

FAMLNWS 2025-02

Family Law Newsletters

January 20, 2025

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

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When a Bar (to divorce) is Not Where You Want to Be

Dauncey v. Grose, 2024 CarswellSask 442 (K.B.) — Brown J.

Issues: Saskatchewan — Requirements for a Divorce — Reasonable Arrangements for the Support of the Children

The Petitioner/Mother, Ms Dauncey, applied for a divorce. The claim was not opposed by the Respondent/Father, Mr. Grose. The parties had two children, aged seven and six.

The parties had yet to settle the parenting issues. Mr. Grose did not have shared parenting for much of the time since the separation, and he was asking for it in this application.

While Ms Dauncey wanted a divorce, and while this request was not opposed by Mr. Grose, none of the agreements between the parties at that time had provided for monthly child support to be paid pursuant to the *Child Support Guidelines*, SOR/97-175 — even though both parties earned not insignificant income.

The most recent parenting agreement provided that, based on Mr. Grose's work schedule, he would parent the children Monday after school until Wednesday morning at daycare or school drop off. This parenting plan was intended to be flexible and to be reviewed if there were any changes to the employment schedules of the parties. Holiday times were evenly split.

Another agreement provided that daycare expenses and extraordinary expenses were to be split equally.

Therefore, this matter squarely raised s. 11 of the *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp) and the requirement of reasonable arrangements being in place for the children before a divorce will be granted.

Section 11(1)(b) of the *Divorce Act* states:

Duty of court — bars

11(1) In a divorce proceeding, it is the duty of the court

.....

(b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, **and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made;** [emphasis added]

This requirement preceded the enactment of the *Guidelines* in 1997 (*Harper v. Harper*, 1991 CarswellOnt 1001 (Gen. Div.)), but at that time, of course, there was no reference to "reasonableness" being in comparison to the Table amount. Since the passing of the *Guidelines*, in determining whether reasonable arrangements for child support have been made, the court looks to the *Guidelines* — see s. 11(1)(b) of the *Divorce Act*.

In one of the first cases to consider this new *Guidelines*-referenced requirement, Justice Goodfellow of the Nova Scotia Supreme Court considered whether strict adherence to the Table amount was required. In *Corbett v. Corbett* (1997), 35 R.F.L. (4th) 397 (N.S. S.C.), the court considered whether the creation of an education fund to benefit the child would make up for the fact that exact s. 3 Table child support was not being paid, so as to allow the court to issue a divorce. In *Corbett*, the payor was paying \$122 a month less than the Table amount, but he was also contributing \$150 a month to the education fund. The payor was also maintaining his existing medical, dental, and drug plan coverage for the children.

The court considered that these additional incidents of child support resulted in reasonable arrangements being in place for the children in satisfaction of s. 11(1)(b):

[13] The court does not encourage departures from the [*Guidelines*] chart unless, as is the case here, it is shown to be in the best interests of the children to do so . . .

[14] A departure from the order directing at least the basic [*Guidelines* amount] is permitted where, as is the case here, additional benefits, i.e., education fund, are identified and quantified. The overriding consideration is, however, the benefits to the children of the arrangement sought to be incorporated in the corollary relief judgment.

The parties were not as fortunate in *Willenborg v. Willenborg* (2001), 23 R.F.L. (5th) 447 (Sask. Q.B.). There, where the payor was paying child support that was about half the Table amount (by way of Separation Agreement), the divorce was stayed until the court was satisfied that reasonable arrangements for child support had been made. The court noted that while parties were free to negotiate what they believed to be fair child support arrangements, they must do so having regard to the *Guidelines*.

Sometimes, a provision for below-Table child support must be explained before a court will accept the arrangements as being reasonable. This was the case in *Andrew v. Andrew*, 2008 CarswellSask 65 (Q.B.). There, the original divorce on consent was denied — until the mother subsequently explained (by way of a supplementary affidavit) that the child support arrangements were reasonable because the father had also agreed to pay school fees and school supplies and clothing expenses for the children. This then satisfied the court.

In *Savoia v. Savoia* (2009), 74 R.F.L. (6th) 19 (Alta. Q.B.), the Alberta Court of Queen's Bench helpfully set out the following principles to consider when determining if "reasonable arrangements" for child support have been made:

[32] In summary, regard should be had to the following in determining whether the court has discharged its duty under s. 11(1)(b):

i) Counsel must realize that the court has a duty under s. 11(1)(b). Therefore, prior to making a request for severance of corollary issues, counsel should be satisfied that maintenance for the children is adequate: *Bailly* [*Bailly v Bailly* (1991) 1991 CanLII 6210 (AB KB), 126 AR 84 (Alta QB)], *McMillan* [*McMillan v McMillan* (1991), 1991 CanLII 13078 (AB KB), 126 AR 3 (Alta QB)], *Kienitz* [*Kienitz v Kienitz* (1991), 1991 CanLII 5830 (AB KB), 79 Alta LR (2d) 270 (Alta QB)];

ii) Evidence of the parties' income is required. However, financial statements alone may be insufficient; evidence of the arrangements made for the support of any children of the marriage should be put before the court: *Tomlinson* [*Tomlinson v Tomlinson* (1992), 12 CPC (3d) 8 (Ont Gen Div)], *Roberts* [*Roberts v Roberts*, 2007 BCSC 236], *Dumas* [*Dumas v Dumas*, [1992] WDFL 1283 (Alta QB)], *Kienitz*;

iii) quantum of support should not be in issue: *Roberts*;

- iv) Information pertaining to any social assistance payments is an important factor in determining the income available for child support. Such income is to be considered in determining whether reasonable arrangements for child support have been made: *F.(R.D.) v. F.(S.L.)* [(1987), 1987 CanLII 2708 (BC SC), 34 DLR (4th) 732 (BC SC)], *K.(L.A.) v. K.(G.N.)* [(1987), 1987 CanLII 2709 (BC SC), 12 BCLR (2d) 9 (BC SC)];
- v) Any agreement reached as to child support must be reasonable in the circumstances: *Bailly*;
- vi) In negotiating a reasonable arrangement for child support, the parties must have regard to the Guidelines, as well as other relevant factors in terms of the circumstances of the children of the marriage: *Willenborg, Graham* [*Graham v Graham* (1998), 78 ACWS (3d) 529 (Ont Gen Div)];
- vii) Evidence as to whether reasonable arrangements for child support have been made should be fact based, as opposed to testimony reflecting subjective opinion: *P.(L.W.) v. P.(T.W.)* [(1987), 1987 CanLII 2710 (BC SC), 12 BCLR (2d) 12 (BC SC)], *Dumas*;
- viii) Evidence as to the reasonableness of an arrangement need not be extensive; it needs to enable the court to satisfy itself pursuant to s.11(1)(b); *Money* [*Money v Money* (1987), 1987 CanLII 8422 (MB CA), 5 RFL (3d) 375 (Man CA)]; and
- ix) In certain limited circumstances, where it is impractical or inequitable to require an applicant to obtain financial information from a spouse with a view to establishing child support arrangements, a divorce may nonetheless be granted: *Zarebski* [*Zarebski v Zarebski* (1997), 1997 CanLII 12245 (ON SC), 29 RFL (4th) 93 (Ont Gen Div)].

As noted by Justice Brown in the present case:

[17] The test for whether the arrangements which do not see the full amount of s. 3 support being paid are reasonable is ultimately whether it is appropriate in all the circumstances keeping in mind child support is the child's right. **The benefits aside from the full amount of s. 3 support may be direct or indirect but must still be to the benefit of the child.** The court may maintain a **flexible attitude** towards such situations and will consider each case on its own merits when assessing the duty under ss. 11(b). **Nonetheless, evidence of a benefit to the child must be shown in each instance and will not be assumed.** [emphasis added]

To this, we would add the suggestion that arrangements for the support of the children need be "reasonable" — not perfect — as noted in *Kilgar v. Church*, 2018 CarswellOnt 3329 (S.C.J.), and as exemplified in *Labelle v. MacMillan*, 2022 CarswellOnt 15045 (S.C.J.). In *Labelle*, the parties agreed that the payor would put in place pension survivor benefits as a reasonable arrangement for child support in lieu of full Table child support. Mr. Labelle's survivor pension benefits were set up so as to be used as security for child support. Mr. Labelle had been diagnosed with ALS and his health was deteriorating rapidly, making time of the essence. There, reasonable arrangements for child support were found. The court was satisfied that if the parties were divorced at the time of Mr. Labelle's death, and he remained single, the pension survivor benefits would provide a monthly amount of child support higher than what the children would be entitled to under the *Guidelines*. (This conclusion was based on an actuarial report.) Again, not "perfect", but certainly reasonable.

And what of the idea that the court should not really interfere with an agreement between parents as to reasonable support arrangements? For example, in this case, the child support arrangements were just one part of the settlement as evidenced in various settlement documents executed by the parties covering a range of issues — not merely support. Well, Justice Brown had *this* to say about *that*:

In *Richardson v. Richardson* (2019), 35 R.F.L. (8th) 265 (Ont. C.A.) at para 25-27, the Ontario Court of Appeal discussed the discretion which judges have when presented with terms of an overall settlement:

[25] There is no dispute about the importance of settlements in family law. Settlements are to be promoted and encouraged, as our colleague Nordheimer J.A. explains.

[26] Nevertheless, **it is well established that judges have the authority to review settlements and to reject them if they are not in the best interests of the children:** *Martin v. Martin*, 1981 CarswellBC 773 (C.A.), at para. 7; *C.T.G. v. R.R.G.*, 2016 SKQB 387, 86 R.F.L. (7th) 312, at para. 11; and *Harper v. Harper* (1991), 1991 CanLII 8330 (ON SC), 78 D.L.R. (4th) 548 (Ont. Gen. Div.), at p. 553. **This authority must be exercised with caution.** Mere disagreement with the terms of a settlement affords no basis for courts to intervene: see e.g., *F.J.V. v. W.K.S.*, 2019 BCCA 67, 18 R.F.L. (8th) 225, at paras. 26, 29. Further, whether a settlement is in the children's best interests should take into account more than just the settlement terms. **It should also consider the general benefits to children that flow from parents resolving their disputes through compromise rather than litigation.**

[27] If a judge rejects a settlement, the reasons for rejecting the settlement should be provided. Moreover, if the judge does not take any steps to facilitate settlement — such as sending the parties away with some direction as to the aspects of the agreement that are of concern, or arranging a settlement conference either with him or her or with another judge — the reason for this should also be provided. Without explaining the basis upon which the parties' settlement is rejected, the judge leaves the parties with no way of knowing, what, if anything, they could do to address the court's concerns. The concerns may have been of a nature that could be addressed, but in the absence of reasons the parties will have no opportunity to address them. [emphasis added]

Excepting situations of inappropriate pressure, duress, or unconscionability, is it not a problem to force "settled" parties back to the drawing board because the agreed-upon child support deviates too far from the Table amount? Would it be better for the children that the war continues — that a parent be unable to move forward with a new relationship being unable to get divorced — especially if the parent wanting to move on is the parent prepared to take less than Table child support?

This is what we are left with:

- When dealing with requests for a divorce pursuant to the *Divorce Act*, the court must be satisfied, on a balance of probabilities, that the arrangements for child support are reasonable.
- To determine "reasonableness" the court must have regard to the proper Table amount in the *Guidelines*.
- Benefits that stand in the place of *Guidelines* support can be direct or indirect - but they must somehow aid or benefit the children. If deviation is to be allowed, it must be shown that the totality of the situation is in the best interests of the children.
- If reasonable arrangements have not been made, the court must stay the granting of the divorce until such arrangements are in place.
- Just what is considered "reasonable support arrangements" is a case-specific, discretionary matter. However, there is a strong presumption that child support be provided based on the Table amount.

So — what of the plight of Ms Dauncey and Mr. Grose?

There was an agreement by Ms Dauncey (who, again, was the party asking for the divorce) to not seek payment from Mr. Grose for the children. While s. 7 expenses had been addressed, there was no specific identifiable benefit to the children meant to stand in place of Table child support. Therefore, the application was dismissed without prejudice to Ms Dauncey reapplying with evidence of reasonable arrangements being in place for the support of the children.

Changes in Parenting Time as Punishment for Contempt?

Palacios v. Palacios, 2024 CarswellOnt 14730 (Div. Ct.) — Sachs, Lococo and Howard JJ.

Issues: Ontario — Variation to the Parenting Arrangements as a Penalty for Contempt

Can a party be punished for contempt with a punitive parenting order?

One would generally think not, given the wording of s. 16(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) that we all know by heart: "The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order." In fact, in para. 6 of *Chan v. Town* (2013), 34 R.F.L. (7th) 11 (Ont. C.A.), the Ontario Court of Appeal pretty much says exactly that: "Custodial arrangements of children cannot be used as a punishment for contempt."

But is this an unbreakable rule? (Would we be writing about it if it was?)

In *Palacios*, the Appellant/Father was appealing the order of Justice Leef of June 15, 2023, in which her Honour found the father in contempt of the Order of Justice Hughes of May 18, 2022.

Now, this appeal was not to the Court of Appeal. It was, rather, to the Ontario Divisional Court, which is sort of an appellate branch of the Ontario Superior Court of Justice. The appeal routes in Ontario are incredibly convoluted and frustrating, with appeal routes depending on such things as the statute under which the order appealed from was made; whether the order being appealed is final or interlocutory; whether the order being appealed is from a Unified Family Court, the Superior Court of Justice or the Ontario Court of Justice; the monetary amount being appealed; and the day of the week the order below was issued (this last one may have been for dramatic effect; but we had you worried). If anyone has a few hours and a really good bottle of tequila, we're happy to explain Ontario appeal routes to you. (The irony is that these new rules for appeal routes were brought in a few years ago because the old ones were too complicated.)

In any case, this appeal was to the Ontario Divisional Court, presumably because it appeared to be an appeal of a final Order from a Unified Family Court made only under a provision of an Act or regulation of Ontario (in this case, the *Family Law Rules*, O. Reg. 114/99). However, as discussed below, the Divisional Court determined that the Order at issue was a temporary Order (which opens up another can of appeal-route worms that we won't get into here).

The father argued that the court below acted without jurisdiction when, in the context of a contempt proceeding, the court varied the final parenting Order of Justice Hughes. (That is, the court altered custodial arrangements as a punishment for contempt.)

He also argued that it was an error to have found him in contempt for taking his daughter to a new dentist and because he had strictly complied with the terms of the Order of Justice Hughes.

After finding the father in contempt, the motion judge ordered as follows:

8. Until such time as the [father] complies with all terms of this order, including but not limited to, the full payment of costs owing to the [mother], he shall have parenting time with the children every second weekend, from Friday pick up at school until Sunday drop off at Ajax GO Station at 7 pm.

This reduced the parenting time that had been granted under Justice Hughes' Order, and the father argued that a reduction in parenting time could not be ordered as "punishment" for a finding of contempt.

There are certainly cases that go both ways on the issue.

Some cases (although fewer in number) suggest that a change in primary care and control may be used as a sanction for contempt: *Morrison v. Charney* (2007), 38 R.F.L. (6th) 94 (Man. Q.B.); *Nixon v. Hunter* (2009), 73 R.F.L. (6th) 391 (Ont. S.C.J.); *JS v. JW* (2005), 27 R.F.L. (6th) 159 (Ont. C.J.); *Wong v. Barnard*, 2010 CarswellMan 106 (Q.B.); *AU v. TC*, 2018 CarswellNS 185 (Fam. Ct.).

The weight of authority suggests otherwise: *Chan v. Town* (2013), 34 R.F.L. (7th) 11 (Ont. C.A.); *Chin v. Chin*, 2010 CarswellOnt 2292 (S.C.J.); *D.D. v. H.D.* (2015), 62 R.F.L. (7th) 261 (Ont. C.A.); *Zafar v. Saiyid*, 2018 CarswellOnt 5621 (C.A.); *Van de Veen v. Van de Veen*, 2001 CarswellAlta 1147 (Alta. Q.B.); *Sheppard v. Boyde*, 2010 CarswellAlta 434 (Q.B.).

In *JLZ v. CMZ* (2021), 58 R.F.L. (8th) 313 (Alta. C.A.), the Alberta Court of Appeal does us the favour of summarizing some of the cases that go both ways from across the country, ultimately concluding that, "[t]here is no consensus across Canada as to resort to a change in parenting in these circumstances."

See also *Rogers v. Rogers* (2008), 52 R.F.L. (6th) 281 (Man. Q.B.) at paras. 111-114 for a discussion on remedies for contempt of parenting orders.

In this case, the father primarily relied on two cases from the Ontario Court of Appeal in support of his argument: *Chan v. Town* (2013), 34 R.F.L. (7th) 11 (Ont. C.A.) and *Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.).

In *Chan*, as noted above, the Ontario Court of Appeal held that custodial arrangements cannot be used as a punishment for contempt. And, according to the father, that is exactly what had happened here.

However, in *Bouchard*, a majority of the Ontario Court of Appeal accepted that a motion judge *can* make a temporary parenting order in the context of a motion for contempt, both because of the broad remedial authority granted under Rule 1(8) of the Ontario *Family Law Rules*, O. Reg. 114/99 and because the purpose of the motion judge's order in *Bouchard* was not to vary or replace the previous parenting order — but to *facilitate compliance* with that order.

While the father tried to distinguish *Bouchard* on the basis that, here, the motion judge effectively made a final variation, not a temporary one, the Divisional Court was of the view that para. 8 (above) was clearly only in effect until the father complied with the terms of the order under review:

[9] . . . taken in context, the variation was made with a view to facilitating compliance with Justice Hughes' order. Thus, pursuant to the reasoning in *Bouchard*, the motion judge had the jurisdiction to make the order she did.

Therefore, it would seem that, in Ontario at least, a court may change parenting arrangements as a penalty for contempt if the change is made with a view to facilitating compliance.

For us, we're not sure why that caveat is required. Yes, courts must focus only on the best interests of children. But surely part of those best interests entails parents following court orders about the very children in question. What is wrong with parents understanding that a consequence for disobeying court orders with respect to children may be a change — a permanent change — in the parenting regime?

The motion judge had also found the father in contempt of the provision of the Order which prohibited him from taking the child to a new dentist without the mother's consent.

Try as he might, the father could not overcome the basic fact that he had done exactly that which he was not to do; he took the child to a new dentist without the mother's consent. And that was contempt, especially given the history found by the court below of the father having a history of acting unilaterally with respect to the children.

The father's suggestion that he had otherwise "strictly complied" with the order was also met with an incredulous audience.

In short, the father was not able to show that the motion judge made a palpable and overriding error in finding that the father continued to breach court orders.

In a final (what we might call a) Hail Mary argument, the father suggested that he was denied procedural fairness in the hearing below because he had no access to CaseLines during the hearing when the judge and the mother's lawyer did. However, the father was a licensed paralegal and had been given directions about uploading his materials on CaseLines and accessing CaseLines. In the words of the Divisional Court, "[t]he fact that he did not follow those directions does not create a breach of procedural fairness . . . ". No one had done anything to restrict the father's access to CaseLines.

The father's appeal was dismissed — with costs of \$12,000.

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