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

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K.K. v. M.M. (2024), 98 R.F.L. (8th) 391 (Ont. S.C.J.) — Petersen J.

Our apologies for an initial rant.

Our family justice system is *supposed* to serve and protect the best interests of children. We have no doubt that ***everyone*** involved in the system — judges, lawyers, court staff, etc. — are doing their very best to make the system work within the financial constraints being imposed on them. But the family justice system can only be neglected and starved for so long before, despite the best efforts of those involved, it collapses under its own weight.

In past issues of this Newsletter, we have discussed some of the problems in the family justice system and been so bold as to offer suggestions for trying to improve it. (See, for example: "While You're in London, Grab Me Some Fish & Chips Would You?" in the June 7, 2021 (2021-22) edition of *TWFL*; "After 33 Days of Trial, I Wouldn't Let You Deduct Legal Fees from Income Either!" in the November 15, 2021 (2021-44) edition; "At the Risk of Repeating Ourselves — This is No Way to Run a Railroad" in the January 23, 2023 (2023-03) edition; and "It Just Keeps Going And Going And Going And Going . . . " in the June 10, 2024 (2024-22) edition).

However, after reviewing the tragic circumstances of *K.K. v. M.M.*, and after considering the seeming endless systemic problems and delays we hear about on a daily basis from colleagues (and in our own practices), perhaps the time has finally come to admit defeat. It may be time to just admit that the system, as currently constituted, is beyond repair and cannot be fixed by tweaking the Rules and issuing more Practice Directions about page limits and filing deadlines. And new "pilot programs" are not going to fix what is, at its core, a fundamentally broken system largely brought about by the failure of the Federal and Provincial Governments across the country to provide the family justice system (and, to be blunt, the entire justice system) with the air and financial assistance it needs to breath, and to be able to do the incredibly important work it must do.

But instead of acknowledging the problem, both levels of Government seem to be pretending that they are doing everything they can to fix it. As but one example, as part of the press release for one of its most recent judicial appointments [https://www.canada.ca/en/department-justice/news/2024/07/minister-of-justice-and-attorney-general-of-canada-announces-a-judicial-appointment-in-the-northwest-territories.html] the Federal Government blew its own horn for having appointed more than 760 judges since November 2015, including 137 appointments since July 26, 2023.

What the press release fails to recognize, however, is that judges elect supernumerary status and that judges retire. Basic math suggests that five new appointments replacing 10 judges is nothing to toot one's own horn about. They fail to mention that as of August 1, 2024, there were still **fifty** judicial vacancies across Canada, including 14 in Ontario, nine in B.C., six in Quebec, four in Saskatchewan, and three in Alberta. While this is unquestionably better than the 75 judicial vacancies that existed when we last discussed the problem in the February 19, 2024 (2024-07) edition of *TWFL*, the failure to fill the remaining 50 spots

is certainly nothing to tweet about. It also ignores the facts that: (a) the failure to appoint enough judges has already been a persistent problem for many years; and (b) it is unlikely (or at best unclear) that we would have enough judges even if every single one of the existing vacancies were filled (after all, the same Government that has failed to fill the existing vacancies is the same Government that decides how many judges should be appointed in the first place).

As another example, although it has been obvious — painfully obvious — for decades that Unified Family Courts are desperately needed to streamline and simplify the family court process, only three provinces (New Brunswick, Nova Scotia, and P.E.I.) are currently unified province-wide. The other provinces have, at best, a patchwork of Unified Family Courts in certain judicial centres (Saskatchewan, Manitoba, Ontario, and Newfoundland), while the rest (B.C., Alberta, and Quebec) have none — zero, zippo, zilch. (For more information, see Delay No Longer: Family Justice Now that was published by the Advocates' Society in June 2024, and is available at https://advocates.ca/Common/Uploaded%20files/Advocacy/DelayNoLonger/Delay_No_Longer_Family_Justice_Now_June_2024.pdf.)

Our governments should be ashamed for allowing the situation to reach this point — for not being able to get conferences for months; short motions, in some cases, for years; and trials? See you in 2028.

With that off our chests (and guaranteeing that our income tax returns are going to be assessed for the foreseeable future), we now turn to *K.K. v. M.M.* and discuss why this latest chapter of this highly dysfunctional family's never-ending journey through the family court system has led us to say out loud what so many have already been saying in private for far too long.

K.K. also deals with the legal question of whether and when a trial judge can go behind, or at least undo the impact of, a costs Order from an interim step in a proceeding that, with the benefit of hindsight and additional information, ought not to have been made.

This is our second discussion of *K.K. v. M.M.* In our first discussion (see the July 11, 2022 (2022-25) edition of *TWFL*), we reviewed the father's appeal on the interesting legal issue of whether the trial judge erred by admitting into evidence information from professional disciplinary proceedings by the College of Physicians and Surgeons of Ontario against the court appointed custody and access assessor. The father argued that this evidence violated s. 36(3) of the *Regulated Health Professions Act, 1991,* S.O. 1991, which provides that documents prepared in relation to proceedings under the statute are inadmissible in other civil proceedings.

[By way of reminder, s. 36(3) prohibits the admissibility of the documents it expressly lists, which are records of proceedings, reports, documents, things prepared for, or statements given at such proceedings, and orders and decisions made in such proceedings. But anything else is fair game, including the fact that a complaint was made, an investigation was conducted, and a decision was rendered, and undertakings given. Furthermore, parties are free to review the information contained in the prohibited documents, and then try and prove those facts by calling the necessary witnesses and evidence.]

We did not, however, at that time, delve into the tortured procedural history of the underlying case. We do so now because it helps to illustrate just how broken the family justice system is. As discussed further below, it took eight years of litigation (from 2012 to 2020) to get *K.K.* to trial. And although the first appeal was heard in September 2021 and the Court of Appeal's decision was released in January 2022, we recently learned that, after the appeal, the trial continued for another ***two years*** (including a further trip to the Court of Appeal), and only recently concluded.

The parties in *K.K.* were married in 2003 and separated in 2012. When they separated, their two children were eight and three-years-old.

The marriage was marred by significant conflict, and messy litigation ensued almost immediately after the parties separated. The reasons for the conflict were in serious dispute. Both parties made serious allegations against each other.

Although the outcome of the case turned largely on questions of fact, and although trial courts are well equipped to decide contested factual issues (or, at least they are when they are not also trying to manage crushing caseloads without adequate

resources), instead of trying the case, the system put the parties through more than ***40 interim court*** attendances before numerous different judges over ***seven years***.

No family case, no matter how complicated or high conflict, should require or be entitled to anything close to 40 court attendances to get to trial. (Quite frankly, even as few as three or four are too many in all but the most complicated cases.) Allowing high conflict cases to linger in the system without end and allowing/requiring so many interim attendances is financially ruinous for the litigants involved, unfair to other litigants in the system who also need access to the justice system, and a massive waste of already scarce systemic and judicial resources.

After seven years in the system, the case finally came on for trial before Justice Petersen. The trial took ***19 days*** spread out between December 2020 and April 2021. No single parenting case should be allowed to monopolize that much trial time. Parties should not be permitted to gorge on court resources: *Greco-Wang v. Wang*, 2014 CarswellOnt 12651 (S.C.J.). There is no absolute right to a trial on all issues or in all cases or for as long as the parties think they need; there must be some reason to expend the resources: *Merko v. Merko* (2008), 59 R.F.L. (6th) 439 (Ont. C.J.); *Rannelli v. Kamara*, 2011 CarswellOnt 14161 (C.J.).

In lengthy reasons (the need for which also take away judicial resources from other judicial functions), Justice Petersen reviewed the entire history of the matter going all the way back to the parties' engagement in 2002. Her Honour found that the father was not credible, had subjected the mother to a campaign of alienation and vilification, and had verbally, emotionally, and psychologically abused the children and had caused them significant psychological and emotional trauma. She concluded that the children, who by that point were 16 and 11-years-old (remember they were eight and three when the case first started), should live primarily with the mother and have limited contact with the father, and that the mother should have sole decision-making authority.

But that was not the end.

The parties were asked to make further submissions about some of the financial issues, and the father appealed (unsuccessfully) the parenting Order and the subsequent financial Orders to the Ontario Court of Appeal.

Finally, in 2024, the parties made submissions on costs. Justice Petersen found the mother had been the successful party at trial and that the father had acted in bad faith by, among other things, deliberately concealing relevant evidence and knowingly presenting fabricated evidence to try and mislead the court, and ordered him to pay the mother $211,000 (rounded) in costs (in addition to the almost $52,000 he had been ordered to pay for various prior steps in the proceeding).

Interestingly, the mother also asked the court to set aside previous costs Orders totalling $114,000 (rounded) that had been made against her in the seven years leading up to the trial, and to award costs to her for those prior steps in the case.

Rule 25(19) of the *Family Law Rules*, O. Reg. 114/99 allows a court to change an Order (which includes the power to set aside an Order — see *Gray v. Gray* (2017), 98 R.F.L. (7th) 109 (Ont. C.A.) at paras. 20-31) that: (i) was obtained by fraud; (ii) contains a mistake (e.g. a typo or a mathematical error); (iii) needs to be changed to deal with a matter that was before the court but was not decided; (iv) was made without notice; or (v) was made with notice, but an affected party was not present because the notice was inadequate or the party was unable, for a reason satisfactory to the court, to be present.

The mother could have argued that the father had obtained the prior costs Orders by fraudulently concealing relevant information and/or by deliberately misleading the court. However, for reasons that are not entirely clear (perhaps because the threshold for establishing civil fraud is so high), instead the mother argued that the prior costs Orders should be set aside because the father had acted in bad faith. The father responded by arguing that the court lacked jurisdiction to grant the relief sought by the mother because bad faith is not an enumerated ground under Rule 25(19), and that it would be improper to allow the mother to effectively appeal prior Orders that were not previously appealed.

Justice Petersen agreed with the father — because "bad faith" was not an enumerated ground under Rule 25(19), the mother's argument to set aside the prior costs Orders could not succeed. However, that was not the end of the matter. Although the mother had not raised the issue of whether the prior costs Orders should be stayed, Justice Petersen cleverly pointed out that: (a) s. 106

of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 authorizes a court to stay a proceeding *on their own initiative (ex proprio motu* for Latin lovers) or at the request of any person; and (b) the term "proceeding" includes "the power to stay execution of a final judgment in a family law proceeding": *Buttarazzi v. Buttarazzi* (2009), 84 R.F.L. (6th) 240 (Ont. S.C.J.) at paras. 52-55; and *Peerenboom v. Peerenboom* (2020), 39 R.F.L. (8th) 11 (Ont. C.A.) at paras. 30-32.

After giving the parties an opportunity to make further submissions on whether the prior costs Orders in favour of the father should be stayed, Justice Petersen concluded that the particular facts of this case justified staying enforcement of the $114,000 in costs that the mother had previously been ordered to pay the father:

> [109] The court's authority to stay execution of an Order in a family law proceeding **must be exercised sparingly and only in the clearest of cases. A stay of execution may only be granted in rare circumstances where the conduct of the judgment creditor is oppressive or vexatious or an abuse of process, and where the stay would not cause them an injustice**: *Peerenboom*, at para. 34.
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> [110] With respect to a stay of the enforcement of costs Orders, **a successful litigant should not be deprived of the benefit of such Orders unless the interests of justice require they be withheld.** A stay of costs Orders is therefore rarely granted, even on an interim basis: *Yormak v. Yormak*, 2015 ONSC 2180, at para. 12; *Fluney v. Fluney,* 2010 ONSC 4813, at paras. 7 and 13; and *Nhau v. Obahiagbon*, 2020 ONSC 2765, at para. 3.
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> [113] I am of the view that **it would be oppressive to permit [the father] to enforce the pre-trial costs Orders against [the mother]**. This case involves exceptional circumstances of extreme bad faith by [the father], which resulted in protracted litigation with ruinous financial consequences to [the mother]. **[The father's] bad faith actions were not limited to specific issues and were not restricted to the conduct of the trial.** It infected the entire litigation proceeding. **He waged a litigation war against [the mother]. His conduct must not be rewarded with the execution of costs Orders in his favour.** Granting a stay of the Orders will not cause an injustice to [the father]. On the contrary, the interests of justice require that payment of those costs be withheld.
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> [114] I therefore order a stay of the enforcement of the following costs Orders against the [father]: Justice Edwards's Order dated August 8, 2013 ($45,000); Justice Van Melle's Orders dated April 4, 2014 ($63,000) and January 22, 2015 ($5,000); and Justice Ricchetti's Order dated February 6, 2020 ($500). Payment of any outstanding amounts pursuant to these Orders is no longer required. [**emphasis** added]

Therefore, in addition to having to pay his own significant costs, the father had to pay the mother $211,000 for her costs and had to forfeit $114,000 in costs that he had previously been awarded. (It is unclear from the decision whether the mother had already paid the $114,000 in costs such that these funds would have to be repaid, or whether they were outstanding but no longer payable, but the result is the same unless, of course, the father was judgment proof.)

While $211,000 is unquestionably a significant amount of money, it is a mere fraction of the actual costs — both financial and emotional — incurred by the mother, the father, the two children that were at the heart of this case — and the family justice system.

The sum does not come close to compensating the children and the mother for the years of pain they endured while the case crawled its way through the system, or to repair the serious trauma the children must have endured while the system left their lives hanging in limbo for the last decade. Their entire childhood was spent in litigation. And it does nothing to justify the enormous cost to the public of funding more than 40 interim attendances, a 19-day trial, and multiple sojourns to the Court of Appeal.

So how can we prevent what happened in *K.K.* from happening again? Well, as a starting point, and to reiterate what we said earlier, before we can fix the problem, we must recognize that we are dealing with a systemic problem rooted in years of neglect by both levels of governments across Canada. We are well beyond rearranging deck chairs on the Titanic; the system is beyond

"tweaking." The finger cannot be pointed at individual participants in the system. A complete overhaul, combined with sufficient funding, is required (although funding might be less of an issue if we stopped wasting massive amounts of time and money on individual high conflict cases like *K.K.*).

The form of a new and improved family justice system is open for debate. But whatever form it takes, it needs to be quick, straightforward, efficient, and affordable, instead of the slow, complicated, unwieldy, and expensive system we have now.

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