal depended on whether his appeal was more properly characterized as an issue of contractual interpretation, or also an appeal as to costs only.

Her Honour then continued on to consider whether the provisions of the *Arbitration Act* animated the "except as otherwise provided" wording in Rule 14.4. Of the three provisions in the *Arbitration Act* that provide for appeals to the Court of Appeal, only s. 48 required discussion — those in ss. 8(3) and 15(5) were irrelevant to the question at hand.

Section 48 of the *Arbitration Act* provides that "[a]n appeal from the Court of Queen's Bench decision under section 44, 45 or 47 may, with the permission of a justice of the Court of Appeal, be made to the Court of Appeal". Section 44 is the provision that provides for the appeal of an arbitration award to the Court of King's Bench.

However, in *719491 Alberta Inc v. Canada Life Assurance Company*, 2021 CarswellAlta 3191 (C.A.) (leave to appeal to SCC refused), the Court of Appeal confirmed that s. 48 of the *Arbitration Act* did not give the Court of Appeal jurisdiction to hear an appeal from a refusal by the Court of Queen's Bench to grant leave to appeal under s. 44(2) of the *Arbitration Act*. The rationale for this, of course, is judicial economy and the sanctity of the arbitration process once contracted: *Esfahani v. Samimi* (2022), 73 R.F.L. (8th) 330 (Alta. C.A.) at para. 15.

However, other decisions of the Court of Appeal, including *Esfahani v. Samimi*, 2021 CarswellAlta 2059 (C.A.), have resulted in some confusion in Alberta. (There, a single judge of the Court of Appeal granted leave to appeal on what appeared to be only a procedural matter, but with questionable jurisdiction to do so.)

The state of the law highlights the need for clarification of the scope of the jurisdiction of the Court of Appeal to hear matters that are ancillary to the arbitral decision, and to balance the ideas of reviewability, consistency and finality. And, again, while a single judge of the Court of Appeal could opine on the question, her Honour was of the view that clarification was best provided by a panel of the Court.

Both parties were granted permission to appeal to the Court of Appeal *conditional* on a panel of the Court finding it had jurisdiction to hear the appeals.

And now, we wait . . .

Confusion About Intrusion on Seclusion?

Stewart v. Demme, 2022 CarswellOnt 3710 (Div. Ct.) — H. Sachs J., J.A. Ramsay J., Nishikawa J.

This is not a family law case, but in *Stewart*, the Ontario Divisional Court offers some clarification about the tort of Intrusion Upon Seclusion, first approved of in *Jones v. Tsige* (2012), 6 R.F.L. (7th) 247 (Ont. C.A.). In overturning an order granting certification of a class action based on this still relatively new privacy tort, the Divisional Court offered guidance as to what is supposed to be the narrow scope of the tort — here, with respect to unauthorized access to medical records.

The focus in this case for the Divisional Court was reaffirming the very high bar that a plaintiff must meet under the third leg of the test for Intrusion Upon Seclusion: "that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish."

In *Stewart*, the defendant ("Demme"), a nurse, stole drugs from the dispensing unit at a hospital. To do so, she had to access the "limited" medical information of over 10,000 patients over the course of a decade.

The class action was certified — although just barely — by the Superior Court of Justice, and the defendant appealed the certification.

The question for the Divisional Court was focussed on the third leg of the test: that a reasonable person would regard the invasion as "highly offensive causing distress, humiliation or anguish." [The first two parts of the test are that (a) the defendant's conduct was intentional; and (b) the defendant invaded, without lawful justification, the plaintiff's private affairs.]

In finding that the class action should not have been certified, the Divisional Court offered the following comments:

> • Not every intrusion amounts to a basis to sue for the tort of intrusion upon seclusion. The particular intrusion must be "highly offensive" when viewed objectively having regard to all the circumstances.
>
> • If the case does not "cry out for a remedy", it is a signal that the high standard for this tort may not be met. Even though the phrase "cry out for a remedy" is not part of the test, it informs the purpose of the tort — to remedy *serious intrusions of privacy*.
>
> • The "highly offensive" standard is an objective one, which conjures the spectre of the reasonable person.
>
> • Plaintiffs must show that intrusions into their private affairs are serious and significant, not just that the accessed information was sensitive.

The Divisional Court found that intrusions sufficient to ground the tort cannot be "fleeting," even if the accessed information is highly sensitive (such as personal health information).

Here, the Divisional Court determined the intrusions, in fact, to be "fleeting." The Court also determined that the information accessed was not "particularly sensitive" within the realm of health information. It also determined it relevant that the defendant was not "after the information itself" which information was available to a number of other hospital employees and that there

was, consequently, "no discernible effect on the patients." Therefore, a reasonable person informed of all the circumstances would not find the intrusion "highly offensive."

While we understand the Divisional Court was concerned about "the floodgates" as cautioned by the Court of Appeal in *Jones v. Tsige*, we do have to wonder if the "reasonable person" would not find the access of private health information "highly offensive." One would think that the unauthorized access of private health information would be at least as offensive as the unauthorized access of private banking information, which was the foundation for the tort in *Jones*. Perhaps, therefore, the key is that, in this case, the access information was only a means to an end and not the end unto itself.

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