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Family Law Newsletters

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

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Who Wants to Read My Diary?

***DF v. SHS* (2026), 24 R.F.L. (9th) 262 (Alta. K.B.) — Malik J.**

This case deals with the admissibility of the notes from a child's therapist.

The parties were married in 2004, separated in 2015 and divorced in 2018. They had one child together, who will be 14 in November of 2026 (the "Child").

The parties were scheduled to have a two-day parenting trial in mid-March of 2026. There had been a shared parenting regime in place for approximately 10 years. The Mother was looking to vary the parenting schedule such that she would have primary parenting. Child's counsel was representing the Child at trial and had provided the parties with a report on January 16, 2025.

The Child had received counseling from a registered psychologist (the "Counsellor") from May to December of 2025. The Father had obtained a copy of the Counsellor's notes from the Child's sessions (the "Notes") through a disclosure request to Alberta Health Services. Both parties *had* the Notes; the question was whether or not the Father could *use* them in the trial.

The Father acknowledged the importance of confidentiality in the Child's therapeutic relationship with the Counsellor, and also admitted that the Child had been assured by the Counsellor that the sessions would remain private. However, the Father argued that the Notes were relevant to determining the Child's best interests with respect to parenting in accordance with s. 16 of the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.). The Father argued that the Notes provided the only objective evidence of the Child's emotional and psychological state and the Child's perspective regarding parenting issues. He further argued that the infringement on the Child's privacy and the importance of the therapeutic relationship could be appropriately addressed through safeguards such as restricting the use of the evidence to the Notes alone without calling the Counsellor and redacting the portions of the Notes not relevant to parenting, and limiting their use solely to the assessment of the Child's best interests.

The Father relied on two cases to support his argument, the first being *Raso v. Di Egidio* (2014), 48 R.F.L. (7th) 389 (Ont. S.C.J.) ("*Raso*"). In *Raso* one spouse sought access to notes from marriage counselling sessions claiming that they contained evidence of the other spouse's "explosive behaviour and controlling arrangements" which were relevant to parenting. The Court in *Raso* set out that production of notes should only be ordered in cases where they are truly relevant to an issue at trial and if their disclosure would be fair to both parties. Specifically, at para. 8, the Court observed that it should only order production where "necessary":

. . . it must be recognized that marriage counselling is presumed to be a confidential undertaking. That is, when a party enters into marriage counselling that party presumes that the counselling sessions are private and confidential. Based on

that presumption, the party is able to participate in an open and frank manner, without fear that whatever is said or done during the sessions would be recorded and disclosed at a later date in a courtroom. Given this underlying presumption, in my view the court should not order the disclosure of the privileged notes and records of a marriage counsellor unless there is a strong reason to do so.

The second case was *R. v. O'Connor*, 1995 CarswellBC 1098 ("*O'Connor*"), in which the Supreme Court of Canada held that anyone seeking confidential therapeutic records must first establish that the records are likely relevant, or logically probative, of an issue at trial. If this threshold is met, then a court *may* review the records and consider whether the benefits of disclosure outweigh the potential negative impacts. In performing this weighing exercise, a court must consider factors including whether the disclosure is necessary for the applicant to present a full defence, the evidentiary value of the records, the degree of privacy the records are reasonably expected to hold, whether the request is based on discriminatory beliefs or bias, and the possible harm to the dignity, privacy and security of the individual whose records are at issue.

The Father argued that he had met the "likely relevance" threshold in *O'Connor* as the Notes address the Child's emotional and psychological safety, including the impact of "parent conflict" on the Child's health and the level of "discord" in each parent's home. He also claimed that the Notes addressed the "evolution and inconsistency" of the Child's wishes regarding the parenting arrangement and the "allegations relied upon in support of a variation in parenting." Essentially, he was arguing that the Mother was manipulating the Child and that the Notes would vindicate that concern. As there had not been an assessment or report about the Child, the Father argued that the Notes were the only "contemporaneous, third-party evidence regarding the [C]hild's mental health and lived experience". The Father argued that, while *O'Connor* primarily applies in the criminal context, its principles "apply with particular force in family law, where the Court's truth-seeking function is inseparable from its obligation to protect a child's best interests".

The Mother argued that the Child's relationship with the Counsellor was strictly confidential. The Child has been assured that the sessions would be a "safe" place where they could speak openly and privately. The Mother further claimed that the Notes contained nothing relevant to the current parenting arrangement and their disclosure would only serve to hurt and harm the Child.

Counsel for the Child made submissions on their behalf. She argued that admitting the Notes would violate the Child's reasonable expectation of privacy. She also set out that since both parties were already aware of what the Notes contained, they could address those matters by questioning the other. Admitting the Notes could discourage the Child from continuing with counselling.

In *Children's Aid Society of Toronto v. K.Y.*, 2025 CarswellOnt 20616 (C.J.) at paras. 356-358, the Court emphasized the importance of preserving the confidentiality of a child's communications with their counsellor/therapist:

[356] The Supreme Court of Canada observed in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at paragraph 17:

Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under [various statutes], not to mention international protections such as the *Convention on the Rights of the Child* . . . The law attributes the heightened vulnerability based on chronology, not temperament [.]. [Emphasis in original.]

[357] Children have a privacy interest in their therapy records due to the confidentiality of the therapeutic relationship in which the records were created: *G.L.K. v. C.L.K.*, 2021 ONSC 5843 at paragraph 66, citing *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC) at 37; and *Child and Family Services for York Region v. L.H.*, 2013 ONSC 5622 at para. 34.

[358] Therapeutic relationships are necessarily confidential given the intimate personal topics that are shared in therapy. To properly benefit from therapy, children must share their innermost thoughts and feelings with their therapists, which requires them to have confidence with the privacy of their therapeutic sessions: *G.L.K. v. C.L.K.*, 2021 ONSC 5843 at paragraph 50.

The test for assessing whether a counsellor's or therapist's confidential notes are privileged was first articulated by the Supreme Court of Canada in *Slavutych v. Baker*, 1975 CarswellAlta 39 (S.C.C.) and later affirmed by a majority of the Supreme Court in *M. (A.) v. Ryan*, 1997 CarswellBC 99 (S.C.C.):

1. Does the communication originate in confidence?
2. Is the confidence essential to the relationship in which the communication arises?
3. Is the relationship one which should be sedulously fostered?
4. If these requirements are met, do the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and a correct disposition of the litigation?

While the parties agreed that the first three requirements were satisfied, the Court noted:

1. When considering the first requirement, it is important to recognize that although those involved in a patient-counsellor or therapist relationship might be aware that their communications may be revealed in a future legal proceeding, it does not undermine the fact that the communications were originally made in confidence. The mere possibility of inadvertent or subsequent disclosure does not displace the confidential nature of the relationship.
2. With respect to the second requirement, once a patient-counsellor/therapist relationship is "ruptured", the "frame" of counselling/therapy is broken. The patient may find themselves without support, their treatment may cease, the issues for which they require counselling may be exacerbated and their health adversely affected.
3. With respect to the third requirement, it is recognized that mental health is a "public good of great importance" and that supporting mental health for children accessing counselling is of "transcendent public importance" (see *Ryan* at para. 27). Disclosure of records could discourage children from seeking future therapeutic support if there is a possibility of those communications being revealed. This "chilling effect" could result in children withdrawing from therapy entirely, potentially leading to negative mental health outcomes and strained relationships. (See *G.L.K. v. C.L.K.*, 2021 CarswellOnt 12634 (S.C.J.) at para. 51.)

The Court then considered the fourth requirement. As set out by the Supreme Court of Canada in *Ryan*:

[29] . . . [t]he interests served by non-disclosure must extend to any effect on society of the failure of individuals to obtain treatment restoring them to healthy and contributing members of society. Finally, the interests served by protection from disclosure must include the privacy interests of the person claiming privilege and inequalities which may be perpetuated by the absence of protection.

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[31] . . . For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of that litigation.

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[33] . . . if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. **On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure.** In some cases, the court may well decide that the truth permits of nothing less than full production. This said, I would venture to say that **an order for partial privilege will more often be appropriate in civil case where, as here, the privacy interest is compelling.** [Emphasis added.]

The Court engaged in the weighing exercise set out in the fourth requirement and determined that the Notes were not to be received as evidence. The Child was going to be represented at trial. The Child's wishes and preferences could be directly expressed by their counsel without having to resort to an interpretation of what the Child expressed to the Counsellor. Given that the Notes had already been provided to the parties, they had the information necessary to run their respective cases. They could lead evidence and cross-examine on their parenting styles, relationships with the Child and events culminating in the Child receiving counseling, how the Child was coping with parental conflict and what arrangement would be the most suitable.

The Child had never intended for their most personal reflections, opinions and feelings that had been shared with their Counsellor in a private setting to be relied on in court proceedings. The Court also set out that the Notes may not be accurate to the Child's actual feelings and/or views. The Notes reflect the Child's ongoing process of addressing a wide range of issues that they find important to *them*, which have nothing to do with the issues their parents are fighting over. The Notes captured the Child's immediate reactions, which will often be incomplete and not fully developed, to specific events and experiences. Relying on the Child's statements made during counselling sessions to guide the Court unfairly places the responsibility for the parenting outcome on the Child, who was in need of a safe place, shielded from their parents' interference *because* of their parents' conflict.

Everyone with a Valid Exclusion Take One Step Forward . . . Not so Fast Mr. Najm

Najm v. Najm (2026), 23 R.F.L. (9th) 16 (Ont. C.A.) — van Rensburg, Miller and Sossin JJ.A.

Sometimes there is more to a claim that property is excluded than meets the eye.

The husband and wife married in Pakistan in 1985. They relocated to Ontario in 2000. In or around March 2005, the couple started to have issues, and in October 2005, the husband participated in a "bare" Talaq divorce — of no legal effect in Canada: *Abraham v. Gallo* (2022), 81 R.F.L. (8th) 278 (Ont. C.A.); *Dahroug v. Hassan*, 2024 CarswellOnt 10235 (C.A.).

Shortly thereafter, the husband's father swore a declaration in Pakistan about gifts he and the husband's mother allegedly gave to the husband. The declaration stated that the gifts were for the husband's sole benefit and were not to become part of the husband's Net Family Property.

After that, the husband removed the wife as a beneficiary under his will.

In March 2006, the husband's father (who lived in Pakistan) incorporated Safina Investments Inc. ("Safina") in Ontario. Safina was a real estate holding company to be operated by the husband and his brother.

The husband's father was issued 313 common shares in Safina, and he then transferred 10 shares to each of the husband and his brother. In July 2006, the husband's father signed an affidavit in Ontario swearing to the truth of his earlier gift declaration and made a will dividing his estate equally between his two sons. The will specified that income on inheritance was not to fall into Net Family Property, as allowed by the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"). Upon the husband's father dying in July 2011, the husband received half of his father's Safina shares valued at \$530,000.

Each of the husband and wife sought exclusions during their 12-day trial. Some exclusions were accepted and some denied for each party. However, the trial judge, Justice Jarvis, rejected the husband's claimed exclusion of his 50% shareholdings in Safina — on the basis that no documentary evidence corroborated that the father had provided the original funding for Safina. His Honour noted that the husband knew about the *FLA* exclusion rules when Safina was established and had motive to structure his finances to evade future claims by the wife as evidenced by his religious divorce, the declaration signed by his father and the new will. Justice Jarvis was also not taken with the husband's testimony that Safina had been incorporated as part of his father's inheritance plan, since it was unclear why the husband's father personally needed to incorporate Safina when he could have just sent his son — the husband — the funds for Ontario property investments.

The claimed exclusion was not allowed. A \$353,752 equalization payment was found owing to the wife. And the husband appealed.

The main question we're interested in is whether the trial judge erred by requiring the husband to prove that *his father* was the source of the funds used to establish Safina?

On the appeal, the husband argued that the trial judge erred in expanding on the s. 4(2) of the *FLA* exclusion provisions by requiring that the husband prove an absence of fraud or misconduct intended to evade the *FLA*. The husband argued that the trial judge had ignored the documentary evidence confirming that a gratuitous transfer of the shares had taken place. According to the husband, unless the wife had alleged — and proven — a fraudulent conveyance, the trial judge was not allowed to look *behind* a properly documented gift when assessing a s. 4(2) exclusion claim.

The Court of Appeal did not agree. It held that Justice Jarvis did not err in concluding that the husband had failed to establish an exclusion for the Safina shares. Justice Jarvis had been justifiably concerned that the husband had structured his affairs with a view to avoiding potential property claims by the wife. His Honour had made well-supported factual findings that the husband had been incentivized to, and had taken, steps to document assets as gifts from his parents — but had failed to provide evidence actually linking money from his father to the subscription for the Safina shares. The fact that the husband's expert witness merely traced assets using a chart prepared by the husband did not help so much.

The Court of Appeal agreed that Justice Jarvis had not engaged in speculation that the husband had, in fact, transferred funds to his father to fund the Safina share subscription. The Court of Appeal agreed that the husband should have been able to provide evidence that the share funding came from his father so as to be a valid gift and inheritance. In fact, the *absence* of this evidence sharply contrasted with the husband's other well-documented exclusion claims. The trial judge did not speculate; rather, he applied the rules of evidence and accepted that the husband bore the burden of proof:

[23] . . . In many cases, the focus in applying this exclusion will be on tracing the property in question back to a gift or inheritance from a third party, and there will be no need for proof of the funds used by the donor to acquire the asset. In this case, however, the trial judge was concerned that the husband had structured his affairs with a view to avoiding potential property claims by the wife. The trial judge made findings of fact that were amply supported by the evidence: that the husband was alive to the concept of exclusion of property from net family property under the *Family Law Act* before Safina Canada was incorporated; that he had the incentive to take steps to insulate himself from a future equalization claim; and that he had already taken steps around the time Safina Canada was incorporated in respect of the father's declaration in Pakistan, confirmed by affidavit in Ontario and the father's new will.

And what does this mean practically? The Ontario Court of Appeal has emphasized that when a spouse claims corporate shares as excluded property, it may not be sufficient to show that the *shares* were gifted from a third party. In some cases, it may be necessary to show that the spouse was not the original source of funds for the corporation.

While in many cases the original source of funds will not be an issue, here the trial judge was specifically concerned that the husband had structured his affairs to avoid potential claims, and those findings of fact were well supported by the evidence. Here, the husband failed to show the origin of funding. And on the facts of the case — including concerns regarding the husband's credibility — this was a problem. In fact, both experts confirmed that they were "unable to find any documentary evidence in what they had been provided to corroborate the husband's claim about the source of the funds." This will not be a concern in all cases where an exclusion is claimed, but here,

[25] . . . The trial judge appropriately concluded that the husband failed to establish that the husband's shares in Safina Canada in fact had belonged to the father such that they could have been gifted and bequeathed to the husband as part of his father's estate.

Have an exclusion? Be prepared to prove it — sometimes, all the way back to the beginning.