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— Franks & Zalev - This Week in Family Law

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Contents

- Est-Ce Possible???
- The Cost of *Not* Having a Trial

Est-Ce Possible???

R.D.L. v. R.C.S., 2022 CarswellSask 480 (K.B.) — Scherman J.

In *R.D.L.*, the Court was faced with what, at first glance, seemed to be just another fight about where a child should go to school. But it is far more interesting than that — because the Court appears to have decided the case by taking judicial notice of the "fact" that French immersion programs are generally beneficial for Canadian children, and then using that general proposition as a basis to overcome other considerations that were relevant to the best interests of the *particular child in this case*.

The parties never married. They lived together from 2016 to 2019 and had a young daughter together. After they separated, the child lived primarily with the mother, and spent every other weekend from Thursday night to Monday morning with the father.

When the mother started a court proceeding in May 2021, for various financial relief, the father responded by requesting a shared parenting arrangement, and bringing an interim Application for a week-on/week-off parenting schedule. He also asked to have the child, who would be starting kindergarten in September, enrolled in a school with a French immersion program instead of the English-only public school where the mother had already enrolled her.

The interim hearing took place in July 2021. The Chambers judge granted the father's request for interim shared decision-making authority, but dismissed his request to vary the schedule that had been in place for the last two years. The Chambers judge also ordered the parties to attend a pre-trial to try to resolve the school issue.

The father appealed, but his appeal was dismissed in May 2022 (2022 CarswellSask 218 (C.A.)). The Court of Appeal also directed the parties to proceed to a pre-trial on an expedited basis to try to resolve all of the parenting issues.

The pre-trial did not result in a settlement, and the father brought an interim Application to change the child's school so she could attend a French immersion program for grade 1. The mother opposed the father's Application.

While the mother was not against the child learning French, she did not think it would be in her best interests to attend a French immersion program for a number of reasons, including that she was already doing well at her current school, and the mother would not be able to help with her homework as she did not speak French. The child's older brother (the mother's child from a previous relationship) also attended the English public school, and the mother argued that it would be better for them to go to school together.

The father disagreed, and argued that the child was adaptable and would have no difficulty changing schools for grade 1. He also claimed that the parents of most of the students in the French immersion program did not speak French, and the school accommodated them by communicating about homework primarily in English.

As the schools were of similar quality and distance to the parties' homes (they were also only five blocks away from each other), the Application judge concluded that the central issue he needed to determine was "whether or not it is of benefit in Canada for a child to gain the ability to communicate in both French and English."

As there was no expert evidence before the court about French immersion (whether generally or for the particular child in this case), the Application judge decided that "the application must necessarily focus on whether I can take judicial notice of the potential benefits of a French immersion education to a child and, if so, whether such potential benefits outweigh the concerns [the mother] has." To answer this question, his Honour started by reviewing the Ontario Court of Appeal's summary of some of the principles of judicial notice in *R. v. G.M.C.*, 2022 CarswellOnt 63 (C.A.):

[34] The principles of judicial notice were recently explained by Brown J.A. in *R. v. J.M.*, 2021 ONCA 150, 154 O.R. (3d) 401, at paras. 31-38. For the purposes of this appeal, only the following principles need be stated. First, **courts may only take judicial notice of facts that are (1) "so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons", or (2) "capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy": *J.M.*, at para. 31.** [emphasis added]

After considering these principles, the Application judge decided that he could — and should — take judicial notice that French immersion is generally beneficial for children:

[16] **While counsel for [the mother] argued that I should not take judicial notice of the potential benefits of a French Immersion education, I am satisfied that I can and should. I am satisfied that it is generally accepted and not the subject of dispute among reasonable people that being multilingual has many benefits.** This general acceptance exists internationally but is especially pronounced in countries that are bilingual like Canada. Beyond this general acceptance, **the benefits are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy. The published papers of neuroscientists, psychologists, economists and other scientists and academics consistently support the cognitive, intellectual, social and economic benefits of being bilingual or multilingual.**

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[19] While [the mother] expresses a variety of concerns, these concerns are but concerns and there is no good reason to conclude these concerns will become actual problems. [The child] is, on the evidence before me, an intelligent, social and adaptable young lady. **The concerns do not outweigh what in my opinion are the clear benefits to [the child] of French Immersion schooling.** The best time to start French Immersion schooling is clearly Grade 1. I am satisfied that the benefits that [the child] will obtain from French Immersion schooling outweigh any potential harms. If it turns out that for some reason [the child] does not benefit from French Immersion education, it is, as Schwann J. said, easier to transfer back to the English program than the reverse. [emphasis added]

As a result, the parties were ordered to enrol the child in the father's chosen French immersion program.

While we offer no opinion about whether this was the "right" outcome for the child in this case, we have some significant concerns about how the Court arrived at its conclusion.

First, by framing the issue as "whether or not it is of benefit in Canada for a child to gain the ability to communicate in both French and English", the Court appears to have lost sight of the fact that its real task was to determine whether it would be in the best interests of *the particular child in this case* (as opposed to Canadian children in general) to switch to the specific French immersion program the father was proposing.

Second, there were other important factors in this case that warranted serious consideration. In *Thomas v. Osika* (2018), 13 R.F.L. (8th) 191 (Ont. S.C.J.), Justice Audet provided an excellent summary of the principles that courts should consider when deciding where a child should attend school — and the following ones are directly relevant on the facts of *R.D.L.*:

[37] . . .

c. When considering school placement, one factor to be considered is the ability of the parent to assist the child with homework and the degree to which the parent can participate in the child's educational program (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. C.J.));

d. The emphasis must be placed on the interests of the child, and not on the interests or rights of the parents (*Gordon v. Goertz*, [1996] S.C.J. No. 52 (S.C.C.);

e. The importance of a school placement or educational program will promote and maintain a child's cultural and linguistic heritage (*Perron v. Perron*, 2012 ONCA 811 (Ont. C.A.);

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k. If an aspect of a child's life, such as school placement, is to be disrupted by an order of the court, there must be good reason for the court to do so. Thus, before a court will order a child to transfer schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron v. Perron*, 2012 ONCA 811 (Ont. C.A.);

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m. Those cases are very fact-driven. **The courts are not pronouncing on what is best for all children in a general sense but rather deciding what is in the best interests of this child before the court** (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. C.J.)). [emphasis added]

To this we would add that, as the Supreme Court of Canada recently noted in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.) at para. 123, "[t]he parent who cares for the child on a daily basis is in a unique position to assess what is in their best interests[.]"

Although the mother did not have sole decision-making authority, the child was in her care for the vast majority of the time. Accordingly, she was in a unique position to assess what was in the child's best interests, and her views ought to have been entitled to significant weight. So should the facts that:

- The mother did not speak French and would not be able to help the child with her school work (or, at the very least, it would be far more difficult).
- The mother was responsible for the majority of school pick-ups and drop-offs, and her other child attended the English school. Although it might not be impossible for her to get both kids to and from school given they were only five blocks away from each other, it would definitely be far more difficult to do two pick-ups and drop-offs at different locations instead of just one.
- As the father was the one asking to change the child's school, it was *his onus* to produce "convincing evidence that a change of schools is in the child's best interests[.]" And given that the Court ended up having to decide the case based on judicial notice, clearly he did not meet that onus.

While none of these factors are necessarily determinative, they certainly warranted very serious consideration.

On the other hand, while the Application judge didn't discuss the child's cultural or linguistic heritage in his reasons, the Court of Appeal's earlier decision indicates that one of the reasons the father wanted the child to attend French immersion was "to foster her connection to her French Métis heritage." It is unclear whether this argument was raised before the Application judge

because it is not mentioned in his reasons. But if it was raised, it certainly warranted at least a mention, and may even have been a reasonable basis to find that it would be in the child's best interests to attend the French immersion program without having to resort to judicial notice.

Finally, although the Court considered some of the principles of judicial notice that Justice Brown set out in *R. v. J.M.*, 2021 CarswellOnt 3180 (C.A.), it does not appear to have considered several of the other principles that were discussed in that case, including:

- "Since judicial notice dispenses with the need for proof of facts, the threshold for judicial notice is strict[.]" [paragraph 31(iv)]
- "The closer the facts lie to the dispositive end of the spectrum, the more pressing it is to meet the two criteria of notoriety or immediate demonstrability[.]" [paragraph 33]
- "Finally, matters of which judicial notice may be taken and those that require expert evidence are not compatible. Matters that are the proper subject of expert evidence are, by definition, neither notorious nor capable of immediate and accurate demonstration[.]" [paragraph 35]

To be clear, we do not take issue with the proposition that being bilingual can be beneficial. But we also don't think that this should be the primary basis for a court to decide that a *particular* child should attend a *particular* French immersion program. We also question whether it was really necessary or appropriate for the Court to resort to judicial notice to decide this particular case.

Reductio ad absurdum (extra points for Latin), if it is a matter of judicial notice that it is of benefit in Canada for *all children* to gain the ability to communicate in both French and English, there is no point in litigating this issue ever again. Ce n'est pas possible!

The Cost of *Not* Having a Trial

Ierullo v. Ierullo, 2023 CarswellOnt 14 (S.C.J.) — Jarvis J.

The husband and wife were involved in complicated financial litigation in the Ontario Superior Court of Justice over how to divide the significant assets they accumulated during their 27-year marriage.

After COVID-19 related adjournments, the trial was ultimately scheduled to be heard during the November 2022 trial sittings.

Shortly before the November 2022 trial sittings were scheduled to start, the husband initiated a civil Action against the wife and their jointly owned company (the "Company"). He alleged that the wife had engaged in a fraudulent transaction involving a property owned by the Company.

To further complicate matters, the weekend before the trial was supposed to have started, the husband's lawyer realized there might be a potential problem with a limitation period. He reported to his insurer, and notified the wife's lawyer that his client would be seeking an adjournment when the matter was called to trial later that week.

Although the Court granted the husband's request for an adjournment, it did so on strict terms, including that the new trial date in May 2023 would be peremptory to the husband, and that the civil Action involving the Company would be tried together with the matrimonial case. The Court also held that the wife and the Company would be able to claim their costs "thrown away" as a result of the last minute adjournment request. It is this last part of the decision — the claim for costs thrown away — that is of interest to us.

In her cost submissions, the wife requested \$85,000 (rounded and inclusive of disbursements and HST) for her costs "thrown away." This was a significant amount of money, and was essentially comprised of all of the time her lawyers had spent on trial preparations in the weeks leading up to the November 2022 trial. The Company also requested \$27,000 (rounded and inclusive of disbursements) for its costs "thrown away".

Notably, the husband did not file his own Bill of Costs so as to allow the Court to compare the costs "thrown away" by the husband to the costs "thrown away" claimed by the wife.

Justice Jarvis started his analysis by reviewing Justice Quinlan's incredibly helpful summary of the principles that apply when dealing with requests for costs thrown away from *Caldwell v. Caldwell* (2015), 70 R.F.L. (7th) 397 (Ont. S.C.J.), including that:

- "The phrase 'costs thrown away' refers to a party's costs for trial preparation which have been wasted and will have to be re-done as a result of the adjournment of the trial[.]" [paragraph 8]
- There are generally three categories of cases involving claims for "costs thrown away":
 - [9] . . . (i) the first category deals with fault where, for example, one of the parties or their counsel neglect to call a witness or a last-minute amendment is required. The court will grant the adjournment on conditions, including the payment of costs thrown away;
 - (ii) the second category is where the trial is adjourned because of the court's scheduling problems. No costs are awarded in this circumstance as no party bears responsibility for the adjournment; and
 - (iii) the third category deals with adjournments sought by one of the parties as a result of no fault on their part. Costs thrown away are still awarded against the party applying for the adjournment, notwithstanding lack of fault[.] [citations omitted]
- "Costs thrown away are generally payable on a full recovery basis", as "the purpose of such an award of costs is to 'indemnify a party for the wasted time for trial preparation arising from the adjournment'." [paragraph 11]
- The purpose of a costs thrown away award "is not to punish the party seeking the adjournment, but to indemnify the other party for the wasted time for trial preparation arising from the adjournment[.]" [paragraph 11]
- Determining the amount of costs that have actually been wasted is "not an easy task", and "has been described as an 'intuitive', rather than a scientific, process[.]" [paragraph 12]
- "An award of costs thrown away can be revisited at the end of the trial to determine if further costs should be awarded[.]" [paragraph 13]

Ultimately, Justice Jarvis found that this case fell into the third category (that the need for an adjournment was not the husband's fault), and that it would be appropriate for him to indemnify the wife and the Company for any costs that had truly been wasted.

Nevertheless, his Honour chose to **significantly** reduce the wife's claim for \$85,000 in costs thrown away to \$25,000 (inclusive), and to reduce the Company's claim from \$27,000 to \$10,000 (also inclusive). He did this because although some of the time the wife and the Company's lawyers had spent preparing for trial was undoubtedly wasted as a result of the husband's request for an adjournment at the 11th hour:

1. He was not persuaded that **all** of the work that was done in the weeks leading up to trial would need to be redone, particularly given that the parties' evidence in chief would be going in by Affidavits that had already been completed and filed with the court.
2. He was of the view that it was inconceivable "that counsel for the wife and for [the Company] would not have made notes scripting, whether in a general or more specific way, their supplementary, oral question-in-chief or prepared for cross-examination for the husband and his experts." While these notes would need to be reviewed and updated, they would not need to be entirely redone.

3. He was not satisfied that the brief Bills of Costs that were filed by the wife and the Company provided him with enough information to properly assess which of the significant costs claimed by the wife and Company would actually need to be redone.

That being said, Justice Jarvis also made it clear that "the award can be revisited at the end of trial to determine whether further costs should be awarded." But for this ability to revisit the matter at the end of trial, we would have some difficulty with this result, at least as it relates to the wife. The \$85,000 claimed by the wife in costs "thrown away" was obviously a *very* significant amount, and we agree that it may not be necessary for *all* of the work that was done in the week leading up to trial to be redone. But \$25,000 in costs for "costs thrown away" does seem a little light for a complicated case involving senior and experienced counsel and significant financial issues.

Furthermore, even if the wife's lawyer made significant notes and scripts to help her during the trial, the fact of the matter is that most lawyers, ourselves included, need to fully immerse themselves in the case in the days leading up to trial in order to prepare properly. The fact that the wife's lawyer did just that in the week leading up to the trial that was supposed to have started in November 2022 does not mean that she will not need to repeat most of that exercise again for May 2023 — six months away.

While the ability to review the matter after trial does address our concern, given the husband did not file critical information about his own costs, we suggest this amount (about 30% of her claimed costs thrown away) may have been low at first instance. One cannot complain about costs claimed by an opponent without revealing their own costs: *Scipione v. Del Sordo* (2015), 68 R.F.L. (7th) 66 (Ont. S.C.J.); *Smith Estate v. Rotstein*, 2011 CarswellOnt 5677 (C.A.). And, again, the wife was out of pocket for significant legal fees born even though she bore absolutely no responsibility for the situation.