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— Franks & Zalev - This Week in Family Law

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Contents

We Admit We Don't Often Think About Admissions

Champoux v. Jefremova, 2021 CarswellOnt 1716 (C.A.) - van Rensburg, Hourigan and Brown JJ.A.

Formal admissions are important.

A formal admission is not like other evidence at trial that is generally weighed. Rather, a formal admission is *conclusive* of the matter admitted, and a court must act on a formal admission, even if other evidence contradicts it: *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.) at para. 106.

While a trial judge may interpret what an admission means, that interpretive exercise cannot ultimately question the truth of the admission.

Therefore, what is or is not an admission can be crucial, and in *Champoux v. Jefremova*, the Ontario Court of Appeal opined that when a party refuses to admit a fact in a Request to Admit, the *reason for the refusal can become an admission in and of itself*, and it cannot just be withdrawn. [1] An "admission" can be the reason for a refusal to admit a fact.

The purpose of the Request to Admit procedure is to save time and cost by narrowing the facts in issue. If a litigant could deny a fact in a Request to Admit on the basis that alternate facts are accurate, but then treat those alternate facts as non-binding, this purpose would be undercut. To allow that would obfuscate rather than clarify the facts in issue.

By way of example, suppose Wife asked Husband to admit that Husband quit his job after separation because Husband was expecting a large inheritance. And, in response, Husband refused to admit that fact, and responded that he did not quit but that he was fired because of insubordination. The fact of termination because of insubordination would be an admission, and Wife could use that fact in her support claim. Or suppose Husband refused to admit that fact, and responded that he quit because he was suffering from severe mental health issues. Those mental health issues would then be admitted, and could possibly come into play with respect to custody matters.

The practice point to take from this? Be careful what you admit. Be careful what you don't admit. And remember that the reason for any refusal can be held against you.

The New Brunswick Court of Appeal Takes s. 17(10) Out for a Spin

Rayworth v. More, 2021 CarswellNB 54 (C.A.) - Green, Baird and French JJ.A.

The New Brunswick Court of Appeal's recent decision in *Rayworth v. More* is now one of the most comprehensive appellate level decisions about s. 17(10) of the *Divorce Act*, which deals with varying a time-limited spousal support order after the payments have already expired. The other is *Therrien-Cliche c. Cliche* (1997), 30 R.F.L. (4th) 97 (Ont. C.A.).

The parties separated in 2013 after 19 years of marriage. Their child was born in 2001, the husband left the workforce to be a stay-at-home parent, while the wife continued working as an engineer to support the family. The husband did not return to the workforce for the rest of the marriage (i.e. the next 11 years).

When the parties separated, they consented to a final order that provided, among other things, that the wife would pay the husband $3,114 a month in fixed and non-variable spousal support from November 2014 to June 2019.

The agreed-upon duration was significantly less than what was provided for by the *SSAG*. According to the wife, however, the shortened duration was part of a global settlement that also required her to make support payments at a level greater than the high range of the *SSAG*, and to make these payments no matter what happened (e.g. she would have to continue paying the $3,114 a month even if she became ill or lost her job).

The parties also signed an agreement confirming that the terms of the order were "equitable and appropriate in the circumstances with particular regard to the objectives and factors contained in sections 15 and 17 of the *Divorce Act*", and that the final consent order constituted a "full settlement of all claims and demands for their own support or maintenance, past, present or future[.]"

Shortly after the wife made the final support payment, the husband brought a motion to vary the order. He argued that the consent order did not properly reflect the *Divorce Act* factors and objectives, and that, despite his best efforts, he had not been able to become economically self sufficient. Accordingly, he asked that the order be varied to require the wife to continue paying spousal support indefinitely.

Because the husband waited until after the court-ordered spousal support payments had ended, his motion was governed by s. 17(10) of the *Divorce Act*. Thus he was required to establish not only that there had been a material change in circumstances, but also that a variation was necessary to relieve economic hardship related to the marriage:

> 17(10) Notwithstanding subsection (1), where a spousal support order provides for support for a definite period or until a specified event occurs, a court may not, on an application instituted after the expiration of that period or the occurrence of the event, make a variation order for the purpose of resuming that support unless the court is satisfied that
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> > (a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4.1) that is related to the marriage; and
> >
> > (b) the changed circumstances, had they existed at the time of the making of the spousal support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.

There were significant problems with the husband's case, including that the evidence clearly showed that the parties both clearly knew the husband might not find employment anytime soon when they consented to the final order. The husband also had a net worth of almost $500,000 that he could use to support himself without support from the wife, and he had not established that his financial difficulties were caused by a change in circumstances that was related to the marriage.

Not surprisingly, therefore, the husband's motion was dismissed.

The husband appealed the motion judge's decision to the New Brunswick Court of Appeal on both procedural grounds and on the merits. The Court could have probably disposed of the husband's appeal on the merits with brief reasons confirming that the motion judge's decision was owed significant deference, and that the husband had not established an error in principle, a significant misapprehension of the evidence, or that the award was clearly wrong (*Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) at para. 11).

Instead (and fortunately for us since there are not many decisions that meaningfully dealt with s. 17(10)), the Court of Appeal used the case as an opportunity to provide a helpful summary of the principles that govern requests to vary/extend time limited spousal support orders:

> • "As a matter of public policy, stricter criteria apply when a variation of an expired time-limited spousal support order is sought. Once paid, if they were subject to variation indefinitely, these orders would be rendered meaningless." [para. 18]
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> • "When a judge signs an order in which there are provisions for time-limited spousal support, as in this case, there is a presumption the entitlement question has been satisfactorily dealt with. The material change analysis becomes critical, more so in those cases where the time-limited support order has expired." [para. 22]
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> • To establish economic hardship for the purposes of s. 17(10), "the moving party must provide detailed financial disclosure and prove the economic hardship is related to the marriage." [para. 26]
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> • "Economic hardship that arises from extrinsic circumstances unconnected with the marriage, such as an involuntary loss of employment due to illness or disability or an inability to find employment before expiry of the fixed-term that is unrelated to the duration of and functions performed during the marriage and arises solely by reason of the economic climate, falls outside the protection of section 17(10) of the *Divorce Act*." [para. 27]
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> • "Where the termination date arises from spousal agreement, the original order will be assumed to have correctly and equitably redistributed the economic consequences of the marriage and its breakdown and the order will be varied only when the changed circumstances distort the equity of the original redistribution of those economic consequences when measured by the objectives defined in sections 15(7) and 17(7) of the *Divorce Act*." [para. 27]

As these statements make abundantly clear, it is - as it should be - exceedingly difficult to extend a time-limited spousal support order after it has already expired. So if you are acting for a recipient who has been out of the workforce for many years, you must think carefully before recommending a settlement that includes a time-limited spousal support arrangement. Either your client needs to get meaningful consideration in exchange for agreeing to a fixed term (e.g. in *Rayworth* it appears that the husband received a guaranteed stream of income from the wife in an amount greater than what he would otherwise have been entitled to), or perhaps the better course of action would be to either insist that the payments be subject to the usual material change threshold, or that the payments can be reviewed at some point in the future.

With respect to the husband's appeal on procedural grounds, he argued that the motion judge should have adjourned the matter and scheduled a hearing with *viva-voce* evidence. While the Court of Appeal agreed with the husband that *viva-voce* evidence will often be required to resolve conflicting affidavit evidence when dealing with a request to vary a support order, it concluded that it is ultimately up to the individual motion judge to decide what is actually necessary in the circumstances of each particular case:

> [36] A judge has control over his or her court and may dispose of a motion in a variety of ways (Rule 37.10). In my view, **when a motion judge is satisfied that he or she has sufficient and reliable evidence before him or her to decide the germane issue in dispute, he or she has a wide, but not unfettered, discretion to proceed in the manner he or she determines is in the interests of justice**. This is a vested discretion to which deference is accorded. In full compliance with the *Rules*, parties need to put their "best foot forward" in their affidavits, as there is no guarantee a judge will want to hear *viva voce* evidence during a motion hearing. **Given the crowded dockets and the lengthy delays in obtaining trial dates in certain judicial districts, it would become impractical and would interfere with the administration of justice if every motion to vary a support order were to be decided in the same way as a trial**.
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> . . . . .
>
> [41] In this case, the judge was required to conduct an analysis, narrowly circumscribed. His job was not to conduct a *de novo* trial on entitlement. **Not every case where there are conflicting affidavits requires a hearing**.

. . . . .

> [43] Surely, in keeping with Rule 1.03, **when a judge determines that he or she can make findings of fact, findings of credibility and can apply the relevant legal principles, from the affidavit evidence, a judge need not hear oral evidence**. In those cases where a judge is not satisfied the matter can be properly adjudicated on the basis of conflicting affidavits, he or she may still order a hearing and require *viva voce* evidence when it is determined necessary to do so in the interests of justice (Rule 39.02). [emphasis added]

In this case, the Court of Appeal was satisfied that the motion judge had conducted the hearing properly, and that *viva-voce* evidence would not have changed the fact that the husband had simply failed to prove his case:

> [44] In this case, the judge assessed the credibility of the affidavit evidence and he applied the criteria. He found there was sufficient evidence to enable him to properly adjudicate the motion, applying the criteria, as noted. The conflicting affidavits were not material to the result because the appellant failed to prove his case. I would not interfere with his decision and I would dismiss this ground of appeal.

The other significant problem the husband faced was that he had not clearly objected to the case being dealt with on a paper record, and his lawyer only requested a hearing with *vive-voce* evidence *after* he was already well into his submissions on the merits. Having not adequately pursued the request for an oral hearing in the court below, it was difficult for the husband to seriously suggest that the motion judge somehow erred in not granting one.

Lack of Evidence re. Income Imputation - What's a Trial Judge to Do?

Jonas v. Pacitto (2020), 49 R.F.L. (8th) 56 (Ont. C.A.) - Trotter, Hourigan and Jamal JJ.A.

Ms. Jonas and Mr. Pacitto married in 2003 and separated in 2016. When they married, Ms. Jonas was 42 and Mr. Pacitto was 66. They executed a Marriage Contract before the wedding. It provided that, upon separation, the parties would be separate as to property. Ms. Jonas also released her right to claim spousal support.

Ms. Jonas came to Canada from Hungary as a refugee claimant in 2001. She was married and had three adult children. Mr. Pacitto immigrated to Canada from Italy in 1958. He was married to his first wife for 40 years, until she died in 2000.

Mr. Pacitto acquired a number of properties while married to his first wife.

The parties commenced their relationship in 2002, and Ms. Jonas moved into Mr. Pacitto's home. They entered into a Cohabitation Agreement on January 15, 2003, which released all property claims but was silent as to support. The Cohabitation Agreement was eventually replaced by the Marriage Contract that was the subject of the trial.

At trial, Ms. Jonas tried to set aside the Marriage Contract.

Justice Kaufman found that the Contract was valid and binding as it applied to the division of property. However, in applying *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), his Honour found that Ms. Jonas' financial circumstances at the time of trial warranted overriding the support release. He ordered Mr. Pacitto to pay Ms. Jonas lump-sum spousal support of $40,000.

During the trial, the parties provided very different versions of how the Marriage Contract came to be. In detailed reasons, however, Justice Kaufman explained why he preferred the evidence of Mr. Pacitto on major issues, which led to the following critical findings:

- He found that Ms. Jonas signed the Marriage Contract after getting advice from a paralegal, Ms. Simms, and that she signed the Contract at the lawyer's office where Ms. Simms worked. Someone from the same law office translated the document for Ms. Jonas into Hungarian, and another person properly witnessed it.

• Although Ms. Jonas did not see a lawyer, that was a choice she made. Ms. Simms, although a paralegal, told Ms. Jonas not to sign the Contract as it was not fair. At that point in time, Ms. Jonas had options she chose not to pursue.

• Ms. Jonas signed the Marriage Contract before the wedding, not afterwards.

• Ms. Jonas was told that if she did not sign the Contract, there would be no wedding. However, based on Ms. Jonas' own testimony, she was indifferent about returning to Hungary.

It is worth remembering that, while there are many preconditions to a valid domestic contract in Ontario, independent legal advice is not actually one of them. Independent legal advice is unquestionably preferable, and can inoculate a contract against claims such as duress, mistake, unconscionability, and *non est factum*; but it is not a precondition to a valid and binding contract. It is more of a situational requirement. See *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.) at para. 11; *Raaymakers v. Green* (2004), 4 R.F.L. (6th) 120 (Ont. S.C.J.), aff'd (2006), 25 R.F.L. (6th) 54 (Ont. C.A.); *Smith v. Smith* (2017), 3 R.F.L. (8th) 399 (Ont. C.A.); and *Freake v. Freake* (2004), 50 R.F.L. (5th) 1 (N.L. C.A.).

Here, Justice Kaufman found, on the evidence, that Ms. Jonas understood the terms of the Contract and, despite the advice she did receive, opted to sign the Contract and proceed with the marriage.

Justice Kaufman accepted that Mr. Pacitto wanted to protect the property he acquired before he even met Ms. Jonas. His Honour also noted that Mr. Pacitto's net worth grew solely due to the increase in the value of his property - not as a result of any efforts by Ms. Jonas. This finding protected Mr. Pacitto from having to pay what would otherwise have been an equalization payment of almost $2.5 million based on a very short marriage.

In considering the spousal support release and the weight to afford the Contract, Justice Kaufman found that it passed the first stage of the test from *Miglin v. Miglin*:

> [123] Despite the fact that neither party was proficient in English, I find that the conditions in which the contract was negotiated, while not perfect, pass the initial stage of inquire [sic] required by the Supreme Court in *Miglin*. **In doing so I am mindful of all of the allegations of circumstances of oppression, pressure or other vulnerabilities argued before me as well as the absence of negotiations in the execution of the contract**. [emphasis added by Court of Appeal]

The Contract did not fare quite as well when considering the second stage of *Miglin*. Here, Justice Kaufman decided to award spousal support notwithstanding the support release; however (according to the Court of Appeal), he did so pursuant to s. 33(4) of the *Family Law Act*, R.S.O. 1990, c. F.3, which is a bit odd. As the parties were married, we must *presume* that neither party had claimed a divorce, otherwise the proper analysis would have been pursuant to s. 15.2(4) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) and *Miglin*, and not the provincial legislation (which also sets the standard at "unconscionability" not "unfairness"). However, as the lower court decision does not appear to be available, for now this remains a bit of a mystery.

Justice Kaufman determined that Ms. Jonas earned annual income of only $15,564, whereas Mr. Pacitto earned $24,226 (which finding, as we will see, was challenged by the Court of Appeal). While Ms. Jonas submitted that, for the purposes of support, the Court should impute an annual income of $250,000 to Mr. Pacitto, that submission was based on an assertion that a construction company once owned by Mr. Pacitto generated substantial revenue. However, there was absolutely no evidence on which Justice Kaufman could have relied on to support that submission.

Justice Kaufman also rejected the submission that he should impute additional income to Mr. Pacitto from the properties he owned (and we will see this paragraph again later):

> [133] [Ms. Jonas'] income is $15,564.00 according to her financial disclosure submitted to the court. [Mr. Pacitto's] income is declared at $24,226.00. The court heard evidence of rental income received from the rental of 174 and 180 Weldrick as well as for a large portion of 176 where [Mr. Pacitto] resides in the lower or two basements. **This issue was not fully explored by [Ms. Jonas] in cross-examination of [Mr. Pacitto]. It leaves the court in a difficult position of determining [Mr. Pacitto's] income. The court cannot speculate on what the precise income of [Mr. Pacitto] is in the absence of**

> **evidence received at trial. The court also cannot speculate as to the expenses of maintaining the realty taxes and mortgages on the subject properties**. [emphasis added]

Being unable to create something from nothing, based on the financial information before him, Justice Kaufman calculated that support should be paid indefinitely in the range of $127-$170 per month; this then translated to the $40,000 lump-sum award to Ms. Jonas.

Ms. Jonas appealed both the finding that the Contract was binding and the award of lump-sum spousal support.

At the Court of Appeal, Ms. Jonas argued that Justice Kaufman should have found that, on the entirety of the evidence, she satisfied the requirements to set aside the Contract in its entirety. She relied on her lack of proficiency in English; the lack of independent legal advice; the lack of negotiation; her economic dependency on Mr. Pacitto; and the prospect of having to return to Hungary - all of which she argued created vulnerabilities that undermined the validity of the Contract.

The Court of Appeal did not accept these submissions, as they could not succeed based on Justice Kaufman's findings. Each of the issues raised by Ms. Jonas was specifically addressed by Justice Kaufman. Ultimately, Ms. Jonas made choices, and the consequences of those choices were hers.

The Court of Appeal emphasized that a trial judge's findings of fact, including credibility assessments, are entitled to substantial deference on appeal, "*especially in family law cases*". This is at least the third time the Ontario Court of Appeal has suggested that a trial judge's findings of fact are entitled to some sort of "super priority": *Rados v. Rados* (2019), 30 R.F.L. (8th) 374 (Ont. C.A.); *Levin v. Levin*, 2020 CarswellOnt 13548 (C.A.); and now here. We are not entirely sure why family law findings of fact are "especially" entitled to deference. Just as there is only one civil standard of proof [*F.H. v. McDougall*, 2008 CarswellBC 2041 (S.C.C.)] one would think there would be only one standard of deference to factual findings. That said, such sentiment should help appellate counsel about 50 percent of the time.

However, the Court of Appeal was of a slightly different view with respect to the spousal support order below.

As at trial, counsel for Ms. Jonas argued that Justice Kaufman ought to have imputed further income to Mr. Pacitto from his properties.

According to the Court of Appeal, despite the high standard of deference to support orders made by trial judges (*Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.); *Mason v. Mason* (2016), 83 R.F.L. (7th) 1 (Ont. C.A.); *Berger v. Berger* (2016), 85 R.F.L. (7th) 259 (Ont. C.A.)), "the unique circumstances of this case require[d] intervention by this court."

The Court of Appeal then continued:

> [46] . . . The trial judge's dissatisfaction with the record before him was understandable. However, both parties must share the responsibility for this state of affairs. Although Ms. Jonas had the onus of demonstrating why income should be imputed to Mr. Pacitto, and in what amount, Mr. Pacitto was required to make proper disclosure of all sources of income, but failed to do so.

This is a troubling statement given the current state of the law. There does not appear to have been any suggestion that Mr. Pacitto had in any way defaulted on his disclosure obligations; and courts across the country have been quite consistent that the onus is on the party looking to impute income to establish an evidentiary basis and rationale for doing so: *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.); *T. (S.L.) v. T. (A.K.)* (2009), 77 R.F.L. (6th) 67 (Alta. C.A.); *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.); *Nielsen v. Nielsen* (2007), 47 R.F.L. (6th) 26 (B.C. C.A.); *E. (C.L.) v. R. (B.M.)* (2010), 86 R.F.L. (6th) 26 (Alta. C.A.); *White v. White* (2015), 62 R.F.L. (7th) 1 (N.S. C.A.); *Drover v. Drover*, 2020 CarswellNfld 56 (C.A.).

Again, Justice Kaufman specifically said:

> [133] [Ms. Jonas'] income is $15,564.00 according to her financial disclosure submitted to the court. [Mr. Pacitto's] income is declared at $24,226.00. The court heard evidence of rental income received from the rental of 174 and 180 Weldrick as well as for a large portion of 176 where [Mr. Pacitto] resides in the lower or two basements. **This issue was not fully explored by [Ms. Jonas] in cross-examination of [Mr. Pacitto]. It leaves the court in a difficult position of determining [Mr. Pacitto's] income. The court cannot speculate on what the precise income of [Mr. Pacitto] is in the absence of evidence received at trial. The court also cannot speculate as to the expenses of maintaining the realty taxes and mortgages on the subject properties**. [emphasis added]

Therefore, query what Justice Kaufman could have done without falling offside previous appellate authority regarding income imputation. Again, while the *failure* of a payor to properly disclose can mitigate the obligation on the recipient to provide an evidentiary basis to impute income - that does not seem to have been the case here: *Graham v. Bruto*, 2008 CarswellOnt 1906 (C.A.); *Ouellette v. Ouellette* (2012), 16 R.F.L. (7th) 39 (B.C. C.A.).

Section 6 of the *SSAG* provides that the starting point for determining income for spousal support purposes is the definition of income under the *Federal Child Support Guidelines*, SOR/97-175. Section 19(1)(e) of the *Guidelines* provide that the court may impute income where the "spouse's property is not reasonably utilized to generate income". The Court of Appeal thought that the facts of this case "cried out" for this section to be considered. But, again - those were submissions for Ms. Jonas to make and evidence for Ms. Jonas to marshal (again, assuming no default in Mr. Pacitto's disclosure obligations). As noted by Justice Kaufman (at para. 134): "The court should not be required to generate its own evidence upon which to determine a case. This is especially relevant when examining the large quantum of support being sought by [Ms. Jonas]."

The Court of Appeal found that, "[i]n all of the circumstances," it was an error for Justice Kaufman not to at least consider imputing additional income to Mr. Pacitto. As a result, and on account of the time that had elapsed since trial, the Court of Appeal remitted the case back to the Superior Court of Justice for a focussed hearing on the imputation of income to Mr. Pacitto for the purposes of calculating the award of spousal support. For this purpose, both parties were ordered to provide current property valuations as well as income statements.

Counsel in future cases should not count on this sort of "do over" every time. If you are looking to impute income, unless *Jonas v. Pacitto* was meant to incrementally change the law of income imputation, counsel must remember that evidence is required.

Footnotes

1 And it's not so easy to withdraw an admission. See *Antipas v. Coroneos*, 1988 CarswellOnt 358 (H.C.); *Liu v. The Personal Insurance Company*, 2019 CarswellOnt 1745 (C.A.), at para. 13; *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.).