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— Franks & Zalev - This Week in Family Law

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Contents

Breaking News from the Land of Living Skies (that would be Saskatchewan)

Anderson v. Anderson, 2023 CarswellSask 224 (S.C.C.)

On May 12, 2023, the Supreme Court of Canada released its decision in *Anderson v. Anderson*, in which the Court considered how courts should approach and weigh a domestic contract or "interspousal agreement" that purports to opt out of a provincial property scheme, but fails to meet the statutory requirements that would entitle it to presumptive enforceability. Of greater interest, however, the Supreme Court also considered whether the framework it developed in *Miglin v. Miglin*, 2003 CarswellOnt 1374 (S.C.C.), which dealt with spousal support under the *Divorce Act*, is applicable to such a domestic contract (spoiler alert — it is *not* — but regular readers would have known that . . .).

The Supreme Court commented — once again — that domestic contracts should generally be encouraged and supported by courts, absent a compelling reason to discount the agreement. This should not come as a surprise to many, considering the Court has a long history of supporting the freedom of parties to settle their domestic affairs privately and domestic contracts — all the way back to the *Pelech v. Pelech*, 1987 CarswellBC 147 (S.C.C.), *Richardson v. Richardson* (1987), 7 R.F.L. (3d) 304 (S.C.C.) and *Caron v. Caron* (1987), 7 R.F.L. (3d) 274 (S.C.C.) "Trilogy", through *Hartshorne v. Hartshorne* (2004), 47 R.F.L. (5th) 5 (S.C.C.), past *Miglin* and now up to *Anderson*.

We discussed the Saskatchewan Court of Appeal's decision, and the Supreme Court of Canada's decision to grant leave to appeal, in the 2022-14 (April 18, 2022) edition of *This Week in Family Law*.

As a reminder of the facts of *Anderson*, at the end of a three-year marriage, the parties entered into a "kitchen table" separation agreement which essentially provided that each party would keep the property held in his or her name, with the exception of the family home and the household goods. The parties signed the agreement at the end of a meeting with two friends, who witnessed its execution. The parties did not exchange financial disclosure and neither party obtained independent legal advice.

The husband later sought an order for division of family property, arguing that the agreement was signed without legal advice and under duress, and should be disregarded by the court.

There was no dispute that the parties' agreement did not comply with s. 38 of Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3 (the "*FPA*") (similar to s. 55(1) of Ontario's *Family Law Act*), which sets out the formal requirements for a binding interspousal agreement under the *Act*, and was, therefore not presumptively enforceable; however, under s. 40, a court can give "whatever weight" to "any agreement, verbal or otherwise, between spouses that is not an interspousal contract."

The trial judge found that the parties' agreement was not binding on the parties and declined to give it any weight. He equalized the parties' family property under the *FPA* and ordered the wife to pay the husband an equalization payment of about $90,000. The wife appealed.

The Court of Appeal reversed the trial judge's decision, and applied the framework developed by the Supreme Court in *Miglin* (to the property agreement) to conclude that the agreement should be afforded great weight. The Court of Appeal divided the family property in accordance with the agreement and ordered the husband to pay the wife about $5,000.

The husband sought leave to appeal to the Supreme Court, and leave was granted in April 2022.

Justice Karakatsanis, writing for a unanimous Supreme Court, agreed with the Court of Appeal that the trial judge erred, but specifically and clearly declined to transpose the *Miglin* framework, which arose within a different statutory context, onto provincial family property legislation. As Justice Karakatsanis explained, "[w]hile useful general principles emerge from *Miglin* to guide courts in approaching domestic contracts, *Miglin* **is not, and was never intended to be, a framework of general applicability for courts in dealing with all types of domestic contracts**" [**emphasis** added]. We can all breathe a deep sigh of relief.

One of the useful principles that emerged from *Miglin* and from the Supreme Court's subsequent jurisprudence is that "domestic contracts should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement." As Justice Karakatsanis further explained,

> [33] . . . This deference flows from the recognition that self-sufficiency, autonomy and finality are important objectives in the family context. . . . Not only are parties better placed than courts to understand what is fair within the context of their relationship, but the private resolution of family affairs outside the adversarial process avoids the cost and tumult of protracted litigation. . . .

While courts must be alive to the vulnerabilities that can arise in the family law context, concerns about these vulnerabilities may be countered by the presence of procedural safeguards, such as the exchange of disclosure and the presence of independent legal advice — which itself is not a requirement to a binding domestic contract in most of the country.

Justice Karakatsanis helpfully set out a framework for how a court should approach an agreement that is not an interspousal contract, under s. 40 of the *FPA*:

> [8] **In determining whether to consider an agreement that does not qualify as an interspousal contract under the *FPA*, the court must first assess the agreement for its procedural integrity, where such concerns are raised.** By examining the integrity of the bargaining process for undue pressure, or exploitation of a power imbalance or other vulnerability, the judge can determine whether the parties executed the agreement freely and understanding its meaning and consequences. While safeguards like financial disclosure and independent legal advice provide critical protection in the family law context, they are not required by the legislation and their absence, without more, does not necessarily impugn the fairness of an agreement. Given the respect for spousal autonomy reflected in both the legislation and the jurisprudence, **unless the court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration under s. 21 of the *FPA***.
>
> [9] **Once the court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division.** The weight to ascribe to the substance of the agreement will ultimately be determined by what is fair and equitable according to the scheme set out by the *FPA*. [**emphasis** added]

(While Justice Karakatsanis was considering the application of s. 40 of Saskatchewan's *FPA*, in particular, her analysis should assist those of us outside of Saskatchewan when we are dealing with an agreement that does not satisfy the enforceability requirements of the local neighbourhood family property statute.)

Justice Karakatsanis agreed with the Court of Appeal's conclusion that the parties' agreement was binding and there were no substantiated concerns with its fairness. The agreement was "short and uncomplicated" and reflected the intention of the parties to effect a clean break from their partnership. The lack of independent legal advice and formal disclosure was not troubling here because the husband could not point to any resulting prejudice — there was no suggestion that the absence of these safeguards undermined either the integrity of the bargaining process or the fairness of the agreement. The agreement was therefore entitled to serious consideration.

Given the circumstances, including the short duration of the marriage and the assets each party brought into the marriage, the agreement was fair and equitable, taking into account the criteria and objectives of the *FPA*. Justice Karakatsanis allowed the appeal, set aside the Court of Appeal's decision with respect to the division of family property, and divided the family home and household goods as of the date of trial, which resulted in an order that the wife pay the husband about $43,000.

Yiddish Word of the Day: "Rachmones" (mercy, compassion, pity)

Teixeira v. Teixeira (2022), 81 R.F.L. (8th) 483 (Ont. S.C.J.) — Shore J.

Repeat after us . . .

Court orders are not suggestions: *Gordon v. Starr* (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.); *Booth v. Hildebrandt*, 2007 CarswellOnt 8482 (S.C.J.); *Cummings v. Cummings*, 2020 CarswellOnt 6926 (S.C.J.); *A.C.V.P. v. A.M.T.*, 2019 CarswellOnt 3495 (S.C.J.).

Court orders are not a form of judicial exercise: *Thomson v. Fleming*, 2020 CarswellOnt 7581 (S.C.J.); *Jassa v. Davidson* (2014), 54 R.F.L. (7th) 184 (Ont. C.J.).

A Court order is not an invitation to dance or an offer to negotiate or request a debate: *Haghighynia v. Darvish* (2013), 36 R.F.L. (7th) 98 (Ont. S.C.J.); *Holly v. Greco*, 2018 CarswellOnt 20489 (S.C.J.), aff'd, (2019), 28 R.F.L. (8th) 49 (Ont. C.A.).

A party who does not follow Court orders must be assessed a game misconduct and ejected from the proceedings: *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.), aff'd, (2016), 84 R.F.L. (7th) 374 (Ont. C.A.).

A party in breach of a Court order should not be heard by the court: *Dickie v. Dickie* (2007), 39 R.F.L. (6th) 30 (S.C.C.) (and its progeny). And so it generally should be. But not always . . .

This was the mother's motion to stay the father's motion to change child support until the father had complied with an outstanding order for costs and child support. The mother brought her motion under Rule 1(8) of the Ontario *Family Law Rules*, O. Reg. 114/99, which offers the court direction as to how to deal with a litigant who is not in compliance with a Court order. Here, the father was in breach of his ongoing child support obligation as set out in the Order of Justice Faieta, dated January 12, 2021 (the "Faieta Order"). The mother was also claiming security for costs.

This motion brought into conflict two fundamental principles: the importance to the administration of justice that parties obey orders of the Court; and the primary objective of the *Family Law Rules* — the obligation on the Courts to deal with cases justly: Rules 2(2)-(4).

Which principle governs here? Stay tuned . . .

The parties were married for six years of their 10-year cohabitation. There were two children of the marriage. The parties separated in April 2010.

After a 9-day trial in the spring of 2014, the children were placed in the father's primary care and the mother's parenting time was to be supervised.

On November 28, 2014, the mother was ordered to pay the father child support of $200 a month.

The father incurred debt of $167,000 in the litigation, financed by a line of credit on his parents' home.

The mother was ordered to pay costs of $85,000. Those costs were never paid and did not survive the *mother's filing for bankruptcy protection* in 2016.

After the mother had dealt with her demons, in June 2015, the parties agreed to equal parenting time, although the father retained sole custody.

In December 2018, the mother brought a motion to change both the parenting order and the child support order. She also sought an order eliminating her arrears of child support under the prior order. The mother also claimed primary care and sole custody of the children and child support. That motion to change was ultimately heard on an uncontested basis in January 2021, as the father did not participate in the case. It was this uncontested hearing that resulted in the Faieta Order requiring the father to pay monthly setoff child support of $764 a month plus $400 a month toward his arrears, and $12,500 in costs.

In September 2021, the Family Responsibility Office started to enforce and started garnishing the father's wages.

In February 2022, the father brought a motion to set aside the Faieta Order on the ground of material non-disclosure/fraud by the mother, or in the alternative, a motion to change the Faieta Order. It was this motion the mother was asking to stay pending compliance with the child support and costs order.

In Ontario, the jurisdiction to stay a court proceeding is found in both the *Courts of Justice Act*, R.S.O., 1990, c. C.24, s. 106(1) and *Rule* 1(8) of the *Family Law Rules*. Rule 1(18) provides:

> (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,
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> (a) an order for costs;
>
> (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.

Generally, in considering relief under Rule 1(8), courts follow the three-step process set out in *Ferguson v. Charlton*, 2008 CarswellOnt 667 (C.J.):

> 1. Has there been a triggering event (i.e. non-compliance with a court order)?
>
> 2. If there has been a triggering event, is it appropriate to exercise the court's discretion to not sanction the party's non-compliance?
>
> 3. If the court determined it should not exercise its discretion in favour of the non-complying party, what is the appropriate remedy to impose?

It was not hard for Justice Shore to find there had been a triggering event. The father was in breach of the support and costs owing under the Faieta Order. End of story.

The father tried to suggest that as over $17,000 had been garnished, he had paid the costs order. However, this argument ignored the primacy of child support; child support takes precedence over other payments. Garnished funds were first to be attributed to child support. But in any case, the father was still in breach of the Faieta Order.

The next question was whether the Court was inclined to exercise its discretion under Rule 1(8) to sanction the non-compliance.

In *Pearce v. Kisoon*, 2019 CarswellOnt 11744 (S.C.J.), the Court clarified that the onus is on the party not in compliance with a previous order to show why it would be appropriate for the Court to exercise its discretion in his/her favour and to not sanction the non-compliance or, in this case, to not stay the father's motion.

As Justice Shore noted, these decisions are not made in a vacuum, and the Court must consider what would be fair and appropriate in the circumstances.

Ultimately, Justice Shore determined that the facts of this case were exceptional such that it would not be fair to stay the father's motion. Her reasoning certainly makes sense:

- The father incurred $167,000 in debt for the 2014 proceedings and trial.
- The costs in his favour in the sum of $85,000 were never paid because the mother filed for bankruptcy.
- The father was still servicing the debt incurred for the 2014 proceedings and had been unable to pay down the principal to any significant extent. The rising interest rates had increased his monthly payments, and he was falling behind. He could not service the debt and pay the child support — and if he could not service the debt, the bank would call the line of credit secured on his mother's home.
- The father earned around $60,000 working as a handyman until that income was reduced on account of injury in 2021.
- The children (now 15 and 17) were supposed to be in an equal time-sharing arrangement with the parties.

These facts convinced Justice Shore that staying the father's motion would have a devastating impact on the father, effectively forcing him to choose between losing his mother's home to comply with the order or never being able to bring a motion to change and being subject to the stigma (and other ramifications) of being in breach of a Court order. This Hobson's Choice on account of the father never receiving the $85,000 due to him from the mother was a sufficiently unusual and exceptional circumstance so as to convince Justice Shore that her discretion should be exercised in favour of the father. She saw unfairness at play and, again, the primary objective of the *Family Law Rules* is to deal with cases justly.

Therefore, the father was free to proceed with his motion to have the Faieta Order set aside based on his claim that the mother's material before Justice Faieta did not include full and fair disclosure.

This was a thoughtful and well-reasoned decision. While we have, in this Newsletter, been critical of courts for being slow to find parties in contempt (when they are clearly in contempt), this is not the same issue. Yes, parties ***must*** comply with court orders, and parties run a serious risk of seeing pleadings struck or of non-participation if orders are not followed. But sometimes — just sometimes — a litigant just finds themselves in a bad place, through no fault of their own or, as in this case, because of the conduct of the opposing party. In such circumstances, respectfully, courts must be cautious to not put a litigant in a hole from which they can never, ever, escape: *Serra v. Serra*, 2007 CarswellOnt 4033 (C.A. [In Chambers]); *Knopf v. Knopf*, 2002 CarswellBC 91 (S.C.).

Rachmones. A word to live by.

No Good Deed Goes Unpunished . . . Until You Get to the Tax Court of Canada

Vohra v. The King, 2022 CarswellNat 5468 (T.C.C. [Informal Procedure]) — MacPhee J.

The decision of the Tax Court of Canada in *Vohra* reminds us as to the importance of ensuring that spousal support agreements and Orders are carefully drafted to comply with s. 56.1(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) (the "*ITA*"), which sets out the conditions for allowing a spousal support payor to deduct his or her payments (and, conversely, for ensuring that the payments will be taxable in the hands of the recipient).

The parties in *Vohra* married in 2006 and separated in 2010. In 2011, they signed a homemade Separation Agreement (how many good family law stories start) that provided, among other things, that, "[the husband] shall pay spousal support to [the wife] in the amount of $3500 monthly commencing Dec 8/10 and ending Dec 8/14." (You can see where this is going, right?)

The husband paid the wife the $3,500 a month in spousal support in accordance with the Separation Agreement. And, even though the Agreement only covered the period from December 2010 to December 2014, the husband continued paying the $3,500 a month throughout 2015, 2016, 2017, and 2018, and for part of 2019.

In 2019, the parties consented to an Order that included the following term:

> Commencing on July 1, 2019 and on the first day of each month thereafter until further order of the Court the [husband] (hereinafter referred to as the Payor) shall pay to the [wife] (hereinafter referred to as the Recipient) temporary support in the amount of $8000.00 per month. The above is being agreed on a without prejudice basis and subject to verification of the [husband's] income and redefined as child support or spousal support once [the husband's] income verified retroactively to July 1, 2019.

Based on this wording, the husband should not have any difficulty deducting the $8,000 a month in spousal support he started paying as of July 2019. But what about the payments from January 2015 to July 2019?

When the parties filed their 2018 Income Tax Returns, the wife claimed the $3,500 a month ($42,000 a year) in spousal support she'd received from the husband as taxable income, and the husband claimed a corresponding deduction.

In a masterful display of "no good deed goes unpunished," the CRA denied the husband the deduction. It argued that since the 2010 Agreement only covered the period up until 2014, the 2018 payments could not be said to have been made "pursuant to a written agreement" or a Court Order. Accordingly, they did not meet the definition of a "support amount" for the purposes of s. 56.1 of the *Income Tax Act*, which is found in the part of the *ITA* that deals with deductibility of support, and includes the following definition of "support amount":

> **support amount means an amount payable or receivable as an allowance on a periodic basis for the maintenance of the recipient**, children of the recipient or both the recipient and children of the recipient, **if the recipient has discretion as to the use of the amount**, and
>
> > (a) **the recipient is the spouse or common-law partner or former spouse or common-law partner** of the payer, **the recipient and payer are living separate and apart** because of the breakdown of their marriage or common-law partnership and **the amount is receivable *under an order* of a competent tribunal or *under a written agreement***; [emphasis added]

[As an aside, it is not clear from the reasons whether the husband was able to deduct the payments he made from 2015 to 2017. These years were also not covered by the 2011 Separation Agreement, but it does not appear that the CRA challenged the husband's claimed deductions in those years as they are not mentioned in the decision.]

Justice MacPhee of the Tax Court of Canada, in a decision that is sensible (but possibly inconsistent with the *ITA*), allowed the husband's appeal, and permitted him to deduct the $42,000 he had paid the wife in 2018. In his reasons, his Honour explained

that the precise wording of the agreement should not trump the clear evidence as to the parties' actual intentions on the "unique facts" of this case (i.e. judicial code for "this decision may not have much value as a precedent"):

> [20] The formal requirements of a properly drawn up contract should not overwhelm my analysis. There is no question that the contract the parties relied upon was flawed. Yet it was an agreement in writing, setting out the support payments.
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> [21] The parties continued through the 2018 taxation year to consider themselves bound by their 2011 separation agreement. **The conduct of the parties supports the conclusion that a meeting of the minds continued to exist concerning spousal support obligations. What was set out in the 2011 separation agreement was treated by the parties as continuing to be in force up to and including 2018.**
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> [22] In my review, I **am guided by the plain meaning of the words of the Act when is ask myself whether the support payments in question were made pursuant to a written agreement**. I have concluded that the payments were made pursuant to the terms of a written agreement.
>
> [23] **These unique facts satisfy definition provided of support payment provided in subsection 56.1(4), specifically the amount in issue in this trial was an amount payable . . . on a periodic basis for maintenance . . . under a written agreement.** [emphasis added]

As a result, Justice MacPhee ordered that the husband could deduct the $42,000 he had paid the wife as support payments in 2018. But, in point of fact, had the husband terminated his support with the payment in December 2015, the wife could not have alleged he did so improperly.

Despite the result in this particular case, when dealing with periodic spousal support, we urge you to deal with the deductibility issues properly and clearly up front, instead of hoping that your client will eventually be able to get some relief from the Tax Court. And, if you have any concerns, or are just not sure whether a deduction will be allowed, call your trusted family law accounting expert to assist. And if you don't have a trusted family law accounting expert, get one.

You may also want to consider including wording in the agreement or Order to make it clear what will happen if the CRA does not allow a deduction you anticipated would be permitted. For example, if the CRA doesn't allow an anticipated deduction, the parties will net out the tax based on the midpoint between the net benefit to the recipient and the net cost to the payor, and the recipient will then reimburse the payor for the corresponding overpayment. That way, if the CRA ever challenges your client's claimed deductions, you won't have to cross your fingers and hope that your client can get a remedy from the Tax Court.