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— Franks & Zalev - This Week in Family Law

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Note: We'll be taking next week off. We'll be back with the next edition of *TWFL* the week of August 5, 2024.

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Issues: Ontario — Extending the Time to Appeal

It can be fun and rewarding to argue appeals — especially as appellant — and even more so as a *successful* appellant. But winning an appeal is always hard; most appeals are not successful. And winning a family law appeal can be particularly challenging, as family law cases tend to turn on questions of fact and/or the exercise of judicial discretion, and thus are subject to an exacting standard of review.

Succinctly stated, a Court of Appeal will intervene on an appeal from an order of a judge only where the judge made an error of law or a palpable and overriding error of fact or mixed fact and law: *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.). Where a judge has made an order in the exercise of judicial discretion, the court will intervene only if the exercise of the judge's discretion was based on a wrong principle, a failure to consider a relevant principle, or a misapprehension of the evidence: *Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 CarswellOnt 16221 (C.A.), at para. 30; *Iturriaga v. Iturriaga*, 2024 CarswellOnt 9802 (Div. Ct.).

The deferential standard of review is designed to promote finality; an appeal court can only intervene where the trial judge's decision "exceeds a generous ambit within which reasonable disagreement is possible and is plainly wrong": *Juvatopolos v. Juvatopolos* (2005), 19 R.F.L. (6th) 76 (Ont. C.A.). And appellate courts have held, rightly or wrongly, that this directive is even more accentuated in family litigation: *Johanson v. Hinde*, 2016 CarswellOnt 8605 (C.A.); *Choquette v. Choquette* (2019), 25 R.F.L. (8th) 150 (Ont. C.A.); *Alalouf v. Sumar*, 2019 CarswellOnt 11544 (C.A.); *Alajajian v. Alajajian*, 2021 CarswellOnt 12430 (C.A.).

And how about this: An appellate court will not interfere with a spousal support award even where there is a clear "error in the precise manner in which the trial judge calculated the amount of the lump sum award for spousal support", if, "when all factors are considered, it remains a fit and appropriate award in the circumstances of the case." [See *Green v. Green* (2015), 65 R.F.L. (7th) 291 (Ont. C.A.); *Jasiobedzki v. Jasiobedzka* (2023), 92 R.F.L. (8th) 253 (Ont. C.A.).]

Furthermore, while trial courts tend to grant extensions in the family law context (particularly where the requested extension is brief and was required because of a relatively minor procedural error), this has not necessarily been the case in the appellate context since the Ontario Court of Appeal's 2013 decision in *Denomme v. McArthur* (2013), 36 R.F.L. (7th) 273 (Ont. C.A.).

The appellant father in *Denomme* instructed his lawyer to appeal a parenting Order within the required 30-day appeal period. However, his lawyer mistakenly served the Notice of Appeal on the 31st day because she thought (incorrectly) that Victoria Day did not count as part of the 30-day appeal period. But even though the appeal deadline was only missed by one day, Justice Feldman rejected the father's request for an extension primarily because she was not satisfied that the appeal had any merit. (She also expressed concerns that the motion was also not brought as quickly as it ought to have been, and because the evidence showed that the children had been doing well under the terms of the trial judge's order, but those points were secondary to the lack of merit).

This seemed to be the start of appellate courts, at least in Ontario, finding that lack of merit alone in a family law appeal can be decisive in refusing to grant even a short extension: *Wardlaw v. Wardlaw*, 2020 CarswellOnt 7347 (C.A.); *Trivedi v. Hudd*, 2022 CarswellOnt 1882 (C.A.); *Oliveira v. Oliveira*, 2022 CarswellOnt 3245 (C.A.); *Fatahi-Ghandehari v. Wilson*, 2022 CarswellOnt 17641 (C.A.); *Beazley v. Johnston*, 2024 CarswellOnt 7928 (C.A.).

Are Courts of Appeal less inclined to grant indulgences in family law cases?

You decide; but both cases discussed below suggest a clear shift towards stricter judicial attitudes in family law appeals, *particularly* in parenting cases.

***J.J.W. v. K.F.* (2024), 1 R.F.L. (9th) 1 (Ont. C.A.) — Roberts J.A.**

The parties in *J.J.W.* had a six-year-old child. The mother alleged that the father had abused her and the child. However, after carefully reviewing the evidence, the trial judge rejected the mother's allegations, and found that while both parties had engaged in physical and verbal abuse, "they were minor and isolated incidents." The trial judge also found that the mother and her family had either intentionally or unintentionally coached the child to believe that he had been abused, and that this had contributed to the child's reluctance to have contact with the father.

As a result, the trial judge ordered reunification therapy between the child and the father, and put in place a schedule that would eventually step-up to equal time. His order also dealt with child and spousal support.

Under Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), the mother had 30 days from the date of the trial judge's decision to serve a Notice of Appeal and a Certificate Respecting Evidence, which is a somewhat perfunctory form that lists the evidence the appellant believes is required for the appeal. She then had 10 days from the date she served these materials to file them with the court.

The mother's former lawyer served a Notice of Appeal and tried to file it with the court within the time limits provided for by the *Rules*. However, the materials were rejected because she had used the wrong form of Notice of Appeal (she used the form provided by the *Family Law Rules* that only apply to appeals from the Provincial Court to the Superior Court instead of the form provided by the *Rules* that applies when an appeal is from the Superior Court to the Divisional Court and the Court of Appeal). She had also not served a Certificate Respecting Evidence.

On a side note, the appeal process in Ontario is needlessly complicated. Different appeal routes, different rules and different forms apply depending on the nature of the Order being appealed (final vs. interlocutory and under the *Divorce Act* or provincial legislation), which level of court the appeal is from (Superior Court or Unified Family Court), whether the parties are married, whether money is in issue (and, if so, how much), what municipality the parties live in, and whether the parties are married. There are three different courts that hear appeals (the Superior Court, the Divisional Court, and the Ontario Court of Appeal), and determining which court and which forms apply requires a careful review of two sets of rules of court and multiple statutes — and a post-doctorate degree in statutory interpretation.

And, of course, these old *Rules* were changed to make things "easier." As the kids say, "LOL."

This state of affairs *desperately* needs to be fixed. As the Ontario Court of Appeal said in *Priest v. Reilly*, 2018 CarswellOnt 5979 (C.A.):

> [5] . . . we feel compelled to express strong support for the concern voiced by MacPherson J.A. in *Christodoulou* [*v. Christodoulou*, 2010 ONCA 93] about the inconsistency in current appeal routes and how confusing they must be for the public, for counsel and for institutional litigants. We add that the litigants most significantly affected by the confusion are self-represented litigants such as one of the parties to this appeal.
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> [6] It has been over eight years since MacPherson J.A. went on to specifically invite legislative reform in this area. This is a serious access to justice problem that must be remedied.

See also *Mattina v. Mattina*, 2018 CarswellOnt 17838 (C.A.) at para. 37 and *Marchildon v. Beitz* (2012), 23 R.F.L. (7th) 316 (Ont. C.A. [In Chambers]) at para. 4.

The current situation could be immeasurably improved simply by designating one appellate court to hear all family law appeals, and simplifying the rules. But as is so often the case, legislatures across Canada inexplicably (and unacceptably) seem to have no interest in trying to tackle even the simplest of problems in the family law system. Even experienced appellate counsel must regularly refer to the *Rules* to figure out where an appeal is to be heard.

With that off our chests, back to *J.J.W.*

The mother took immediate steps to remedy her minor errors, but the father refused to consent to late filing, and forced the mother, who by that point was representing herself, to bring a motion to extend the time to file her materials.

The test for extending the time to appeal in Ontario and most other provinces is well known, and requires the court to consider:

1. Whether the appellant formed the intent to appeal within the relevant period;
2. The length of the delay and the explanation for it;
3. Any prejudice to the responding party as a result of the delay;
4. The merits of the appeal; and
5. The justice of the case.

See e.g. *Rizzi v. Marvos*, 2007 CarswellOnt 2841 (C.A. [In Chambers]) at para. 16; *Paulsson v. University of Illinois*, 2010 CarswellOnt 116 (C.A. [In Chambers]) at para. 2; and *Robertson v. Robertson*, 2016 CarswellOnt 7212 (C.A.) at para. 5.

In cases involving children, "the justice of the case is reflected in the best interests of the children": *Denomme v. McArthur* (2013), 36 R.F.L. (7th) 273 (Ont. C.A.) at para. 7 and *D.C. v. T.B.*, 2021 CarswellOnt 11173 (C.A.) at para. 3.

Similar tests apply in other jurisdictions across Canada. See e.g. *1199096 Alberta Inc v. Imperial Oil Limited*, 2024 CarswellAlta 1249 (C.A.) at paras. 5-6 and *GS v. AB*, 2024 CarswellNS 15 (C.A.) at paras. 6-8.

The motion judge, Justice Roberts, was satisfied that the mother had formed the intent to appeal within the relevant period, and that the delay was minimal and adequately explained. However, since the mother was primarily seeking to challenge the trial judge's findings of fact about the parenting issues, and since findings of fact are given significant deference on appeal, Justice Roberts was not satisfied that there was sufficient merit to the appeal to warrant an extension. She also found that the child would be prejudiced if the mother was granted an extension as it would deprive him of stability and finality, and it would prejudice the father as he would be forced to defend an appeal that appeared to lack merit and the mother lacked the means to pay costs.

Accordingly, as was the case in *Denomme*, a minor procedural error resulted in a family law litigant being precluded from having what otherwise would have been an appeal as of right heard and determined on the merits.

***MacMillan v. Klug* (2024), 98 R.F.L. (8th) 371 (Ont. Div. Ct.) — Leiper J.**

Disclosure: Epstein Cole LLP was counsel for the respondent mother.

The issue before Justice Leiper in *MacMillan* was whether to grant the father's request to extend the time for him to file a motion for leave to appeal an interlocutory parenting order.

The father wanted to appeal an Order that gave the respondent mother interim sole decision-making authority for the parties' eight-year-old son, and permitted the mother to travel with the child without the father's consent. The self-represented father claimed he had not realized that he only had 15 days to serve and file his motion for leave to appeal the interlocutory order, and mistakenly thought that his appeal was governed by the 30-day time limit that applies to appeals as of right from final orders.

The test for extending the time to serve a motion for leave to appeal is the same as the test for extending time to serve a Notice of Appeal: *Catalyst Capital Group Inc. v. Moyse*, 2016 CarswellOnt 813 (Div. Ct.) at para. 2 and *Van De Kerckhove v. Wagner*, 2022 CarswellOnt 14553 (Div. Ct.) at paras. 10-11.

Justice Leiper was satisfied that the father had formed the requisite intention to seek leave to appeal within the original timeframe, that the delay was minor, and that he had provided a reasonable explanation for the delay.

However, the test for leave to appeal an interlocutory Order requires the moving party to show that the proposed appeal raises an issue that rises above the interest of the particular litigants. The test is close to impossible to meet in the family law context (Philip Epstein referred to the test as "Draconian" in his discussion of *Lokhandwala v. Khan* (2019), 34 R.F.L. (8th) 139 (Ont. Div. Ct.) in the November 18, 2019 (2019-46) edition of *TWFL*), as interim family law orders will rarely raise issues of general importance to the public. Accordingly, it is not surprising that Justice Leiper concluded that the father's motion for leave to appeal lacked merit.

Justice Leiper also found that the justice of the case did not support granting the requested extension, as it would force the parties to waste further time and money arguing about interim issues instead of focusing on getting the case ready for trial where the issues could be decided on a final basis.

As a result, the father's motion for an extension was dismissed.

The Lesson?

If you are going to accept a retainer for an appeal in a family law case, particularly one based on alleged errors of fact or the exercise of judicial discretion, it is crucial to consider the following: To which court does the appeal lie? Is leave required? What documents need to be prepared and served, and what are the exact deadlines for serving and filing those documents? Even the slightest misstep can result in your client losing the opportunity to have the matter heard on its merits. Although it may be difficult to envision a scenario where a missed opportunity to appeal due to procedural errors would lead to a claim for damages against you, you will certainly end up with a very unhappy client. So go get that post-doctoral degree.

Everything You'll Ever Need to Know About Severance — Part Deux

De v. De (2024), 100 R.F.L. (8th) 351 (Alta. K.B.) — Devlin J.

Issues: Alberta — Severing the Divorce from the Corollary Relief

In Part One of "Everything You'll Ever Need To Know About Severance" (see the November 2, 2020 (2020-42) edition of *TWFL*), we discussed the case of *Hicks v. Gazley* (2020), 48 R.F.L. (8th) 439 (Alta. Q.B.), where Justice Lema meticulously

(and we mean *meticulously*) reviewed the caselaw regarding severing a divorce from corollary relief, and identified over 30 factors to consider when determining whether such a request should be granted.

In Part Two, we review *De v. De*, where Justice Devlin did a 6-for-1 reverse stock split on the *Hicks* factors, cutting down the 30-plus factor list to just five, making the framework much simpler.

The parties in *De* were married in 1997. They had two children together, who were 22 and 18-years-old at the time of the motion before Justice Devlin. The husband left Alberta to work in the United Arab Emirates in 2018, and the marriage ended shortly thereafter.

The wife started a divorce proceeding in Alberta in October 2018 and obtained an order preserving the parties' Canadian assets. However, despite efforts by the husband to move the matter forward, the parties never finalized the terms of their separation or obtained a divorce.

The husband eventually re-partnered, but asserted that UAE law precluded him from moving in with his new partner unless and until they were married. As a result, in late 2023, the husband brought a motion to sever the divorce from the corollary relief so that he could obtain a divorce.

The wife opposed the husband's motion, and claimed that a divorce would be unfair to her because, among other things, the husband had not provided full disclosure, and the husband was living in a foreign jurisdiction where enforcement might be difficult.

To grant a divorce, ss. 8 and 11 of the *Divorce Act*, R.S.C. 1985, c. 3 (2 nd Supp.) require the requesting party to establish that the parties have been separated for at least a year and that reasonable arrangements are in place for the support of any children. (While adultery and cruelty are still technically grounds for divorce in s. 8(2)(b), and collusion, condonation, and connivance are still technically bars to a divorce in s. 11(1), these concepts are relics from another time that should probably be abolished.)

That being said, the caselaw has developed additional requirements in circumstances where a party is seeking to sever the divorce from the corollary relief so that a divorce can be obtained before the rest of the family law related issues have been resolved.

In Alberta, the test for severance requires the court to determine whether doing so would be "fair in the circumstances": *Miles v. Miles*, 2004 CarswellAlta 1493 (C.A.) at para. 4 and *Brousseau v. Brousseau*, 2017 CarswellAlta 330 (C.A.). However, as we discussed in our comment on *Hicks*, while the test for severance is reasonably consistent across Canada, there are some variations (much like the recipe for chocolate mousse). Some provinces focus more on the "absence of prejudice" rather than on "fairness", and some provinces seem to be more inclined to grant severance than others. Justice Turcotte elaborated on this in *Burgsteden v. Jewitt*, 2020 CarswellSask 556 (Q.B.):

> [87] Numerous cases across Canada have commented on the reasons for which severance may be granted. As mentioned above, **the decision is inherently discretionary. Different courts have adopted different approaches to severance and have required different thresholds to be met when determining whether severance is appropriate.** For example, as cited by counsel for [the husband], **courts in Ontario have held that requests for severance of divorce from corollary matters are "almost routinely granted" and that the party opposing severance must show that severance would cause a legal disadvantage**. (*Al-Saati v Fahmi*, 2015 ONSC 1114, 59 RFL (7th) 219 [*Al-Saati*]).
>
> [88] However, **in Manitoba, a slightly more stringent approach to severance has been adopted.** In *Winstanley*, the Manitoba Court of Queen's Bench noted that severance is not a matter of right and even in situations where the applicant is able to establish criteria to support an application for severance, the Court retains discretion to deny a motion for severance. Additionally, in *Desjardins v. Desjardins* (1993), 1993 CanLII 15105 (MB KB), 89 Man R (2d) 140, the Court noted that in family law proceedings, **severance should not be granted easily as it is preferable to have all matters resolved together.** According to the Manitoba Court of Queen's Bench in *Spiring v. Spiring*, 2004 MBQB 258, [2005] 6 WWR 737 [*Spiring*], **the reluctance to sever the divorce proceedings from other matters relates to what is referred to as judicial**

> **tidiness, "whereby a court usually prefers spouses to complete their domestic issues before granting a change in marital status"** (at para. 18).
>
> [89] **Saskatchewan courts appear to have adopted a middle ground between these two approaches. While they have not held that severance should be granted sparingly, they have also not opined that severance should be granted liberally.** In the decisions in *Yung, Behnami*, and *Theriault* discussed above, this Court reiterated that the decision of whether to grant severance of the divorce from corollary matters is **discretionary and should be judiciously determined on a case-by-case basis** taking into consideration the impact of delay in granting the relief and whether any party will suffer prejudice or irreparable harm (*Behnami* at para. 15). Although there is no closed list of considerations, **the evidence should identify a genuine and substantive reason for the granting of the relief.** I would add, the mere possibility of a reconciliation advanced by one of the parties as a ground to adjourn the application is not sufficient. There must be a realistic possibility of reconciliation on the evidence before the Court such that the Court is required to adjourn the application in accordance with s. 10 of the *Divorce Act*. [**emphasis** added]

See also *Stewart v. Stewart* (2023), 90 R.F.L. (8th) 96 (Sask. C.A.) at para. 40, where the Saskatchewan Court of Appeal recently noted that "there is some variation across the country in terms of how the question of severance is approached and that, in an appropriate future case, this court may want to take a considered view of the issue."

There is also some debate in the caselaw about where the onus lies. In B.C., for example, "it is the party opposing the divorce who must establish that granting the order would give rise to prejudice or risk of prejudice before the burden shifts to the other party to show that the order should be granted in any event": *Gill v. Benipal* (2022), 67 R.F.L. (8th) 253 (B.C. C.A.) at para. 17.

In contrast, in Ontario "[t]he onus of establishing that no prejudice will result if the divorce is split from the other issues rests with the moving party": *Bakmazian v. Iskedjian*, 2015 CarswellOnt 18171 (S.C.J.) at para. 10; *Zantingh v. Zantingh* (2021), 54 R.F.L. (8th) 67 (Ont. S.C.J.), at para. 15; and *Sandhu v. Sandhu*, 2023 CarswellOnt 15903 (S.C.J.) at para. 6.

According to Justice Devlin, in Saskatchewan, neither party bears the onus to establish fairness. Instead, "each part[y] may advance the evidence and arguments they believe speak to fairness, and the Court should exercise its discretion upon that record." (But surely one party must bear the burden of persuasion?)

But whatever province you are in, as Justice Devlin explained in *De*, the court's task is to exercise its discretion to make "a holistic determination of what is fair in the unique matrix of facts, parties, and events in each case", having regard to the following factors:

> (i) The length of time since separation;
>
> (ii) The desire/need of one party to move on with their lives;
>
> (iii) Each party's conduct of the proceedings to date, including delay, obstruction, failure to abide by orders relating to the divorce, or other litigation misconduct in connection with the divorce proceedings;
>
> (iv) Loss of legal entitlements flowing from losing spousal status (e.g.: health and insurance benefits); and
>
> (v) Prejudice to rights in another jurisdiction.

With respect to the third factor (conduct of the proceedings to date), Justice Devlin explained that the court should not "withhold or delay granting a divorce to incentivize one of the parties to negotiate or compromise their position", as this "would be unfair to the spouse requesting the divorce where there is no concrete reason to believe they will behave poorly in resolving the remaining corollary issues after divorce is granted." That being said, "a divorce may be legitimately deferred to bring a spouse into compliance with Court Orders and their general obligations within the court process, such as the provision of full disclosure, attendance for questioning, responding to undertakings, and so forth."

On the record before him in *De*, Justice Devlin was satisfied that this was an appropriate case to sever the divorce from the corollary relief. The children were older and significant funds had been set aside to pay for their respective educations. The husband had met his disclosure obligations, was voluntarily paying significant support, and there was no evidence to suggest that he would not comply with his obligations going forward. There were also significant assets in the jurisdiction to secure the wife's potential entitlements, and the wife's concern that the husband might be less willing to negotiate a resolution if his request for a divorce was granted was not a proper basis to deny his request for discretionary relief that he was otherwise entitled to.

By distilling the *Hicks* considerations into five core elements, the *De* factors offer a straightforward and practical framework for evaluating severance requests. Regardless of the severance test used in your jurisdiction, incorporating the *De* factors can help structure your argument and effectively convince the presiding judge of your client's position.

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