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— Franks & Zalev - This Week in Family Law

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Remembering *Moge*

D.J. v. K.J. (2023), 87 R.F.L. (8th) 393 (P.E.I. S.C.) — Cann J.

We understand. *Moge* was decided three decades ago. That's a *long* time.

D.J. is a spousal support case that offers the chance to review, remember, and discuss some of the fundamental principles of compensatory spousal support. Although it was decided under Prince Edward Island's *Family Law Act*, S.P.E.I. 1995, c. 12, as the Court acknowledged in its reasons, "the governing principles are essentially identical and the *Divorce Act* jurisprudence is applicable with equal force to proceedings under the *Family Law Act*."

The parties in *D.J.* cohabited for 18 $^{1}/_{2}$ years and were married for 16 years. They had three teenage children together.

In the early years of the marriage, the parties lived in Ottawa, where the father worked for the federal government, and the mother worked as a legal assistant at a law firm. Shortly after the birth of their second child in 2010, the family moved to Prince Edward Island. The father continued working for the federal government, while the mother stayed at home full time to take care of the children.

When the youngest child started school in 2018, the mother started working for the provincial government.

By the time the parties separated in 2020, the father was earning more than twice as much as the mother (he earned $112,000 in 2020, $133,000 in 2021 and $144,000 in 2022; whereas the mother earned $52,000 in 2020, $53,000 in 2021 and $62,000 in 2022). As a result, while the father was able to purchase a house and new car for himself after the parties separated, the mother was only able to afford rental accommodations that did not really have enough space for her and all three children.

Prior to trial, the parties agreed on a shared parenting arrangement, and that child support should be based on a straight set-off (presumably to avoid the "Hot Mess Inside a Dumpster Fire Inside a Train Wreck" involved with a *Contino* analysis — see the 2020-42 (November 2, 2020) edition of *TWFL*). They also resolved the property issues, which were neither significant nor contentious since the parties were not wealthy, and had gone bankrupt several years before separation because of some bad investment decisions.

However, the parties were unable to resolve the issue of spousal support (there was also a small dispute about child support arears, but it is not important for the purposes of our discussion).

We would have thought that the mother was clearly entitled to both compensatory and non-compensatory spousal support given that:

> (a) the parties had a reasonably long relationship (16 years of marriage and 18.5 years of cohabitation);
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> (b) the mother left the work force to raise the children for eight years while the father built a career with the federal government that allowed him to earn significantly more than the mother; and
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> (c) the family moved a significant distance during the marriage (although it is not entirely clear from the decision why they chose to do so, or whether they moved so that the father could advance his career).

Surprisingly, the trial judge disagreed. While he accepted that the mother was entitled to support based on need, he found that she was ***not*** entitled to compensatory support, because she had not adduced evidence to establish what her income might have been had she not left the work force for eight years to stay home with the children:

> [33] . . . **Compensatory entitlement is grounded upon the notion that the recipient has given up an opportunity to pursue a greater level of income as a result of contributing to the material and other well being of the family.** I do not intend to describe the requirements of the compensatory basis of spousal support at length. In this proceeding, **the mother did not put forward evidence capable of establishing lost opportunity, arising from the marriage, to attain a higher income than the one she has already.** No basis for comparison to what she could have earned, absent her departure from the work force, has been offered. In addition, **the departure was comparatively short lived, rendering an inference of lost opportunity problematic**, especially when combined with the family's relocation from Ontario to this province. As a result, I am unable to find a compensatory basis for entitlement to spousal support. [emphasis added]

[As an aside, we respectfully disagree that leaving the work force for eight years can properly be characterized as "short lived".]

Having found that the mother was only entitled to non-compensatory spousal support, the trial judge concluded that she was only entitled to support based on the income the father earned during the marriage instead of his higher income post-separation (about $112,000 in 2020 instead of the $133,000 he earned in 2021 and the $144,000 he earned in 2022). He then ordered the father to pay the mother $412 a month in spousal support based on the mid-range of the *SSAGs*. This was less than half of what the mother would have been entitled to at the mid-range of the *SSAGs* had the Court used the father's current income instead of his income in the final year of the marriage.

The trial judge also determined that spousal support should be indefinite in form, but that it should be reviewed when the oldest child (who was 14 at the time of the trial) turned 18 because of the "genuine and material uncertainty which is likely to arise as the children get older and child support payments become subject to the potential for significant variations."

Very respectfully, the trial judge's compensatory support analysis is, in our view, flawed. But it does provide us with a good opportunity to refresh our memories about *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), the Supreme Court of Canada's seminal decision on compensatory spousal support.

Contrary to what the trial judge had to say in *D.J.*, compensatory spousal support is ***not*** (and at least since *Moge*, has never been) reserved for spouses who can prove that, but for the marriage, they would be earning a higher income at the time of separation. In fact, the exact opposite is true and, in most cases, it will be impossible for a spouse claiming spousal support to prove what would have happened had different life choices been made over a medium-to-long-term marriage. As Justice L'Heureux-Dubé explained more than 30 years ago in her decision for the majority in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.):

> [74] **The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution** which, in my view, the *Act* promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it **recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative**. In so far as economic circumstances permit, the *Act* seeks to put the remainder of the family in as close a

position as possible to the household before the marriage breakdown. As Judge Abella wrote in "Economic Adjustment On Marriage Breakdown: Support," at p. 3:

> To recognize that each spouse is an equal economic and social partner in marriage, regardless of function, is a monumental revision of assumptions. It means, among other things, that **caring for children is just as valuable as paying for their food and clothing. It means that organizing a household is just as important as the career that subsidizes this domestic enterprise. It means that the economics of marriage must be viewed qualitatively rather than quantitatively**. [emphasis added]

Furthermore, a claim for spousal support is not a claim in tort. Using a "but for" analysis to assess compensatory support claims is also inconsistent with the Supreme Court's determination in *Moge* that, when dealing with spousal support claims, the court must consider *what actually happened* in the relationship, and not what *might have happened* had the spouses made different decisions. As Justice McLachlin (as she then was) specifically explained in her concurring reasons in *Moge*:

> [119] A formalistic view of causation **can work injustice** in the context of s. [15.2(6) and] 17(7) [of the *Divorce Act*], as elsewhere. The question under [s. 15.2(6)(a) and] s. 17(7)(a) is whether a party was disadvantaged or gained advantages from the marriage, as a matter of fact; under [s. 15.2(6)(c) and] s. 17(7)(c) whether the marriage breakdown in fact led to economic hardship for one of the spouses. **Hypothetical arguments after the fact about different choices people could have made which might have produced different results are irrelevant, unless the parties acted unreasonably or unfairly.** In this case, for example, Mrs. Moge in keeping with the prevailing social expectation of the times, accepted primary responsibility for the home and the children and confined her extra activities to supplementing the family income rather than to getting a better education or to furthering her career. That was the actual domestic arrangement which prevailed. **What Mrs. Moge might have done in a different arrangement with different social and domestic expectations is irrelevant.**
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> . . . . .
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> [121] **What is required under s. [15.2(6) and] 17(7) of the *Divorce Act* is a common sense, non-technical view of causation,** such as this court proposed for personal injury cases in *Snell v. Farrell*, [1990] 2 S.C.R. 311, 110 N.R. 200, 4 C.C.L.T. (2d) 229, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, per Sopinka J., at p. 330 [S.C.R.]:
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> > The legal or ultimate burden remains with the plaintiff, but **in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.** [emphasis added]

In some cases, it won't really matter whether a party is entitled to compensatory or non-compensatory spousal support, as the result will essentially be the same. However, that was not the case in *D.J.*, because the trial judge's finding that the wife was not entitled to share in the husband's post-separation income flowed *directly* from his conclusion that she was not entitled to compensatory support. Had the trial judge found entitlement on compensatory grounds and considered the other relevant principles, it seems likely that he would have ordered the husband to pay significantly more spousal support than he did.

[For further discussion about post-separation increases in income, see Professor Rollie Thompson's excellent paper on the subject, "Post-Separation Increases in Payor Income and Spousal Support", 39 CFLQ 185, which is available on *Westlaw*; see also Justice Chappel's thorough discussion of the issue in *Thompson v. Thompson*, 2013 CarswellOnt 12392 (S.C.J.), particularly the list of factors and considerations that can be found at paragraph 103 of the decision.]

During a marriage, a couple typically operates in a financial partnership, where each partner assumes roles that support their mutual goals and the best interests of the family. If one spouse makes economic sacrifices, it will usually be with a view to improving the financial position or quality of life of the family as a whole. But when the relationship breaks down, the equilibrium of mutual benefit is disturbed. Only at that time will the financial sacrifices that a spouse made come home to roost. Absent some form of compensation, the cost of those sacrifices will be borne exclusively by that spouse in the form of diminished earning capacity and employment opportunities (past and future). At the same time, the financial benefits conferred

on the other spouse will, absent compensation, exclusively benefit the advantaged spouse. This is the raison d'être — the goal — of compensatory support: to ensure that, prospectively, the economic consequences of choices made by the couple during the marriage are not borne by only one spouse, but shared fairly: *Zacharias v. Zacharias* (2015), 66 R.F.L. (7th) 1 (B.C. C.A.); *Rozen v. Rozen* (2016), 86 R.F.L. (7th) 56 (B.C. C.A.); *H. (J.L.) v. W. (R.S.)* (2017), 94 R.F.L. (7th) 1 (Alta. C.A.); *Roseneck v. Gowling* (2002), 35 R.F.L. (5th) 177 (Ont. C.A.); and *Chutter v. Chutter* (2008), 60 R.F.L. (6th) 263 (B.C. C.A.), aff'd, 2009 CarswellBC 1386 (S.C.C.).

Or, as noted by the Ontario Court of Appeal, "over a long marriage, expectations and interdependency evolve into an economic merger of interests and that merger combined with a compromised career path meets the threshold of entitlement to support": *Cassidy v. McNeil*, 2010 CarswellOnt 1637 (C.A.).

Finally, we want to briefly comment on the trial judge's decision to order a ***review*** of support in four years, when the oldest child turned 18. While it is true that the spousal support arrangements might need to be adjusted when the children reach the age of majority or otherwise cease to qualify as "children of the marriage" for child support purposes, this eventuality is already expressly dealt with in s. 15.3 of the *Divorce Act*, which provides that a subsequent reduction or termination in child support automatically qualifies as a material change for the purposes of varying a spousal support order:

> **15.3(3)** Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

Accordingly, it was not necessary for the Court to order that support would be reviewed in four years to address any subsequent changes in child support arrangements.

Now, if you'll please excuse us, we're going to go deliver a copy of *Moge* to P.E.I.

Can You "Know" Something that Is Not True?

D.L. v. E.C., 2023 CarswellOnt 10989 (C.A.) — Doherty, Feldman and Roberts JJ.A.

This case arose out of the death of B.L. and the resulting dispute over the proceeds from his pension from employment. B.L. died without a will. The claimants to B.L.'s pension were the named beneficiaries, D.L. and A.L-G., his mother and sister respectively, and E.C., who sought an order for dependant support on behalf of her child, P.C.L., under s. 58 of Ontario's *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*").

In Ontario (and in some other jurisdictions, including Saskatchewan and P.E.I., for example) the definition of "child" in provincial support and dependant's relief statutes define child (and reciprocally "parent") to include both a biological child *and* a person whom a parent "has demonstrated a settled intention to treat as a child of his or her family." See, for example, section 1 of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3; section 57 of the Ontario *Succession Law Reform Act*, R.S.O. 1990, c. S.26; section 2 of the Saskatchewan *Family Maintenance Act*, 1997, SS 1997, c F-6.2; and section 1 of the P.E.I. *Family Law Act*, Chapter F-2.1 — to name a few.

These provisions stand in contrast to the definition of "child of the marriage" in the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp), wherein a "child of the marriage" is defined to include "any child for whom they both stand in the place of parents." No requirement for "settled intention" in sight.

So what does "settled intention" mean — or what does it not mean — and how is it different from "standing in place of a parent" *simpliciter*? We're about to find out.

Having met in high school, E.C. and B.L. had been involved in an on-again-off-again romantic relationship for about eight years before B.L.'s. death. At the time of his death, B.L. was 26 years old.

When the child, P.C.L., was conceived in December 2017, E.C. and B.L. were romantically involved with other people. In April 2018, nearing the end of her pregnancy, E.C. approached B.L. for assistance. They then lived together in a motel for a couple of months. B.L. attended the hospital when E.C. gave birth to P.C.L. on July 23, 2018.

In September 2018, B.L. moved into E.C.'s parents' home, where she and P.C.L. were living. E.C.'s parents were the primary financial support of E.C. and P.C.L. While E.C. and B.L. continued to parent P.C.L., both E.C.'s and B.L.'s mothers were initially listed as custodial parents. However, B.L.'s mother was removed from her position as a custodial parent, and B.L. briefly had his right to see P.C.L. revoked due to continued drug use.

In January 2019, B.L. was ejected from E.C.'s parents' home, and he lived with his sister until his death in March 2019.

B.L. was named as P.C.L.'s father on the birth and baptismal certificates; B.L. named E.C. and P.C.L. as beneficiaries on his life insurance; and he arranged to add E.C. and P.C.L. as dependants on his medical insurance.

The motion judge concluded that E.C. had not met her onus under s. 58 of the *SLRA* to demonstrate that P.C.L. was a dependant of B.L. at the time of B.L.'s death. The court concluded that E.C. and B.L. were not common law spouses and that, as the ordered DNA tests demonstrated, P.C.L. was not the biological child of B.L.

The Court *also* did not accept that B.L. had demonstrated "a settled intention" to treat P.C.L. as a child of his family in accordance with the expanded definition of "child" under s. 57(1) of the *SLRA*. While the evidence had shown a *basic* intention by B.L. to treat P.C.L. as his child, it was not a *settled* intention. While B.L. *believed* that he was P.C.L.'s biological father, E.C. knew better. She knew when P.C.L. was conceived that either (1) B.L. *was not* the father, or that (2) B.L. *may not* be the father of P.C.L. — and she did not did not disabuse B.L. of his misunderstanding.

In conclusion, the Court determined that, had E.C. been forthright and honest with B.L. about the parentage, the eight months *may* have been a sufficient time frame to have allowed for a settled intention to form.

The Court also awarded substantial indemnity costs against E.C. for advancing "a false narrative" or otherwise engaging in the kind of egregious conduct that warranted an award of costs on a substantial indemnity scale. The motion judge termed this so "reprehensible, scandalous and outrageous" as to warrant the sanction of elevated costs.

E.C. appealed, primarily (and for our purposes, most interestingly) on this issue of settled intention.

Relying primarily on *Chartier v. Chartier* (1999), 43 R.F.L. (4th) 1 (S.C.C.), E.C. argued that the court below erred in treating B.L.'s knowledge or lack of knowledge of P.C.L.'s true parentage as a relevant factor in the analysis, especially given B.L.'s "suspicions" as to P.C.L.'s parentage. E.C. argued that the best interests of the child was the sole consideration. But if we've not yet put you to sleep, you will notice a problem: *Chartier* was decided under the *Divorce Act* (without the requirement of a "settled intention"); this was being decided under the *Family Law Act*, where "settled intention" reigns supreme.

According to the Court of Appeal, "while it would have been preferable if the application judge had expressly addressed the uncontroverted evidence that B.L. had suspicions as to whether he was P.C.L.'s biological father," those suspicions did not preclude the Court's finding that B.L. believed he was P.C.L.'s biological father during the very short time that he was involved in her life.

The reasons of the Court of Appeal on this issue are relatively brief. But, as we discuss below, we approve of the result, but we question the reasoning:

> [13] None of the case law submitted by E.C. prohibits the consideration of B.L.'s knowledge of P.C.L.'s parentage as a factor in the court's consideration of whether he had a settled intention to treat her as his child. It is a question of weight to be given to that factor in the particular circumstances of the case. For example, *Chartier v. Chartier*, 1999 CanLII 707 (SCC), [1999] 1 S.C.R. 242, on which E.C. principally relied, involved the question of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), for a non-biological child. In *Chartier*, the court referenced the father's knowledge that the

child was not his natural daughter, but the length and depth of the relationship between the father and the child underpinned the court's conclusion that the father had treated the child as a "child of the marriage". While the court in *Chartier* lists a number of factors relevant to determining "the parental relationship" and does not include knowledge of parentage or lack thereof in the list, this does not prohibit consideration of such knowledge as a relevant factor where appropriate.

[14] Which factor will figure more predominantly in the analysis of whether a person has "a settled intention" to treat a child as his or her own will therefore depend on the circumstances of the case. As the application judge correctly noted, this is a fact-driven exercise. In the circumstances of this case, the state of B.L.'s knowledge was a relevant but not determinative factor because of the very short time period involved and the limited evidence of B.L.'s relationship with P.C.L. The application judge did not consider it to the exclusion of other relevant factors, including P.C.L.'s need for support and her relationship with B.L. as manifested in the very short time they were together.

[15] B.L.'s knowledge of P.C.L.'s parentage was one of many factors that the application judge considered in his fact-driven analysis of what he correctly characterized as the "key issue for determination", namely "on the limited evidence before this court, in the short period between July 2018 and April 2019, can a 'settled intention' of the deceased to treat P.C.L. as his child, be found, making her a dependant to whom the deceased was either providing support or was under a legal obligation to provide support immediately before his death."

[16] The application judge's determination that E.C. did not demonstrate that B.L. had shown a settled intention to treat P.C.L. as a child of his family was open to him on the record. The evidence of B.L.'s intention was arguably ambiguous. While, as the application judge noted, some of the evidence, such as B.L.'s name on the birth and baptismal certificates, pointed towards intention, other evidence, such as B.L.'s lack of financial support of P.C.L., the very short time he lived with her, and his failure to follow through on adding E.C. and P.C.L. as his pension beneficiaries once he was no longer living with them, suggested no settled intention. It was up to the application judge to weigh this evidence. I see no basis to intervene.

Allow us to meekly suggest that this is the correct result but for the wrong reasons. The focus here should be on the *meaning* and application of "settled intention":

1. As noted above, *Chartier* was a case decided under the *Divorce Act* where the test for "standing in the place of a parent" or "*in loco parentis*" is essentially *objective*.

2. This case was decided under the *Family Law Act* where, to be a "parent" to a non-biological child, a person must have "demonstrated a *settled intention* to treat as a child of his or her family." This is not an objective test; it is *subjective*. What else can "settled intention" mean?

3. One cannot have a settled intention without knowing the true state of affairs regarding paternity: *R.C. v. C.W.* (2003), 49 R.F.L. (5th) 11 (Ont. S.C.J.). A "settled intention" to treat a child as a member of the family requires knowledge of the true state of affairs on the part of the person who is said to have formed that settled intention. The word "intention" suggests that a decision is to be made consciously, with knowledge, and with purpose: *W. (T.) v. L. (S.)* (2017), 92 R.F.L. (7th) 130 (Sask. Q.B.). The time to assess settled intention is subsequent to knowing the truth: *R.N.H. v. G.C.-B.* (2004), 24 R.F.L. (6th) 459 (Sask. Q.B.). See also: *L.S. v. C.S.*, 2002 CarswellOnt 1684 (C.J.); *B. (K.L.) v. M. (J.)* (2005), 14 R.F.L. (6th) 1 (Ont. C.J.).

In distinction to the reasoning of the Court of Appeal, we would suggest that this case should have come down to the fact that the putative father did not have the opportunity to form a settled intention to treat the child as a child of his family. The truth was kept from him.

The "settled intention" component should *not* be a matter to be weighed with all the other fact of the case. *Chartier* is a false comparator because of the more objective wording of the test in the *Divorce Act*. Furthermore, in *Chartier*, and unlike this case, the father *knew* the child was not his natural daughter. Far from the *Family Law Act* "not prohibiting consideration of such

knowledge as a relevant factor" — a consideration of knowledge is actually mandated by the requirement of "settled intention." Respectfully, the state of knowledge should have been a determining factor, especially in a relationship of only eight months.

Somewhat ironically, the regular reference by the Court of Appeal to B.L.'s "suspicion" that he was not the P.C.L.'s biological father should have militated in favour of a finding of settled intention — or perhaps settled intention based on wilful blindness. But that is a tortured thought for another day.

On the matter of costs, the Court of Appeal held there was no basis for an award of substantial indemnity costs.

Substantial indemnity costs are awarded where a party engages in egregious conduct: *Iannarella v. Corbett*, 2015 CarswellOnt 2150 (C.A.), at para. 139; *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 CarswellOnt 369 (C.A.), at para. 53. The application judge had awarded higher costs being of the belief that E.C. advanced a "false narrative," knowing that B.L. was not (or may not have been) P.C.L.'s biological father and failing to disabuse him of that notion.

But, according to the Court of Appeal, this did not amount to advancing a false narrative or a failure to be honest or forthright. As a result, the award of substantial indemnity costs was set aside.

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