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— Franks & Zalev - This Week in Family Law

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Contents

Is Leave Required to Appeal an Interim Order under the *Divorce Act*? You Betcha.

Charapovich v. Charapovich (2023), 88 R.F.L. (8th) 274 (N.S. C.A.) — Van den Eynden, Fichaud, and Beaton JJ.A.

In what is now the fourth reported decision arising out of the Charapovich family's ongoing dispute, the Nova Scotia Court of Appeal had to decide whether leave is required in Nova Scotia to appeal an interim parenting and/or support Order under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "*Divorce Act*"). [This is also the second time we've commented on this case in *TWFL* — see "The Pot Calling the Kettle 'Repugnant'" in the 2022-43 (November 21, 2022) edition, which dealt with a decision refusing to recognize the parties' Belarusian divorce on public policy grounds.]

The wife in *Charapovich* applied for interim parenting Orders for the parties' two children, who were 12 and 7 years old. She also sought interim support. At the conclusion of the hearing, the judge granted the wife's request for primary care of the children and sole decision making authority (subject to consultation with the husband), and gave the husband four overnights with the children during every two weeks. She also ordered the husband to pay child support based on an imputed income of $100,000 a year.

The husband appealed.

In Nova Scotia, as in many Canadian jurisdictions, an appeal from an interlocutory Order generally requires leave of the appellate court. In Nova Scotia, this requirement is set out in s. 40 of *Judicature Act*, R.S.N.S. 1989, c. 240 (the "*Judicature Act*"), which states as follows:

> 40. There is no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the Rules or by leave of the Court of Appeal.

What could be more clear, right? Not so fast. Section 21(1) of the *Divorce Act* provides that "an appeal lies to the appellate court from any judgment or order, *whether final or interim*, rendered or made by a court under this Act." Since the *Divorce Act*, which is *Federal* legislation, expressly provides for a ***right to appeal*** from interim Orders, it is questionable whether that right can be abrogated by provincial legislation (in this case Nova Scotia's *Judicature Act*). A right to seek *leave* to appeal is arguably quite different than a right to appeal (especially in Ontario, where the test for leave to appeal in family law cases is extremely onerous: *Lokhandwala v. Khan* (2019), 34 R.F.L. (8th) 139 (Ont. Div. Ct.)).

However, while this is an interesting argument for the self-represented husband to have raised, there were at least two significant problems with it. First, it disregarded ss. 21(6) and 25 of the *Divorce Act*, which provide that appeals under the *Divorce Act* "shall be asserted, heard and decided according to the ordinary procedure governing appeals to the appellate court from the court

rendering the judgment or making the order being appealed", and expressly authorizes the provinces to "make rules applicable to any proceedings under [the *Divorce Act*] in a court, or appellate court, in a province".

Second, it ignored the Ontario Court of Appeal's comprehensive 2011 decision about this very issue in *Elgner v. Elgner* (2011), 5 R.F.L. (7th) 1 (Ont. C.A.), leave to appeal refused, 2011 CarswellOnt 12421 (S.C.C.), where the Ontario Court of Appeal considered, but rejected, this exact argument:

> [31] **Mr. Elgner contends that s. 21(1) of the *Divorce Act* provides a direct right of appeal of all orders, interim and final, made under the *Divorce Act*.** Consequently, he argues, s. 19(1)(b) of the *CJA* conflicts with s. 21(1) because it stipulates that an appeal from an interlocutory order of a Superior Court judge lies to the Divisional Court only with leave. **Mr. Elgner argues that a provincial law cannot derogate from the right of appeal specifically created by a federal statute. Therefore, because the *Divorce Act* is federal legislation, he says that the doctrine of paramountcy applies to render s. 19(1)(b) of the *CJA* inoperative to the extent of the conflict.** He also argues that the Divisional Court erred in relying on policy considerations to interpret appeal rights created by s. 21(1) of the *Divorce Act*, given that the language of s. 21(1) is clear and unambiguous.
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> [33] **I do not accept this submission.** In my view, the Divisional Court correctly held that **by virtue of s. 21(6) of the *Divorce Act*, an appeal from an interlocutory order made under the *Divorce Act* is subject to the leave requirement in s. 19(1) of the *CJA*.** To conclude that s. 21(1) creates a direct right of appeal, without leave, is to ignore ss. 21(6) and 25 of the *Divorce Act*, and the constitutional analysis that must be undertaken before applying the doctrine of paramountcy. [emphasis added]

[For further discussion about *Elgner*, see Philip Epstein's comment on it in the 2011-43 (October 25, 2011) edition of *TWFL*.]

While *Elgner* was not *binding* on the Nova Scotia Court of Appeal, it was certainly persuasive; the Court's reasoning was sound, and the Nova Scotia Court of Appeal saw no reason to depart from it.

The husband also argued that while the *Divorce Act* used the term "interim orders", the *Judicature Act* only referred to leave being required to appeal from "interlocutory orders". And, since the husband was appealing from an interim order as opposed to an interlocutory order, leave was not required.

This time, the self-represented husband's argument was quite obviously wrong. An Order is interlocutory for the purposes of an appeal if it "does not determine the real matter in dispute between the parties — the very subject matter of the litigation — or any substantive right to relief of a plaintiff or substantive right of a defendant": see e.g. *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2020 CarswellOnt 8062 (C.A.) at para. 16. As the interim parenting and support Orders in this case would only last until trial, they were unquestionably interlocutory for the purposes of an appeal.

But lest there be any lingering doubt, the Nova Scotia Court of Appeal noted that Rule 90.01 of Nova Scotia's *Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009, expressly provides that, "unless the context requires otherwise . . . 'interlocutory order' in reference to an order under appeal, includes an interim order", and there was no basis here to conclude that the "context required otherwise" with respect to appeals of interim Orders under the *Divorce Act*. That being said, the Court also made it clear that the "determination on the leave requirement is restricted to the appeal of (interim) interlocutory orders under the *Divorce Act* and does not address interim appeals under other statutes."

The Court of Appeal also determined that, although most appeals from interim Orders in Nova Scotia had to be started within 10 days of the date of the decision under appeal, the *Divorce Act* provides for 30 days to start an appeal from *any* Order made under the *Divorce Act*, whether interlocutory or final, such that the longer time limit applied here.

Having determined that leave to appeal was required, the Court of Appeal had to determine whether it should be granted in this case. In Nova Scotia, the test for granting leave to appeal simply requires that the party seeking leave raise an "arguable issue"

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— an issue that is not "merely academic interest, but one that actually arises on the facts and legitimately requires the Court's attention", and that "could result in the appeal being allowed": *Lavy v. Hong*, 2018 CarswellNS 1089 (C.A.) at para. 24.

In this case, the Court of Appeal found that although some of the husband's complaints about the decision below were without merit, it was satisfied that he had raised an "arguable issue" that warranted granting leave. However, it is not clear what that issue was, because the Court then proceeded to resoundingly dismiss the husband's appeal on the merits, and made comments to the effect that the appeal should never have been brought, including:

- "This case warrants the reminder that an appeal is not a retrial."
- "There is no substance to the allegations the judge misapprehended or omitted evidence, improperly gave weight to the credibility of [the wife], and failed to follow proper procedures."
- " . . . [The husband's] complaint about retroactive support is frivolous . . . "
- "The complaint of judicial bias is entirely without merit and warrants no further comment from this Court."

One final point. The Order under appeal was made on July 22, 2022, but the appeal was not heard until February 10, 2023, and the Court's reasons were not released until March 14, 2023. That is a total of 7 $^{1}/_{2}$ months to determine whether an interim Order was correct. Even if there had been any merit to the husband's appeal, and it is apparent from the Court's reasons that there wasn't, both the parties and the system would have been better served by focusing on getting the case to trial so it could be resolved on a final basis, instead of wasting the better part of a year arguing about the interim arrangements. As Justice Zuber aptly put it in *Sypher v. Sypher* (1986), 2 R.F.L. (3d) 413 (Ont. C.A.):

> [2] At the outset, it is appropriate to observe that **interim orders are intended to cover a short period of time between the making of the order and trial.** I further observe that interim orders are more susceptible to error than orders made later; but **the purpose of the interim order is simply to provide a reasonably acceptable solution to a difficult problem until trial.**
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> [3] At trial, after a full investigation of the facts, a trial judge may well come to the conclusion that a substantially different order should be made. I gather that there is a fear that the interim order may acquire such an aura of propriety that there will be a tendency to repeat the terms after trial. This is not so. The trial judge's discretion is unfettered and his judgment will be rendered on a full investigation of the facts.
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> [4] Having those principles in mind then, **an appellate court should not interfere with an interim order unless it is demonstrated that the interim order is clearly wrong and exceeds the wide ambit of reasonable solutions that are available on a summary interim proceeding.** . . . [emphasis added]

And in Ontario, this is a principle that is enforced with the intensity of a thousand suns.

Maybe Some Orders *Are* Just Mere Suggestions? [Alternate Title: Argh!!]

Hamid v. Hamid, 2023 CarswellOnt 7894 (C.J.) — Sager J.

Non-compliance with parenting Orders is a serious problem in family law. Such non-compliance has plagued the bench and bar for decades. And, at least anecdotally, the problem seems to be getting worse. While the reasons why can, we suppose, be debated, we can't help but wonder out loud if the problem has been exacerbated by some relatively recent appellate decisions that have hampered the Court's ability to provide meaningful remedies for non-compliance.

We discussed one of these decisions, *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), in the 2021-34 (September 6, 2021) edition of *TWFL*. In that case, the Ontario Court of Appeal followed its own (and other) prior appellate decisions in cases such as *Campbell v. Campbell* (2011), 2 R.F.L. (7th) 334 (Man. C.A.); *Hefkey v. Hefkey* (2013), 30 R.F.L. (7th) 65 (Ont. C.A.); *Vigneault v. Massey*, 2014 CarswellOnt 4027 (C.A.); *Godard v. Godard* (2015), 65 R.F.L. (7th) 265 (Ont. C.A.); *Hokhold v.*

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Gerbrandt, 2016 CarswellBC 13 (C.A.); *Bassett v. Magee* (2015), 68 R.F.L. (7th) 257 (B.C. C.A.); *Ruffolo v. David* (2019), 25 R.F.L. (8th) 144 (Ont. C.A.); and *Chong v. Donnelly* (2019), 33 R.F.L. (8th) 19 (Ont. C.A.); and again made it clear that the Court should rarely use its contempt power — the "big stick of civil litigation" — to enforce parenting Orders, and that contempt is a remedy of last resort in parenting cases.

To be clear, we whole-heartedly agree that the contempt power of the Court should not be used as a first resort to encourage compliance; it is a serious power that should be used sparingly — but it should be used. And the contempt power should not be used to address those minor and annoying breaches we often see in parenting cases (*Fisher v. Fisher*, 2003 CarswellOnt 1170 (S.C.J.); *Campbell v. Campbell* (2011), 2 R.F.L. (7th) 334 (Man. C.A.); *Shields v. O'Brien*, 2013 CarswellOnt 362 (S.C.J.); *Travers v. Travers*, 2014 CarswellOnt 5279 (S.C.J.)) — but it should be used where appropriate. And the contempt power should not become just another way to enforce orders — but it should be an option where appropriate. Once recalcitrant parties come to learn they can behave without fear of punishment — they do; or once those same litigants come to understand that they have several "strikes" before they are "out" — they will happily take their strikes (sometimes more than three like in Little League these days). As we have said before, bad behaviour tolerated is bad behaviour encouraged. When a parent flouts an Order of the Court after a lengthy trial and costs order, rarely will convening a Case Conference, or merely issuing a "declaration of breach" (see below) solve the problem: *Hefkey v. Hefkey* (2013), 30 R.F.L. (7th) 65 (Ont. C.A.).

Then, in *Altman v. Altman* (2022), 76 R.F.L. (8th) 122 (Ont. S.C.J.), which we discussed in the 2023-13 (April 3, 2023) edition of *TWFL*, the Divisional Court declined to grant leave to decide whether a judge in Ontario can impose a monetary penalty or fine as a remedy for a breach of court order in the absence of a formal contempt motion. (We referred to this type of Order as a *Mantella* Order, as it first originated in a case called *Mantella v. Mantella* (2008), 61 R.F.L. (6th) 252 (Ont. S.C.J.).) As the case law about whether the court can make a *Mantella* Order is hopelessly conflicted, the Divisional Court's refusal to clarify whether and when it can be available makes it difficult to justify the cost and risk associated with seeking such relief.

So if we can't seek — and if a court cannot find/award — contempt or monetary penalties/fines for non-compliance with parenting Orders, how are we to compel compliance when breaches occur, and to discourage non-compliance in the first place? What is a court to do? Well, based on Justice Sager's recent decision in *Hamid*, the unsatisfactory answer appears to be: "not much."

The parties in *Hamid* were married for 15 years and had two children together. In 2021, they consented to a final Order that provided for shared decision-making authority, and a week-on/week-off residential schedule.

The parties followed the schedule until February 20, 2023, when the children apparently started refusing to see or speak to the father.

On March 19, 2023, the father brought a contempt motion against the mother, and alleged that she had breached the final Order by failing to facilitate the shared parenting schedule.

The mother denied the father's allegations, and claimed that the children, who were 14 and 9 at the time of the motion, were refusing to see the father because of his own behaviour. However, she did not ask the court to vary the final Order to reflect the children's alleged views and preferences (or otherwise).

The motion was argued and decided in late April 2023, and Justice Sager released her decision in early May 2023. As her Honour explained in her decision, the **first stage** of the test for contempt requires the moving party to establish all of the following beyond a reasonable doubt:

1. The order alleged to have been breached must state clearly and unequivocally what should and should not be done;

2. The party alleged to have breached the order must have had actual knowledge of it; and

3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

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See *Carey v. Laiken*, 2015 CarswellOnt 5237 (S.C.C.) at paras. 32-36.

In this case, there was no question that the first two parts of the test were met: the Order clearly and unequivocally said what the residential arrangements for the children were supposed to be, and the mother clearly knew about this term of the Order.

With respect to the third part of the test, in many parenting cases, the parent who is allegedly in contempt tries to claim that the breach was not intentional because they were unable to compel the children to see the other parent or otherwise follow the terms of the Order. As a result, a number of principles have been developed for courts to consider when dealing with these types of arguments. As Justice Braid recently well-summarized in *McCarthy v. Murray*, 2022 CarswellOnt 1466 (S.C.J.):

> [30] **A parent has a positive obligation to ensure that a child who allegedly resists contact with the access parent complies with the access order.** The parent is not entitled, in law, to leave access up to the child: see *Hatcher v. Hatcher*, 2009 CanLII 14789 (Ont. S.C.) at paras. 27-28.
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> [31] **A parent does not have to force a child to go for access with the other parent, but should require the child to go.** A failure to require the child to do this is considered contempt: see *Sickinger v. Sickinger*, 2009 CanLII 28203 (Ont. S.C.) at para. 30, aff'd 2009 ONCA 856.
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> [32] Although a child's wishes should be considered by a court prior to making an access order, **once the court has determined that access is in the child's best interests, a parent cannot leave the decision to comply with the access order up to the child.** A parent has a positive obligation to ensure a child who allegedly resists contact with the access parent complies with the access order. **Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they reasonably can:** see *Godard v. Godard*, 2015 ONCA 568, 387 D.L.R. (4th) 667 at paras. 28 and 29.
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> [34] **Actively promoting and facilitating compliance with a custody and access order requires the parent to take concrete measures to apply normal parental authority to have the child comply**, including addressing the following: (i) Did they engage in a discussion with the child to determine why the child is refusing to go? (ii) Did they communicate with the other parent or other people involved with the family about the difficulties and how to resolve them? (iii) Did they offer the child an incentive to comply with the order? (iv) Did they articulate any clear disciplinary measures should the child continue to refuse to comply with the order?: see *Smart v. Belland*, 2021 ONSC 1124 at para. 10.
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> [35] **Parents are not required to do the impossible in order to avoid a contempt finding. They are however required to do all that they reasonably can:** see *Godard*, at para. 29. [emphasis added]

In some cases, it can be difficult to determine whether a parent has done "all that they reasonably can" to require a child to abide by a court ordered parenting schedule, especially on a paper record. But not in *Hamid* — the mother effectively admitted she had done nothing to get the children to comply with the Order.

Accordingly, Justice Sager found that the third part of the test for contempt was met. She was also highly critical of the mother's conduct noting that her argument that her non-compliance was justified because the children had said they did not want to see the father was "a completely unacceptable stance to take" — further noting that it was "irresponsible for counsel to suggest" otherwise. She also took the opportunity to remind lawyers of their *professional obligation* to tell clients that they ***must*** comply with court Orders unless and until they are lawfully varied:

> [42] Family law litigants must be counselled to comply with court orders or immediately move to vary an order that evidence demonstrates is no longer in a child's best interest due to a material change in circumstances. **Counsel must ensure that parents understand that a court order for parenting time must be complied with and cannot be unilaterally changed or ignored.** The onus is on the parent who believes that a parenting order no longer promotes the children's best interests to immediately come before the court to explain why. [emphasis added]

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The **second stage** of the test for contempt requires the Court to consider whether contempt would be an appropriate remedy, bearing in mind the following principles from the Ontario Court of Appeal's decision in *Moncur*:

> [10] . . . 2. Exercising the contempt power is discretionary. Courts discourage the routine use of this power to obtain compliance with court orders. **The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort.** A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. **As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance:** *Carey*, at paras. 36-37; *Chong v. Donnelly*, 2019 ONCA 799, 33 R.F.L. (8th) 19, at paras. 9-12; *Valoris pour enfants et adultes de Prescott-Russell c. K.R.*, 2021 ONCA 366, at para. 41; and *Ruffolo v. David*, 2019 ONCA 385, 25 R.F.L. (8th) 144, at paras. 18-19.
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> 3. **When the issue raised on the contempt motion concerns access to children, the paramount consideration is the best interests of the children:** *Ruffolo*, at para. 19; *Chong*, at para. 11; and *Valoris*, at para. 41. [emphasis added]

Given the Court of Appeal's clear admonition that contempt is "an enforcement tool of last rather than first resort", and as the contempt motion was the father's first attempt to compel compliance with the Order, it is not surprising that Justice Sager was not willing to find the mother in contempt — at least not yet.

Instead, as suggested by the Court of Appeal in *Moncur*, Justice Sager made a declaration that the mother was in breach of the Order, and put terms in place, including a graduated schedule that the mother agreed to during the course of the motion whereby the father's parenting time would gradually return to the week week-on/week-off schedule set out in the final order from 2021.

Justice Sager also adjourned the matter to be spoken to in early June, and cautioned the mother that if she "fails to comply with the temporary order gradually increasing the father's parenting time until the schedule in the final order is reinstated, then [the] father may bring a contempt motion and she will be exposing herself to a finding of contempt and potentially harsh penalties available to the court if such a finding is made." She also ordered that the parties could speak to the issue of costs in early June if they could not otherwise resolve it on their own.

Based on *Moncur*, there is no question that the father's contempt motion was premature, and that Justice Sager's decision was correct on the current state of the law. Furthermore, although the father did not request a *Mantella* Order, a motion for that relief would have likely failed given the uncertain state of the law about whether the court even has jurisdiction to grant this type of relief.

But the more important question to consider is whether this *should be* the correct result.

Just to briefly recap what happened in this case:

- The mother started over holding the children on February 20, 2023;
- The mother took no meaningful steps to address the parent-child contact problems even after the father served her with a contempt motion on March 19, 2023;
- The mother waited until the middle of oral argument on April 26, 2023, to agree to a graduated plan for resuming the court ordered parenting schedule; and
- The Court found that the mother had intentionally breached a court Order.

And what consequences did the mother face? A stern warning, the possibility that she would be ordered to pay part of the father's costs, and a court date in over a month to see whether the situation had changed (or, for the cynics out there, another month to come up with better reasons for why she couldn't comply with the Order). And more court hours will be devoted to this case rather than another.

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As we said in our comment in *Moncur* when it was first released, such limited consequences "could be interpreted by some to mean that, in many cases, parenting orders really are not much more than suggestions."

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