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

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It's About Time We Had Another Dog Case

Coates v. Dickson, 2021 CarswellOnt 1430 (S.C.J.) - Baltman J.

Phil loved dog cases. He wrote numerous comments about them in this very newsletter (at least 10 by our count). Some people (including Phil himself in the September 2, 2019 edition of *TWFL*) might even say he was obsessed. He also pioneered the idea of a "Voice of the Dog Report" to ensure that the court would be able to have the best possible evidence about each particular dog's views and preferences. So in honour of Phil, we decided to start this edition of *TWFL* with another dog case - the "tail" of two Labrador Retrievers - Jazz and Jetta.

For four years, Jazz and Jetta lived with their humans, Mr. Coates and Ms. Dickson. When the humans parted ways, they could not decide who would keep the dogs.

The only thing rivaling the animosity between Mr. Coates and Ms. Dickson was their love of 4-year-old Jazz and 3-year-old Jetta. The parties resolved the issue of spousal support, but they could not resolve the issue of possession of the dogs. Each claimed possession/ownership of both dogs, and in the alternative, each sought possession of Jazz. Jetta surely now has a canine inferiority complex.

Justice Baltman started with the usual refrain: no matter how much we humans love our dogs, in the eyes of the law, a dog is a kitchen table, ownership of which must be determined.

As regular readers will recall, the case law reveals two different approaches to determining the ownership of pets. The more traditional and narrow approach turns on who paid for the dog: *King v. Mann*, 2020 CarswellOnt 178 (S.C.J.) at para. 71; *Warnica v. Gering*, 2004 CarswellOnt 5605 (S.C.J.) at paras. 25-28, aff'd 2005 CarswellOnt 3989 (C.A.). This traditional approach views the care and maintenance of the dogs (such as paying vet bills, purchasing food, walking them, etc.) to be wholly irrelevant to ownership.

The broader, more contemporary, more SPCA-friendly approach, considers the relationship between the parties and the pooch - or pooches in this case. This approach has been adopted in several Small Claims Court decisions and has been followed in *Eggberry v. Horn et al*, 2018 CarswellBC 1920 (C.R.T. (S.C.)); *Oh v. City of Coquitlam*, 2018 CarswellBC 1558 (S.C.); *Delloch v. Piche*, 2019 CarswellBC 4117 (Prov. Ct.); and *Almaas v. Wheeler*, 2020 CarswellBC 784 (Prov. Ct.), to name a few. Those principles were summarized in *MacDonald v. Pearl*, 2017 CarswellINS 188 (Small Cl. Ct.) at para. 25:

1. Animals (dogs included) are considered in law to be personal property;

2. Disputes between people claiming the right to possess an animal are determined on the basis of ownership (or agreements as to ownership), not on the basis of the best interests of the animal;
3. Ownership of - and hence the right to possess - an animal is a question of law determined on the facts;
4. Where two persons contest the ownership of an animal, the court will consider such factors as the following:
 - i. Whether the animal was owned or possessed by one of the people prior to the beginning of their relationship;
 - ii. Any express or implied agreement as to ownership, made either at the time the animal was acquired or after;
 - iii. The nature of the relationship between the people contesting ownership at the time the animal was first acquired;
 - iv. Who purchased or raised the animal;
 - v. Who exercised care and control of the animal;
 - vi. Who bore the burden of the care and comfort of the animal;
 - vii. Who paid for the expenses of the animal's upkeep;
 - viii. Whether a gift of the animal was made at any time by the original owner to the other person;
 - ix. What happened to the animal after the relationship between the contestants changed; and
 - x. Any other indicia of ownership, or evidence of agreements, relevant to the issue of who has or should have ownership or both of the animal.

These two competing approaches collided in a case that was heard by three successive levels of courts in Newfoundland (home to one of the top 10 best breeds - the Newfoundland - if you don't mind a little drool): *Baker v. Harmina* (2018), 7 R.F.L. (8th) 283 (N.L. C.A.).

Using the more traditional approach, the Small Claims Court granted ownership of the dogs in that case to Mr. Baker, because he paid for them.

Ms. Harmina was dogged. She believed the Small Claims Court judge to have been barking up the wrong tree. She appealed, and the appeal judge found that the Small Claims Court judge had erred in deciding ownership without considering the full factual matrix of the parties' relationship. She concluded that the parties owned the dog jointly. She ordered that Mr. Baker, who often worked out of town, have the dog while in town and that Ms. Harmina have the dog the rest of the time.

But Mr. Baker would not let sleeping dogs lie, and the dog fight continued in the Newfoundland Court of Appeal which resulted in a split decision. The majority opted for the more traditional approach and expressed the view that joint ownership would be an undesirable result.

Justice Hoegg, in dissent, accepted that, in law, dogs are considered property, but agreed with the first appeal judge that the dog was jointly owned. She noted that people acquire personal property all the time, sometimes jointly, and in so doing often "pay little attention to legal rules respecting exactly who is acquiring title to the property."

Justice Hoegg also took an expansive, holistic view of human behaviour with respect to their furry friends:

[52] Like the SCTD Judge, I am of the view that the ownership of Mya involved much more than a determination of who paid for her at the time of purchase. The ownership of a dog is a more complex and nuanced question than the ownership of, say, a bicycle. In this regard, I see the non-exhaustive list of principles to which the SCTD Judge referred, set out by Adjudicator Richardson . . . as helpful and relevant to determining the ownership of a dog.

As noted by Justice Baltman, that approach was followed by Justice Miller in *Hutchinson v. Hutchinson*, 2019 ONSC 6574, who rejected the idea that "the difficulties which naturally flow from a finding of joint ownership of a pet should themselves preclude such a finding."

Justice Baltman strayed from the classic approach. She found that ownership of a dog is an investment that goes beyond the mere purchase price, and it includes the care and maintenance that are an integral part of "owning" the dog. Separating the purchase price from the upkeep is artificial and unfair - particularly where there were two dogs in issue and, assuming the facts support joint ownership, they could be divided.

The parties each swore affidavits that conflicted. However, as determined by her Honour, on any objective view of the evidence, both parties were significantly vested in both dogs. The following factors were particularly relevant to Justice Baltman:

1. Both dogs were purchased by the parties during their marriage as their family dogs;
2. Although they disagreed on the amounts of their respective contributions, both parties had invested financially in the purchase and upkeep of the dogs;
3. Both parties had made significant contributions of time and energy toward the dogs' welfare and upkeep;
4. Both parties were listed on different official documents connected to the dogs, including veterinary, the municipality, and The Canadian Kennel Club; and
5. Both parties had suffered mental and emotional stress as a result of the separation and believed that the dogs would be therapeutic to their recovery. (Respectfully, we don't see this factor as terribly relevant. It is an after-the-fact justification for the result - or, as one might say, letting the tail wag the dog.)

Based on this evidence, it was a walk-in-the-park for Justice Baltman to conclude that both of the dogs were jointly owned. Both parties were involved in looking after them as family pets. Unfortunately, continued joint ownership was just not possible.

Ultimately, as Jazz was the better watchdog, and had protective qualities that were particularly important to Ms. Dickson, she was awarded Jazz, while Jetta went to Mr. Coates.

A thoughtful decision from a thoughtful judge. But please don't make the mistake of thinking that *all* judges will so sensitively devote resources to the determination of pet ownership. To do so with some may very well land you in the judicial doghouse. (Sorry. Last one.)

No costs. It's a dog-eat-dog world. (Sorry. Lied a bit there.)

The 3 Certainties Ride Again

Xu v. Hu, 2021 CarswellBC 6 (C.A.) - Fenlon, Hunter and Butler JJ.A.

The main issue here was whether the trial judge erred in finding that a corporate-owned family residence was subject to an express trust in the wife's favour, and therefore a family asset. The decision offers an excellent review of the "3 Certainties" with respect to trusts.

The trial judge granted a divorce, declared the family residence to be subject to an express trust in favour of the wife, and divided the interest equally between the spouses.

The parties married in 2002. At the time, the husband was living and working in China. He moved to Vancouver to join the wife (and her son from a previous marriage) and began working in a business owned by the wife's well-to-do parents, Mr. Hu and Mrs. Fan. Parts of the business were the corporate defendants in the case - especially BHIT.

In 2005, BHIT purchased a home in Vancouver (the "property") and the husband and wife (and her son) lived there until the parties separated in 2012. BHIT paid the mortgage, property taxes, and renovation and insurance costs, and the couple paid routine home maintenance and other living expenses. The wife's income taxes included a taxable housing benefit reflecting the use of the property.

Following a 26-day trial, the trial judge found that the property was subject to an express trust in favour of the wife and, like the other family assets, should be apportioned equally between the spouses.

To give some idea as to the difficulties the trial judge had in this case:

[27] This is a case in which I cannot accept all, or even much, of the evidence of any party or its principals. To varying extents, all were careless with the truth, self-serving and argumentative or dissembling while on the witness stand. On balance, [the husband] suffered least from these testimonial deficiencies, but, given their magnitude in others, this is hardly praiseworthy. The net result, mildly put, is that finding facts on disputed matters has been unusually challenging.

[28] [The husband, the wife and the wife's father] all seemed to have trouble answering many of the questions posed on direct and cross examination. Instead, they launched into long soliloquies or rambled off on tangents with regrettable frequency. In addition, none of the three seemed to strive much for factual accuracy. Their trial testimony often differed from contemporaneous documents, previous affidavit or discovery evidence and, when confronted, the common reaction was to shrug off the inconsistency dismissively or project blame elsewhere. For her part, [the wife's mother] mostly parroted what her husband said.

Although the trial judge initially found the husband was the most credible of the least credible, shortly after the trial, circumstances came to light that showed the husband to be equally worthy of credibility condemnation. (In fact, the trial was reopened to accept that evidence and to make further negative credibility findings against the husband.) The trial judge could easily have simply said, "I find that the pants of *all* the primary witnesses are on fire."

The main question before the Court of Appeal was whether the property was subject to an express trust in favour of the wife.

In her reasons, Justice Fenlon noted that express trusts are established where the three certainties are established: certainty of intention, subject, and object; and when the property has been vested in the trustee: *Suen v. Suen*, 2013 CarswellBC 1957 (C.A.) at para. 45. Of course, the onus of establishing each of the certainties is on the party asserting the trust.

As certainty of intention is a question of fact and certainty of subject and object are questions of mixed fact and law, the trial judge's conclusion that the requisite certainties were present was reviewable on a standard of palpable and overriding error (save for any extricable questions of law, which would be reviewed on the standard of correctness): *Grewal v. Khakh*, 2018 CarswellBC 2479 (C.A.) at para. 24.

Justice Fenlon first went to work on the certainty of intention, noting that the settlor's intention is the critical element for the creation of an express trust: *Ted Leroy Trucking Ltd., Re*, 2010 CarswellBC 3419 (S.C.C.) at para. 83. Intention is a matter of substance over form: while the intention may be express or implied, and while the intention may arise from words or acts, and while technical language or specific words need not be used, there must be something from which to derive the intention.

So as to differentiate between gifts and trusts, it is not enough for the purported settlor to have intended for another party to benefit; they must have intended for the other party to benefit on trust. Courts will not construe an "imperfect gift" as a declaration of trust: *Paul v. Constance*, [1977] 1 All E.R. 195 (Eng. C.A.) at 531. Therefore, where the intention to benefit is clear, the crucial inquiry is whether the donor intended the property as a gift or as a trust. If the benefit was *intended* as a gift, the court cannot *convert* it into a trust.

Citing some very old law, Justice Fenlon also agreed that, "the donor should have evinced by acts which admit of no other interpretation, that he himself has ceased to be, and that the other person has become, the beneficial owner": *Heartley v. Nicholson* (1875), L.R. 19 Eq. 233 (Eng. Ch.) at 242.

The situation in B.C. is particularly tricky because, as Justice Fenlon noted, trusts are specifically exempt from the general requirement that *dispositions of land* be evidenced in writing: *Law and Equity Act*, R.S.B.C 1996, c. 253, s. 59(1)(a). The situation in Ontario appears to be different: *Hartstein v. Ricottone Estate*, 2016 CarswellOnt 18704 (C.A.); *Goldman v. The Queen*, 2021 CarswellNat 453 (T.C.C. [General Procedure]); *Statute of Frauds*, R.S.O. 1990, c. S.19, ss. 9 and 10.

The trial judge accepted that certainty of intention was established because Mr. Hu (the wife's father) had "unambiguously" told the wife and others that the property was being gifted to her, and that the reason for the trust was to protect the wife's interest in the house from claims by the husband. However, he failed in that objective because pursuant to the s. 58(3) of the B.C. *Family Relations Act*, R.S.B.C 1996, c. 128 (the governing statute at the time) a trust property that would be a family asset if owned by a spouse was a family asset.

In addressing the remaining elements of an express trust, the trial judge said:

[166] The first certainty is thus established. The same is true of the second and third. The subject of the trust is the equity in the [property]. The only person intended to benefit is [the wife], who is its object. Although [the wife's father] referred to [the husband] in some of the statements he made, given the nature and circumstances of the family relationship and his other conduct, I find he intended to give the beneficial interest in the house to [the wife] alone.

Justice Fenlon respectfully disagreed, and held that the findings of fact relied on by the trial judge fell short of establishing the certainties of intention and object.

First, the trial judge had found that the wife's father had told his daughter and others that the property was being *gifted* to the wife. And while the word "gift" is not conclusive, there is a presumption that parties usually intend to gift, but rarely intend to constitute themselves as trustees.

Second, the trial judge found that the wife's father had told the husband that the property was for both spouses, and that it would eventually be transferred into their joint names. Justice Fenlon found these statements to be consistent with an intention to make a *future gift to both spouses* and not supportive of an intention to immediately transfer a beneficial interest to anyone - let alone the wife alone.

Third, the trial judge accepted the evidence of a third party guest at a dinner party that was hosted by the wife's parents shortly after the property was purchased. The witness testified that the wife's father told the guests that he had purchased the property for his daughter and son-in-law "to live in." This evidence was ambiguous - it could support a gift, a trust or neither.

Finally, the trial judge accepted statements from another witness to the effect she was told that the property had been purchased as a gift for the spouses. However, while these statements suggested that the property was intended to benefit both spouses, the trial judge relied on the "nature and circumstances of the family relationship and [the wife's father's] other conduct" to conclude that he intended the beneficial interest to pass only to his daughter. This contradicted the very words relied on allegedly to create the trust and suggested that the trial judge was relying on the subsequent poor relationship between the wife's father and the husband - when the time to determine certainty of object was the time the trust was created: *Champoise v. Champoise-Prost Estate*, 2000 CarswellBC 1405 (C.A.) at para. 16.

The wife's father's later change in attitude towards the husband *after* the date on which the trust was alleged to have been created could not be used to override the intention he expressed that the house was purchased for both his daughter and the husband.

Therefore, Justice Fenlon was of the view that the findings below did not actually establish the certainties of intention and object required to establish an express trust. Rather, the statements relied on were consistent with either an imperfect gift or an unenforceable gratuitous promise to transfer the house at some future date.

As a result, the declaration that BHIT held the property in trust for the wife was set aside.

Peripherally, the Court of Appeal agreed with the trial judge's conclusion that a whole life insurance policy owned by the wife at the time of marriage was a family asset because it was ordinarily used for a family purpose. While the wife argued the trial judge erred in that finding because her parents' company paid the premium and because the wife's parents were the beneficiaries, the policy had cash surrender value that the wife could have cashed and used at any time. Therefore, the policy had provided the parties with a "measure of security," which was a family purpose within the meaning of s. 58 of the *Family Relations Act*.

Justice Fenlon also upheld the trial judge's decision that certain properties the husband acquired after separation were not family assets. Under the *Family Relations Act* (again, the statute in force at the time), assets acquired by a spouse after the "triggering event" were not "family assets": *Foster v. Foster* (2007), 37 R.F.L. (6th) 139 (B.C. C.A.), and here the separation occurred long before the husband purchased the properties in question.

Finally, notwithstanding the rather severe findings regarding the credibility of the parties, the question arose as to whether the trial judge erred in ordering the parties to each bear their own costs. Below, in a stunning lack of self-reflection, each party had claimed elevated costs pointing to the "bad litigation conduct" of the other. As held by the trial judge:

[38] . . . I conclude that all concerned engaged in litigation misconduct in that each of [the husband, the wife and the wife's father] sought to mislead the court in various ways and provided unreliable testimony. These actions prolonged the trial and made the resolution of all the claims extraordinarily difficult. In the end, success was divided, although [the husband] did succeed to some extent on some major issues such as the validity of the Chinese divorce agreement and the existence of the express trust in the equity of the [property]. Nevertheless, I conclude that the litigation misconduct of all concerned disentitles all of them to costs, and I order that all of the parties bear their own costs.

And, for good measure, the Court of Appeal did not award costs either, "as an expression of this Court's censure of the parties' cavalier disregard for the oaths and affirmations they made to tell the truth."

Why are prosecutions for perjury so rare?

When "Reasonable" Isn't "Enforceable"

J.D. v. M.C. (2020), 46 R.F.L. (8th) 138 (Ont. S.C.J.) - Charney J.

This case warns of a potential drafting issue regarding access/parenting schedules of which counsel must be aware. To be candid, on first reading the decision (which just recently came to our attention), we thought it was wrong. However, on further thought, it is not that the decision is wrong; rather, it is the legally correct but unfortunate result of well-intentioned counsel.

M.C. and J.D. were the biological parents of K, a 9-year-old child.

P.D. and B.D. were J.D.'s parents.

On December 15, 2019, the parties entered into a Consent Order.

The Consent Order provides for only two things:

1. J.D., P.D. and B.D. were to have joint custody of the child; and
2. M.C. was to have "reasonable access on reasonable notice as agreed by the parties."

That was it. Or so it would have seemed.

The parties could not, in fact, agree on M.C.'s access to the child.

M.C. brought a motion to be added as a custodial parent, and J.D. responded with a motion for an order that M.C.'s access be supervised.

There was a long and unfortunate history of conflict between M.C. and J.D. Both M.C. and J.D. had a history of substance abuse (although both had undergone treatment and, at the time of the motion, were in recovery). J.D. also alleged a history of abuse that M.C. denied.

Quite properly, Justice Charney found it was not necessary to review the history of the relationship. The parties had consented to an order for "reasonable access", and that Order had to be the starting point. The question was not whether M.C. should have been granted "reasonable access" at the time of the Consent Order, but whether there had been a material change in circumstance since that order was made: *Meitine v. Grigoryan*, 2019 CarswellOnt 22183 (S.C.J.) at paras. 13-15; *Norris v. Morocco*, 2020 CarswellOnt 5361 (S.C.J.) at paras. 23-26.

M.C. swore that, immediately prior to the Consent Order, he had enjoyed regular access with the child. However, J.D. then became unresponsive to M.C.'s access requests.

Shortly after the COVID-19 crisis began, M.C. was advised that further access, including video conferencing, was suspended. J.D. took the position that the child was "extremely upset" after access, and that the access visits had been distressing for the child and causing him psychological and emotional harm.

J.D. provided some medical reports indicating that the child had multiple difficulties including elevated phobias, separation anxiety, elevated levels of developmental delay and an elevated preoccupation with death. He had been diagnosed with excessive anxiety, obsessive thoughts, oppositional defiance disorder, and a persistent pattern of hyperactivity and impulsivity. However, most of the reports (some of which confirmed an autism spectrum disorder) pre-dated the Consent Order. That is, the child's emotional and mental health issues were known to the parties prior to the Consent Order. And none of the reports spoke to J.D.'s access or the need to curtail it.

P.D. and D.B argued that the Consent Order was clear as written, and that if M.C. did not agree to supervision, then there was no "agreement" on access. Justice Charney disagreed. He found that strained interpretation to be contrary to both the plain wording and spirit of the Consent Order. (Orders, including consent orders, are to be interpreted based on their plain wording, not on the impressions or subjective understandings of one or both parties: *Mazepa v. Embree*, 2014 CarswellAlta 2286 (C.A.).)

As noted by Justice Charney, "reasonable access on reasonable notice" is a common term frequently found in custody and access agreements. While it lacks precision, it offers flexibility where a fixed access schedule may not be practical. It requires some additional cooperation and agreement between the parties to make it work. However, where parties are not able to cooperate, it can result in further litigation.

The Consent Order in this case provided for "reasonable access on reasonable notice as agreed by the parties". Therefore, the fact of access was agreed to as an essential term. Justice Charney found that the phrase "as agreed by the parties" related to the incidental details of access necessary to make the agreement operative. These include incidental details such as day(s) of the week, starting time and duration, or location of pick up and drop off.

In *Bhasin v. Hrynew*, 2014 CarswellAlta 2046 (S.C.C.), the Supreme Court of Canada recognized a general organizing principle of contract law to be good faith contractual performance. And in *C.M. Callow Inc. v. Zollinger*, 2020 CarswellOnt 18468 (S.C.C.), the Court expanded on the notion of good faith in contract performance. The Court held that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. And while the Supreme Court in *Bhasin* and *Callow* were dealing with commercial parties, the principles apply with even greater force in the family law context: *Lopatowski v. Lopatowski* (2018), 3 R.F.L. (8th) 411 (Ont. S.C.J.) at paras. 57 and 58. The principle of good faith and honest contractual performance would require that the parties take the steps necessary to make the agreement operative.

Therefore, Justice Charney was left in a situation where neither party supported the Consent Order. Justice Charney then stated a proposition of law with which we do not entirely agree:

[51] Once all of the parties to the consent order ask the court to amend or set aside the order, the consent order has served its initial purpose and should be set aside on the consent of the parties. While they disagree on what should happen next, they all agree that the consent order is not working.

Once the jurisdiction of the court is invoked to make a consent order - especially one that involves the best interests of children, a court need not set it aside just because the parties request it: *Richardson v. Richardson* (2019), 35 R.F.L. (8th) 265 (Ont. C.A.); *Novak v. Novak*, 2020 CarswellINS 199 (C.A.). When a consent order involving children is signed, it is presumed that the court discharged its duty to ensure that the order met the best interests of the children: *Cheng v. Li* (2015), 69 R.F.L. (7th) 306 (Alta. C.A.).

Therefore, it stands to reason that a consent order regarding children cannot just be withdrawn on consent. Here, however, there were other issues with the Consent Order.

In this case, access was an essential term of the agreement that supported the Consent Order. What was left to be agreed upon were the details (which, of course, is where the devil is). Here, there was no agreement as to access; there was only an "agreement to agree" - which is no agreement.

As a consent order may be set aside on the same grounds as the agreement giving rise to it, there was actually no enforceable agreement supporting the Consent Order: *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.); *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.); and *Shackleton v. Shackleton* (1999), 1 R.F.L. (5th) 459 (B.C. C.A.). A consent order may be set aside if the agreement giving rise to it is unenforceable at common law.

Justice Charney noted the fundamental principle of contract law that an agreement must state the essential terms with sufficient certainty, otherwise there is no agreement. The contractual principle of "certainty of terms" was described by the Ontario Court of Appeal in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CarswellOnt 836 (C.A.) at paras. 21-22:

However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all.

.....

If no agreement in respect to essential terms has been reached or the terms have not been agreed to with reasonable certainty, it can only be concluded that such terms were to be agreed upon at a later date and until that time there would be no completed agreement.

This principle was further confirmed in *Bogue v. Bogue* (1999), 1 R.F.L. (5th) 213 (Ont. C.A.) at para. 12. Therefore, if P.D.'s and B.D.'s interpretation of the Consent Order was correct, none of the essential terms of the agreement were agreed to. Even the meaning of "reasonable access" was subject to future agreement. This would be nothing more than an unenforceable "agreement to agree".

Then, because the two paragraphs of the Consent Order were clearly meant to be a "package deal" - M.C. agreed to grant custody to J.D., P.D. and B.D. in exchange for his continued access - if the provision relating to access was set aside, so too would the provision relating to custody. Accordingly, held Justice Charney, the Consent Order had to be set aside in its entirety.

At first blush, as noted at the outset, this decision sounds wrong. But on further thought, while it may not be uncommon for parties to agree to "reasonable access", that is not an agreement. That is just an "agreement to agree" in the future as to the reasonable terms of access. The addition of the qualification "as agreed by the parties" only clarifies the fact that Justice Charney

was correct. The court will not enforce an "agreement to agree" or a list of "guiding principles" to be further negotiated into specific rights and obligations: *Berthin v. Berthin* (2016), 76 R.F.L. (7th) 58 (B.C. C.A.) at paras. 47-48.

It is no answer to say that the court could determine the meaning of "reasonable access", as that is just asking the court to make an agreement for the parties. This would be no different than parties settling property division by agreeing that "party A will pay a reasonable sum to party B for property division." That is not an agreement. The court will adjudicate for the parties, but it will not (and cannot) make an agreement for them: *Tether v. Tether* (2008), 56 R.F.L. (6th) 250 (Sask. C.A.).

Justice Charney set aside the Consent Order, and wisely ordered that the parties attend a Case Conference before any additional motions were to be heard or any final orders made. He also ordered the involvement of the Children's Lawyer.

While Justice Charney did set aside the Consent Order, he was not persuaded that there should be any change in custody at that time. Accordingly, he allowed the custody provision to continue on an interim and without prejudice basis. He also ordered that M.C. could continue to have access to the child pursuant to a specific interim schedule. How to avoid this situation? Easy. In the consent order, specify that "if the parties cannot agree on reasonable access, the issue will be determined by the Court." And that closes the loop.

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