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

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Orange Jumpsuit Anyone?

Bose v. Bose, 2023 CarswellNS 565 (S.C.) — Jollimore J.

In our discussion of *Hamid v. Hamid* (2023), 91 R.F.L. (8th) 447 (Ont. C.J.) in the August 28, 2023 (2023-33) edition of *TWFL*, we discussed the court's increasing reluctance to use its contempt power to deal with breaches of parenting orders, and wondered if: (a) the serious problem of non-compliance with parenting orders "has been exacerbated by some relatively recent appellate decisions that have hampered the court's ability to provide meaningful remedies for non-compliance"; and (b) we had now reached the point where parenting Orders really were, despite the multitude of cases stating otherwise, not much more than mere suggestions.

Fortunately, based on Justice Jollimore's recent decision in *Bose v. Bose*, it appears that our concerns were premature (or, at the very least, that the pendulum may have started swinging the other way).

The parties in *Bose* had a young son together who was born in or around 2019. Shortly after the child was born, the mother made it clear — abundantly so — that she was not going to support the child having a relationship with the father. She even prevented the child from having contact with the father for the 10 months leading up the trial, which obviously was not the *best* litigation strategy.

The case went to trial and, in February 2022, the trial judge made a detailed final Order that included, among other things, a graduated parenting schedule whereby the child would eventually be with the father every Monday and Wednesday and on alternate weekends.

Almost immediately after the Order was released, the mother made it clear — abundantly so — that she had no intention of complying with it. According to the father:

> 1. The mother did not provide him with a current address for their son as required by s. 1b(1) of the Order;
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> 2. She did not keep him updated with their son's current address as required by s. 1b(2) of the Order;
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> 3. She denied him parenting time at the location of his choice on February 28, 2022 in breach of ss. 2d and 2e of the Order;
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> 4. She denied him parenting time on May 28, 2022; May 30, 2022; and June 1, 2022 in breach of ss. 2h and 2i of the Order;
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> 5. She denied him 36 consecutive hours of parenting time during Onam in breach of s. 2***o*** of the Order;

> 6. She denied him 36 consecutive hours of parenting time during Diwali in breach of s. 2***o*** of the Order;
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> 7. She denied him 2 non-consecutive 1-week blocks of parenting time during July 2022 and August 2022 in breach of s. 2p of the Order;
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> 8. She denied him parenting time at a location and time of his choice beginning February 28, 2022 in breach of ss. 2d-2i of the Order;
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> 9. She denied him overnight parenting time on alternate weekends from Saturday at 10 a.m. until Sunday at 5 p.m. starting on September 10, 2022 in breach of s. 2j of the Order;
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> 10. She denied him regular parenting time on Mondays, Wednesday, and alternate weekends from Saturday at 10 a.m. until Sunday at 5 p.m. starting on October 7, 2022 in breach of s. 2j of the Order; and
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> 11. She did not meaningfully consult with him or agree on all major developmental decisions with respect to their son's health in breach of ss. 1a and 1b(5) of the Order.

In other words, according to the father, the mother viewed the Order as a mere form of judicial "recommendation" that she was free to ignore.

As a result of the mother's intransigence, the father started a contempt proceeding against her in October 2022. But in the face of the contempt proceeding, and despite being represented by counsel and warned by at least one judge about the potential consequences for non-compliance, the mother responded by prohibiting the father from having ***any*** contact with the child for the next five months. You have to admire the mother's commitment to self-destruction.

The contempt proceeding was supposed to have been heard in March 2023. On the eve of the hearing, the mother permitted the father to resume seeing the child, but still refused to comply with all of the terms of the Order. The mother also requested, and was granted, an adjournment of the contempt proceeding to June 2023. Respectfully, this wreaks of a litigant knowing how to game the system.

In June 2023, Justice Jollimore heard the contempt proceeding on the merits. After setting out the 3-part test for contempt (the order must state clearly and unequivocally what should and should not be done; the breaching party must have had actual knowledge of the order; and the breaching party must have acted or failed to act intentionally: *Carey v. Laiken*, 2015 CarswellOnt 5237 (S.C.C.) at paras. 32-35), Justice Jollimore reviewed the evidence. While she was not satisfied that the father had proven *all* of the alleged breaches beyond a reasonable doubt, she was persuaded that the mother had, in fact, knowingly and intentionally breached the Order by denying the father parenting time on February 28, May 28, May 30, June 1, two religious holidays, during parts of the summer, and multiple weekends and weekdays in September and October. As a result, Justice Jollimore found the mother in contempt, and scheduled a hearing to address what the penalty should be.

According to *Carey* and, more recently in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), which was written by Justice Jamal (as he then was) shortly before he was appointed to the Supreme Court of Canada, even if the 3-part test for contempt has been met, the presiding judge must still consider whether contempt is an appropriate remedy, bearing in mind that it should only be used as a remedy of last resort. As Justice Jamal explained in *Moncur*:

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

We have previously discussed how "issuing declarations of breach" or "encouraging professional assistance" are cold comfort to a party dealing with the alienation of a child [see the August 28, 2023 (2023-33), May 2, 2022 (2022-16) and the September 6, 2021 (2021-34) editions of *TWFL*].

Although Justice Jollimore did not address *Moncur* in her decision or expressly explain why this was not an appropriate case to exercise discretion in the mother's favour, it is abundantly clear from her reasons that, given the mother's blatant disregard for the final Order, she was satisfied that no other remedy would suffice. And, on the particular facts of this case, it is abundantly clear that a lesser remedy, such as a declaration of breach or requiring the mother to seek professional help, would have been ineffective and inadequate, as they usually are.

At the penalty hearing, the father asked that the mother be incarcerated but that the sentence be suspended as long as the mother complied with the final Order. The mother, on the other hand, suggested that a $500 fine might be appropriate and that incarceration would only be appropriate if she did not pay the $500. This is what we call "misreading the room". Given the mother's egregious conduct, in our view a $500 fine would not even qualify as a "slap on the wrist", especially since the mother said nothing about what the remedy might be if she continued breaching the final Order going forward.

As part of considering what an appropriate penalty would be, Justice Jollimore provided an excellent explanation of the important role of contempt proceedings for ensuring respect for the rule of law:

> [5] **The focus of a contempt proceeding is far greater than the impact of [the mother's] denial of parenting time because obeying the law and following court orders are foundations of social order.**
>
> [6] **Respect for court orders means following them.** If a decision is thought to be wrong, it should be appealed. If the circumstances on which a decision is based have changed, it should be varied. **Until stayed, overturned, or varied, court orders must be followed.** Since the parenting decision was made in February 2022, [the mother] has not applied to stay it, sought to appeal it, or asked to vary it.
>
> [7] **[The mother's] penalty is both to secure her compliance with the Corollary Relief Order and to protect the administration of justice:***Carey v. Laiken*, 2015 SCC 17 at paras 18 and 30. I have the inherent authority to impose penalties for civil contempt. The *Civil Procedure Rules* are supplementary to my authority.
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> [8] **Securing compliance with the order means ensuring that [the mother] does not continue to thwart [the father's] parenting time.**
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> [9] **Denouncing [the mother's] conduct and deterring both her, specifically, and others, generally, from defying court orders is particularly important where this order relates to parenting time for a young child.** The denial of parenting time for a young child can negatively impact a child's relationship with a parent and the child's own well-being.
>
> [10] **[The mother's] penalty must reflect her offence. It must be in proportion to the offence's gravity and [the mother's] degree of responsibility**, recognizing any aggravating and mitigating factors. [emphasis added]

Justice Jollimore found that, here, there were no mitigating factors, and that there were actually three aggravating factors: (a) the mother had not apologized for her conduct; (b) the mother's breaches began immediately after the Order was released; and (c) the mother responded to the contempt motion by cutting off all contact between the father and the child.

Accordingly, Justice Jollimore determined that the mother should be sentenced to one month at His Majesty's pleasure. However, she gave the mother one last chance to avoid prison by suspending the mother's sentence on condition that she complied with the final Order, attended a parental education course "designed to include a component to educate parents about the damage done to children by continuing levels of conflict and animosity between parents", and facilitated the child attending therapy to help reunify him with the father.

While reasonable people can disagree about whether a month in jail was overly harsh in the circumstances, and that a shorter period of incarceration as an initial punishment might have sufficed, the sentence in this case clearly sends the message to the mother — and to the public at large — that non-compliance with parenting Orders is not acceptable, and will not be tolerated. Or, as Justice Quinn famously put it in *Gordon v. Starr* (2007), 42 R.F.L. (6th) 366 (Ont. S.C.J.):

> [23] . . . **An order is an order, not a suggestion. Non-compliance must have consequences.** One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders. [emphasis added]

We commend Justice Jollimore for having the courage to make this type of decision. The mother's conduct was blatant, purposeful, and unacceptable, and warranted serious consequences and clear denunciation. Hopefully, her decision to use contempt to deal with the type of egregious disregard for the rule of law demonstrated by the mother will be followed by other courts. And, being able to point to this type of decision should help to deter at least some other parties from engaging in similar conduct in the future, because it will help to ensure they know that this type of unacceptable behaviour can and does lead to extremely serious consequences.

I'll Gladly Pay You Tuesday for a Matrimonial Home Today

Zhao v. Xiao (2023), 92 R.F.L. (8th) 265 (Ont. C.A.) — Simmons, Harvison Young and George JJ.A.

This was an appeal with respect to an application for child support and related relief. We are most interested in the child support claims.

The Appellant (the "Mother") argued that the original application judge and the Superior Court appeal judge made three errors to justify appellate intervention:

> 1. First, she argued that the application judge erred in dismissing her claim for retroactive child support from 2006 until 2013, granting it only from 2013 forward.
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> 2. Second, she argued that the application judge erred in her approach to and calculation of the Mother's share of s. 7 expenses — which was ordered to be based on not individual income, but on *household* income.
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> 3. Third, she argued that the application judge erred in determining that child support should end when the children reach the age of 25.

The Mother and the Respondent (the "Father") divorced in 2003. They had two children together: a son (born August 28, 1996) and a daughter (born June 17, 2002). In settling their affairs, they had agreed:

> • the Father would pay child support of $950 a month for each child "according to the child support guideline";
>
> • the amount of child support could be changed based on future changes in the Father's income, such that 17% of the Father's gross income would be paid monthly for each child until each child reached the age of 18;
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> • if the Mother remarried, the amount of child support would be reduced from 17% to 12.5% of the Father's gross income; and
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> • the matrimonial home would be transferred to the Mother in exchange for monthly payments totalling $74,600 (equivalent to the monthly child support commencing May 1, 2006) but to be paid immediately upon the Mother remarrying.

The Mother remarried in 2006, but she did not advise the Father, and the payment for the matrimonial home was not paid on an accelerated basis as stipulated in the agreement. Nor did the Father provide his annual income information, as would have been necessary to calculate the monthly child support payment to be offset against the amount owing on the property.

The Mother lived in China from 2003 to 2011, and since that time had been living in the United States.

In November 2016, having been unsuccessful in getting disclosure from the Father, the Mother commenced an application for child support and other relief.

The application judge did not award retroactive child support for May 1, 2006 to June 2, 2013. The Superior Court appellate judge upheld that decision. The Mother was not happy about it. But the Court of Appeal was not concerned.

The Court of Appeal agreed that the agreement between the parties that child support would be offset commencing May 1, 2006 by the $74,600 owed by the Mother to the Father for the transfer of his share of the matrimonial home constituted "special provisions" that directly benefitted the children during this period. Ordering child support for this period would have been "unfair and inequitable" within the meaning of s. 37(2.3) of the *Family Law Act*, R.S.O. 1990 c. F.3. (As the parties were divorced, query why the court was not referencing s. 15.1(5) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp)).

Therefore, lest there be any doubt, allowing one spouse to reduce child support in exchange for the transfer of a home is an acceptable "special provision." The Court of Appeal specifically noted that, in considering the starting date for retroactive child support, the application judge was entitled to consider the property agreement — which was "intertwined" with the Father's child support obligations — within the context of the special provisions set out in s. 37(2.3) of the *Family Law Act*. This is a very handy piece of information regarding special provisions, which can sometimes be risky: *Wright v. Zaver* (2002), 24 R.F.L. (5th) 207 (Ont. C.A.). And, for the same reason, the application judge made no error in considering the property provisions when determining what weight to assign to the Father's failure to notify the mother of changes in his income between 2006 and 2013. It was a "no harm — no foul" situation.

The Court of Appeal also noted the "strong and well-known policy reasons for respecting agreements made between parties to family law proceedings whenever feasible." What is interesting here is that this oft-cited principle is here applied to an agreement respecting child support, which is reassuring to see. Here, as noted by the Court of Appeal, the agreement benefitted both the Mother — *and the children* — who were then able to remain in the matrimonial home without any immediate payment obligation to the Father. In fact, it would have been unfair and inequitable to award retroactive child support for this period, ignoring these special provisions.

Well done Court of Appeal. It would have been concerning had this agreement not been given its due because "child support is the right of the child."

As noted above, the application judge also ordered that s. 7 expenses be shared in proportion to the household income of the parties rather than in proportion to their individual incomes. And this was fine with the Superior Court appeal judge and with the Court of Appeal.

While the "guiding principle" in s. 7(2) of the *Divorce Act* is that s. 7 expenses are shared by the spouses *in proportion to their respective incomes* — that is only a "guiding principle" that can be departed from in appropriate circumstances.

Here, the Father had remarried and was the sole support for his children and wife, who was ill and unable to work. On the other hand, the application judge had found that the Mother had been able to work in remunerative employment since 2008, but had decided not to. Furthermore, the children were listed as her new husband's dependents for benefits purposes, and the new husband had covered all of the oldest child's educational expenses through his benefits as a university employee, along with the majority of medical and dental expenses.

In these circumstances, the application judge decided to set each party's share of s. 7 expenses based on their respective *household* income. That was just fine with the Court of Appeal and serves as a useful reminder that a "guiding principle" is not an "immutable principle."

Finally, the Court of Appeal also rejected the Mother's argument that the Superior Court appeal judge erred in upholding the application judge's finding that child support should end upon each child's 25th birthday. This was a discretionary determination

by the application judge based on all the facts of this case — which included the parties' original arrangement that child support would terminate at age 18. At the time of the appeal to the Court of Appeal, the older child was in medical school (and over 25) and the daughter was studying for an undergraduate degree. There was nothing "arbitrary" or "speculative" about ending support at age 25 on these facts. Good to know.

For a relatively short decision, this case may prove very useful for some child support principles:

1. The notion of "special provisions" such that it would be "inequitable" to award Table child support is alive and well.

2. Section 7 expenses need not always be paid in proportion to individual income.

3. In appropriate cases, the court can call for the termination of child support at a certain age in the future.

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