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

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Some Things are NOT Better the Second Time Around

Murray v. Harrison, 2023 CarswellBC 3389 (S.C.) — Hardwick J.

Some family law litigants tend to raise the same arguments time-and-time again, or litigate by instalment instead of bringing forward all their relevant claims/issues at once. *Murray v. Harrison* considers whether and when you can rely on the doctrines *res judicata* and *functus officio* to prevent litigants from engaging in this type of behaviour.

The parties married in 2009 and separated in 2020. They had two children together. In April 2021, they signed a Separation Agreement that resolved all the issues arising out of the breakdown of their relationship on a final basis.

In October 2021, the wife filed an Application for, among other things, an order allowing her to relocate with the children to Cochrane, Alberta, and orders enforcing certain financial provisions of the Separation Agreement, including payment of \$31,767 that the husband owed the wife to equalize one of their properties. The husband opposed the wife's request to relocate and, while he acknowledged that he owed the wife the \$31,767, he claimed he needed more time to pay.

In January 2022, Justice Brongers granted the wife's request to relocate with the children, and also ordered the husband to pay her the \$31,767 he owed her pursuant to the Separation Agreement.

The Husband's Application To Set Aside The Property Provisions Of The Agreement

In June 2022, the husband filed an Application to set aside or vary the property provisions of the Separation Agreement pursuant to s. 93(3) of the *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*"), which provides that:

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

[Most matrimonial property statutes across Canada have similar provisions (see e.g. s. 56(4) of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 and s. 55(4) of Prince Edward Island's *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1).]

It is not clear from the reasons whether there was actually any merit to the husband's claim to set aside the property provisions of the Separation Agreement or why he waited until June 2022 to raise the matter. In any event, instead of dealing with the issue on the merits, the wife responded to the husband's Application by moving to have it summarily dismissed based on the doctrines of *res judicata* and/or *functus officio*. The crux of her argument was that the husband should not be permitted to litigate by instalment, and that had he wanted to challenge the Separation Agreement, he should have done so in response to the wife's Application to enforce the Agreement. And, having not done so, it was too late for him to do so now.

To decide the issues, Justice Hardwick started by providing helpful summaries of the principles that apply when dealing with the doctrines of *res judicata* and *functus officio*.

Res Judicata

As Justice Hardwick explained in her decision, "[a]ccording to the doctrine of *res judicata*, where the matter in dispute has already been adjudicated upon by a competent court, it cannot be litigated again."

She also explained that there are two distinct types of *res judicata*. The first type — "issue estoppel" — arises where a party is trying to raise "an issue that has already been decided in a previous proceeding": *Erschbamer v. Wallster*, 2013 CarswellBC 425 (C.A.) ("*Erschbamer*") at para. 12. In *Angle v. Minister of National Revenue*, 1974 CarswellNat 375 (S.C.C.) ("*Angle*"), the Supreme Court of Canada set out the following test for issue estoppel:

1. The same question has already been decided;
2. The prior judicial decision was final; and,
3. The parties to the prior judicial decision or their privies were the same.

The second type of *res judicata* is "cause of action estoppel". It arises where a party has commenced a new proceeding to pursue "a matter that was *or should have been* the subject of a previous proceeding": *Erschbamer* at para. 12. According to the Supreme Court in *Angle*, cause of action estoppel arises where:

1. There has been a final decision of a court of competent jurisdiction in a prior proceeding;
2. The parties to the prior proceeding or their privies were the same;
3. The cause of action in the prior proceeding must not have been "separate and distinct"; and
4. The basis of the cause of action raised in the current proceeding was argued *or could have been argued* in the prior proceeding with the exercise of reasonable diligence.

The wife in *Murray* argued that both branches of *res judicata* — issue estoppel and cause of action estoppel — applied. Since she had already successfully sued to enforce part of the property provisions of the Separation Agreement, it was, according to the wife, no longer open to the husband to try and challenge the property provisions of the Agreement pursuant to s. 93(3) of the *FLA*. He had that chance before and did not avail of it. It was then too late.

Although Justice Hardwick agreed that the wife had met some parts of the tests for issue estoppel and cause of action estoppel, she ultimately rejected the wife's arguments because she was of the view that husband's claims pursuant to s. 93(3) of the *FLA* raised different questions than those that were decided in the prior proceeding (part 1 of the test for issue estoppel), and involved a separate and distinct cause of action (part 3 of the test for cause of action estoppel).

We agree with Justice Hardwick's conclusion that issue estoppel did not apply. The caselaw is clear that the first part of the test — that the same question has already been decided — can only be met if the issue had actually been put before the court for a determination. As the Supreme Court of Canada explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2434 (S.C.C.):

[24] . . . **This description of the issues subject to estoppel ('[a]ny right, question or fact distinctly put in issue and directly determined') is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, supra, at p. 558).** Dickson J. (later C.J.), speaking for the majority in *Angle*, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. **'It will not suffice' he said, 'if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.' The question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceeding.** In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings. [emphasis added]

Since the issue of whether the Agreement should be set aside or varied under s. 93 of the *FLA* was not raised in the prior judicial proceeding, it could not be said to have already been decided for the purposes of issue estoppel.

However, we are not sure that we agree with her Honour's conclusion that the husband's claim was not precluded by cause of action estoppel because the causes of action in each case were "separate and distinct". As the wife had sued to enforce part of the very same property provisions of the Agreement that the husband was now looking to set aside or vary pursuant to s. 93, both actions clearly dealt with the exact same issue — the validity and enforceability of the Separation Agreement.

Furthermore, unlike issue estoppel, cause of action estoppel extends to any issues that *could have been raised* in the previous proceeding with the exercise of reasonable diligence. Accordingly, had the husband wanted to challenge the validity of the Separation Agreement, the time to do so was when the wife was enforcing it (unless there was material new information that went to his claim to set aside the Agreement). He was not free to hold back that claim for another day.

To borrow from the late Justice Echlin in *Moran v. Cunningham* (2010), 89 R.F.L. (6th) 421 (Ont. S.C.J.) at para. 37, aff'd (2011), 2 R.F.L. (7th) 1 (Ont. C.A.), the wife should not be forced into "playing the equivalent of the carnival midway game of 'Whack-A-Mole' in her ongoing dispute" with the husband or be "compelled to defend in installments." See also *S. (S.) (Litigation guardian of) v. British Columbia (Director of Child, Family and Community Services)* (2016), 78 R.F.L. (7th) 226 (B.C. S.C.); *Town of Grandview v. Doering*, 1975 CarswellMan 64 (S.C.C.); *Hill v. Hill*, 2016 CarswellAlta 229 (C.A.); *Freedman v. Reemark Sterling I Ltd.*, 2003 CarswellOnt 3 (C.A.); *Horsfall v. Horsfall* (1988), 14 R.F.L. (3d) 393 (Man. Q.B.); *Strand v. Gilewich* (2007), 37 R.F.L. (6th) 182 (Sask. Q.B.); *Rowell v. Manitoba*, 2006 CarswellMan 30 (C.A.); *Becker v. Toronto (City)*, 2020 CarswellOnt 13702 (C.A.) (re. raising new issues or arguments on appeal).

Courts are busy enough without indulging parties in "second-thought litigation."

That being said, again, if the husband's set-aside claim was based on newly-discovered information (such as, for example, recently-discovered evidence of financial misrepresentation), the test for cause of action estoppel would not have been met as it could not be said that he could have raised the issue in the prior proceeding with the exercise of reasonable diligence.

Functus Officio

Justice Hardwick started her analysis of the wife's request to dismiss the husband's set-aside claim based on the doctrine of *functus officio* by reviewing the B.C. Court of Appeal's recent decision about the subject in *Esteghamat-Ardakani v. Taherkhani* (2023), 90 R.F.L. (8th) 42 (B.C. C.A.). In that case, the B.C. Court of Appeal explained that:

[81] The doctrine of *functus officio* is founded on the notion that **once a court has performed its function, it has exhausted its authority**. Narrow in scope, it is one of several legal principles designed to promote finality and achieve stability of

judgments for purposes of appeal. Under the *functus officio* doctrine, as a general rule, **once a judge has decided a matter and the judgment has been entered, they have discharged their office and have no ability to return to and correct the decision.** Rather, subject to limited exceptions, the function of correcting judgments is reserved to the appellate court: *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at paras. 32-35; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 (C.A.) at 264; *Truong v. Tran*, 2012 BCCA 492 at para. 35.

[82] **Despite the general rule, judges have jurisdiction to correct or alter an entered judgment where there is a statutory basis for doing so.** For example, in family law proceedings judges have jurisdiction to alter orders for support. Other exceptions apply where amendment is necessary to correct an error in expressing the manifest intention of the court, or where the matter has not been heard on its merits: *Canadian Broadcasting Corp.* at para. 33. [emphasis added]

While Justice Hardwick was satisfied that *functus officio* would have precluded the husband from seeking to vary Justice Brongers order granting judgment to the wife for the \$31,767 the husband owed her pursuant to the Separation Agreement, she was not persuaded that had any bearing on whether he should be able to seek to set aside or vary the underlying Separation Agreement that formed the basis for that order pursuant to s. 93 of the *Family Law Act*.

[This raises an interesting law-school-exam question: what would happen to Justice Brongers' order if the underlying agreement upon which it was based was set aside? While consent orders can generally be set aside on the same grounds as the agreement that gives rise to judgment (*Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.) at para. 64), the order in this case was not made on consent. While we are not experts on civil procedure in B.C., perhaps resort could be had to rule 13-1(17) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which allows a court to correct mistakes or deal with issues that should have been but were not adjudicated on? For those of you who practice in B.C., let us know if there's an easy answer.]

Abuse of Process & Collateral Attack — The Ones that Got Away?

Surprisingly, it does not appear that the wife argued that the husband's attempt to set aside the Separation Agreement was an abuse of process. In *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328 (S.C.C.) at para. 37, the Supreme Court of Canada described abuse of process as:

a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel,

but that can be applied,

to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

Given that Justice Hardwick rejected the wife's claims of *res judicata*, we suspect that she also would have rejected the notion that the husband's set-aside claim was an abuse of process. But we raise it because it is somewhat unusual to see a claim of *res judicata* that is not also accompanied by the twin allegation based on the more flexible doctrine of abuse of process.

We also note the wife did not defend the husband's claim to set aside the Agreement on the basis that it was a collateral attack on the previous Order of Justice Brongers. The doctrine of collateral attack is another related defence that prevents litigants from using a court proceeding to try and reverse, vary, or nullify an order that was made in another separate proceeding: *Toronto (City) v. C.U.P.E., Local 79*, 2003 CarswellOnt 4328 (S.C.C.) at para. 33. Or, phrased somewhat differently, a collateral attack is an attack on a previous order made in proceedings other than one whose specific object is the reversal, variation or nullification of the previous order or judgment: *R. v. Wilson*, 1983 CarswellMan 154 (S.C.C.) and). The previous Order of Justice Brongers implicitly assumed the validity of the Separation Agreement. Therefore, the husband's subsequent claim to set parts of the Agreement aside was arguably a collateral attack.

If you are not well-versed in the doctrines of *functus officio*, *res judicata*, abuse of process and collateral attack, you are missing out on potential arguments that you may be able to raise in your client's favour.

I'll Take "Things to Not do in Court" for \$5,000 Alex

China Yantai Friction Co. Ltd. v. Novalex Inc., 2024 CarswellOnt 2459 (Ont. S.C.J.) — Chang J.

China Yantai Friction Co. Ltd. is a civil case — a civil case about incivility. And we bring it to your attention because of what it has to say about civility — or, more particularly, the lack of it — in the courtroom.

Practicing family law is incredibly stressful and difficult. Clients are angry and upset. They are often at one of the lowest points in their lives. They lack objectivity. They have unrealistic expectations. The stakes are often high and the costs of litigation are astronomical. The law is complicated, and the justice system is slow and frustrating.

Furthermore, while many (even *most*) family law lawyers are collegial, friendly, helpful, co-operative, empathetic and kind, a minority seem to think that to succeed in family law, one must be mean, uncooperative, aggressive and uncivil. We are constantly hearing stories about lawyers sending each other rude and insulting correspondence, yelling at and/or hanging up on each other on the phone, demanding immediate responses to matters that are not remotely urgent, and refusing reasonable requests for accommodations. If you are one of these lawyers; stop it. It is not "good lawyering." It is actually counter-productive to good lawyering. And who wants to be universally despised by one's colleagues?

This type of ugly behaviour also seems to be rearing its head during court attendances. Many lawyers seem to think it is acceptable to interrupt, to make faces or to roll eyes, while opposing counsel is trying to make submissions. Some think such behaviour is actually effective advocacy. It isn't. And it is dangerous.

We previously commented on *W.N. v. M.V.*, 2023 CarswellOnt 3092 (Ont. S.C.J.) wherein a successful party was denied the majority of her costs because of her courtroom antics such as outbursts, gestures, and eye-rolling. Eye-rolling can be expensive.

In any case, if you don't believe us, take it from Justice Chang, who recently had this to say about how one lawyer conducted himself during a contested hearing before his Honour in *China Yantai Friction Co. Ltd.*:

[20] During the application hearing, **counsel for the applicant somehow decided that it was appropriate during opposing counsel's submissions to express themselves by way of, among other things, eye rolling, head shaking, grunting, snickering, guffawing and loud muttering. This behaviour culminated in one of them leaning back in his chair, throwing both hands in the air and laughing** in a gleeful moment of triumph during a particularly engaging exchange between opposing counsel and the bench. Apparently, applicant's counsel felt that he had scored some major point during my questioning of the respondent's counsel and wanted to ensure that everyone else was aware of that victory.

[21] I addressed this misconduct at the applicable time during the hearing and, on my insistence, the once-exultant counsel apologized to his colleague. However, the ignoble display continued — albeit mutedly and intermittently — for the rest of the hearing.

[22] Unfortunately, the behaviour engaged in by applicant's counsel is neither a new nor a rare phenomenon. **Too often, counsel seem to believe that enthusiastically attempting to disrupt and/or demean opposing counsel during the latter's oral submissions is one of the hallmarks of an effective advocate. It is not.** Too often, **counsel seem to believe that "rolling eyes, dancing eyebrows and other mannerisms" whilst opposing counsel is making submissions to the court constitute proper critique or response to those submissions. They are not.**

[23] Counsel's submissions to the court are to be made in only two ways: written argument and oral argument. **No proper submissions are made by way of emanations from counsel (be they oral, non-verbal, audible or inaudible) when another justice participant is speaking.** Indeed, during a court hearing, there should be nothing from counsel but complete oral and non-verbal silence while someone else "has the floor". **Anything other than such complete silence is not only distracting to the court, but is also profoundly disruptive, disrespectful and demeaning to everyone in that courtroom.**

[24] I fully acknowledge that, in the "heat of battle", human emotions run high and can sometimes get the better of even the most seasoned advocate. However, **I am unable to countenance any circumstances under which the type of sophomoric behaviour too often demonstrated by counsel could possibly be excusable, let alone acceptable.** It is not only discourteous and disruptive, but is also antithetical to the peaceful and orderly resolution of disputes and undermines procedural and substantive fairness (see: *R. v Beals*, 2023 ONSC 555, at para. 148).

[25] **The type of misconduct demonstrated by the applicant's counsel in the case-at-bar significantly delays the timely and effective administration of justice, exacts an unnecessary and unacceptable additional cost on litigants and erodes the public's respect for the legal profession and, more importantly, for the rule of law.** The parties, counsel, other justice participants, the public and the administration of justice deserve far better than what too many counsel seem to have to offer.

[26] Whether the culprit is a lack of proper mentoring, an overconsumption of courtroom television shows, extended periods of time without in-person human interaction or something else entirely, a fundamental shift in mindset is required to stem this tide.

[27] **It has long been a tradition and requirement of etiquette in our courts that counsel refer to their counterpart as their "friend".** While most counsel use this appellation, **painfully few appear to understand that the fundamental intention underlying its use is to remind counsel of their duty to treat opposing counsel with professionalism, courtesy, respect and civility.** All counsel would be well advised to always keep this top of mind, lest the already threadbare state of professionalism and civility between them deteriorate into the irremediable. [emphasis added]

So the next time you are in court, practice your poker face. Of course everyone has bad days. Everyone get frustrated at times. And everyone can sometimes forget that it is far more effective to make your submissions after the other side, rather than at the same time. The trick is to make such situations the very rare exception rather than the very common rule. And if you have one of those days — in or outside court — pick up the phone and apologize — and maybe discuss your case. That is the only practical reason to even have a telephone these days.

If you really want to learn more about other things you should not be doing, pull up Justice Quinn's incredibly funny and informative 2012 paper, "A judge's view: things lawyers do that annoy judges; things they do that impress judges", which is referred to in Justice Chang's reasons (as well as in previous editions of *TWFL* — see the May 15, 2023 (2023-19) edition), and can be found online at <https://www.oba.org/en/pdf/JudgesView.pdf>. Here's a brief excerpt just to whet your appetite:

[16] Since crossing over to the dark side, I find that I have become mesmerized by the mannerisms of counsel. Most mannerisms are annoying; more importantly, they are distracting. Imagine this situation. Counsel for the husband is cross-examining the wife regarding her efforts to become self-supporting. He asks her, "Why did you not apply for work at such-and-such company when you knew there was an opening?" I think to myself, "That is a good question." I await the next question. But, then I notice that counsel for the wife is looking at the ceiling. More cross-examination follows by counsel for the husband, while counsel for the wife frowns, scowls and scrunches his nose (as if detecting a foul odour), then he slides down in his chair and again stares at the ceiling. I am transfixed. "Why is he doing this?" I ask myself. "Is he in pain? Could it be his back? Those chairs do not look terribly comfortable. Is he having a seizure of some sort? His mouth does appear to be drooping on one side. Is that foam I see?" Then I find myself sneaking a peek at the ceiling. Meanwhile, five minutes of evidence have gone into the record and I have missed most of it. At the first recess, I call the court reporter into my chambers and ask her to prepare a transcript of those five minutes. This has happened to me more than once. You may rightly wonder, in the circumstances, whether I am suited to be a judge. Too late.