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— Franks & Zalev - This Week in Family Law

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The Only Case You'll Ever Need to Read About Supervised Parenting Time (And A Short Rant About The System)

***V.K.G. v. I.G.* (2023), 94 R.F.L. (8th) 283 (Ont. S.C.J.) — Chappel J.**

Issues: Ontario — Parenting Time — Supervision

In *V.K.G.*, Justice Chappel offers a comprehensive review on a number of topics, including:

• Supervised parenting time (paragraph 129);

• Family violence in the parenting context (paragraphs 111-123);

• The foundational principles of child support (paragraphs 235-236);

• Whether and when to calculate income for child support purposes based on a three-year average (paragraphs 246-248);

• Income for child support purposes for payors who live outside of Canada (paragraphs 249-250); and

• Imputation of income in child support cases involving allegations of non-disclosure and intentional underemployment (paragraphs 251-261).

Yes — it's *really* long; but if you need to know the law about any of these topics, you need look no further. But the main reason we decided to comment on *V.K.G.* is because it includes an incredibly helpful list of factors to consider about whether and when it is appropriate to order supervised parenting time, and what terms any such Order should include.

The parties in *V.K.G.* met and married in Nigeria in 2013 and had two children together. They immigrated to Canada in 2016, and they separated in 2019.

The trial, which dealt with allegations of abuse by the father, began in April 2022. It was only supposed to take 5-6 days, but ultimately took more than 20 days to complete. It also had to be spread out over 14 months, and did not finish until June 2023 because of various scheduling issues involving both the court and the parties' lawyers. We will have more to say about this at the end. But this is no way to run a railroad.

The situation before the court was further complicated by the fact that during the trial, the father moved back to Nigeria, and planned to remain there for the foreseeable future.

The main issues at trial were whether and to what extent the father should be permitted to have unsupervised parenting time with the children when he was in Canada. The mother took the position that because of the alleged family violence the father had committed against her and the children, and because of the potential risk of abduction, the father's parenting time should supervised by either a professional supervisor, or a third party agreeable to the mother.

Justice Chappel started her analysis of the mother's request for supervised parenting time by reviewing the leading cases about the issue, including *Jennings v. Garrett* (2004), 5 R.F.L. (6th) 319 (Ont. S.C.J.) and *H. v. A.* (2022), 69 R.F.L. (8th) 18 (Ont. S.C.J.), and distilling them down to the following list of general principles (apologies for the lengthy block quote; but why summarize and/or reinvent the wheel):

> [129] . . . 1. **The imposition of supervision on a parent's time with a child materially affects the opportunity for meaningful parenting time and the quality of that time**. Having regard for the principle set out in section 16(6) of the *Divorce Act* that a child should have as much parenting time with each parent as is consistent with their best interests, **there must be compelling reasons and evidence in support of the need for supervision**.
>
> 2. However, **it is important to avoid a doctrinal approach to the issue of supervised parenting time**, and to refrain from establishing principles that may hover dangerously close to creating presumptions. This is because the best interests analysis is a highly fact-driven and contextualized undertaking that must always revolve around the particular characteristics and needs of the child in question.
>
> 3. The determination of whether supervision of parenting time is in the child's best interests **must take into account society's developing awareness of social issues that impact on the safety and overall wellbeing of children**, including the impact of all forms of family violence on children.
>
> 4. Supervision of parenting time or exchanges may be appropriate where it is necessary to protect children from risk of harm, including exposure to family conflict. In determining this issue, **the court should consider all relevant factors**, including:
>
> > a) Whether there is a **history of family violence** as that term is broadly defined in the *Divorce Act*, towards either the child or a family member;
> >
> > b) Whether the parent has a **history of anger management difficulties** generally, **or aggression** towards other people;
> >
> > c) Does the parent have a **history of substance abuse** issues, and if so, have they addressed those issues to the court's satisfaction, and how may those concerns impact the child?
> >
> > d) Are there **flight risk concerns** respecting the parent?
> >
> > e) Are there any **concerns regarding the parent's overall physical, cognitive, mental or emotional health** functioning that render supervision appropriate for the safety and wellbeing of the child?
> >
> > f) Has there been **child protection intervention**, or is there an ongoing child protection investigation, and if so, have the child protection professionals involved given any temporary or indefinite directions respecting supervision of the party's parenting time? If so, what are the grounds for such directions?
>
> 5. Supervised parenting time **may also be in the child's best interests where the parent-child relationship has been severed or undermined for any reason**, including alienation by the other party or a third party, illness, or geographical distance, and the evidence indicates that supervision by a third party would assist the child in re-establishing the relationship. **In these circumstances, supervision may be a valuable tool in implementing a gradual step-up plan for parenting time.**

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6. In cases involving **older children** who are able to articulate their views and preferences, their **expressed wish for supervision of parenting time should weigh very heavily in support of such relief**.

7. Supervision of parenting time is **often appropriate as a time-limited measure rather than a long-term solution**. It represents a significant intrusion upon the parent-child relationship, and therefore its continued imposition must be justified.

8. However, **supervision may be appropriate on an indefinite basis where the evidence suggests that the reasons for the order are unlikely to be addressed in the reasonably foreseeable future**.

9. Where supervised parenting time is ordered, **the court should also address whether there are any steps that the party could take to potentially move towards a more natural setting** for their parenting time.

10. Finally, **if the court concludes that supervision of parenting time is appropriate, it should also consider whether it can be carried out by family members or friends in a normal family setting rather than by a third party professional or agency**. The decision respecting the appropriate form of supervision must be based on the child's overall best interests and not the other party's comfort level or personal preferences. [**emphasis** added]

After carefully reviewing the mother's evidence, Justice Chappel dismissed her request to limit the father to supervised parenting time, as she was satisfied that the children would be safe in the father's care. She also concluded that the father supported the children remaining in the mother's primary care in Canada and would not attempt to abduct or withhold the children from the mother, and that it was in the children's best interests that "their time with their father occur in a more comfortable family setting, without the disquietude that naturally flows from having a supervisor document every movement and comment of the family members."

And with that said, excuse us while we rant for a moment.

The family court system in Ontario (and in most provinces) is designed such that parties are required to attend multiple conferences with a judge (typically at least three, but often more). The system is "front-end loaded" with conferences and opportunities for settlement and settlement discussions. The conferences are ideally supposed to all be conducted by the same judge, although in practice this only happens in certain parts of the province (at least in Ontario). Theoretically, the conferencing system is supposed to increase the chances of a negotiated resolution, while also ensuring that the case been tried quickly and efficiently if it cannot be resolved.

But while this is what is *supposed* to happen, at least anecdotally, it is not working. Many litigants (and lawyers) express the view that too little gets accomplished at each conference to justify the significant investment of time and money that is required. We have also lost track of the number of cases where the pre-trial time estimate turned out to be wildly off, and the number of trials that have had to be heard in fits and starts over many months.

After at least three judicial conferences (and likely more), including one that is expressly called a "Trial Management Conference", surely the parties and the Trial Management Conference judge should be able to arrive at a reasonable and realistic estimate as to how long a trial is going to take, and whether the amount of court time being requested is *necessary* given the nature of the issues in dispute. And surely there must be a way to ensure that family courts are sufficiently resourced to start and finish a trial on schedule.

So . . . Arbitrators Must Follow the Law. Who Saw That Coming?

***Eyelet Investment Corp. v. Song*, 2024 CarswellOnt 5787 (Ont. Div. Ct.) — Lococo, Myers and LeMay, JJ**

Issues: Ontario — Arbitration — Arbitrator's Jurisdiction

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This is not a family case, but in *Eyelet*, we learn that — surprise surprise — an arbitrator must decide matters in accordance with the law. While arbitrators are generally afforded broad deference for matters within their jurisdiction, and in interpreting the scope of their jurisdiction, they are not free to ignore the law or to decide cases "in accordance with their whims."

The appellant was a home-builder. The respondents were homebuyers who refused to close. The builder elected to accept the buyers' repudiation and sued for damages. (The builder had incurred carrying costs, resold at a loss and treated the buyers' deposits as forfeited.)

The contract between the builder and buyer required arbitration.

The buyer's defence rested on the narrow fact that the builder had not checked the "yes" or "no" boxes on the standard terms incorporated into the Agreement of Purchase and Sale. According to the Arbitrator, "The tick boxes indicated whether the agreements were subject to any early termination conditions." Having not ticked a box, no matter how immaterial on the facts, the buyers had a lawful basis to walk away from the agreement such that there was no anticipatory repudiation for the builder to accept. The Arbitrator ordered the builder to return the purchaser's deposits, arguably contrary to contract law.

The builder's appeal was allowed. Justice O'Brien found that the builder's failure to tick "yes" or "no" was immaterial and had "no meaningful effect on any of the buyers or their rights". Therefore, the buyers had no right to terminate the sales agreements. Justice O'Brien set aside the Arbitrator's initial award, held that the buyers were liable, and referred the case back to the Arbitrator to assess the builder's damages.

And here is where things go a bit sideways.

In the award for damages and costs (that the Arbitrator was directed by Justice O'Brien to determine) — the Arbitrator was critical of Justice O'Brien's decision and her having allowed the builder's appeal. He then ruled he was not bound by Justice O'Brien's decision and direction, being of the opinion that,

> . . . [T]he fact that the appeal decision is binding on the parties concerned does not mean that it is binding on the tribunal . . .
>
> . . . remitting the award to determine further issues based on [Justice O'Brien's] conclusion makes me feel that I'm given an assignment to do: substantiate her decision with merits which I don't believe exist. Without being convinced that it is not the [builder] that breached the contract, but the contrary, and without proper grounds for setting aside the award, I find it difficult to make an award to the opposite of the original one . . .

To us, the answer is clearly — "try harder."

The builder appealed again, and this time the matter went to the Divisional Court where the parties found Justice Myers and friends waiting for them.

Justice Myers starts with this:

> [1] Domestic arbitrations in Ontario must be decided in accordance with the law. Arbitrators are accorded broad deference for matters within their jurisdiction and in defining the scope of their jurisdiction. But they are not free to ignore the law or to decide cases in accordance with their whims.
>
> . . . . .
>
> [30] . . . It is not open to the Arbitrator to choose to ignore the findings of the court on the basis that he does not like the standard of review that was applied or based on his view that the reviewing Court misinterpreted the statute. His failure to acknowledge that he was bound by the decision of O'Brien J. amounted to a fundamental error of law.
>
> . . . . .

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> [36] It was not open to the Arbitrator to ignore the findings of the court on appeal regardless of whether he believes that he is correct in his view of the merits. Nor is he entitled to impose a burden on a court to convince him of the existence of breaches of contract even if they are the opposite of the findings he made. His findings were wrong in law and O'Brien J. was empowered, entitled, and duty-bound to say so. **He, on the other hand, was bound to implement the findings of the court regardless of whether he accepts the applicable principles**. [**emphasis** added]

And then, a strong finish:

> [40] As best as I can tell, the Arbitrator found that the builder committed a "contributory breach of contract" by being primarily at fault for failing to tick the correct box in the agreements of purchase and sale. On that basis he determined that the parties should each bear their own "fair share" of damages. He determined that it would be unfair to award any damages to the builder caused "not exclusively by the purchasers" and therefore the builder's damages were limited to the forfeiture of the buyers' deposits.
>
> [41] There is no such thing as a "contributory breach of contract" to determine a fair sharing of contractual damages. For the past 170 years, the law of contract has provided that a party who breaches a contract is required to pay.

And finally, lest there be any doubt:

> [67] No one suggested that the initial award should be revived. The contract analysis by the Arbitrator cannot stand on any standard of review. It was wrong, unreasonable, legally unintelligible, and palpably so. If O'Brien J. lacked jurisdiction to hear the appeal before her, I would transfer it to this proceeding and allow the appeal as she did.

It likely also did not help that the Arbitrator had released his decision on damages and costs before receiving the builder's submission.

The court ordered a new hearing on damages and costs but, this time, before a different arbitrator.

So for those of you that attend arbitrations or act as arbitrators, the law — and directions by the court — binds the arbitrator as they bind the parties. Once a court issues any orders or directions regarding an arbitrator's award, the arbitrator is bound to follow them.

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