

FAMLNWS 2023-44
Family Law Newsletters
November 20, 2023

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

Aaron Franks & Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

- The Court Is Not a Restaurant and a Court Order Is Not a Buffet
- Is it Time to Get Mahr-Ried?

The Court Is Not a Restaurant and a Court Order Is Not a Buffet

Kantor v. Kantor (2023), 90 R.F.L. (8th) 255 (Alta. C.A.) — Khullar C.J, Watson and Pentelchuk JJ.A.

Mr. Kantor cross-applied to reduce his spousal support payments retroactively and prospectively.

He lost.

He appealed.

He lost again.

Read on to see why, and what this has to do with buffets.

The parties participated in binding judicial resolution. The process was successful, and a final Corollary Relief Order was granted in January 2018. That Order required Mr. Kantor to pay \$2,400 a month in spousal support.

Four months later, Mr. Kantor lost his job, and he stopped making the required payments.

In October 2018, the parties consented to an Order temporarily suspending the payments. That Order also required Mr. Kantor to notify Ms. Kantor within 10 days of him finding new employment and to recommence spousal support payments two months after that. *Another* term was that if Mr. Kantor had not found new employment within six months, either party could apply to "review or vary" spousal support under the January 2018 Order.

Mr. Kantor found work in June 2019, 13 months after losing his previous employment. Under the October 2018 Consent Order, he was to notify Ms. Kantor and restart payments. He did neither.

There were subsequent gaps in Mr. Kantor's employment: he did not work from January to August 2021; or from January to March 2022.

In August 2021, Ms. Kantor learned that Mr. Kantor had been re-employed for various periods since June 2019 and, in March 2022, she applied for an order requiring him to make all spousal support payments he had missed under the January 2018 Order back to August 2019.

Mr. Kantor cross-applied to reduce his spousal support payments both prospectively and retroactively to May 2018. He categorized his application both as a "review" (such that no material change would be required: *Leskun v. Leskun* (2006), 34

R.F.L. (6th) 1 (S.C.C.)) and a "variation." In either case, the basis for his claim was that he had been without work for various periods since the January 2018 Order and earned less income than he did at the time of that Order.

The application and cross-application were the opposite sides of the same coin: if Mr. Kantor was successful in retroactively reducing or cancelling his support under the January 2018 Order, then Ms. Kantor would not be entitled to the payments he missed under that Order.

The chambers judge dismissed Mr. Kantor's cross-application primarily because apart from the 13-month period when he was without work (from May 2018 to June 2019) his income had been the same as it was at the time of the January 2018 Order. And since Mr. Kantor had not paid support during that 13-month period, nor was Ms. Kantor claiming it, there was no basis to vary the January 2018 Order to say that he owed no support for that period.

Mr. Kantor appealed. He argued that:

1. The October 2018 Consent Order entitled him to a review of spousal support if he was out of work for six months, without the need to show a material change in circumstances since the January 2018 Order.
2. The chambers judge applied the wrong test for determining if the reduction in his income amounted to a material change in circumstances.

That is, Mr. Kantor was arguing that, despite not complying with the burdens of the October 2018 Consent Order, he was entitled to its benefits. Rarely does that dog hunt. The chambers judge found that Mr. Kantor had no right to a review because the review was "implicitly conditional" on his compliance with other terms of the October 2018 Consent Order, wherein he was required to disclose new employment within 10 days of getting it and to restart payments.

Mr. Kantor argued that this was an error of law because nothing in s. 15.2(5) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (the "*Divorce Act*") suggested that any provision in a spousal support order — here, the provision granting a right to a review — be conditional on compliance with other terms of that order. Again, Mr. Kantor was arguing that the October 2018 Consent Order should be "subdivided" into its "component parts" and that, to the extent each part conveyed a benefit to a party, the benefit should be treated as available to that party regardless of what happened with respect to other component parts of the Order. But, ultimately, Mr. Kantor was arguing that his "misconduct" (i.e. his own non-compliance with the October 2018 Consent Order), was not a proper consideration because, with no-fault divorce, conduct specifically does not matter under s. 15.2(5) of the *Divorce Act*. Slightly different kind of dog; still don't hunt.

The Court of Appeal rejected all forms of this argument. And in doing so, the Court offers some useful comments as to the meaning of "misconduct" in s. 15.2(5) of the *Divorce Act* which states:

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse **in relation to the marriage**. [emphasis added]

The Court of Appeal notes that the words, "in relation to the marriage" are there for a reason. No fault divorce, and more specifically the rights and entitlements upon divorce, are in no way related to the conduct or misconduct of either spouse *during the marriage*. But a party's post-marriage conduct is fair game; and it should be. The facts of this case did not engage s. 15.2(5) of the *Divorce Act*.

A court order must be interpreted as a holistic document, by reading it as a whole, in the context of the pleadings, the arguments *and the circumstances in which the order was made*: *Weinrich Contracting Ltd v. Wiebe*, 2022 CarswellAlta 1180 (C.A.) at para. 25; *Yu v. Jordan* (2012), 24 R.F.L. (7th) 154 (B.C. C.A.) at para. 53; *Campbell v. Campbell* (2016), 78 R.F.L. (7th) 64 (Sask. C.A.) at para. 15; *Greenwood v. Greenwood*, 2023 CarswellSask 389 (C.A.). A consent order must be interpreted as would an agreement — the factual background is relevant: *Toronto Dominion Bank v. Cariboo Trail Hotel Ltd.*, 1996 CarswellBC 2687 (S.C. [In Chambers]), aff'd 1998 CarswellBC 1422 (C.A.); *Power v. Jackman* (2008), 61 R.F.L. (6th) 144 (N.S. S.C.).

Here, the October 2018 Consent Order was meant to provide Mr. Kantor with relief given his employment situation. It specifically recognized the January 2018 Order and that Mr. Kantor had recently lost his job. It then (amongst other things):

- provided for the temporary suspension of support payments;
- required Mr. Kantor to give notice of new employment and to immediately continue spousal support payments after recommencing employment;
- allowed either party to apply to vary the January 2018 Order if Mr. Kantor's new income was a material change in circumstance;
- allowed either party to apply to terminate the suspension of spousal support or to review or vary the terms of the January 2018 Order if Mr. Kantor had not secured new employment within six months of the October 2018 Consent Order; and
- affirmed that all other provisions of the January 2018 Order remain in force.

Six months after October 2018 would have been April 2019. Mr. Kantor did not resume employment until June 2019. Mr. Kantor argued that he could rely on the October 2018 Consent Order to vary spousal support as he was still, in fact, unemployed six months later.

But this suggests that a party can "pick and choose" which provisions of an Order they will be bound by at any given time. Or, as gastronomically said by the Court of Appeal:

[22] Mr Kantor's argument seems to view a court order as a buffet, where he can pick and choose which paragraphs he might adhere to, and then at a later time, if convenient for him, choose to go back for seconds and maybe comply with another paragraph. He is wrong.

That statement does not leave much room for dessert.

So while Mr. Kantor was unemployed up to April 2019 and *until that time* could have brought an application to "review or vary" the terms of the January 2018 Order regarding spousal support, he could *not* rely on this provision in August 2022 (the date of the chambers hearing). Again, the whole premise of the October 2018 Consent Order was to provide temporary relief because of his lack of income. *If* his lack of income continued, the October 2018 Consent Order provided a means for the parties to address it.

But Mr. Kantor did not avail of that opportunity before April 2019. (One might postulate this was because, in April, he knew he would be employed again in June.) He then ignored the requirement to give notice and to resume spousal support. By August 2022, the date of the hearing, having flouted his own obligations, he could not then "cherry pick" the one paragraph of the October 2018 Consent Order he wanted to rely on. By August 2022, the review paragraph was "spent" and could not be relied upon. The temporary situation it was specifically designed to address no longer existed; by August 2022, there was nothing left to the October 2018 Consent Order when Mr. Kantor tried to invoke it. And, worse, Mr. Kantor's breach of his obligations undermined the basis of the other paragraphs of the October 2018 Consent Order. As far as the Court of Appeal was concerned, Mr. Kantor forfeited the benefit of the review paragraph of the October 2018 Consent Order as of June 2019, when he should have given notice of his new employment.

Finally, as new members of the "imputation of income club" through *Peters v. Atchooay*, 2022 CarswellAlta 3110 (C.A.), the Court of Appeal offered these comments about financial disclosure that we know will join the ranks of oft-cited disclosure quotes across the country:

[28] We take this opportunity to underscore that **disclosure in family law is a legal obligation, not a forensic technique**. As this Court said in *Peters v. Atchooay*, 2022 ABCA 347 at para 113, **the effect of changes of income of a payor on the payor's obligation is not to be assessed without accounting for lack of disclosure: "a payor parent does not get a free pass if they fail in their duty to provide timely disclosure simply because they can later show a drop in their**

income". While the Court in *Atchooay* was talking about child support, a comparable disclosure duty applies as to spousal support. Non-disclosure has been described as a "cancer" in family law litigation: *Leskun v. Leskun*, 2006 SCC 25 at para 34. See likewise *Michel v. Graydon*, 2020 SCC 24 at para 33; *Smith v. Smith*, 2016 ABCA 376 at para 16. [emphasis added]

Want some other great cases and quotes about the importance of financial disclosure? Feel free to select from this bountiful buffet:

Cunha v. Cunha, 1994 CarswellBC 509 (S.C.) (non-disclosure is the cancer of family law litigation); *Wu v. Sun* (2011), 97 R.F.L. (6th) 104 (B.C. C.A.) (non-disclosure is the "Achilles Heel" of family litigation; *Leitch v. Novac* (2020), 38 R.F.L. (8th) 1 (Ont. C.A.) ("invisible litigants"); *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.); *Manchanda v. Thethi* (2016), 84 R.F.L. (7th) 341 (Ont. S.C.J.), aff'd (2016), 84 R.F.L. (7th) 374 (Ont. C.A.) (a party who does not make early, voluntary, and complete financial disclosure is not participating in the process, and such parties must be assessed a game misconduct and ejected from the proceedings); *Mackey v. Rerrie*, 2016 CarswellOnt 10853 (C.A.); *Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.) (disclosure is the most basic family law obligation and the obligation is immediately, ongoing and automatic and should not require orders); *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.); *Fielding v. Fielding* (2015), 70 R.F.L. (7th) 253 (Ont. C.A.); *Arenburg v. Arenburg*, 2016 CarswellNS 937 (C.A.); *Burke v. Poitras* (2018), 22 R.F.L. (8th) 266 (Ont. C.A.); *Martin v. Watts*, 2020 CarswellOnt 8657 (C.A.); *Mullin v. Sherlock* (2018), 19 R.F.L. (8th) 1 (Ont. C.A.); *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052 (S.C.J.) at 27 (disclosure is not transactional and it is automatic, immediate and ongoing and non-disclosure strikes at the heart of the administration of family justice).

Finally, even if Mr. Kantor had a right to review his support obligations, it would not have mattered — the chambers judge found as a fact that Mr. Kantor's income had not materially changed appreciably from the date of the January 2018 Order, except for the period of May 2018 to June 2019. And this was so even though he did not work for two discrete periods. Although Mr. Kantor did not earn any income during those periods, he paid no support, and Ms. Kantor was not claiming for those periods. There would be no practical point in reducing his spousal support obligation — it was a moot point.

Appeal dismissed. We're going to find a buffet.

Is it Time to Get Mahr-Ried?

E.K. v. N., 2023 CarswellOnt 3681 (S.C.J.) — Kraft J.

The parties were married in Lebanon in 2007 and had two children together. They moved to Canada in 2014 and separated here in 2019.

The family law case dealt with parenting, support, and property division. However, the case is of interest for our purposes with respect to how the Court dealt with the parties' Mahr. While Justice Kraft's reasons don't break new ground, they are worth a careful read because they carefully review the leading cases, and provide a clear and concise summary for how to deal with a Mahr in the family law context.

For those of you who are not familiar with a Mahr — an Islamic marriage contract — you should have a look at Fareen Jamal's excellent paper on the topic, "Enforcing Mahr in Canadian Courts", which is available on Westlaw at 32 C.F.L.Q. 97, and explains that:

- Mahr (also spelled Maher, Mohr and Mehr) is a Muslim tradition in which an agreement is entered into prior to marriage concerning a sum of money that a groom promises to pay his bride in the event of a marriage breakdown or death.
- There are two types of Mahr: a prompt Mahr (muajjal), which is paid at the time of the marriage, and deferred Mahr (muwajjal), to be paid only if the couple divorces or the husband predeceases the wife.
- It is common for the bulk of the Mahr to be deferred, both because young husbands do not have the finances to pay a large sum up front and because many wives see a large Mahr as only necessary if their husbands are no longer supporting them.

- The Mahr is not considered the settlement of all future financial dealings between the couple in the event of divorce or death. In fact, the Quran, the laws of several Muslim countries, and several schools of thought, state that the wife is entitled to maintenance and any of her own property in addition to the Mahr upon divorce.
- Under some Muslim schools of thought, if a wife seeks the divorce, she typically forfeits her right to the Mahr, unless she does so with cause, by proving her husband is at fault. There is a difference of opinion between scholars regarding when a woman forfeits her right to the Mahr, if ever. The issues are controversial and complex. This is further complicated in no-fault divorce jurisdictions, such as Canada.

The Mahr in *E.K. v. N.* provided that the husband would pay the wife 201 British Sovereign gold coins. One of the coins was paid prior to marriage (a prompt Mahr), and the remaining 200 were to be paid in the event of a separation or death (a deferred Mahr).

The parties agreed that the deferred Mahr (the 200 British Sovereign gold coins) was worth \$32,972 on the date of marriage, and \$107,092 on the date of separation.

The parties *agreed* that the Mahr was enforceable as a domestic contract under Ontario's *Family Law Act*, R.S.O. 1990, c. F.3. This avoided either party having to address s. 58 of the *Family Law Act*:

Contracts made outside Ontario

58 The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,

- (a) a contract of which the proper law is that of a jurisdiction other than Ontario is also valid and enforceable in Ontario if entered into in accordance with Ontario's internal law;
- (b) subsection 33 (4) (setting aside provision for support or waiver) and section 56 apply in Ontario to contracts for which the proper law is that of a jurisdiction other than Ontario; and
- (c) a provision in a marriage contract or cohabitation agreement respecting the right to decision-making responsibility or parenting time with respect to children is not enforceable in Ontario.

However, when dealing with a Mahr, it is important to remember that it can be attacked on the same grounds as any other family law agreement, which in Ontario means that it can only be enforced if it is in writing, signed, and witnessed (see s. 55(1) of the *Family Law Act*), and that it can be set aside: (a) if one of the parties did not provide full financial disclosure; (b) if one of the parties did not understand the nature or consequences of the agreement; and/or (c) otherwise in accordance with the law of contract (see s. 56(4) of the *Family Law Act*).

For example, in *Yar v. Yar*, 2015 CarswellOnt 626 (S.C.J.), Justice Walters declined to enforce a Mahr because it was in a language (Arabic) that neither party understood, the husband had not been involved in the negotiations, and the parties did not agree about what currency the amount owing was supposed to be paid in. The strikes — and the Mahr was out.

Returning to *E.K. v. N.*, the main issue in dispute with respect to the Mahr was how it should factor into the equalization calculations. The wife took the position that the Mahr should be excluded from the net family property calculations, and that the husband should pay her the \$107,092 owing pursuant to the Mahr *in addition to* the equalization payment.

The husband, on the other hand, argued that the Mahr should be included in the net family property calculations, and treated as the wife's asset on the date of marriage and the date of separation, and as a corresponding debt for him on those dates. From a practical standpoint, and all other things being equal, this meant that the Mahr would swing the equalization payment by \$74,120 in the husband's favour because:

- It would decrease the husband's net family property by \$74,120 (from negative \$32,972 on the date of marriage to negative \$107,092 on the date of separation);
- It would increase the wife's net family property by \$74,120 (from \$32,972 on the date of marriage to \$107,092 on the date of separation); and
- 50% of the difference in value between \$74,120 and negative \$74,120 amounts to \$74,120.

In other words, although the Mahr was supposed to be for \$107,092, and ignoring, for the moment, the fact that in Ontario a party's net family property cannot be negative [s. 4(5) of the *Family Law Act*], the wife would ultimately only receive a total of \$32,972 for the Mahr (the \$107,092 the husband owed the wife for the Mahr, less the swing of \$74,120 that the Mahr caused in the equalization payment).

To decide which party was right, Justice Kraft turned to the Ontario Court of Appeal decisions in *Khamis v. Noormohamed* (2011), 91 R.F.L. (6th) 1 (Ont. C.A.) and *Bakhshi v. Hosseinzadeh* (2017), 1 R.F.L. (8th) 267 (Ont. C.A.).

In *Khamis*, the Mahr expressly stated that the payment to the wife was "in addition and without prejudice to and not in substitution of all my obligations provided for by the laws of the land." Based on that wording, the Court of Appeal was satisfied that the amount owing by the husband should be excluded from the net family property calculations pursuant to s. 4(2)6 of the *Family Law Act*, which provides that "[p]roperty that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property."

In contrast, in *Bakhshi* the Court of Appeal reversed the trial judge's decision to exclude the Mahr from the net family property calculations because it did not include wording to support such a result, and there was no "evidence of an objective intention at the time of contract to treat the Mahr differently" than any other payment obligation between the spouses.

Based on these principles, Justice Kraft correctly determined to include the Mahr in *E.K. v. N.* in the net family property calculations:

[136] In the case at bar, **no agreement existed between the parties for the value of the wife's entitlement or the husband's obligation under the Mahr to be excluded from the calculation of the parties' NFPs.** As set out in *Bakhshi*, "the objective contractual intentions of the parties are to be determined as of the time when the contract is made": at para. 22. **There was no evidence at the trial presented that when she agreed to the terms of the Mahr, [the wife] had understood, believed or intended that the Mahr would not be considered in the resolution of the parties' issues should they separate in Ontario, let alone that [the husband] had agreed that it would not.** However, it was not contemplated that the parties would be moving to Canada when the Mahr was negotiated and as such, the parties did not contemplate their mutual obligations that could exist in Ontario under the *FLA*.

[137] **As was the case in *Bakhshi*, absent any evidence of an objective intention at the time of the contract to treat the Mahr differently, the Mahr payment must be treated under the *FLA* like any other payment obligation between the spouses:** at para. 34. [emphasis added]

The wife also tried to argue for an unequal division of net family property because "the unique circumstances of these parties' finances is such that the inclusion of the Mahr in the calculation of each party's NFP leads to an unconscionable result pursuant to s. 5(6)(h) of the *FLA*." But as with many s. 5(6) claims, Justice Kraft rejected it because equalization would not meet the very high threshold of unconscionability.