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— Franks & Zalev - This Week in Family Law

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Uh, No. And Just When We Thought it was Safe to Forget Latin

Laxmikantha v. Adapa, 2023 CarswellOnt 20392 (S.C.J.) — Akazaki J.

A motion is a motion; a Case Conference is a Case Conference — never the twain shall meet . . . or at least never the twain *should* meet. But in *Laxmikantha*, they met. And in our view, this is a serious problem.

In *Laxmikantha*, the Court decided that Rule 17(8) of the Ontario *Family Law Rules*, O. Reg. 114/99 bestowed upon the Court jurisdiction to award interim decision-making and interim support at a Case Conference, where the payor parent/spouse does not attend to oppose.

In her Case Conference Brief, the Applicant/Mother asked for sole decision-making authority and for significant child support and spousal support. The Respondent/Father did not file an Answer or a Case Conference Brief — and he did not attend the Case Conference. The Mother's proposed support amount was based on the Father's most recent disclosed annual income of $621,393 and the Mother's self-imputed income of $32,000.

There were two children, aged 16 and 13. The Court determined that the Mother was the children's primary caregiver during the 21-year marriage. And how did the Court come to that conclusion? Well — that is what the Mother claimed in her Application and stated in her Case Conference Brief — both unsworn documents. And this is the problem with all the "findings" on which the Court's decision was made — they were made (presumably) without the benefit of sworn evidence.

The same is true for the "finding" that, as a pharmaceutical executive, the Father travels frequently and only visits the children sporadically.

As noted by the Court:

> [3] **These facts and the details regarding them are not in evidence**, but rather they are facts set out in a Form 17A Case Conference Brief to which the father has not cared to respond with his own brief. Based on this **uncontested data**, the DivorceMate calculations for child support amount to $7,734 per month. The same software produced a range of $11,304 to $14,384 under the Spousal Support Advisory Guidelines' 'with-child-support' formula. In the brief, the mother has sought a temporary and without-prejudice order for child support starting from December 1, 2023, and spousal support in the mid-range figure of $12,852. [emphasis added]

With respect, "uncontested data" is not "uncontested evidence." Even assuming that the Father was properly served and had simply defaulted on filing an Answer and attending the Conference — the Father's bad conduct does not convert the Mother's unsworn statements into evidence on which major substantive decisions can be made.

The Court goes on to state:

> [4] . . . Had this been a rule 14 motion, the court would have no difficulty ordering the support on an interim and without prejudice basis. Usually, a case conference judge would also attempt to broker a consent order that obviates the need for a contested motion. Here, the father has not defended and did not appear at the hearing of the conference. If he were to bring a motion to set the order aside or appeal this decision, he would have to file evidence and establish that the result on a formal motion would have led to a different order: *Heston-Cook v. Schneider*, 2015 ONCA 10, [2015] O.J. No. 120, at para. 12.

While this statement has the ring of accuracy, there are some notable issues

> 1. "Had this been a motion" there would have been sworn evidence before the Court on which to base an interim decision.
>
> 2. Just as with bad behaviour, the fact that there is no opposite party with whom to "broker" a Consent Order does not convert unsworn information into sworn evidence.
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> 3. *Heston-Cook v. Schneider* speaks to a person trying to appeal an order from a motion (at which there was evidence) that they did not attend — not from a Case Conference.
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> 4. Paragraph 12 of *Heston-Cook v. Schneider* does not actually stand for the cited proposition. Paragraph 12 of *Heston-Cook v. Schneider* simply states:
>
> > [12] Having regard to the submissions made, we make one further comment. It is trite law that an appeal is always from the order of the court and not the reasons. In dismissing the appeal, the motion judge stated in obiter that, "[T]he respondent should have the right to assert any limitation period defences that may also arise as a result of the need to commence a new action in view of the defective action commenced by the applicant." Any motion invoking a limitation period defence will have to be determined on the basis of the proceedings and pleadings as they stand at the time that motion is heard and the motion judge's comments should not be taken to be determinative of the outcome of that issue.

His Honour justifies the order for decision-making authority and interim child support with reference to the powers provided to the Court by Rule 17(8) of the *Family Law Rules*, which set out the procedural jurisdiction for the granting of orders at a Case Conference:

> **Orders at conference**
>
> (8) At a case conference, settlement conference or trial management conference **the judge may, if it is appropriate to do so**,
>
> (a) make an order for document disclosure (rule 19), questioning (rule 20) or filing of summaries of argument on a motion, set the times for events in the case or give directions for the next step or steps in the case;
>
> (i) the engagement of an expert by or for one or more parties,
>
> (ii) the use of expert opinion evidence in a case, or
>
> (iii) the provision, service or filing of experts' reports or written opinions;
>
> (a.1) make an order requiring the parties to file a trial management endorsement or trial scheduling endorsement in a form determined by the court;
>
> (b) make an order requiring one or more parties to attend,

(i) a mandatory information program,

(ii) a case conference or settlement conference conducted by a person named under subrule (9),

(iii) an intake meeting with a court-affiliated mediation service, or

(iv) a program offered through any other available community service or resource;

(b.1) *if notice has been served*, make a final order or any temporary order, including any of the following temporary orders to facilitate the preservation of the rights of the parties until a further agreement or order is made:

(i) an order relating to the designation of beneficiaries under a policy of life insurance, registered retirement savings plan, trust, pension, annuity or a similar financial instrument,

(ii) an order preserving assets generally or particularly,

(iii) an order prohibiting the concealment or destruction of documents or property,

(iv) an order requiring an accounting of funds under the control of one of the parties,

(v) an order preserving the health and medical insurance coverage for one of the parties and the children of the relationship, and

(vi) an order continuing the payment of periodic amounts required to preserve an asset or a benefit to one of the parties and the children;

(c) make an unopposed order or an order on consent; and

(d) on consent, refer any issue for alternative dispute resolution. [emphasis added]

A review of this section makes one thing perfectly clear — all the listed examples of orders a court can make on a Case Conference — whether with or without notice — are either procedural in nature or the type of order that will preserve *status quo* rights until further agreement or order, to avoid any prejudice to a party. But none of the listed examples could be called substantive.

His Honour determined that the "notice" requirement referenced in Rule 17(8)(b.1) was met by service of the Case Conference Brief. We take no issue with that. That is one of the purposes of the Case Conference Brief. Notably, the Rule does not state what form the notice must take: *Hoque v. Mahmud* (2007), 44 R.F.L. (6th) 159 (Ont. S.C.J.) at para. 15.

Although the Court in *Hoque* notes that it is "less clear" whether the Rule conferred authority to grant substantive relief, here the Court suggests there is really no ambiguity:

> [7] . . . The ambiguity can be resolved readily by assuming the drafters followed the usual rules of legislative construction. On first impression, it would appear that para. (b.1) is limited by subject matter to preservation orders and maintenance of financial status quo. However, the specific list of preservation mechanisms follows a general phrase "*any* temporary order" (emph. added) and is connected by the word "including." This grammatical structure takes the meaning outside the *ejusdem generis* rule (limited class interpretation) and protects the generality of the antecedent. See: Sullivan, The Construction of Statutes, Seventh Ed. (Toronto: LexisNexis, 2022), at p. 242, citing National Bank of Greece (Canada) v. Katsikonouris, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029, at 1040-41. It therefore follows that the case conference judge is authorized to grant any temporary orders, if satisfied that the other party has been given due notice.

His Honour therefore concludes that Rule 17(8) confers jurisdiction on a Case Conference:

> [9] I conclude from the foregoing that subrule 17(8) of the FLR confers jurisdiction on a case conference judge to award interim relief of the kind sought by the mother, provided notice is clearly given and stated in the Case Conference Brief and the relief is an appropriate remedy in the circumstances. This interpretation of the rule places the burden on the erstwhile non-participatory spouse/parent to bring a motion to set the order aside, instead of requiring the presumed recipient of support to bring a separation [sic] motion. This would have the effect of reducing steps in most cases and promoting general principles of the FLR in streamlining cases, getting payor spouses used to the idea of paying support, and of rounding up recalcitrant parties into the precinct of the court.

And based on this — but not on any actual evidence — on an interim basis, the Court ordered that the Mother have sole decision-making authority; that the Father pay monthly child support of $7,734; and that the Father pay monthly spousal support of $12,852.

While regular readers will know we are all for measures that enhance judicial economy; procedural fairness must not be sacrificed at that altar. Where one party is truly recalcitrant, they are not likely to respond to a motion after a Case Conference. And if they do, without adequate explanation, they will certainly have to pay costs for wasting the Court's time at the Case Conference.

The fact that *ejusdem generis* does not technically apply (because, here, the specific follows the general rather than the general following the specific) is not a reason to ignore what is otherwise the pretty clear intent of Rule 17(8) and the list of 17 example orders that are procedural in nature housed within it.

Furthermore, one good Latin cannon of statutory interpretation perhaps deserves some others?

> a. *Noscitur A Sociis*: "it is known by its associates". The meaning of an unclear or ambiguous word (as in a statute or contract) should be determined by considering the words with which it is associated in the context — just as the list of procedural orders.
>
> b. *Expressio Unius est Exclusio Alterius*: When a legal document includes a list, anything not in that list is assumed to be purposely excluded — such as substantive orders.

But, then again, we need not have any Latin philosophers tell us that Orders cannot be made without evidence.

As there is no notion of "noting in default" in the *Family Law Rules*, it further stands to reason that a Court cannot make a final order at a Case Conference — even where the other side does not file an Answer: *Rice v. Strachan* (2012), 32 R.F.L. (7th) 404 (N.L. T.D.). The fact that the Court here made an interim Order does not really detract from this general principle. And other cases have also clarified that substantive orders should not be made at a Case Conference: *Kocsis v. Kocsis*, 2005 CarswellOnt 3260 (S.C.J.); *Jones v. Jones* (2014), 43 R.F.L. (7th) 155 (Ont. S.C.J.); *Gyan v. Bobb*, 2012 CarswellOnt 17489 (S.C.J.); and that the Court should not rule on (contested) substantive issues without affording parties the chance to tender evidence, test evidence and make submissions: *Stasiuk v. Lower*, 2006 CarswellBC 1376 (B.C. S.C.); *Robinson v. Morrison*, 2000 CarswellOnt 2776 (S.C.J.).

The one case that *might* support the result in this case is *Burke v. Poitras* (2018), 22 R.F.L. (8th) 266 (Ont. C.A.), where the Court of Appeal suggested that any order that promotes the overall objectives of the *Rules* may be made at any time, including at a Settlement Conference. In that Case, the Court of Appeal notes:

> [5] First, subrule 17(8)(b.1), which sets out a list of final or temporary orders that may be made at conference so long as notice has been served, contains no explicit restrictions on the kind of final order that may be made at a settlement conference beyond the provision of notice.

However, it is important to understand that in *Burke*, the Court of Appeal was actually dealing with other provisions of the *Family Law Rules* — including Rule 1(8) — that specifically provide for the Court to strike pleadings where a person fails to obey an order:

> [7] The express purpose of the *Family Law Rules* is to ensure fairness, save time and expense, and give appropriate resources to the case (while allocating resources to other cases), in order to manage the case, control the process, ensure timelines are kept, and orders are enforced. As clearly stipulated in subrules 1(7.1), (8) and (8.1), an order, including an order to strike pleadings, can be made at any time in the process, including the settlement conference, to promote these overarching purposes. In this way, any order that promotes the overall objectives of the rules may be made at any time, including at a settlement conference.

Therefore, it is not entirely clear whether *Burke* supports the result in this case.

We're now going to have a drink. *In vino veritas*.

Ah . . . The Twin Warm Blankets of Relevance and Proportionality

McDonald v. McDonald (Mombourquette) (2023), 89 R.F.L. (8th) 108 (N.S. S.C.) — O'Neil A.C.J.

We frequently come across cases where a judge has ordered a family law litigant to produce financial disclosure, and we have lost count of the number of cases that have referred to non-disclosure as the "cancer of family law." There are also, however, many litigants who try to weaponize the disclosure process, trying to force the other side to produce excessive and irrelevant disclosure. Some even use overbroad disclosure requests strategically to try to cajole concessions — or worse, in the hopes of defaults in disclosure that might then lead to pleadings being struck. And some are just looking to be nosy.

Despite the prevalence of this type of improper behaviour, only rarely do we see decisions where a judge acknowledges that although non-disclosure is a serious problem in family law, the answer cannot just be to order both parties to produce all of the disclosure the other party has requested. Although *McDonald v. McDonald* may not necessarily break any new ground, it is one of those rare decisions where a judge rejected a request for relatively basic financial disclosure (bank and credit card statements) on the basis that the requested information was not sufficiently relevant and proportionate to the issues in the case so as to warrant invading the other party's privacy or forcing them to spend time and money on producing it.

The parties in *McDonald* were married and had 4 children together. The husband was self-employed and ran several small businesses, while the wife worked for the government. The decision does not say when the parties separated. However, we suspect they did so in or around 2017 or 2018, because by January 2019 they had signed a final and comprehensive Separation Agreement that resolved all of the issues arising out of the breakdown of their relationship, including property division and support based on the husband earning $120,000 a year and the wife earning $79,000 a year.

Both parties received independent legal advice before they signed the Separation Agreement, and the Agreement contained express clauses confirming that:

- The parties had signed the Agreement "without undue influence, fraud, misrepresentation or coercion", and having "read the entire Agreement and is signing it voluntarily[.]"

- Both parties had provided full disclosure, and they were each satisfied they had "received sufficient financial information from the other and waive production of any further documents dealing with financial information[.]"

- The parties "hereby waive financial statements in respect of claims made in this action[.]"

In June 2020, the husband applied for a divorce. Although the parties had already signed their comprehensive Separation Agreement, the wife responded to the husband's Application by bringing a motion to compel him to produce extensive financial disclosure, including but not limited to his personal and business bank and credit card statements going back to at least the time the parties signed the Separation Agreement (January 2019). In support of her motion, the wife alleged that she had signed the Separation Agreement "without any disclosure", and that she intended to "contest all issues arising from the Separation Agreement".

In response to the wife's motion, the husband voluntarily produced extensive financial disclosure, including personal and corporate tax returns and notices of assessment, and the financial statements and bank and credit card statements for his companies. He also confirmed that he was prepared to retain an expert to calculate his income for support purposes. Producing this information voluntarily was a wise strategic decision by the husband (or his counsel), as this information was undoubtedly relevant to the wife's claim for spousal support in the face of the Separation Agreement pursuant to *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), and her claim for child support in accordance with the *Child Support Guidelines*, SOR/97-175.

However, the husband was not prepared to produce his personal bank and credit cards statements from 2019 onwards, and he argued that his post-separation spending was irrelevant to the issues before the Court.

Associate Chief Justice O'Neil started his analysis by reviewing the leading cases about disclosure in Nova Scotia, including *Laushway v. Messervey*, 2014 CarswellNS 45 (C.A.) where the Nova Scotia Court of Appeal set out the following non-exhaustive (and helpful!) list of ten considerations that Courts should consider when deciding whether a particular document or category of documents ought to be produced:

> [32] . . . 1. **Connection**: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
>
> 2. **Proximity**: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;
>
> 3. **Discoverability**: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
>
> 4. **Reliability**: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
>
> 5. **Proportionality**: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
>
> 6. **Alternative Measures**: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
>
> 7. **Privacy**: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?
>
> 8. **Balancing**: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
>
> 9. **Objectivity**: Will the proposed analysis of the information be conducted by an independent and duly qualified third-party expert?
>
> 10. **Limits**: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding? [emphasis in original]

After considering the "*Laushway* criteria", Associate Chief Justice O'Neil was not persuaded that further details about the husband's post-separation spending were relevant to the issues before the court, particularly when weighed against "the privacy interests of [the husband], the need for proportionality and the costs and inconvenience of procuring the sought-after information[.]" As a result, Associate Chief Justice O'Neil dismissed the wife's request to compel the husband to produce his personal bank and credit card statements since 2019.

The outcome would likely have been different had the wife put forward a reasoned explanation for why she needed the information she had requested. For example, the husband's post-2019 personal bank and credit card statements may have become relevant had the wife adduced evidence to suggest that the husband had undisclosed sources of income as he was living a lifestyle beyond what he should have been able to afford based on his disclosed sources.

However, it appears that the only explanation the wife offered for why she was seeking the husband's personal bank and credit card statements was that she believed these documents were somehow "relevant" to the husband's child and spousal support obligations, and she felt she was "entitled" to them. These were not sufficient reasons to force the husband to tell his former spouse how he had spent every dollar he had earned in the almost four years that had passed since the parties signed their Separation Agreement.

More disclosure is not always better; too much disclosure can be harmful. It is much easier to ask questions than to produce the answers, and disclosure orders must be fair to both sides. We are going to keep this case on hand to send to opposing parties who insist on requesting extensive disclosure that isn't relevant or proportionate to the issues in the case. You may want to do so too. You can put it in a folder along with cases like *Boyd v. Fields*, 2006 CarswellOnt 8675 (S.C.J.); *Abrams v. Abrams*, 2010 CarswellOnt 2915 (S.C.J.); Federation v. Babini, 2014 BCCA 143; *Kochar v. Kochar* (2015), 71 R.F.L. (7th) 183 (Ont. S.C.J.); *Chernyakhovsky v. Chernyakhovsky*, 2005 CarswellOnt 942 (S.C.J.); *Kovachis v. Kovachis* (2013), 36 R.F.L. (7th) 1 (Ont. C.A.); and *Mullin v. Sherlock* (2018), 19 R.F.L. (8th) 1 (Ont. C.A.).

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