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

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Contents

Keep Calm and *In Rem* On

***Fisher v. Danilunas*, 2025 CarswellOnt 12068 (S.C.J.[Estates List]) — Myers J.**

While not a family law case, *Fisher* addresses an issue we think will be of interest to family law practitioners: when and how courts in Canada should recognize a foreign order that determines legal status. Such an order — known as an order *in rem* (Latin for "against the thing") — does not impose obligations solely on identified individuals, but instead changes the legal status of a person or thing in a manner that binds the entire world, including those who were not parties to the proceeding.

A divorce is a classic example of an *in rem* order. Once parties are divorced in one jurisdiction, subject to certain defences that we have discussed in prior editions of *TWFL* (see, e.g., "So There Can Be 'Fair' Forum Shopping?" in the April 1, 2024 (2024-13) edition), they are generally considered to be divorced everywhere because their legal status has changed as against anyone who may deal with them. A divorce is notice to the world as to the dissolution of a specific marriage. This is in contrast to an order *in personam* (more Latin — this time "against the person"), which settles obligations only between the specific parties and affects their private rights without altering their universal legal status. And then there is Pig Latin: isthay eekway inway amilyfay awlay.

This brings us to the case at hand. Although *Fisher* arises on the Estates List rather than in family court, the central question before the court was whether an *in rem* order from a foreign court should be recognized in Ontario and given effect here.

The facts were not complicated. Ms. Danilunas resides in England and suffers from progressive dementia. In 2023, the U.K. Court of Protection, relying on psychiatric evidence, found her incapable of managing property and appointed two "Deputies" — including her brother — to manage her financial affairs. The Deputies undertook fiduciary obligations and are subject to annual oversight by the U.K. Public Guardian. Ms. Danilunas was served with the U.K. proceeding and did not appeal. No allegations of coercion, undue influence, or abuse were raised.

As Ms. Danilunas had more than $1.2 million in cash and pension assets in Ontario, the Deputies applied in Ontario for recognition of their authority so as to allow them to use the Ontario assets for her care in the U.K. The Office of the Public Guardian and Trustee (the "PGT") was served with the Application, and intervened to assist the court.

The PGT accepted that the funds in Ontario could and should be accessed for Ms. Danilunas's care, and consented to an Order permitting this as an "ancillary" order. However, it opposed full recognition of the U.K. Order. It argued that foreign appointments of legal representatives for vulnerable adults should not be recognized under the common-law rules governing foreign judgments. Instead, the PGT argued that Ontario public policy requires that, unless a lawful Ontario power of attorney exists, the only path in Ontario for recognizing such authority would be through an Ontario guardianship application under

the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "*SDA*"). Recognition of a foreign *in rem* incapacity order, the PGT submitted, would improperly bypass Ontario's statutory and procedural safeguards.

The PGT pointed to s. 86 of the *SDA* as the exclusive statutory mechanism for recognizing foreign guardianship-style orders. Section 86 permits "resealing" — that is recognition — of a "foreign order" made in another Canadian province or territory, or in a prescribed jurisdiction, and gives such orders the same force in Ontario as if they were made here.

The difficulty with this argument, however, is that precisely zero *foreign* jurisdictions (jurisdictions outside Canada) have been prescribed in the regulations under s. 86. As a result, the statutory mechanism is currently limited to orders from other Canadian provinces and territories, and it is unclear whether this reflects a lack of action by the Minister or a determination that no foreign jurisdiction meets the required regulatory criteria.

Since the U.K. is not a prescribed jurisdiction, the resealing route was unavailable in this case. The PGT argued that without resealing, U.K. Deputies would need to bring a full guardianship application in Ontario unless only ancillary enforcement were granted, to which it was prepared to consent. However, the PGT was unable to explain why an ancillary order was available when recognition of the U.K. court order was not.

Justice Myers considered — but dismissed — the PGT's strict "ancillary enforcement only" approach as logically impossible. If Ontario refuses to recognize the Deputies' legal status, it would have no principled basis to authorize them to withdraw more than $1 million of Ms. Danilunas's assets. The court cannot, as counsel for the Applicant put it, "use a branch of a tree that arises from a guardianship/deputyship, without recognizing the root from which the guardianship/deputyship grows." There is no coherent explanation as to how Ontario could permit use of the funds while denying the very authority that would empower the Deputies to use those funds. It was all a very circular tree.

That led Justice Myers to consider whether the common law allowed for recognition of a foreign guardianship order.

His Honour began by reviewing the evolution of the law governing recognition and enforcement of foreign court orders. Historically, Canadian courts would only recognize a foreign judgment if the defendant had been personally served within the territorial jurisdiction of the foreign court. Even judgments from other Canadian provinces were not enforceable unless these strict service rules were met.

However, the Supreme Court of Canada began dismantling this strict territorial approach in *Morguard Investments Ltd. v. De Savoye*, 1990 CarswellBC 283 (S.C.C.), holding that courts must recognize final *in personam* orders from other provinces where there is a real and substantial connection to the dispute.

The Court later extended this principle in *Beals v. Saldanha*, 2003 CarswellOnt 5102 (S.C.C.), to include final money judgments from courts outside of Canada, again based on real and substantial connection, with only limited defences: extrinsic fraud, denial of natural justice, a violation of Canadian public policy — and most recently, according to the Ontario Court of Appeal in *Vyazemskaya v. Safin* (2024), 99 R.F.L. (8th) 247 (Ont. C.A.) — in cases of "unfair forum shopping."

The next development came in *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 CarswellOnt 7204 (S.C.C.), where the Supreme Court accepted that *non-monetary* foreign orders could also be enforced in Canada, provided domestic courts retain discretion to ensure that enforcement does not undermine the structure or integrity of the Canadian legal system.

After reviewing the evolution of the law about the enforcement of foreign orders, Justice Myers concluded that before enforcing a foreign *in rem* guardianship order, the court must conduct a broader public-policy analysis than applies to foreign money judgments, and ensure that recognition does not undermine the autonomy and protection owed to vulnerable adults.

The PGT argued that enforcing the U.K. order would violate public policy because the process in the U.K. lacked some of Ontario's procedural safeguards, such as management plans under the *SDA*. Justice Myers disagreed. He found that the U.K. Court of Protection provides comparable protections, including vetted appointments, fiduciary undertakings, annual reporting,

proper notice, and psychiatric evidence of progressive dementia. No deficiencies in the U.K. regime or risk to Ms. Danilunas were shown. Recognition therefore would promote, rather than compromise, Ontario's protective values.

Finally, Justice Myers confirmed that Ontario courts always retain *parens patriae* jurisdiction as a backstop for protecting vulnerable adults should enforcement defences prove insufficient. Where a gap in the law would jeopardize a person's safety or autonomy, Ontario courts could invoke their *parens patriae* jurisdiction to grant, deny, or limit recognition to ensure protection.

Accordingly, because the U.K. order met the *Morguard*/*Beals*/*Pro Swing* criteria (finality, real and substantial connection, procedural fairness, and public policy compliance), Justice Myers held that it should be enforced, and he confirmed the U.K. Deputies' authority to take possession of, manage, and invest Ms. Danilunas's Ontario property.

This case, though outside the family law sphere, reinforces key principles relevant to the recognition of foreign judgments. Ontario will respect foreign orders that meaningfully protect individuals and reflect procedural fairness, even where local statutory frameworks differ. At the same time, both the public policy defences and the court's *parens patriae* jurisdiction remain available to protect vulnerable parties if necessary.

Fisher gives practitioners greater confidence that properly grounded foreign orders — whether *in rem* or *in personam* — will be recognized in Ontario when the *Morguard*/*Beals*/*Pro Swing* criteria are met. However, evidence of the foreign legal system's safeguards, while potentially difficult and expensive to marshal, will often be essential to success.

The contrast with *Vyazemskaya v. Safin* (2024), 99 R.F.L. (8th) 247 (Ont. C.A.), which we discussed in "So There Can Be 'Fair' Forum Shopping?", is instructive. There, the husband argued that Russian divorce law offered protections comparable to those available in Ontario, including spousal support in certain circumstances. He submitted that expert evidence would be required to establish otherwise. Yet unlike the Applicant in *Fisher*, he provided no evidence to substantiate his claim that the foreign regime adequately protected the spouse's rights. In the absence of such evidence, recognition was refused.

Therefore, when seeking recognition of a foreign order in Ontario, counsel must come prepared with evidence addressing the foreign court's jurisdiction, procedural fairness, and protective safeguards. Courts will not assume parity, equality or procedural fairness. Recognition is available, but neither automatic nor required.

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A Simple Matter of Priorities?

***Armstrong v. Abramowicz*, 2025 CarswellBC 2702 (C.A.) — Willcock, Fisher, and Iyer JJ.A.**

The parties were in a relationship for just under four years, from January 2013 to September 2016. Their child, now 12 years old, was born in May 2013.

The parties had a traditional marriage. The Appellant/Father was self-employed and earned income through his pipefitting company, which he incorporated in April 2014. The Respondent/Mother managed the household, cared for the child, and did some invoicing and bookkeeping for the Father's company.

Post-separation, the Father paid nominal child support. He was ordered to pay $600 a month at a Judicial Case Conference on January 24, 2019, and he *mostly* complied with it until the trial.

The Father did not pay any spousal support prior to the trial.

The main issues at the trial before Justice Smith were the insufficiencies of the Father's financial disclosure and the quantification of ongoing and retroactive child and spousal support.

The trial judge found the Mother to be a credible and reliable witness; the Father, not so much. He found that the Father was not a credible witness, particularly on evidence relating to his income.

The trial judge found that the Father did not comply with his disclosure obligations in a timely way. Further, he had deprived both the child and the Mother of support.

The trial judge imputed income of $150,000 to the Father for support purposes under the *Child Support Guidelines*, SOR/97-175.

Although the Father claimed undue hardship in an effort to reduce his child support obligation, the trial judge found that the Father had wholly failed to prove undue hardship. The trial judge ordered the Father to pay ongoing child support in the amount of $1,356 a month in accordance with the Table amount and $38,038 in retroactive child support plus interest. The trial judge considered the four factors in *D.B.S. v. S.R.G.* (2006), 31 R.F.L. (6th) 1 (S.C.C.): reasonable excuse for why support was not sought earlier, conduct of the payor parent, circumstances of the child, and hardship occasioned by a retroactive award. In considering the Mother's reasonable excuse, the trial judge noted that the Father, as the payor parent, had an interest in certainty and that a recipient parent ought not to be encouraged to delay in seeking the appropriate amount of support for their children. The problem with this line of thinking is that the need for a recipient parent to establish a "reasonable excuse" for not claiming support earlier is now outdated. It has been supplanted by the need for the recipient parent to only offer an "understandable reason" for not claiming support earlier; no "reasonable excuse"' is required: *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.); *Henderson v. Micetich* (2021), 54 R.F.L. (8th) 295 (Alta. C.A.).

The trial judge ordered retroactive spousal support payable in a lump sum of $74,207. He rejected the Father's arguments that the Mother was not a "spouse" under the *Family Law Act*, S.B.C. 2011 (the "*Family Law Act*"), that her claim for spousal support was brought outside the limitation period, and that she had no entitlement.

The trial judge ordered that a charge be registered against the Father's home to secure payment of the support orders.

The Father was also ordered to provide the Mother with financial disclosure on the first of June every year.

The Father appealed.

He argued that the trial judge:

1. erred in law by awarding lump sum spousal support without weighing the advantages and disadvantages of such an order;

2. erred in law in failing to apply all the factors from *D.B.S. v. S.R.G.* (2006), 31 R.F.L. (6th) 1 (S.C.C.) to assess retroactive child support and retroactive spousal support;

3. erred in fact in determining the quantum of spousal support; and

4. erred in fact in imposing a penalty for inadequate financial disclosure.

The Court of Appeal first considered whether the trial judge had erred in law because he did not weigh the advantages against the disadvantages of making a lump sum award for spousal support, as required by the Court of Appeal in *Parton v. Parton* (2018), 12 R.F.L. (8th) 179 (B.C. C.A.) (and by *Davis v. Crawford* (2011), 95 R.F.L. (6th) 257 (Ont. C.A.)).

The Court of Appeal set aside the lump sum spousal support order because there were issues with the test applied and the calculation of the lump sum award.

First, the Court of Appeal agreed that the trial judge did not properly weigh the advantages and disadvantages of a lump sum award of spousal support. The court below had also made a "fundamental error" in assessing spousal support because he did not determine the range for duration or the commencement date, both of which were relevant to determining the suitability of a retroactive award and the amount of a lump sum.

The court also noted that the software calculation provided to the trial judge by the Mother should *not* have been used to calculate a retroactive support award. The range of duration in the calculation was 2 to 15 years from the date of separation, which meant

that only part of the amount in the calculation was for ongoing spousal support, and the calculation applied a net present value discount which cannot apply to retroactive awards.

The Court of Appeal then considered the Father's second ground of appeal: that the court below had erred in law by not expressly considering the fourth *D.B.S.* factor — hardship — in awarding retroactive child and spousal support.

On one hand, the B.C. Court of Appeal has previously (and recently) confirmed that judges need not explicitly consider each of the *D.B.S.* factors: *Bradley v. Callahan*, 2025 CarswellBC 657 (C.A.). Furthermore, the trial judge considered — and rejected — the Father's claim of undue hardship while assessing whether to reduce the amount of child support payable. However, the Court of Appeal could not infer that the trial judge would not have found hardship under a full and proper *D.B.S.* analysis (which required him to consider hardship to the Father and his other children with his new partner). Ultimately, the Court of Appeal concluded that the retroactive award would not amount to hardship, since the adverse impact on the other children could be mitigated by a gradual payment plan.

The Court of Appeal also concluded that the trial judge had considered hardship to the Father in assessing retroactive spousal support because he reduced the income imputed to the Father from $150,000 to $100,000. The trial judge noted that the Father's undue hardship claim was not persuasive, but reducing the income imputed to him for retroactive spousal support was a fair way to account for his financial responsibilities towards his new family.

The Court of Appeal then raised one additional interesting issue regarding the retroactive spousal support award: the trial judge erred in ordering immediate payment of the retroactive spousal support award where he had also ordered a lower retroactive award of child support to be paid periodically. The court was of the view that this was contrary to s. 173 of the *Family Law Act*, which provides that child support takes priority over spousal support. This is an interesting comment, but we are not sure it is right. It would be one thing if there was reason to believe the Father could not afford to pay both the retroactive child and spousal support orders. But it does not stand to reason the trial judge prioritized spousal support over child support simply because the retroactive spousal support was ordered paid by way of a lump sum.

Then, the Court of Appeal considered the Father's third ground of appeal: that the trial judge erred in fact in determining the amount of spousal support. The Father accepted the highly deferential standard of review with respect to spousal support orders but argued that intervention was warranted because the trial judge misapprehended the evidence in finding that the Mother was self-supporting when the relationship began and he did not appreciate that the Mother had re-partnered.

The court rejected the Father's arguments. First, the trial judge's finding that the Mother was self-supporting was grounded in evidence that she was looking for work in a new location when she met the Father.

Second, the court explained that re-partnering is a significant consideration where the basis of entitlement is need, but less so where the entitlement is compensatory. Re-partnering is likely to reduce the recipient's needs, but is unlikely to affect the economic disadvantages sustained by the spouse during the relationship. Since the trial judge considered the impact of the Mother's re-partnering and noted that her prospects for achieving self-sufficiency improved, the court rejected the Father's argument.

The Court of Appeal then considered the Father's fourth and final ground of appeal: that the trial judge erred in fact in imposing a penalty of $3,500 for inadequate financial disclosure under s. 213(2)(d)(ii) of the *Family Law Act*.

The Father had failed to comply with disclosure deadlines set in the Order from the Judicial Case Conference and contravened ss. 213(1)(a)(i) and (ii) of the *Family Law Act*. The court rejected the Father's argument that the trial judge should have identified what documents he failed to disclose before making an Order under s. 213 because there was no principled reason to require this.

The court upheld the trial judge's determination that a $3,500 payment was an appropriate penalty, and noted that this was a highly discretionary decision deserving of appellate deference.

Ultimately, the court allowed the appeal in part. The order for retroactive spousal support in the amount of $74,207 was set aside and substituted with an order for $60,767 plus interest in monthly payments of $1,000.

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