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— **Franks & Zalev - This Week in Family Law**

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Supreme Court Update: Case to Watch

Commission des droits de la personne et des droits de la jeunesse v. Directrice de la protection de la jeunesse du CISSS de la Montérégie-Est, et al., 2023 CarswellQue 9980 (S.C.C.)

On August 10, 2023, the Supreme Court of Canada granted leave to appeal from the Quebec Court of Appeal's decision in this case.

The case involved a teenaged child who was in the care of the Director of Youth Protection (the "Director") and was being treated in a rehabilitation facility that specialized in adolescents with significant mental health and other issues. While at the facility, the child was placed in a special unit where she was isolated and restrained.

In December 2018, the child and her parents filed an application in the Quebec Provincial Court for relief under s. 91 of the *Youth Protection Act*, CQLR, c. P-34.1 ("*YPA*"), which allows a court to make corrective orders if it determines that the rights of a child are being prejudiced.

The Provincial Court judge found that the child's rights had been violated and made a number of corrective orders against the facility, including an order requiring it to: (a) provide certain types of training for its staff; (b) put specific protocols in place for dealing with children who spit at staff during an intervention; and (c) improve the safety of its isolation rooms.

The Director appealed to the Superior Court, arguing that the Provincial Court exceeded its jurisdiction by making a *general* remedial Order that applied to the facility at large, and that its Order should have only applied to the particular child in issue in the case. The Superior Court judge agreed with the Director, granted the appeal, and varied the Provincial Court judge's Order accordingly.

The child appealed to the Quebec Court of Appeal. Two of the judges who heard the appeal, Justice Levesque and Justice Hogue, agreed with the Superior Court's decision, but found that the Order should have been made against the Director instead of the facility. They also made it clear in their reasons that they did not think s. 91 of the *YPA* was broad enough to permit courts to make policy decisions for public agencies that would impact on the allocation of human, material, and financial resources.

The other judge, Justice Schragger, agreed that the Court did not have jurisdiction to require certain types of training, and that the Order should have been made against the Director instead of the facility. However, he was also of the view that s. 91 of the *YPA* was broad enough to allow the Court to require the Director to improve the safety of its isolation rooms and to implement specific protocols for dealing with spitting.

It will be interesting to see how all of this plays out in Ottawa, especially since the case will likely require the Supreme Court to delve into difficult and important questions about whether and to what extent courts should be involved in making policy decisions in both the child welfare context and beyond.

I Hear Voices . . . Children's Voices

B. v. B., 2023 CarswellOnt 315 (S.C.J.) — Tellier J.

This was a review of the residential arrangements for the parties' children, then aged 8 and 6.

As a review, there was no need for either party to show a material change in circumstances: *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.) ("*Leskun*") and the previous order helpfully set out the specific purpose of the review, namely, whether an expansion of the father's parenting time was in the best interests of the children.

As a practice point, keep in mind that a review order should be tightly circumscribed to indicate exactly what is being reviewed and the terms of the review: *Leskun*; *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.); *Domirti v. Domirti*, 2010 CarswellBC 2864 (C.A.); *Sappier v. Francis* (2004), 10 R.F.L. (6th) 458 (N.B. C.A.); *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.); *Verkaik v. Verkaik* (2020), 49 R.F.L. (8th) 69 (Ont. Div. Ct.); *Dumont-Dizy v. Dizy*, 2015 CarswellSask 207 (Sask. Q.B.); *P.M. v. S.M.* (2019), 34 R.F.L. (8th) 34 (Sask. C.A.); *Seymour v. Seymour* (2015), 65 R.F.L. (7th) 93 (Sask. Q.B.); and *Cvetkovic v. Cvetkovic-Gorovic*, 2021 CarswellOnt 4162 (C.A.) at 8. Absent those specified parameters, the court is left with only the factors in the *Divorce Act*, R.S.C., 1985, c.3 (2nd Supp.) ("*Divorce Act*") as applied to the then-present circumstances as compared to the circumstances at separation: *Morrow v. Finch* (2016), 85 R.F.L. (7th) 245 (Ont. S.C.J.); *M.T. v. J.S.* (2023), 86 R.F.L. (8th) 281 (B.C. C.A.) — and that could very well convert what may have been meant to be a circumscribed review into a wide-open hearing *de novo*. Yuck.

And now back to our regularly scheduled commentary . . .

For the review, the father wanted an order for a Voice of the Child report ("VCR"). He had taken prompt steps to seek the mother's consent to a VCR. He proposed that it be done on a private retainer basis to avoid any possible delay were the Office of the Children's Lawyer ("OCL") retained to undertake the VCR. He also provided the names of four qualified mental health professionals. And he offered to pay the entire cost.

The mother objected to a VCR. Her main concern — as is common in many cases — was that the children were being influenced by their father, calling into question the independence of any views the children might express. However, while the mother objected to a VCR, she conceded that the person the father *proposed* to provide the VCR was qualified to do so.

As the mother refused to consent, the father brought a motion in writing under Rule 14(10) of the Ontario *Family Law Rules*, O. Reg. 114/99, which is permitted for unopposed, procedural or uncomplicated motions. The father argued that the Court could make such an order on a Rule 14(10) motion: *Canepa v. Canepa* (2018), 14 R.F.L. (8th) 306 (Ont. S.C.J.), reminding the Court that Rule 2 of the *Family Law Rules* demands an efficient allocation of court resources, and that delay almost invariably works contrary to children's best interests.

The mother argued that the Court could not make an order for a VCR under Rule 14(10).

What's a judge to do?

As noted by Justice Tellier, s. 16(3)(e) of the *Divorce Act* requires the court to consider the views and preferences of the child(ren) to the extent they can be ascertained. And there are several options:

- a parenting assessment;
- the appointment of the Children's Lawyer, with or without clinical assistance;

- a Voice of the Child report;
- judicial interviews;
- through any admissible hearsay statements made by the child(ren) to their parent(s) or other witnesses; and
- the child's direct testimony in court.

These methods are not mutually exclusive, and each approach has its own advantages and disadvantages.

In determining what method might be best, context is important.

The parents had joint decision-making authority and a residential arrangement whereby the children were in their parents' care equally during all holidays. During the school year, the father's parenting time was more limited, with the children being in his care 10 days in a four-week (28-day) cycle. The father was now looking for an equal parenting schedule — therefore, the sole issue was whether it was in the best interests of the children that their time in their father's care be increased by four days every 28-days.

Justice Tellier first turned her mind to the possibility of a parenting assessment — and given the context above, concluded that a parenting assessment would be to use a sledgehammer to kill a mosquito. That said, her Honour did helpfully summarize the case law and criteria for a parenting assessment from *Glick v. Cale* (2013), 48 R.F.L. (7th) 435 (S.C.J.). In that case, Justice Kiteley rejected the notion that a clinical issue is a prerequisite for a parenting assessment, and set out the following 15 factors for consideration:

- (a) What was the parenting relationship like before separation? Did the parents function at least adequately before the separation and the dysfunction arose after the separation?
- (b) Are the parents unable to make any decision about the child's needs (including education, religion, health, and activities) without intervention by a court?
- (c) Without defining "high conflict", is the relationship between the parents so unhealthy that one or both parents is/are unable to identify the best interests of the child and act on it?
- (d) Do the parents have a mutual disregard for the other parent's ability to parent?
- (e) Do the parents blame each other for the dysfunction each describes?
- (f) Is there a clinical diagnosis that might impact on the parenting capacity of one or both parents?
- (g) Is there a clinical diagnosis with respect to any of the children in the family unit that means the child is fragile and vulnerable to ongoing conflict and has special needs?
- (h) What is the age of the child at separation and at the time of the request for the assessment?
- (i) Is the child manifesting behaviour that might be associated with stress caused by the conflict between the parents?
- (j) Is there an alternative? For example, is the child of an age and maturity that his or her views should be known and if so, would it be more appropriate to ask the OCL to become involved and appoint a lawyer to act for the child?
- (k) Are there other challenges in the family such as whether the family home must be sold? If those challenges are resolved, will the family dynamic be improved and avoid the necessity of an assessment?
- (l) What is the basis upon which the moving party relies? Is it essentially a mobility case on which the court must hear evidence? Is the issue custody or access?

(m) What is the estimated cost? Do the parents have the financial resources to pay that cost?

(n) Will the assessment cause delay that is not in the best interests of the child? In considering the impact of delay, is it more likely than not that the delay necessarily involved in an assessment will enable the parents to have a better understanding of the family dynamic and arrive at a resolution without a trial?

(o) Is an assessment in the best interests of the child?

Very few of the above "boxes" were "checked", and it was quite clear to Justice Tellier that the sledgehammer of a full-blown assessment was not required to address this relative fly of a problem. Given the narrow issue in the review, an expansive assessment was neither necessary nor proportionate.

The other issue is that an assessor's expert report is intended for use at trial — not on an interim motion — *generally*, absent exceptional circumstances or compelling reasons dictating that it be relied on immediately: *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.J.); *Miranda v. Miranda*, 2013 CarswellOnt 9752 (S.C.J.); *Calabrese v. Calabrese*, 2016 CarswellOnt 7327 (S.C.J.); *Daniel v. Henlon*, 2018 CarswellOnt 2901 (C.J.); *Lonsdale v. Smart* (2018), 13 R.F.L. (8th) 413 (Ont. S.C.J.).

That then led her Honour to consider a VCR. For those of you that did not do well in — or don't care about — history, feel free to skip the next paragraph (but you then can't be upset if you fail the exam).

From May 2016 to March 2017, there was a Voice of the Child Pilot Project at numerous court sites in Ontario, at different court levels. The project received very positive assessment and reviews by Dr. Rachel Birnbaum and Professor Nicholas Bala in: *Views of the Child Reports: The Ontario Pilot Project*, Int'l J of Law, Policy & The Family, 2017 31, 344-62. As a result, the use of VCRs is now formally part of Ontario's legislative patchwork meant to ensure that children's views are heard. VCRs have proven to be an effective and efficient process for ensuring that the voices of children are heard. Further, more judges are recognizing that in addition to a child's right to be heard, the child has a right to participate in the process, which may include their limited participation: *G. (B.J.) v. G. (D.L.)* (2010), 89 R.F.L. (6th) 103 (Y.T. S.C.); *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.); *Medjuck v. Medjuck* (2019), 28 R.F.L. (8th) 190 (Ont. S.C.J.); *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 CarswellOnt 9575 (C.A.).

While the VCR process does not involve gathering information from other sources, it is a direct way for the court to receive the children's views from a neutral source.

However, the VCR process also does not contemplate that the party charged with soliciting those views will challenge those views to determine whether they are independent. And this led Justice Tellier to address the mother's concern that the father would pressure the children to express the views he wanted them to express.

According to her Honour, those who meet with children to canvass their views and preferences, "are attentive to the potential impact of parental and other influences on the child's expressed wishes" and "the question of whether a parent has made statements or engaged in conduct that might impact the independence of a child's views and preferences can certainly be explored at any hearing." Such concerns are but one factor that go to the weight to be given to the expressed views.

To address the mother's concerns, the father proposed that the professional interviewing the children be able to contact the one child's therapist to get information. As noted, the VCR process generally does not contemplate interviewing collaterals, and Justice Tellier would have none of it:

[26] . . . In my view, it serves the administration of justice and the best interests of children, if, once a methodology has been selected to assist the court, that a relatively standardized, uniform approach to that methodology be employed. This serves to minimize the possibility of later disputes about the weight to be given a report based on perceived methodological deficiencies or anomalies.

[27] I also decline to make an order for a VCR, which confers discretion on the privately retained [mental health professional] to contact [the child's] therapist on the grounds of privacy . . . An essential aspect of a therapeutic relationship is the confidential, private nature of the dialogue between the [mental health professional] and his or her patient or client. The recipients of therapy, even children, are given some assurances about the confidential nature of the relationship and the clinical notes and records related to their therapy. The principles for balancing the need for disclosure of relevant health records and the privacy interests of the person or party engaged in therapy are well established. See *M(A) v. Ryan*, 1997 SCC 403 (CanLII) and *M-A., P.A., M.D. and A.D. v. E.L. v. Kunuwanimano Child and Family Services, Attiwapiskat First Nation*, 2020 ONSC 4597 (CanLII) . . .

Fair point. It would also be necessary to consider whether the child should have the opportunity to consent to the release of any such information: *L.S. v. B.S.*, 2022 CarswellOnt 14693 (S.C.J.).

In fairness, we think this may give overly short shrift to the mother's stated concerns. If the professional interviewing the children to get their views is not empowered to probe those views to determine their independence, how can that issue possibly be "explored" in any hearing? Most professionals will at least interview a child two or three times so as to be able to understand the strength and consistency of a child's views; but how do we test for independence in the context of a VCR? (And yes, we know that some professionals do try to gauge independence, but most do not, and that is not the primary function of a VCR.) For this reason, we are of the view, as are many, that VCRs are best suited to very discrete issues — such as choice of camp, school or recreational activities — rather than more significant decisions like parenting schedules.

The final issue considered by Justice Tellier was whether the VCR would cover both children (being 8 and 6 years old) or just the 8-year-old:

[24] The father conveyed to the court that [the mental health professional] indicated she would interview A., who turned 6 this summer. While there are no specific guidelines directing the Superior Court, Family Division regarding at what age it might be appropriate for children to be interviewed by the judiciary, I believe that generally judges follow the guidelines prepared for the Ontario Court of Justice, which support interviewing children 8 years and older.

[25] The OCL does not have hard age guidelines for VCR reports. The court appreciates that every child is unique, including their maturity level, at any given chronological age. While I am concerned that A. is too young, [the mental health professional] has indicated that she will interview A., as well as her brother. Accordingly, I will reluctantly grant the order requested so that both children are interviewed. If [the mental health professional] finds A. is too immature to convey her views and preferences in any meaningful way, she may abort the interview or address those concerns in her report.

This is the only case of which we are aware where a child this young was to be interviewed for a VCR.

Express Waiver of Privilege and Clint Eastwood

F.C.A.S. v. C.E.S., 2023 CarswellBC 1817 (S.C.) — Murray J.

Sometimes we get so caught up in arguments about the implied waiver of solicitor-client privilege, we forget that privilege can also be *expressly* waived by disclosing and/or referencing otherwise privileged communications.

The parties started living together in 2012. They married in 2015, entered into a marriage agreement in 2016, had two children, and separated in 2020. Upon separation, the wife looked to set aside the agreement for duress.

On this interim application, the husband was claiming a declaration that the wife waived privilege over the following (the "communications"):

1. Her former lawyers' file;
2. All communications between the wife and her former lawyer with respect to:

- a. The parentage of the children;
- b. Family violence;
- c. The date of separation; and
- d. Parenting time with the children and drug test reports and results.

The husband was also seeking an order that the wife's former lawyers produce copies of the communications.

In 2022, the wife filed an application to amend her pleadings to withdraw admissions about the separation date and the children's parentage, to make allegations against the husband's parentage, and to allege family violence in 2016 when the marriage agreement was formed.

In support of that application, the wife filed an affidavit that attached email correspondence between herself and her former lawyers which discussed the biological parentage of the children, parenting time, and family violence.

The obvious question, therefore, was whether the wife had waived solicitor-client privilege over parts of her former lawyers' files by explicitly disclosing correspondence between her and her former counsel.

We are all used to saying that waiver of privilege can be express or implied. But we so regularly address the alleged implied waiver of privilege, that we sometimes forget about express waiver. A court will find that privilege has been waived where a party takes a position inconsistent with the maintenance of privilege — such as by disclosing them — or makes legal assertions that make it unfair for them to rely on privilege: *Glegg c. Smith & Nephew inc.*, 2005 CarswellQue 2643 (S.C.C.) at para. 19; *ProSuite Software Ltd. v. Infokey Software Inc.*, 2015 CarswellBC 320 (C.A.) at para. 23.

Or, as written by Justice McLachlin way-back-when in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, 1983 CarswellBC 147 (S.C.):

[6] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication . . .

Where privilege is waived, production of all documents relating to the acts contained in the communication will be ordered: *George Doland Ltd. v. Blackburn Robson Coates & Co.*, [1972] 3 All E.R. 959 (Eng. Q.B.). The waiver of privilege applies to the entire subject matter of the communications; a party may not "cherry-pick" privileged communications, disclosing what is helpful for that party and claiming privilege over the rest: *Leitch v. Novac*, 2017 CarswellOnt 18669 (S.C.J.); *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CarswellOnt 4488 (S.C.J.). See also *Pacific Concessions Inc. v. Weir*, 2004 CarswellBC 3004 (S.C. [In Chambers]); *Spicer v. Spicer*, 2016 CarswellOnt 1745 (S.C.J.).

Here, the husband argued that the wife had expressly waived solicitor-client privilege over the areas of the communications she had appended to her affidavit.

In response, the wife argued that she did not intend to waive privilege — and to emphasize that, she pointed to a paragraph in her affidavit stating exactly that: "I do not generally waive privilege between my former counsel and me and only provide this correspondence to prove that the errors in the pleadings were inadvertent errors on the part of my counsel and me."

But, to paraphrase Clint Eastwood in *The Unforgiven*: "Intention's got nothin' to do with it."

Rarely would privilege be found to have been waived if it was a matter of intention. As noted by the B.C. Court of Appeal in *Brown v. Clark Wilson LLP*, 2014 CarswellBC 1340 (C.A.), the intention to waive privilege is essentially irrelevant to a determination of waiver of privilege:

... A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. **He may elect to withhold or to disclose, but after a certain point his election must fail.** [emphasis added]

Here, there could be no question that, in actually *appending* the communications to her affidavit, the wife had expressly waived privilege; and by disclosing *part* of the communication, the wife had expressly waived privilege over *all* communications with respect to the issues raised in the emails. It was a matter of fairness.

As a result, Justice Murray quite properly found that the wife had expressly waived privilege over communications with her former counsel relating to the parentage of the children, family violence, date of separation, parenting time with the children and her drug test reports and results, and she ordered the wife's former lawyers to provide copies of all communications relating to these subjects.

Solicitor-client privilege is no longer an evidentiary principle. It is a general principle of substantive law and a principle of fundamental justice within the meaning of section 7 of the *Charter*: *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 CarswellQue 2477 (S.C.C.); *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 CarswellBC 295 (S.C.C.); *R. v. McClure*, 2001 CarswellOnt 496 (S.C.C.); *Canada (Procureur général) c. Chambre des notaires du Québec*, 2016 CarswellQue 4459 (S.C.C.). But as important as it is, it can be lost in an instant. *Fait attention.*