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— Franks & Zalev - This Week in Family Law

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**At This Rate, No One Will Be Competent to Testify**

*Cohen v. Estate of Cohen* (2023), 84 R.F.L. (8th) 286 (Ont. S.C.J.) and 2023 CarswellOnt 2757 — Doyle J.

The wife in *Cohen* is seeking to set aside a marriage contract from 1986, and an amending agreement from 2008, pursuant to s. 56(4) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Act*") which allows a court to set aside all of part of a domestic contract in the following circumstances:

**56(4)** . . .

- (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
- (b) if a party did not understand the nature or consequences of the domestic contract; or
- (c) otherwise in accordance with the law of contract.

The case has been going on for years (since 2017), and millions of dollars are at stake. Justice Doyle's most recent decisions are of particular interest for our purposes for two reasons: (a) the one provides a clear roadmap for determining whether a witness has capacity to testify at trial; and (b) they both offer further reflection on when/whether it is a good idea to bifurcate claims to set aside domestic contracts from the other issues.

The basic facts in *Cohen* were as follows:

- The husband and wife were married in 1986. It was a second marriage for both parties.
- The husband was a very wealthy man.
- The day before the wedding, the husband asked the wife to sign a marriage contract that waived her right to an equalization payment. He disclosed that he was worth at least \$12,000,000 at that time.
- The wife signed the marriage contract as requested by the husband. [As an aside, while we all know that it is a *terrible* idea to sign a marriage contract on the eve of a wedding, this was less well known back in 1986, as the *Act* had only just come into force, and eight years had passed since Ontario first started allowing people to enter into marriage contracts with the enactment of the *Family Law Reform Act* in 1978.]

- In 2008, the husband and wife signed an amending agreement that dealt with a mortgage against the matrimonial home in favour of the husband's daughter from his prior marriage.
- The husband died in 2017, and litigation ensued between the wife and the estate over how the husband's substantial assets should be divided. Although the precise value of the estate was in serious dispute, there was no question that it was very significant (the estate's expert had concluded the estate was worth *at least* \$24,000,000).

In June 2019, Justice Audet granted a motion by the estate to bifurcate the case so that: (a) the validity of the marriage contract would be tried first; (b) the remaining issues would be determined at the second trial; (c) both trials would be heard by the same judge; and (d) the evidence from the first part of the trial would "form an integral part of the second trial." Her Honour also directed that the matter could be added to the next available trial list as soon as the parties submitted a Trial Scheduling Endorsement Form to their Case Management Judge.

In her decision, which can be found at (2019), 27 R.F.L. (8th) 108 (Ont. S.C.J.), Justice Audet explained that bifurcating the issue of the validity/enforceability of the marriage contract from the rest of the issues would shorten the proceedings, and help the parties resolve the matter:

[51] Looking at all the factors set out in *Simioni [v. Simioni (2009), 74 R.F.L. (6th) 202* (Ont. S.C.J.)], I am of the view that there are clear advantages in allowing the issue of the validity of the Marriage Contract to be bifurcated from the other issues in the case and adjudicated prior to the trial on the remaining issues. **The validity of the Marriage Contract is a relatively straightforward issue requiring limited documentary evidence, and that evidence is already available and has been disclosed.** The only anticipated oral evidence required to determine the issue is that of [the wife], Steven Cohen, Mr. Radnoff and possibly his ex-wife, all of whom will be testifying as to the circumstances surrounding the execution of the Marriage Contract.

[52] **The determination of this threshold issue is going to allow the parties to manage their expectations about disclosure, and may very well relieve this litigation from any subsequent dispute over disclosure issues. There is no doubt in my mind that the determination of the validity of the Marriage Contract will substantially increase the opportunities for settlement in this case.** If the Marriage Contract is upheld, [the wife's] claim for an equalization of the parties' net family property falls. This will significantly reduce not only the length of trial, but also the costs associated with the trial and its preparation. If the Marriage Contract is set aside, her dependant claim will be significantly impacted by her increased net worth. Assuming that her dependant claim settles as a result of her receiving an important equalization payment, the only issue left for trial will be the validity of the two mortgages registered against her property. **[emphasis added]**

In reaching this conclusion, Justice Audet distinguished the previous case law about bifurcation which (as Justice Quigley confirmed in *Simioni v. Simioni (2009), 74 R.F.L. (6th) 202* (Ont. S.C.J.)) established that "the power to split a case should be regarded as one that is narrowly circumscribed and to be exercised in only the clearest of cases — in cases that exhibit the exceptional merit that calls upon the Court to exercise its inherent power". Instead, her Honour determined that a less onerous test should be applied in family law cases:

[30] In my view, **considering if there are "threshold" issues in family law cases that once determined will facilitate resolution or save resources requires a balancing act, and should not be reserved to the clearest of cases.** The judicial toolbox available to the court is large enough to craft a procedure that will meet the needs of any given case, address the parties' concerns related to fairness, and promote the primary objective of the *Family Law Rules*, and the court should thrive to do so whenever possible. **[emphasis added]**

Unfortunately, the bifurcation Order did not expedite the matter as hoped and intended. Although almost four years have now passed, the first part of the trial is still pending, and the parties have been bogged down in pre-trial motions about a number of issues, including preserving evidence from the lawyer who acted for the wife on the marriage contract in 1986 (2020 CarswellOnt

37 (S.C.J.)), undertakings and refusals (2021 CarswellOnt 879 (S.C.J.)), and amendments to the pleadings (2021 CarswellOnt 4672 (S.C.J.)).

Most recently, Justice Doyle had to deal with the two significant pre-trial issues that we are now discussing. First, the wife brought a motion for extensive financial disclosure, and argued that the Court had to know the value of the estate to properly decide whether the marriage contract should be set aside. Second, the Court had to determine whether the wife had capacity to testify at trial.

With respect to the disclosure issue, at first glance, there was clearly merit to the wife's argument that the Court had to know the value of the estate to decide whether to uphold the marriage contract. If the wife was able to satisfy the Court that one of the provisions of s. 56(4) of the *Family Law Act* was engaged, the Court would then need to decide whether to exercise its discretion to set aside the contract. And, to make that decision, one of the things the Court would need to consider was what the party seeking to set aside the contract would be entitled to both with and without the contract. As the Ontario Court of Appeal explained in *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (Ont. C.A.):

[33] It is now well established that a finding that a party has violated a provision of s. 56(4) of the *FLA* does not automatically render the contract a nullity. Rather, a trial judge must determine whether it is appropriate, in the circumstances, to order that the contract be set aside. This is a discretionary exercise. . . .

. . . . .

[60] . . . once a judge has found one of [the] statutory preconditions to exist, he or she should be entitled to consider the fairness of the contract together with other factors in the exercise of his or her discretion. It seems to me that a judge would be more inclined to set aside a clearly unfair contract than one that treated the parties fairly.

However, there were some significant problems with the wife's attempt to obtain further disclosure at this point in the case. The disclosure motion was effectively a collateral attack on Justice Audet's bifurcation Order (or, as Justice Doyle put it, "an attack on the spirit of [Justice Audet's] order"), and Justice Audet's prior findings that the validity of the marriage contract was "a relatively straightforward issue requiring limited documentary evidence, and that evidence is already available and has been disclosed."

Furthermore, although the trial judge would need to know what the Estate was worth to decide whether to exercise its discretion to set aside the Marriage Contract, that did not necessarily mean that the trial judge would need to determine the "exact value of the estate". And, as the Estate had produced an expert report showing the Estate had a value of \$24,000,000, and had conceded for the purpose of the wife's motion that it may actually be closer to \$36,000,000, it was already obvious that the wife would be entitled to an enormous equalization payment if the Marriage Contract was set aside.

As a result, Justice Doyle dismissed the bulk of the wife's disclosure motion.

With respect to the capacity issue, there was no dispute that the wife had capacity when the litigation first started back in 2017. Unfortunately, by late 2022, her cognitive abilities had declined to the point that the parties agreed she no longer had capacity to instruct counsel, and needed a litigation guardian. However, they could not agree about whether she had capacity to testify, which has a lower threshold than capacity to instruct counsel.

The wife, through her litigation guardian, took the position that she lacked capacity to testify. The Estate, on the other hand, argued that despite the wife's cognitive issues, she still met the low threshold for testimonial capacity as she could communicate, her dementia was mild, and she was able to function independently (e.g. she lived alone, and was able to manage her own banking and medications).

Justice Doyle started her analysis by reviewing the principles that apply when a court has to decide whether a person has capacity to testify, some of which are set out in s. 18 of the *Evidence Act*, R.S.O. 1990, c. E.23 and s. 16 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5:

## *Ontario Evidence Act*

### **Presumption of competency**

18(1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).

### **Challenge, examination**

18(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).

### **Exception**

18(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).

## *Canada Evidence Act*

### **Witness whose capacity is in question**

16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

- (a) whether the person understands the nature of an oath or a solemn affirmation; and
- (b) whether the person is able to communicate the evidence.

### **Testimony under oath or solemn affirmation**

16(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

### **Testimony on promise to tell truth**

16(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

### **No questions regarding understanding of promise**

16(3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

### **Inability to testify**

16(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

### **Burden as to capacity of witness**

16(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Her Honour also reviewed the Supreme Court of Canada's seminal decision about capacity to testify in *R. v. I. (D.)*, 2012 CarswellOnt 1089 (S.C.C.), where the Court stated as follows:

[76] First, **the *voir dire* on the competence of a proposed witness is an independent inquiry**: it may not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements.

[77] Second, although the *voir dire* should be brief, **it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify**. A witness should not be found incompetent too hastily.

[78] Third, **the primary source of evidence for a witness's competence is the witness herself**. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

[79] Fourth, **the members of the proposed witness's surrounding who are personally familiar with her are those who best understand her everyday situation**. They may be called as fact witnesses to provide evidence on her development.

[80] Fifth, **expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness**.

[81] Sixth, **the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?**

[82] Seventh, **the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions**. It may be useful to ask if she can differentiate between true and false everyday factual statements.

[83] Finally, **the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only**. [emphasis added]

After conducting a *voir dire* where the wife and a number of other witnesses (including two experts) gave evidence, Justice Doyle concluded that the wife did **not** have capacity to testify. While the wife understood the need to tell the truth, her Honour concluded she would **not** be able to tell her story at trial even with supports, and her evidence would **not** be helpful in determining the issues as she could not recall vital information or communicate her evidence. However, as the wife had previously been examined under oath out of court while she still had capacity to testify, Justice Doyle determined that the parties would be able to file the transcripts of her examinations for use at trial, and that any issues about this would be discussed at a trial management conference in April 2023.

At the beginning of this discussion, we noted that *Cohen* offers a chance to consider the utility of bifurcating these types of cases. While it is not clear from any of the reported decisions why the first half of the trial has still not happened, the fact of the matter is that the bifurcation Order was made almost four years ago, and the first part of the trial has still not taken place. Furthermore, once the first part of the trial is done and reasons have been released, the second part of the trial could be significantly delayed if: (a) one or more parties decides to appeal; (b) there are further disputes about what disclosure is needed for the second part of the trial; and (c) the judge who heard the first part of the trial may not be available to conduct the second part of the trial for a considerable period of time.

So while bifurcating the validity of a domestic contract from the rest of the issues will often seem like a good idea to at least one of the parties, *Cohen* provides at least some evidence to suggest that such an Order can lead to significant delays and issues that would not have arisen if the parties had simply dealt with all of the issues at once instead of on a piecemeal basis.

### Children Like Cookies — But the Court Doesn't Like Cookie Cutters

*Manitoba (Director of Child and Family Services) v. M.K. and C.J.O.*, 2022 CarswellMan 343 (Q.B.) — Dunlop J.

What does the court do when it has to make an order in the child's best interests, but none of the available orders are in the child's best interests? Rely on the court's *parens patriae* jurisdiction to craft an order that *is* in the child's best interests. Easy peasy.

The Director of Child and Family Services (the "Agency") apprehended the child, M., at birth from his mother. The Agency had also apprehended the mother's other two children at birth, and they were adopted by their foster parents.

The Agency placed M. in the same foster home as M.'s siblings and, at the time of the trial, M. had been there for almost three years.

The Agency sought a permanent order of guardianship for M., with the intention of placing M. for adoption with the foster parents as it did with the mother's other two children.

The mother had a history of severe trauma as a child. She was repeatedly sexually assaulted by her grandfather, but when she reported these instances of abuse to her grandmother, her grandmother did not believe her, and was abusive towards her. The mother did not receive treatment or counselling for the abuse she experienced.

The mother was then sexually assaulted when she was 17 years old, and became pregnant as a result of the assault. While pregnant, the mother was charged with four counts of a historical sexual assault on a child. (The mother's charges dragged on through the courts from 2014 to 2019 when, after a trial, she was convicted of one count of sexual interference and one count of sexual assault. She was placed on two years of probation. The mother followed all of the terms of her probation including engaging in therapy.)

The mother gave birth to her first child shortly after turning 18 years old, and the child was apprehended from the hospital. The mother's first child was made a permanent ward of Child and Family Services within five months, and the child was adopted shortly thereafter by the foster parents. The mother's second child (her first with the father) was also apprehended at birth and made a permanent ward of Child and Family Services within two years, with the consent of both parents, and the child was adopted by the same foster parents. The mother's outstanding criminal charges played a large part in the Agency's decision to apprehend the children and to seek permanent orders in respect of the children.

After the birth and apprehension of the mother's third child (her second with the father), M., the parents consented to an initial six-month temporary order of guardianship and subsequent temporary orders, as the mother's criminal charges remained outstanding. The Agency continued to seek a permanent order for M. with a plan for adoption to his foster parents, and a trial was set to commence in September 2021.

Justice Dunlop noted that this case presented many challenging issues, including that the mother and the father were immigrants who had struggled since coming to Canada (the mother was born in Liberia, while the father was born in Nigeria). Justice Dunlop found that the Agency had utilized a "cookie-cutter approach," which did not recognize the parents' cultural differences in both language skills and styles of communication. This resulted in assumptions being made about the parents' behaviour that, in some instances, proved to be incorrect. Justice Dunlop was highly critical of the Agency's approach in this regard:

[81] **Any person working in the field of child and family services**, from a judge to a social worker to a psychologist, **must be alert to the employment of assessment methodologies and value judgments that are not culturally attuned**. I find that the decision-making and services employed by the Agency in this case were poorly attuned to, and at times disrespectful of, the cultural differences between the social workers involved and [the mother] and [the father]. The social work employed also did not fairly navigate the power imbalance that existed between the Agency workers and the parents and the foster parents and the biological parents. [emphasis added]

Justice Dunlop was also highly critical of the Agency's approach to the mother's criminal charges, and the failure of the Child and Family Services system to work with the criminal justice system — in fact, the two systems worked in opposition to each other. The criminal system told the mother not to admit anything, while delaying the resolution of her case beyond any reasonable time frame, while the child and family services system said it could not work with her until her criminal charges were resolved

or until she took responsibility for what she had done. It was the ultimate "catch-22" between one system that could take her liberty and another that could take her child. Justice Dunlop urged the Agency to substantially rethink the practice model that is applied to these types of cases.

Justice Dunlop ultimately found that it was *not* in M.'s best interests to move from a home where he was well attached to his foster parents and biological siblings, but that it was also *not* in his best interests to sever his attachment to his parents. The evidence supported M. having a continued vibrant, frequent and meaningful relationship with his parents. However, Justice Dunlop found that she could not, within the confines of the *Child and Family Services Act*, S.M. 1985-86, c.8 (the "*Act*"), make an enforceable order that was in M.'s best interests allowing for continuing access and other connections to M.'s parents if M. was placed for adoption (and the Agency had indicated they intended to immediately place him for adoption).

After struggling with the limitations of the *Act*, Justice Dunlop considered her *parens patriae* jurisdiction. Her Honour found there was a gap in the legislation because it did not allow for conditions to be attached to a permanent order when the imposition of such conditions were required to ensure that the fundamental principles of the *Act* were being acted upon and respected:

[175] In this case and on these very specific facts, I do find that there is a "gap" in the *Act* because the *Act* does not allow an order to be made that the court has found to be in the child's best interests based upon expert opinion and prevailing social science. In fact, it is glaringly obvious that the *Act* in its current form is not in sync with modern thinking that supports the view that, in some cases, a permanent order should have conditions attached to it in order to protect a child's connection to his biological family and cultural roots. In other words, when a permanent order of guardianship is the only option for a child, it is not always in that child's best interests to sever all parental rights and connections. This can be accomplished while still respecting the need of the child for permanency as dictated by the *Act*.

Justice Dunlop then proceeded to make a permanent order of guardianship, with a number of conditions, including that the parents be entitled to regular visits with M., and that the Court of King's Bench retain jurisdiction relating to any issues that affect M. while he is under the age of 18 years old.

On the one hand, we are not *entirely* sure this was an appropriate use of the Court's *parens patriae* jurisdiction. *Parens patriae* jurisdiction is not a form of "judicial override" (*Garcia Perez v. Polet* (2014), 49 R.F.L. (7th) 253 (Man. C.A.)) or a means to essentially re-write a statute. It is only to be used to fill a legislative gap or to address a situation clearly unanticipated by the legislation: *E. (Mrs.) v. Eve*, 1986 CarswellPEI 37 (S.C.C.); *Beson v. Newfoundland (Director of Child Welfare)*, 1982 CarswellNfld 29 (S.C.C.); *M. (L.) v. British Columbia (Director of Child, Family and Community Services)* (2016), 79 R.F.L. (7th) 257 (B.C. C.A.); *A. (A.) v. B. (B.)* (2007), 35 R.F.L. (6th) 1 (Ont. C.A.). The desire to exercise the jurisdiction must yield to the provisions of a statute that directly address the question: *M. (L.) v. British Columbia (Director of Child, Family and Community Services)* (2016), 79 R.F.L. (7th) 257 (B.C. C.A.) at para. 33. Here, the statute provided the Court with a specific menu of choices set out by the legislature, and Justice Dunlop may not have been at liberty to order from a different menu.

On the other hand, the Court was of the view that the legislation simply did not provide the Court with the ability to make the order it believed to be in the child's best interests, and while resorting to *parens patriae* jurisdiction should be reserved for "unusual" cases, it should be used where adhering to a statutory requirement would result in an injustice: *A. (J.M.) v. B. (M.A.)* (2007), 34 R.F.L. (6th) 370 (B.C. S.C.) — which was clearly Justice Dunlop's concern here. Would it make sense to make an order specifically *not* in a child's best interests because the best interests alternative was not in the statute? Probably not. Ultimately, it has been suggested that the *parens patriae* jurisdiction permits any order deemed necessary to ensure a child's best interests: *Levesque v. Lapointe* (1993), 44 R.F.L. (3d) 316 (B.C. C.A.) such that it overrides all other considerations when dealing with custody: *K. (K.) v. L. (G.)* (1985), 44 R.F.L. (2d) 113 (S.C.C.). You pick which hand you like.

Justice Dunlop did note that, if she was wrong in finding a legislative gap, she would have declined to make a permanent order. Instead, she would have offered the parties an order placing M. with the foster parents pursuant to s. 38(1)(b) of the *Act*, only if the foster parents agreed, and without transfer of guardianship from the Agency, and with the same conditions as the permanent order. The evidence indicated that the foster parents were intent on adopting M. and were not prepared to agree to anything else, such that Justice Dunlop thought they would not consent to such an order.

This case is a must-read for anyone practicing child protection law, especially for those who encounter the types of issues present in this case — including cases in which one or more of the parties are immigrants to Canada, non-English speakers, or simultaneously involved in a criminal process. It is important that we do not default to a "cookie-cutter" approach when dealing with these types of matters.

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