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

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Mediation with Vengeance? (Mandatory Mediation in Family Law in Saskatchewan)

V.B. v. S.V.B. (2023), 93 R.F.L. (8th) 327 (Sask. K.B.) — Richmond J.

Issues: Saskatchewan — Mediation

V.B. v. S.V.B. deals with the Government of Saskatchewan's recent decision to make out-of-court family dispute resolution processes mandatory in almost all family law cases in the province.

There has been an ongoing debate for many years about whether it is appropriate or advisable to make mediation mandatory in family law cases. On the one hand, mediation can be far less expensive and adversarial than litigation, while also being faster and more efficient, particularly if the mediator has specialized skill and training. It is, in many cases, a far better process for families than the court system, and can also result in far better outcomes.

On the other hand, while mediation is unquestionably a useful tool in many cases, and while cases do settle in mediation — when the timing is right — mediation is supposed to be a voluntary process, not a mandatory one. Furthermore, unlike judges, mediators have no authority to force intransigent parties to do anything they don't want to do, and the ultimate outcome of each particular case can and does vary significantly depending on the skills, abilities and approach of the mediator (normative, evaluative, directive, etc.), as well as the parties' lawyers in the increasingly few cases where both parties can actually afford to have lawyers attend mediation with them. And in some cases, mediation can actually exacerbate already existing power imbalances between the parties, instead of alleviating them; or harden people's positions, instead of bringing them closer together. We have probably all been to a mediation where, intentionally or not, the mediator will try and get a deal done by leaning on the weaker or more reasonable party to make concessions simply because the more powerful party refuses to act reasonably or in good faith.

But for better or worse, in 2017 and 2018, Saskatchewan's Legislative Assembly decided to make ***mandatory*** mediation in all family law cases a reality by passing legislation requiring parties to family cases to attempt to resolve their matters out of court and through an approved "family dispute resolution process," which is defined in s. 7-4(1) of the *King's Bench Act*, S.S. 2023, c. 28 as:

> 7-4(1) . . . a process used by parties to an application to which this section applies to attempt to resolve one or more of the disputed issues, and includes:
>
> (a) the services of any of the following persons:
>
> (i) a family mediator;

(ii) a family arbitrator as defined in s. 2 of *The Arbitration Act, 1992*;

(iii) a parenting coordinator as defined in s. 30 of The *Children's Law Act*, 2020;

(b) other collaborative law services; and

(c) any other process or service prescribed in the regulations;

As a result of these amendments, the *King's Bench Act* also now provides that parties ***must*** participate in a family dispute resolution process and file a certificate of participation with the court after the close of pleadings, failing which the party who failed to participate is prohibited from "(a) taking any further step in the proceeding; and (b) filing with the court any further application for relief." Furthermore, if a party fails to participate in a family dispute resolution process, the court can: "(a) strike out the party's pleadings or other documents; (b) refuse to allow the party to make submissions on an application or at trial; (c) order the party to participate in family dispute resolution; or (d) order costs or any other relief." Ouch.

To try and prevent the proliferation of unqualified mediators, the Legislative Assembly also imposed minimum requirements for family mediators in Saskatchewan pursuant to the *King's Bench Regulations*, Sask. Reg. 100/2023. To qualify as a family mediator for the purposes of s. 7-4(1)(a) of the *King's Bench Act*, the individual must: (a) be a lawyer in good standing or a member of one of several enumerated mediation organizations; (b) have a minimum numbers of years of experience and conducted a minimum number of mediations; (c) have completed at least 80 hours of mediation theory and skills training; (d) have completed at least 21 hours of family law training if the person is not a lawyer; and (e) have completed at least 14 hours of family violence training. The mediator must also complete at least six hours of continuing professional development for family dispute resolutions each year, and maintain minimum levels of insurance.

As a safety valve for cases where mediation might not be appropriate, s. 7-4(6) of the legislation also authorizes the court to exempt a party from participating in a family dispute resolution process where:

7-4(6) . . . (a) there is a restraining order between the parties;

(b) a child of the parties has been kidnapped or abducted by one of the parties;

(c) there is a history of interpersonal violence between the parties;

(d) the party provides proof of attempts to engage the other party in family dispute resolution; or

(e) in the opinion of the person hearing the application, there are extraordinary circumstances.

While the use of an out-of-court dispute resolution process was initially only mandatory in Prince Albert, Saskatchewan, the mandatory regime was subsequently expanded to include Regina, and they were brought into effect across the entire province as of July 1, 2022.

The amendments to the *Divorce Act* in 2021 introduced the term "family dispute resolution process", which is defined in s. 2(1) as a "process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law", which is then referred to in s. 7.3 and 16.6(6) of the *Act*:

7.3 **To the extent that it is appropriate to do so**, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

. . . . .

16.6(6) Subject to provincial law, the [parenting] order **may** direct the parties to attend a family dispute resolution process. [emphasis added]

While the court can make an order directing the parties to attend mediation on parenting issues under s. 16.6(6) of the *Divorce Act*, the onus is on the party *seeking* mediation to convince the court that it is appropriate in the circumstances. In contrast, under the *King's Bench Act*, the onus is on the party *opposing* mediation to convince the court that it is not appropriate.

As *V.B. v. S.V.B.* involved an Application that was started in 2023, there was no question that the mandatory dispute resolution provisions of the *King's Bench Act* applied. But what was in issue was whether the wife should be exempted from having to participate in an out-of-court dispute resolution process pursuant to s. 7-4(6)(c) on the basis that the husband had committed interpersonal violence against the wife.

The parties in *V.B.* were married in 2008 and separated in 2019. They had one child together. With the assistance of their respective lawyers, they negotiated a Separation Agreement that was signed in 2022 and provided, among other things, that they would have a shared parenting arrangement. The terms of the Separation Agreement were subsequently incorporated into a court Order on consent.

In 2023, the mother applied to vary the terms of the Consent Order, and asked the court to exempt her from having to participate in a family dispute resolution process because of the history of interpersonal violence between the parties. In support of her request for an exemption, the mother produced a sampling of the horrific emails and text messages the father had sent her. We will not quote those emails and text messages here, but they are, to use the words of Justice Richmond, "vitriolic" and part of "an ongoing rampage of vile name calling bent on degrading and controlling the mother."

The father opposed the mother's request for a variation. He also took the position that her application could not proceed until the parties had participated in a family dispute resolution process as required by the legislation. While the father acknowledged that he had sent inappropriate emails and text messages to the mother, he claimed that they did not rise to the level of "interpersonal violence" for the purposes of s. 7-4(6)(c) of the *King's Bench Act*. Alternatively, he claimed that they were insufficient to warrant granting the mother's request for an exemption, which exemption as Justice Haaf explained in *Anaquod v. McLean*, 2022 CarswellSask 250 (Q.B.) at para. 14, is "not mandatory" even in cases where the court finds that there has, in fact, been a history of interpersonal violence:

> [13] The clear intention was that this process would be mandatory, therefore participation in the early dispute resolution process is the default. **This was not intended to be an optional process, or a requirement which the court would waive routinely**. While courts will provide exemptions under appropriate circumstances, **exemptions are the exception, not the rule**. This mandatory first step in the process provides an opportunity for parties to meet with an out of court professional at the beginning, with whom the parties can work to, hopefully, dial down the conflict and craft solutions rather than immediately applying to court for an imposed order.
>
> [14] **An important consideration is the use of the word "may"** in s. 44.01(6) of *The Queen's Bench Act, 1998*. **A history of interpersonal violence, a restraining order or other extraordinary circumstances may warrant an order for an exemption**. An exemption, if the court were to find a history of interpersonal violence, is **not mandatory. Any form of interpersonal violence in and of itself does not, by default, exempt the parties from the dispute resolution process or mandate the adversarial process**. [emphasis added]

Justice Richmond resoundingly rejected the father's arguments, and found that he was abusing the family dispute resolution provisions of the *King's Bench Act* to try and "weaponize the process, create delay and provide a further forum to exercise his intimidation tactics" against the mother, and to use the process to "exercise coercive control" and "dominate the mother".

As a result, Justice Richmond granted the mother's request for an exemption, and ordered the father to pay the mother $1,000 in costs. Unquestionably, this was the right result. It would be bitterly ironic if a process meant to offer a safe space to settle matters was used by one party to trap the other in a process where historic abuse can be continued. What we will have to watch for, however, is whether and to what extent the Saskatchewan Legislature's decision to make it mandatory to use out of court dispute resolution processes helps to improve, or hinder, the ability of family law litigants in that province to obtain timely, fair, efficient, and cost effective access to justice. To the best of our knowledge, Saskatchewan is the only jurisdiction in Canada

that has implemented this sort of mandatory regime in all family law cases (although B.C. does have mandatory mediation in family law in certain circumstances, it does not automatically apply in all cases), and it deserves careful study and monitoring as it moves forward.

Foreign Marriage Contracts: Words Matter

Torgersrud v. Lightstone (2023), 93 R.F.L. (8th) 267 (Ont. C.A.) — Feldman, Benotto and Roberts JJ.A.

Issues: Ontario — Property — Foreign Marriage Contracts

This decision from late 2023 about the enforceability of foreign marriage contracts is worth brief comment — not because the decision is wrong — but because some of the *obiter* is concerning.

The spouses signed two marriage contracts in Quebec. Both contracts provided that the parties were separate as to property. Below, the wife was successful in her bid to have the contracts set aside pursuant to s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"). This was the husband's appeal.

The parties were married on March 31, 1987, and they lived in Montreal. After the marriage, the husband asked the wife to sign a marriage contract to protect his family's business interests. This contract (signed in 1988) provided that the parties renounce their property rights to a "partition of acquests", declare that they are "separate as to property", and acknowledge they would not be liable for each other's debts. Under Quebec law, this meant there would be no division of assets of any nature upon marriage breakdown.

The parties signed a second Quebec contract in 1990 in which they agreed to opt out of the family patrimony regime that had recently been legislated into Quebec law. This regime provided that the net value of family patrimony be divided equally upon separation. The family patrimony regime excludes inheritances, property existing at the date of marriage, and gifts, from division.

The parties moved to Ottawa in 1993, where they lived until they separated in 2015, at which time the wife claimed equalization under Part I of the *FLA*. The husband asserted that the Quebec marriage contracts ousted the *FLA*.

The expert evidence from Quebec legal practitioners was that the contracts *would* be recognized in Quebec. The court below concluded that the documents *were* marriage contracts — but that they did not oust the application of the *FLA*.

The court below found that the Quebec contracts did not include any renunciation, releases, or waivers and that they did not "deal with" or release equalization claims, and the statement that the parties were "separate as to property" was insufficient. Therefore, the court below held that the Quebec contracts did not bar the wife's equalization claim. So far — no problem.

However, the court below then went further, saying that there is a "high threshold" for finding an out-of-jurisdiction marriage contract prevails over the *FLA's* equalization provision. The Court of Appeal did not distance itself from that comment, and that is the obiter with which we take issue.

The court below also found that she would have set aside the contracts under s. 56(4) of the *FLA*, because the husband had failed to disclose significant assets at the time of the contracts and the wife did not appreciate the nature and consequences of the contracts. The wife also did not have a full appreciation of the husband's financial position at the time the contracts were executed. These were findings the court below was entitled to make.

Referring to the factors in *Dochuk v. Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.) and *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.), the court below found that this was a proper case to set aside the marriage contracts.

The husband's appeal was primarily focussed on the argument that the court below erred in finding that the Quebec contracts did not oust the *FLA's* equalization provisions.

But based on the finding of insufficient disclosure under s. 56(4)(a) of the *FLA*, the Court of Appeal did not have to decide this issue. Section 56(4)(a) provides that a court can set aside a domestic contract (or a provision within it) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made.

As noted above, our concern is with that one line — that there is a "high threshold" for finding an out-of-jurisdiction marriage contract prevails over the *FLA's* equalization provision. That, respectfully, is not the law.

In this regard, a few sections of the *FLA* come to mind.

The first is s. 2(10):

> **Act subject to contracts**
>
> (10) A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise.

The next is s. 51 which defines "domestic contract" as including a marriage contract.

Then, there is s. 52(1):

> **Marriage contracts**
>
> 52 (1) Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to decision-making responsibility or parenting time with respect to their children; and
>
> (d) any other matter in the settlement of their affairs.

Notably, s. 52 does not say that the contract cannot be a foreign marriage contract.

And finally, we have s. 58:

> **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 s. 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. [**emphasis** added]

And on top of this, we have the Ontario Court of Appeal specifically saying there is no presumption that courts will be hesitant to enforce marriage contracts: *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.).

Therefore, neither the statutory regime nor previous authority from the Court of Appeal suggest that there is a "high threshold" for finding that a foreign marriage contract prevails over the *FLA's* equalization provision.

What the Court of Appeal *has* made clear, however, is that to exclude property from equalization, the foreign contract must evince an intention to exclude certain (or all) property from the property equalization regime (even absent a specific reference to "equalization"): *Lay v. Lay* (2000), 4 R.F.L. (5th) 264 (Ont. C.A.) and *Bosch v. Bosch* (1991), 36 R.F.L. (3d) 302 (Ont. C.A.).

Stated otherwise, s. 58(a) provides an alternative ground for *upholding* a domestic contract that is governed by foreign law: *Jasen v. Karassik* (2009), 62 R.F.L. (6th) 63 (Ont. C.A.). It is *expansive*, not limiting. Therefore, it is, we respectfully suggest, inaccurate to suggest that a "high threshold" applies for finding that a foreign marriage contract prevails over the equalization provisions of the *FLA*.

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