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

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The Estate Won't Pay It If You Don't Say It

***McCulloch v. McCulloch* (2025), 13 R.F.L. (9th) 31 (Alta. K.B.) — Lema J.**

Issues: Alberta — Spousal Support Obligation Surviving the Payor's Death

In *McCulloch*, Justice Lema of the Alberta Court of King's Bench considered whether a spousal support obligation survives the death of the payor. The clear answer — as is often the case in family law — is: definitely maybe . . . it depends.

The parties married in 1971 and separated in the early 2000s. On the eve of trial in 2003, they settled their issues by way of Minutes of Settlement, which provided that the husband would pay the wife $9,000 a month in spousal support "until further order of the Court", subject to review upon his retirement. These terms were incorporated into a final Divorce Judgment.

Despite two post-retirement attempts to vary the order, the husband's efforts were unsuccessful. Accordingly, when he passed away in 2023, the 2003 Divorce Judgment was still in effect. However, his second wife, acting as estate trustee, stopped the monthly support payments, arguing that the estate was not legally required to continue them.

The estate's position was straightforward: spousal support is a personal obligation that ends with the payor's death unless legislation or the support order specifies otherwise — and in this case, neither did so. The wife, by contrast, took issue with that premise, characterizing it as outdated and fundamentally at odds with modern family law principles. She argued that:

> • "[a]ny authority for [the] proposition [that spousal support is 'personal' and 'dies with the payor'] is archaic at best and clearly wrong [and wrongheaded!]."
>
> • " . . . in the 'dark ages' preceding the evolution of family support theories, there might have been some support for this notion, but it clearly cannot survive in modern family law. We now live in an age in which contractual and compensatory support is both commonplace and held to a high standard of compliance."
>
> • "Ensuring that deserving spouses actually receive all the support to which they are entitled, even beyond the life of the payor, is clearly a paramount principle."
>
> • " . . . the modern principles of spousal support have had the effect that spousal support obligations continue past the life of the payor and [bind] their estates."

While the wife's argument might seem persuasive, as discussed further below, it had a major flaw: her claim that spousal support is *not* a mere personal obligation was not supported by any case law or legislation.

In Alberta, as in other provinces, there are two statutory sources for spousal support. The *Family Law Act*, S.A. 2003, c. F-4.5, is Alberta's provincial legislation and applies to both married and unmarried spouses (other provinces and territories have their own family law statutes). The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), is federal legislation that applies only to married spouses.

In this case, because the parties were married and the court order requiring the husband to pay support formed part of their Divorce Judgment, there was no question that the *Divorce Act* — not the *Family Law Act* — was the applicable statute.

Accordingly, while many provincial statutes — including Alberta's *Family Law Act* — *explicitly* state that a support order binds the payor's estate unless it says otherwise (e.g., s. 80(1): "Unless the support order provides otherwise, a support order binds the estate of the person having the support obligation"), the *Divorce Act* contains no such provision. Rather, in Parliament's wisdom — or, some might say, lack thereof — this protection does not automatically extend to support orders made under federal legislation.

Instead of creating a default rule that a support order binds the payor's estate, s. 15.2(3) of the *Divorce Act* merely gives the court discretion to impose such a condition. Unlike the *Family Law Act*, it does not make this the default outcome — nor does it presume that such a condition applies unless the order expressly stated otherwise.

Moreover, the case law that has considered this issue — contrary to the wife's submissions — has consistently affirmed that the default rule under the *Divorce Act* is that a support order terminates upon the death of the payor, unless the order explicitly provides otherwise. As the British Columbia Court of Appeal summarized in *McLeod v. McLeod* (2013), 38 R.F.L. (7th) 295 (B.C. C.A.) at para. 25:

> [25] . . . a) Support terminates on the death of the payor absent an agreement or order specifying continuation of the payments after death[.]
>
> b) If the agreement or order provides for a fixed term of support, the estate is bound by that agreement[.]
>
> c) A "fixed term" evincing an intention for support to continue after the payor's death includes a provision for support "for her lifetime" or "until she remarries"[.]
>
> d) An intention for support to continue after the payor's death can be found in a term relinquishing all claims against the payor's estate except to enforce obligations under the agreement[.]

Similarly, in *Katz v. Katz* (2014), 50 R.F.L. (7th) 1 (Ont. C.A.) at para. 72, the Ontario Court of Appeal stated:

> [72] There is, however, no provision in the *Divorce Act* similar to s. 34(4) of the *Family Law Act*, making a support order binding on a payor's estate. On the contrary, it has long been held that a support or maintenance obligation under divorce legislation ends when the payor dies unless there is a specific agreement to the contrary: *Schwartz Estate v. Schwartz* (1998), 1998 CanLII 29650 (ON SC), 36 R.F.L. (4th) 110 (Ont. Gen. Div.), at paras. 23, 27 and 28.

Furthermore, in at least one Canadian jurisdiction — Nova Scotia — the courts have held that while parties may agree that spousal support will survive the death of the payor, s. 15.2(3) of the *Divorce Act* does not even confer jurisdiction on the court to make such an order. See *Carmichael v. Carmichael* (1992), 43 R.F.L. (3d) 145 (N.S. C.A.) at paras. 17-27, and *Haas v. Payne Estate* (2015), 75 R.F.L. (7th) 251 (N.S. Prob. Ct.) at paras. 23-26. Note to self: Don't move to Nova Scotia after divorce.

After reviewing the Divorce Judgment — which simply stated that the husband would "pay spousal support to the [wife] of $9,000.00 per month . . . until further Order of the Court" — Justice Lema concluded that it did not bind the estate. The order said nothing about support continuing after the payor's death, made no mention of the estate, and included no fallback like life insurance or other security. There was no clear language suggesting the parties intended the support to continue after death, and the phrase "until further order of the Court" was not enough to change that.

Accordingly, Justice Lema dismissed the wife's request for an order requiring the estate to continue paying spousal support under the Divorce Judgment.

Although it may still be open to the wife to pursue a claim for support under Alberta's *Wills and Succession Act*, S.A. 2010, c. W-12.2 — which allows certain dependants to apply for support against an estate — the availability and success of that route is uncertain. More importantly, this situation could have been entirely avoided. Had the Divorce Judgment simply included language confirming that the support obligation would survive the payor's death and bind his estate, or had it required the husband to maintain life insurance as security, the dispute may never have arisen.

For family law practitioners, the message is simple: if you intend for spousal support for a divorced recipient to continue after the payor's death — then say so. Do not leave it to chance. Say it — and draft it — clearly. The *Divorce Act* gives courts in most provinces the discretion to bind an estate or require security, but only if specifically asked. Otherwise, the default rule applies: support obligations under the *Divorce Act* end when the payor does.

And if ongoing support is the goal, do not stop at including language binding the estate. Whenever possible, especially when acting for a recipient, ensure that life insurance or other appropriate security is in place to guarantee recovery. After all, a support obligation against a judgment-proof estate isn't worth the paper it's written on. And you certainly do not want your insurance to be the source of recovery.

Of Judicial Notice and Laundry Lists

***Dupont-Goode v. Ashmeade*, 2024 CarswellOnt 19845 (Ont. S.C.J.) — Sharma J.**

Issues: Ontario — Materials for Family Law Motions

This was a run-of-the-mill case about parenting.

What was not so run-of-the-mill was the list Justice Sharma provided with respect to what motion material should — and should not — look like.

The Applicant was asking to strike several paragraphs from the Respondent's affidavit as (a) scandalous and intended to prejudice or embarrass the Applicant on issues that were not relevant to the issues on the motion; (b) containing opinion evidence; (c) containing law and legal argument; and (d) containing hearsay evidence.

The Respondent's materials were so rife with issues that his Honour declined to detail the issues in each paragraph.

Given the "frequency with which improper motion materials are filed in family proceedings," his Honour took the time to set out for the profession that which is appropriate to file in support of a family court motion:

> (a) A Notice of Motion should succinctly set out the relief sought and may cite the statutory basis for the relief. However, it is not appropriate to recopy the text of rules or statutory provisions or cite and re-copy portions of caselaw within a Notice of Motion.
>
> (b) Evidence on a motion may be given by way of affidavit or other admissible evidence in writing, a transcript of questions and answers from cross-examination or questioning under Rule 20 of the *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*") or with the court's permission, oral evidence: Rule 14(17) of the *Family Law Rules*.
>
> (c) An affidavit should contain only relevant facts that are material to the issues raised in the motion. **The inclusion of facts that are irrelevant or not material to the issues to be decided constitutes poor advocacy**. It distracts the judge from the issues to be decided, consumes limited affidavit space, and raises costs unnecessarily for both parties. The insertion of irrelevant, scandalous and immaterial facts suggests to a judge that a litigant is more concerned about

maligning the opposing party than meeting the prescribed legal test for the relief sought. **It creates an irrelevant distraction**.

(d) An affidavit should contain detailed facts in support of an allegation or position taken on the motion. For example, it is not sufficient to state the opposing party engaged in family violence, without providing detailed facts of the alleged family violence.

(e) **An affidavit should not plead the law, contain argument, or cite legal authorities or authoritative texts**. These matters should be in a factum.

(f) **An affidavit must contain admissible evidence**. In certain circumstances, limited hearsay evidence may be found to be admissible and given weight by the presiding judge where it is necessary to receive such evidence and where such evidence has indicia of reliability, or where another exception to the rule against hearsay evidence applies. However, a party's affidavit should not rely significantly on hearsay evidence as the basis to support or refute allegations. Affidavits from individuals with firsthand knowledge of the information should be filed, and if necessary, leave should be sought to file additional affidavits than are permitted under the Court's Practice Direction.

(g) **In family cases, opinions of doctors, teachers, Children's Aid Society ("CAS") workers, or therapists are often relevant to the outcome of a case. Their opinions should not be in the text of a party's affidavit, nor should reports with opinions from such professionals be attached as exhibits to an affidavit**. It is also not proper to include within an affidavit text of a published report or other external sources from purported experts where their opinions are expressed.

Instead, the purported expert who is expressing an opinion should prepare their own affidavits. If expert opinion evidence is to be relied upon, it must be provided by an expert and the requirements under rule 20.1 of the *Family Law Rules* must be met. It is not common to have expert opinion evidence on a motion; expert opinion evidence is most often relied upon at trial where their opinion can be tested under cross-examination. **If opinion evidence is to be admitted on a motion, leave should be sought for the admission of an affidavit of an expert.**

However, where an exhibit is a business record that merely records an act, transaction, occurrence or event (and not an opinion), it may be attached to an affidavit as an exhibit: *Evidence Act*, R.S.O. 1990, c. E.23, s. 35. Examples include a child's attendance record maintained by a school, work or employment records, and records maintained by a CAS that records facts or observations of a CAS worker. See *Catholic Children's Aid Society of Toronto v. L. (J.)*, 2003 CanLII 57514 (ONCJ), 2003 39 RFL (5th) 54 (ONCJ), at paras. 10 — 11; *Dworakowski v. Dworakowski*, 2022 ONCSC 7209 at para. 52.

(h) Only necessary, relevant and material exhibits should be attached to an affidavit. The exhibit must be legible. **The text of the affidavit that references the exhibit should explain specifically what the exhibit is intended to demonstrate.**

(i) **Counsel have a duty not to mislead the Court**. When attaching extracts of text or email messages as exhibits, counsel should carefully consider if several pages of text/email messages, rather than a single page, should be included as an exhibit to ensure the context in which the message was sent and received is properly understood by the Court. A single page of text/email messages, with only one statement being relied upon by a litigant, may be insufficient to reach a factual conclusion or inference if the context in which the message was sent and received is not readily understood, or if only a single page of the text/email message is entered. Counsel may also consider, within the text of the affidavit, explaining the context in which the message was sent or received. If not readily apparent, the text message should make clear who is saying what.

(j) It is a best practice to **hyperlink** exhibits within an affidavit to permit a judge to review and consider exhibits efficiently. Hyperlinks allow judges to quickly look at the exhibit while reading the text of the affidavit and then return to where they left off in the affidavit.

(k) Font, spacing and page limits prescribed in the Practice Direction must be followed.

(l) It is improper to attach as an exhibit to an affidavit an affidavit of a different person to overcome the restriction in the Practice Direction that only one primary affidavit may be filed for a motion or cross-motion.

(m) It is poor advocacy to repeat the parties' full names each time a party is referenced in an affidavit. If an Affidavit is sworn by a party, they should refer to themselves in the first person (i.e., "I" or "me"), rather than the third person (i.e., "The Respondent", their full name, or "s/he"). Use of the third person suggests that the words in the affidavit are not facts sworn by an affiant, but legal argument of the lawyer who prepared it. (That said, we don't think anyone is under the illusion that witnesses draft their own affidavits?)

(n) An affidavit should be reviewed by a party's lawyer for proper spelling and grammar prior to the party swearing an affidavit. While minor errors will rarely impact the outcome of a motion, the improper use of grammar can raise questions about what the affiant intended by the words used.

(o) **It is improper to mention the substantive contents of an Offer to Settle when the substance of the Offer is the subject of the motion**. **Nor is it proper to refer to discussions at a case conference, settlement conference or trial management conference, including opinions expressed by a previous judge involved in the case**.

(p) Factums should be laser-focussed. In numbered paragraphs and in an organized manner with subheadings, they should:

a. Identify the relief that is sought as set out in the Notice of Motion;

b. Provide a brief factual background of the case that is relevant to the motion;

c. Identify the issues to be decided on the motion;

d. Identify the legal test to be applied, including any factors, and with reference to the relevant statutory authority and caselaw;

e. Pinpoint the paragraphs within the affidavit evidence that establish the facts relevant to the legal test to be applied. Parties should not simply cut and paste an affidavit into a factum. The facts should be synthesized and applied to the legal test; and

f. Conclude by explaining how the legal test has been met and what orders should be granted.

In considering the issue of parenting, his Honour also makes the following interesting statement about the evidence necessary with respect to the best interests of children on parenting motions, and what can be done when that evidence has not been put forward by the parties (here, with respect to children that were aged five and seven):

[30] In assessing these factors, the only evidence was from the parties. There was no independent and objective evidence from the Ontario Children's Lawyer or other parenting assessor of what is best for these children, nor was there expert evidence of what is best for children of this age.

[31] **In the absence of such evidence, I refer to the AFCC-Ontario Parenting Plan Guide, ("*Guide*") as independent and objective evidence of what is best for children.** The *Guide* has been relied upon by other judges of this Court in determining parenting schedules that are in a child's interest based on the child's age and developmental stage . . . [citations omitted]:

The *AFCCO-O Guide* summarizes basic social science knowledge about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of children. [**emphasis** added]

This essentially amounts to taking judicial notice of the AFCC-O Parenting Plan Guide and the fact that it constitutes "independent and objective evidence of what is best for children." So that's a pretty significant statement. Is it accurate?

On the one hand, a judge has to make a decision based on the evidence of the best interests of the children. However, the test in the best interests of the children *before the court* — not the best interests of children *in general*: *Chapman v. Chapman* (2001), 15 R.F.L. (5th) 46 (Ont. C.A.); *B. (S.G.) v. L. (S.J.)* (2009), 66 R.F.L. (6th) 81 (Ont. S.C.J.); *F. (J.) v. E. (T.)* (2010), 82 R.F.L. (6th) 98 (C.A.).

Furthermore, generally the court cannot just take judicial notice of social science literature: *Perchaluk v. Perchaluk* (2012), 27 R.F.L. (7th) 479 (Ont. C.J.); *Bunce v. Peacock*, 2013 CarswellOnt 10802 (C.J.); *Doucet v. The Royal Winnipeg Ballet (The Royal Winnipeg Ballet School)*, 2018 CarswellOnt 5014 (S.C.J.) (especially not social science literature that is not even before the court on a given motion). [See *contra*: *Hasan v. Khalil*, 2012 CarswellOnt 16099 (S.C.J.); *Schmidt v. Haley*, 2004 CarswellOnt 1149 (S.C.J.); *Lygouriatis v. Gohm* (2006), 33 R.F.L. (6th) 354 (Q.B.); *Schmidt v. Haley*, 2004 CarswellOnt 1149 (S.C.J.)].

A court can take judicial notice of (1) facts that are so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy: *R. v. J.M.*, 2021 CarswellOnt 3180 (C.A.); *R. v. P. (T.)*, 2007 CarswellOnt 5358 (Ont. C.A.); *R. v. Find*, 2001 CarswellOnt 1702 (S.C.C.).

Is the AFCC-O Parenting Plan Guide full of facts that are so "notorious" or "accepted" so as to not be the subject of dispute amount reasonable people? Or facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy? Don't think so. The AFCC-O Guide is *unquestionably* useful. In fact, we suggest it is a "must read" for all. But worthy of judicial notice? We are taking "editors notice" of the fact that the Guide was the complication of years of work by experts — and it, in many respects, represents a compromise of positions. It goes without saying that many "experts" disagree with the general propositions and schedules therein and could disagree as to the best interests of any child in any case. Is the Guide useful "in general"? Absolutely. Is it useful in any given case? Dunno.

Fortunately, we get to leave such decisions to those that make the big bucks.

For our comments on the increasing use by courts of the AFCC Guide, see our Comment in the September 19, 2022 edition of *TWFL*.

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