

FAMLNWS 2023-26  
Family Law Newsletters  
July 3, 2023

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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**Breaking News: Best Interests of the Dog and Cat in British Columbia?**

Phil would have been happy to see this.

We're happy to see this.

British Columbia is now the first jurisdiction in Canada to formally recognize that a dog may have different qualities — and attract different considerations at the end of a relationship — than a kitchen table.

In an effort to modernize its *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*"), British Columbia introduced Bill 17, the *Family Law Amendment Act, 2023*. These amendments, passed on May 11, 2023 (now just awaiting royal assent), include new property division provisions. And among the changes is guidance for parties and courts with respect to the ownership and possession of pets upon separation.

While B.C. is the first Canadian province to enact such provisions, these pet-related provisions do not come as a surprise. There have long been calls for Canadian courts to apply other than a regular "kitchen table" or "title governs" analysis to the issue of pets. This is likely because somewhere in the range of 55% of Canadian families include at least one dog or . . . ugh . . . cat.

In the now-passed amendments, pets are defined as "companion animals" — "an animal that is kept primarily for the purpose of companionship". Service animals and animals kept for business or agricultural purposes are excluded. The pet amendments in Bill 17 are summarized as follows (with section references to the amended *FLA*):

1. Section 92 allows couples to make agreements respecting joint ownership, shared possession or exclusive ownership or possession of a companion animal. Courts can uphold such agreements.
2. Section 97 and 193 provide that the B.C. Provincial Court and Supreme Court are permitted to make orders respecting companion animals.

Now, while *both* levels of Court in B.C. have already exercised this power with respect to pet considerations — see, for example: *Brown v. Larochelle*, 2017 CarswellBC 1034 (Prov. Ct.); *Almaas v. Wheeler*, 2020 CarswellBC 784 (Prov. Ct.); and *O'Donoghue v. Walker*, 2019 CarswellBC 3291 (Prov. Ct.) — we do note it is a bit of a "constitutional no-no" for anything but the Superior Court in a province (with judges appointed pursuant to s. 96 of the *Constitution Act, 1867*) to address property issues.

In the *FLA*, "court" is defined as the Supreme Court, or *to the extent that it has jurisdiction* to make an order, the Provincial Court.

Then, s. 193 is clear that:

**Provincial Court jurisdiction**

193 (1) Subject to the Divorce Act (Canada) and subsection (2) of this section, the Provincial Court has jurisdiction in all matters under this Act.

(2) The **Provincial Court does not have jurisdiction** to make an order under

...

(b) Part 5 [**Property Division**], 6 [Pension Division] or 8 [Children's Property]. [emphasis added]

So this is not actually allowed. However, if previously courts were generally less-than-inclined to spend time dealing with pet issues, we pity the first lawyer to bring a constitutional challenge as to whether the Bill 17 amendments with respect to pets offend the constitution division of powers.

Continuing with our list . . .

3. Section 97(4.1) requires the Court to consider the following eight factors (which have collectively been referred to as the "best interests of the animal test" by some) when determining whether to make an order respecting a companion animal:

- a. the circumstances in which the companion animal was acquired;
- b. the extent to which each spouse cared for the companion animal;
- c. any history of family violence;
- d. the risk of family violence;
- e. a spouse's cruelty, or threat of cruelty, toward an animal;
- f. the relationship that a child has with the companion animal;
- g. the willingness and ability of each spouse to care for the basic needs of the companion animal;
- h. any other circumstances the court considers relevant.

4. Finally, absent agreement, s. 97(4.2) specifically precludes the court from granting joint ownership or shared possession of companion animals.

Although Rover is still categorized as "property" under the amendments, pets are now given special consideration either as sentient beings (again, not including cats) or as important parts of the family.

Will other provinces or territories follow suit? Only time will tell.

**This Brief Evidence Refresher Brought to You by the Hearsay Rule**

*A.M. v. D.M.*, 2023 CarswellOnt 4991 (S.C.J.) — Mills J.

**Principle 1:** In most (if not all) Canadian jurisdictions, hearsay evidence (or evidence based on "information and belief") is allowed in affidavits for interim motions if the source of the evidence is identified along with belief in the veracity of the evidence.

**Principle 2:** In many jurisdictions — especially in the busiest trial courts — for reasons of judicial economy and in an effort to shorten trials and save expense, the use of affidavit evidence at trial is becoming increasingly common.

**Principle 3:** It is generally accepted that the rules of evidence should be applied with some degree of flexibility when considering the best interests of the children. For example, from *Gordon v. Gordon* (1980), 23 R.F.L. (2d) 266 (Ont. C.A.):

A custody case, where the best interests of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. It is not necessary for us to go into details.

See also *Powers v. Powers* (2004), 11 R.F.L. (6th) 373 (Ont. C.J.).

However, the combination of these three principles sometimes lead counsel to include hearsay in affidavits for use at trial, thinking that, when it comes to a best interests analysis, "anything goes." But that is most assuredly not the case. When drafting affidavits for use at trial, counsel must get out of "interim motion mode." The Hearsay Rule (or, more properly, the "Rule Against Hearsay") cannot be relaxed at trial simply because a witness provides evidence in chief by way of affidavit.

This was the problem Justice Mills faced in *A.M. v. D.M.* — D.M.'s direct evidence by way of affidavit was replete with hearsay — sometimes double or triple hearsay. In her affidavits, D.M. would recount what was said to her by the children and what the children told others. There was a similar problem with affidavit evidence put forward by some of D.M.'s collateral witnesses.

A.M. opposed the admission of the hearsay statements.

Generally, to avoid having children testify at trial, hearsay evidence of the children is admissible as a principled exception to the Hearsay Rule if the evidence is necessary and if it is reliable. And, again generally, the "necessity" criterion is satisfied where it would be inappropriate to call the child as a witness to give evidence. [See, for example: *Collins v. Petric* (2003), 41 R.F.L. (5th) 250 (Ont. S.C.J.); *G (JD) v. G (SL)* (2017), 2 R.F.L. (8th) 255 (Man. C.A.).]

After considering "necessity", as noted by Justice Mills, threshold reliability may be met if the child has repeated the same statement to more than one person, or where the statement has been made to a person who has a demonstrated skill in interviewing children. Then, if admitted, the weight to be given to the hearsay statement of a child will depend on the (physical and mental) age of the child, the circumstances surrounding the taking of the statement, the risk the child was influenced or manipulated when giving the statement or that the statement itself was edited or manipulated, and the desire of the child to please or appease the parent taking or requesting the statement: *Wilson v. Wickham*, 2018 CarswellOnt 6470 (S.C.J.) at paras. 30 and 31.

The task before Justice Mills was to satisfy herself that the circumstances surrounding the hearsay statements met the test of "threshold reliability" to be admitted. This requirement will generally be met where there is no concern about the truth of the statement having regard to the circumstance in which it was made (giving rise to circumstantial guarantees of trustworthiness), or where the statement can be sufficiently tested by means other than contemporaneous cross-examination. [*R. v. Khelawon*, 2006 CarswellOnt 7825 (S.C.C.) at paras. 51, 62-63]

D.M. relied on the (common) argument that the statements be admitted not for the truth of their contents, but rather for the simple fact that they were made. This — that a statement was not made for the truth of its contents but merely for the fact that it was said — is the classic "non-hearsay purpose" argument for the admission of what otherwise *appears* to be hearsay adopted by the Privy Council in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 (Malaysia P.C.). (In fact, this is not an exception to the Hearsay Rule; rather, it is an argument that the statement is not being admitted for a hearsay purpose, the truth of the contents of the statement.)

This is perhaps one of the most misunderstood hearsay concepts. To very briefly recount the facts from *Subramaniam*, Mr. Subramaniam was charged with possession of ammunition for the purpose of helping a terrorist. He pleaded a defence of duress, claiming that he had no choice because the terrorists had threatened to kill him if he did not follow through with their requests. Of course, the terrorists were not available to testify and, as a result, the trial court excluded the statements of the threats as hearsay. However, the Court of Appeal determined (and the Privy Counsel agreed) that the evidence was not hearsay. The import of the evidence was not that the statement was true — that the terrorists would kill Mr. Subramaniam. Rather, the import of the evidence was the simple fact that it was said, causing Mr. Subramaniam to fear for his life. Here, it did not matter whether the statements were true; it only mattered that the statements were made to Mr. Subramaniam who was present to be cross-examined.

Here, D.M. was looking to use the hearsay statements to provide insight into the family and the challenges faced by the parents in implementing and adhering to the agreed upon parenting schedule. It was argued that the hearsay statements were necessary for the Court to fully appreciate the family dynamics. But that use would require the Court to accept the statements for the truth of their contents — a hearsay purpose. Therefore, the statements were hearsay and presumptively inadmissible.

In addressing the "necessity and reliability" exception to the Hearsay Rule, counsel for D.M. argued that the voices of children in this case could only be heard through the hearsay evidence of parents and that the exception generally reserved for therapeutic professionals should be extended to D.M., a parent. Although the children did meet with professionals, some of the reports were dated. Therefore, D.M. believed herself to be the only source available to provide a full narrative and to offer current evidence respecting the children. That was the basis of the "necessity" argument.

With respect to "reliability", counsel for D.M. argued that the proffered evidence was reliable because D.M. had never been faulted for a lack of credibility or reliability over the 10 years the case had been in litigation. Based on that, D.M. argued that the hearsay statements from her should essentially be afforded a "presumption" of reliability. Essentially Justice Mills was being asked to expand the test for reliability and to be "more practical" in the application of the rules of evidence in family disputes.

Although a lovely invitation, her Honour respectfully declined:

[12] In the absence of any legal or statutory authority directing me to depart from the existing rules of evidence or to re-write the rules of evidence in family law proceedings, I decline to do so. The impassioned pleas of counsel to change the way evidence is received in family law trials would result in the admission of unfettered hearsay evidence. There would be no gatekeeper; rather, everything said by a parent would be admitted as being necessary and reliable unless and until proven otherwise. This approach would inevitably result in longer and more acrimonious family law proceedings, a result that will benefit no one.

Here, the children had independent counsel and had participated in assessments and counselling with therapeutic professionals who were going to be witnesses at the trial. The voices of the children would be heard without having to resort to hearsay.

The proffered hearsay statements lacked both procedural/threshold and substantive reliability. There were insufficient circumstantial guarantees of trustworthiness or evidentiary guarantees that the statements were inherently trustworthy. [*R. v. Bradshaw*, 2017 CarswellBC 1743 (S.C.C.), at para. 27]

Furthermore, here, there was reason to believe that any statements attributed to the children lacked inherent trustworthiness. Both children had been diagnosed with autism spectrum disorder and cognitive disabilities. Both of the children had admitted to lying to his parents and his teachers and the police. One of the children was highly suggestible and would say what he felt necessary to alleviate situational discomfort.

The statements in question were inadmissible.

And as if a reasonably clear decision was not enough, the decision includes two schedules setting out the impugned statements, explaining why they were or were not admissible. Very helpful.

### **The Tie Does Not Always Go to the Runner**

*A.H. v. M.T.*, 2023 CarswellOnt 5591 (S.C.J.) — Conlan J.

This is an interesting conundrum that comes up regularly. Where there are disputed allegations of family violence, should a court adopt the adage that it is "better to be safe than sorry" or that it is "best to err on the side of caution"? As discussed below, while family violence is particularly insidious, the repercussions from a finding of family violence can be extreme. This was the challenge faced by Justice Conlan. Not everyone will agree with the result. But we do.

His Honour had two motions before him. The father sought unsupervised parenting time with the two children, five-year-old twins, from 10:00 a.m. to 5:00 p.m. every Saturday or Sunday. The mother sought an order that the father undergo a forensic psychiatric assessment and that he have supervised parenting time from 8:00 a.m. to 12:00 noon every other Sunday at the premises of a professional supervised access provider, and a restraining order.

Because the father did not meet the filing requirements, his motion was adjourned. That left the mother's claim for a restraining order under s. 46 of the *Family Law Act*, R.S.O. 1990, c. F. 3:

### **Restraining Order**

46 (1) On application, the court may make an interim or final restraining order against a person described in subsection (2) if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.

The evidence from the parties and their collateral witnesses was hopelessly conflicted. The father strenuously denied every allegation of assaultive, abusive, and/or threatening conduct on his part, and the father's evidence directly contradicted the mother's allegations as to the father's alleged general disposition for violence. All of the evidence was untested by cross-examination.

The test for a restraining order is partially objective and partially subjective: there has to be real subjective fear, but that fear must be reasonable for someone in the situation of the party claiming the restraining order: *McGowan v. McGowan*, 2018 CarswellOnt 17724 (S.C.J.) at para. 38. As noted by Justice Conlan, the legislation itself also makes this clear, as an entirely subjective test would have no use for the words "reasonable grounds" as a qualifier to the fear expressed by the requesting party.

The incidents on which the mother's fears were based were somewhat dated. There were no allegations as to the father's conduct that post-dated April 2019, four years ago. Furthermore, after criminal charges against the father were withdrawn by the Crown in favour of a peace bond, there had been no issues, and the peace bond had expired six months ago.

As noted by his Honour:

[11] It must be remembered that, in the context of deciding whether to amend or vacate an existing restraining order, the court may ask itself **whether there is a "continuing need"** for the order . . . "Continuing need", in my view, means a present or a current need, and it makes no material difference to the currency criterion whether the court is dealing with a request for a restraining order at first instance, as here, or a request to vacate such an order . . . [emphasis added]

Here, the allegations were dated, the father was neither convicted nor found guilty of any criminal offence, and the criminal disposition (the peace bond) was not very recent; and the lack of any currency to the mother's allegations is an important factor for the Court to consider — otherwise, "once a restraining order, always a restraining order."

Here, it was determined that the mother had not met her onus. The dated allegations were all untested, and all strenuously denied. There was believable collateral evidence on both sides, and no way for the Court to **reliably** prefer one side's evidence over the other. As a result, his Honour was not satisfied on a balance of probabilities that the mother had reasonable grounds to fear for her safety or that of the children.

While the Court was not remotely critical of the mother for asking for a restraining order, Justice Conlan was somewhat critical (and properly so) of the mother's position that the Court, in a borderline case, should simply resort to erring on the side of caution and grant the order requested. Not only does that position ignore the statutory test and the burden of proof, but it also minimizes the seriousness of an interim restraining order being made:

[17] . . . Such an order immediately impacts all future decisions in the proceeding, as they pertain to parenting matters. Such an order immediately lessens the prospect of shared parenting and joint decision-making responsibility, as those concepts are difficult to imagine in circumstances where one parent is restrained from having any contact or communication or being anywhere near the other, with limited exceptions. Such an order is appropriate where the evidence supports it, **but we should be loathe to water-down the test in favour of simply being cautious. And we should be hesitant to make the order simply because there was a similar order in place before** (the peace bond) that has now expired. Orders expire. This father knows that he cannot risk the slightest misstep if he stands any chance of being more than an eight-hour per month father under supervision. He must not forget that. [emphasis added]

Therefore, the mother's request for a restraining order was dismissed.