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— Franks & Zalev - This Week in Family Law

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Rule 1(8) of Ontario's *Family Law Rules*, O. Reg. 114/99 gives courts in Ontario broad authority and discretion to deal with breaches of court Orders short of a formal finding of contempt:

> **Failure to obey order**
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> (8) If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, **including,**
>
> (a) **an order for costs;**
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> (b) an order dismissing a claim;
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> (c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;
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> (d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;
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> (e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;
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> (f) an order postponing the trial or any other step in the case; and
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> (g) on motion, a contempt order. [**emphasis** added]

However, unlike the contempt provisions of the *Family Law Rules* which *expressly* state that a court can impose a monetary penalty or fine as a remedy for contempt (see Rule 31(5) of the *Family Law Rules*), Rule 1(8) does not *specifically* refer to monetary penalties or fines. However, the wording of Rule 1(8) is clearly broad and open ended (with an inclusive, not restrictive, list of possible remedies), and as far back as 2008, the court relied on the predecessor Rule 14(23) to impose a daily monetary

fine/penalty on a recalcitrant litigant to cajole him into complying with his court ordered disclosure obligations: *Mantella v. Mantella* (2008), 61 R.F.L. (6th) 252 (Ont. S.C.J.). (Although now-repealed Rule 14(23) was replaced with Rule 1(8) in 2014, the former Rule also gave courts broad authority to deal with breaches without making specific reference to monetary penalties or fines.)

In *Mantella*, the Court ordered the husband to produce various disclosure to the wife by April 25, 2008, failing which he would have to pay her a fine of $2,500 a day ($912,500 a year) until he complied. The husband eventually provided the necessary information, but did not do so until July 7, 2008, which was 74 days after the court-ordered deadline. As a result, the wife brought a motion to confirm that the husband owed her a total of $185,000 ($2,500 a day x 74 days). The motion was granted by Justice Van Melle.

The husband appealed Justice Van Melle's Order to the Court of Appeal (*Mantella v. Mantella* (2009), 61 R.F.L. (6th) 259 (Ont. C.A.)), and argued that the Court did not have jurisdiction to Order a monetary fine or penalty punishment in the absence of a finding of contempt.

The Court of Appeal acknowledged that the issue was novel and important, but nevertheless quashed the husband's appeal because the Order in question was interlocutory, and as such his appeal lay to the Divisional Court with leave:

> [23] **The central issue raised in this appeal is whether, absent a finding of contempt, a judge has the jurisdiction under the *Family Law Rules* to impose and order payment of a fine as part of the case management process.** In other words, as submitted by the respondent, is the authority conferred by any of Rules 1(8), 14(23) or 19(10) broad enough to allow for the making of such orders? **Whether a fine or penalty can be imposed absent a finding of contempt, and to whom the fine is payable, are novel issues and are important. The novelty and importance of the issues do not, however, make the order into a final one for purposes of appeal.** [emphasis added]

It is unfortunate that the Court of Appeal could not address the issue on the merits, because since 2009, many conflicting decisions have been released about whether a court can or cannot make the type of Order that was made in *Mantella*, which we will refer to as a "*Mantella* Order" for ease of reference. For example, in 2018, in *Shapiro v. Feintuch*, 2018 CarswellOnt 19129 (S.C.J.), despite a number of previous decisions to the contrary, Justice Monahan found that the court did *not* have jurisdiction to make a *Mantella* Order. Then, in 2019 in *Granofsky v. Lambersky* (2019), 26 R.F.L. (8th) 328 (Ont. S.C.J.) — despite a number of decisions to the contrary — Justice Diamond found that he did, in fact, have jurisdiction to make such a *Mantella* Order. The law was hopelessly conflicted.

The two recent decisions that are discussed below — Justice Shore's decision in *DiPoce* where she granted a *Mantella* Order, and Justice Faieta's decision in *Altman* where he found he did not have jurisdiction to do so — show that the conflict in the jurisprudence continues even now, some 13 years after *Mantella* was originally decided. And, as discussed further below, even though the Court of Appeal found in 2009 that this issue was both novel and important, and even though in 2022, Justice Faieta in *Altman* said this issue needs to be resolved by an appellate court — the Divisional Court inexplicably just rejected the wife's motion for leave to appeal in *Altman*. This is very hard to understand.

***DiPoce v. DiPoce* (2022), 77 R.F.L. (8th) 242 (Ont. S.C.J.) — Shore J.**

In May 2021 and November 2021, the husband in *DiPoce* was ordered to produce certain financial disclosure to the wife. When he failed to produce all of the court-ordered disclosure, the wife brought a motion for a *Mantella* Order, and asked that the husband be required to pay her a significant daily financial penalty until he brought himself into compliance.

Justice Shore accepted the wife's argument that the husband had not complied with the disclosure Orders, and that Rule 1(8) did, in fact, give the court authority to make a *Mantella* Order:

> [15] Fines have been awarded in circumstances similar to the present motion. In *Mantella v. Mantella*, the Court of Appeal quashed an appeal of a trial judge's order that the Respondent pay a fine in the amount of $2,500 each day until disclosure

was complete: 2009 ONCA 194. The fine was imposed because of the Respondent's delay in producing documents the court previously ordered to be produced by a certain date.

[16] There have been a number of other cases where fines or monetary payment have been ordered to ensure disclosure: see for example *Granofsky v. Lambersky*, 2019 ONSC 3251 and *Florovski v. Florovski*, 2019 ONSC 5013. In *Granofsky,* at paras. 28, 30-31, Justice Diamond stated that:

> In my view, the Court has jurisdiction under the *Family Law Rules* to order a fine or monetary payment as part of its role to control and enforce its own process . . . [While it] should be reserved to exceptional and/or egregious circumstances, the respondent has been given opportunity after opportunity to comply with his duty to disclose financial information and documentation and I find the case before me to be a fitting example.
>
> . . . . .
>
> [C]osts orders have been made against the respondent, and while he has complied with those costs orders, their impact has not resulted in compliance with his duty to disclose financial information/documentation.
>
> A daily, monetary penalty payable to the applicant will hopefully have a different impact.

[Unfortunately for our purposes, in her reasons, her Honour did not refer to *Shapiro v. Feintuch* or the other cases that have found that a court cannot make a *Mantella* Order.]

Given some of the serious findings that were made against the husband earlier in the proceeding, including that he was engaged in "a scorched earth approach", and the fact that the parties had already been separated since 2017 and in litigation since early 2018, Justice Shore found that this was an appropriate case to impose a monetary penalty to deal with the husband's non-compliance. And, given the husband's very substantial wealth, Justice Shore ordered the husband to pay the wife a penalty of $2,500 a day ($912,500 a year) for each day his disclosure remained outstanding.

***Altman v. Altman* (2022), 76 R.F.L. (8th) 122 (Ont. S.C.J.) — Faieta J.**

The parties in *Altman* were married in 2003 and separated in 2019.

The husband had a significant net worth as a result of various investments in biotech, technology, e-sports, and real estate, and admitted that his Net Family Property was more than $30,000,000.

In January 2021, the husband retained a senior and experienced business valuator to value his business interests and calculate his income for support purposes. However, the reports were never completed because the husband failed to provide his valuator with the necessary information.

As a result of the husband's significant delays, the wife brought a motion that resulted in a number of Orders being made against him, including an Order requiring him to produce his income and valuation reports by October 25, 2021.

The husband failed to comply with the disclosure Orders, and the wife brought a motion to strike his pleadings. Although the Court declined to strike the husband's pleadings, it made a further Order requiring him to produce additional disclosure, and to comply with the prior Orders, including the Order for an income and valuation report by January 17, 2022.

As the husband yet again failed to comply with the prior Orders, the wife brought another motion to strike his pleadings, and to allow her to proceed with an uncontested trial. She also requested an Order requiring the husband to pay her $3,500 a day ($1,277,500 a year) for each day that he failed to cure his breaches of the prior Orders (retroactive to January 17, 2022).

Justice Faieta was less than impressed (an understatement) by the husband's litigation conduct, but decided to give the husband one last chance to comply with his disclosure obligations before his pleadings were struck. He ordered that if the husband did

not bring himself into compliance within 90 days, his pleadings would be struck, and the wife would be able to proceed with an uncontested hearing.

Justice Faieta also dismissed the wife's motion for a *Mantella* Order, as he did not think he had jurisdiction to make such an Order. In reaching this conclusion, his Honour largely relied on *obiter* from the Ontario Court of Appeal's recent decision in *Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.). In that case, the majority questioned — but did not answer — whether the remedies set out in the contempt provisions of the *Family Law Rules*, including penalties and fines, could be imposed in the absence of a successful contempt motion. As Justice Paciocco explained for the majority of the Court of Appeal:

> [52] I use the term *prima facie* authorized because I do not mean to suggest that there are no limits to the kinds of enforcement orders that can be made under r. 1(8). For example, **it may well be that the remedies that are provided for in r. 31(5), which is reproduced below, cannot be imposed pursuant to r. 1(8), absent a successful contempt motion as contemplated by r. 1(8)(g)**: see *Mantella v. Mantella*, 2009 ONCA 194. **This proposition seems sensible since contempt orders require proof beyond a reasonable doubt, and although they are remedial in purpose, they are punitive in nature, and are therefore to be used as a last resort**: *Hefkey v. Hefkey*, 2013 ONCA 44, at para. 3; *Prescott-Russell Services for Children and Adults v. G. (N.)*, [2006] 82 O.R. (3d) 686 (Ont. C.A.), at para. 26. **I need not resolve this specific question since the ground of appeal before us concerns only the temporary parenting order and the Building Bridges order, neither of which are remedies contemplated by r. 31(5)**; the father did not appeal the Hughes Order where the motion judge did impose punitive fines without making a finding of contempt against the father, nor did he raise any objections in this appeal to the motion judge's order that those fines would "remain in full force and effect". Nevertheless, this illustration demonstrates that there may be other legal limits on the kinds of orders that courts may impose under r. 1(8). [emphasis added]

[For further discussion of the Court of Appeal's decision in *Bouchard v. Sgovio*, see the 2022-06 (February 14, 2022) edition of *TWFL*.]

Curiously, while questioning whether a *Mantella* Order is permitted under Rule 1(8), at the same time, Justice Paciocco states that Rule 1(8) is not limited to procedural remedies and can be used to make substantive orders, because the rule is inclusive and not exclusive:

> [49] "As long as the judge is satisfied that there has been a failure to obey an order 'in a case or a related case' subrule 1(8) is triggered" and the relief provided for therein can be ordered: *Hughes v. Hughes*, (2007), 85 O.R. (3d) 505, at para. 17 (Ont. S.C.J.). Although r. 1(8) provides an itemized list of forms of relief that are available, **that list is inclusive, not exclusive**: *Mullin v. Sherlock*, 2018 ONCA 1063, at para. 46; *Children's Aid Society of Haldimand and Norfolk v. J.H. and M.H.*, 2020 ONSC 2208, at para. 126. **The reach of the remedial orders that can be made is governed not by the itemized list in that rule, but by the general and broad language of the chapeau that precedes it, which provides that "the court may deal with the failure by making any order that it considers necessary for a just determination of the matter.**" [emphasis added]

Why the same logic would not apply to a *Mantella* Order is hard to understand, especially when Rule 1(8) specifically contemplates an order for costs, which is in the nature of a fine. Very confusing . . .

Based on the Court of Appeal's reasoning, Justice Faieta concluded that he did not have jurisdiction to make a *Mantella* Order:

> [43] . . . While there is a pressing and growing need for the efficient, effective and timely management of family law cases, **the need for fairness requires placing limits on the broad authority provided by Rule 1(8) to impose a remedy for non-compliance with a court order.**
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> [44] **There is express authority to order a person to pay fine or penalty under Rule 31(5) of the *Family Law Rules* if that person is found in contempt of the court for failing to comply with an Order. A finding of civil contempt requires proof of the following elements beyond a reasonable doubt**: (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order

> must have actual knowledge of it; and (3) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Chong v. Donnelly*, 2019 ONCA 799, para. 5 (C.A.). As noted in *Carey v. Laiken*, 2015 SCC 17, para .32, "[t]hese three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases". **These heightened requirements and the procedural safeguards provided by Rule 31 are avoided if Rule 1(8), which has no such requirements or procedural safeguards, is used to impose a penalty upon a party for non-compliance with an order.**
>
> [45] Accordingly, I dismiss the [wife's] request to impose a penalty of $3,500.00 per day on the [husband]. [emphasis added]

There is certainly something to Justice Faieta's reasoning based on the rules of statutory interpretation. Rule 31(5) of the *Family Law Rules* expressly refers to monetary penalties and fines as potential penalties for contempt of court, which requires the moving party to prove all three elements of contempt beyond a reasonable doubt: (a) "the order alleged to have been breached states clearly and unequivocally what should and should not have been done; (b) the party alleged to have breached the order had actual knowledge of it; and (c) the party allegedly in breach intentionally did the act the order prohibits or intentionally failed to do the act the order compels": *2363523 Ontario Inc. v. Nowack*, 2016 CarswellOnt 19735 (C.A.) at para. 20.

In contrast, Rule 1(8) only requires proof on a balance of probabilities that the responding party has not obeyed an Order. Had the drafters of the *Family Law Rules* wanted to allow courts to impose monetary penalties and fines under Rule 1(8), they could have easily said so expressly within the rule itself. But then again, as noted above — differentiating between a penalty of "costs" and a "fine or other penalty" is a bit like dancing on the head of a pin. Both are payments to the other party in the nature of a penalty. (See, for example, Justice Sah's decision in *M.P.M v. A.L.M*, 2022 CarswellOnt 18853 (S.C.J.), in which her Honour ordered the Respondent to pay $10,000 in *costs* to the Applicant under Rule 1(8)(a) to "penalize the Respondent" for breaching a parenting time Order and to "act as an incentive for future compliance" — which seems a lot like a monetary penalty or fine.)

Furthermore, Rule 1(8) is also clear that the court can deal with a failure to comply with an order "by making any order that it considers necessary for a just determination of the matter", which based on a plain reading is certainly broad enough to encompass monetary penalties and fines. And further, from a practical standpoint, the ability to Order a monetary penalty or fine to get a family law litigant to comply with his or her disclosure obligations — rather than having to engage the full contempt machinery of the court — can be an incredibly useful tool in appropriate circumstances.

In any event, until late last year, we had thought that we would finally get appellate guidance about whether a court can, in fact, make a *Mantella* Order, as the wife in *Altman* applied for leave to appeal Justice Faieta's decision on this issue to the Divisional Court. Given the Court of Appeal's 2009 finding that the issue was both novel and important in *Mantella*, and given Justice Faieta's suggestion that the issue needed to be addressed by a higher court, and given the numerous conflicting decisions on the issue, we thought a successful leave application would have been a "slam dunk." However, we were surprised and disappointed to find out on December 16, 2022, that, unfortunately, the Divisional Court dismissed the wife's motion for leave to appeal. And, because the Divisional Court does not give reasons when dismissing applications for leave to appeal, we have no idea why it did not agree to hear the matter. Importantly, a dismissed application for leave to appeal does not amount to an endorsement of the decision below; the dismissal of leave does not amount to a dismissal of the substantive issue on the merits: *Mills v. Thompson* (2022), 76 R.F.L. (8th) 243 (Ont. Div. Ct.) at para. 23.

Where Do We Go From Here?

Since we have hopelessly conflicting lines of cases about this important but vexing issue, but the Divisional Court has declined to address the issue (for reasons that escape us), it appears that the only way to clarify the situation will be for the Family Law Rules Committee to clarify Rule 1(8).

If the Rules Committee agrees to take up the issue, we hope they will allow courts to make *Mantella* Orders. Contempt motions are far more complicated, expensive, risky, and time consuming, and it should not be necessary to try to invoke a quasi-criminal

process that potentially can lead to incarceration before lesser methods have been tried. As Justice Jamal (as he then was) explained in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.):

> [10] . . . Courts discourage the routine use of this power to obtain compliance with court orders. The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort. A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance: *Carey [v. Laiken,* 2015 SCC 17] at paras. 36-37; *Chong v. Donnelly*, 2019 ONCA 799, 33 R.F.L. (8th) 19, at paras. 9-12; *Valoris pour enfants et adultes de Prescott-Russell c. K.R.*, 2021 ONCA 366, at para. 41; and *Ruffolo v. David*, 2019 ONCA 385, 25 R.F.L. (8th) 144, at paras. 18-19.

In appropriate cases, requesting a monetary fine or penalty to try to compel compliance is a reasonable and proportionate way of dealing with non-disclosure before seeking more drastic interventions like contempt or striking pleadings. That being said, we would urge the Rules Committee to set out the principles that courts should consider when deciding whether to make a *Mantella* Order including, most importantly in our view: (a) ensuring that the amount ordered is proportionate given the issues in dispute and the means of the parties; and (b) preventing litigants from trying to use *Mantella* Orders to weaponize the disclosure process. As the Court of Appeal put it in *Kovachis v. Kovachis* (2013), 36 R.F.L. (7th) 1 (Ont. C.A.):

> [34] . . . Although full and frank disclosure is a necessary component of family law litigation, exhaustive disclosure may not always be appropriate. Courts and parties should consider the burden that disclosure requests bring on the disclosing party, the relevance of the requested disclosure to the issues at hand, and the costs and time to obtain the disclosure compared to its importance: see *Chernyakhovsky v. Chernyakhovsky* (2005), 137 A.C.W.S. (3d) 988 (Ont. S.C.J.) [2005 CarswellOnt 942 (Ont. S.C.J.)] at paras. 8, 15; *Boyd v. Fields* (2006), [2007] W.D.F.L. 2449 (Ont. S.C.J.) [2006 CarswellOnt 8675 (Ont. S.C.J.)] at paras. 12-14. Disclosure orders must be fair to both parties and appropriate to the case.

Someone please help.

Sanity Prevails at the Interim Stage Too

A.V. v. C.V., 2023 CarswellOnt 3387 (Div. Ct.) — MacLeod, R.S.J., Corbett, and O'Brien J.J.

Spencer v. Spencer, 2023 CarswellOnt 3448 (Div. Ct.) — MacLeod, R.S.J., D.L. Corbett, and O'Brien J.J.

Readers will recall *J.N. v. C.G.*, 2023 CarswellOnt 1538 (C.A.), the recent case in which the Ontario Court of Appeal allowed an appeal from a final order refusing one parent decision-making authority over children's COVID-19 vaccinations. *J.N. v. C.G.* was the subject of our comment in the 2023-08 (February 27, 2023) edition of *TWFL*.

These combined appeals confirm that the rationale in *J.N.* applies with equal force on an interim motion where one parent asks for decision-making authority to have a child vaccinated against COVID-19.

An interim motion judge is permitted to rely on government published recommendations and other information regarding the COVID-19 vaccine (and presumably any vaccine) in the assessment of the best interests of a child. And, again, in the face of such regulatory approval, the onus will be on a parent opposing vaccination to establish that a child should not be vaccinated.

In the *A.V. v. C.V.* appeal, the mother (opposing vaccination) argued that *J.W.T. v. S.E.T.*, 2023 CarswellOnt 1495 (S.C.J.) (which was the subject of our further comment in the 2023-09 (March 6, 2023) edition of *TWFL*), which post-dated the Court of Appeal's decision in *J.N.*, could be distinguished from *J.N.* the same way the lower court in *J.W.T.* purported to distinguish *J.N.*.

The Divisional Court was quick to dispose of the suggestion that *J.N.* could be distinguished — or certainly not in the way suggested by the court in *J.W.T.*.

Can this be the final word on vaccination cases? Please?

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