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

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From the "There But for the Grace of God Goes My Deductible" File

CMM v. RMM, 2020 CarswellAlta 1520 (Q.B.) - Eamon J.

We generally try to stay as current as possible with *This Week in Family Law*, but this case just came to our attention, and we are reporting it as a public service announcement for our friends in Wild Rose Country.

The defendant applied to dismiss the matrimonial property action because it was commenced more than two years after the date of the divorce judgment, and therefore after the expiry of the limitation period in section 6(1)(b) of the *Matrimonial Property Act*, R.S.A. 2000, c. M-8 (the "*MPA*").

The plaintiff acknowledged the action was brought out of time, but argued that the limitation period was extended by a standstill agreement and/or that the defendant was precluded by promissory estoppel from asserting that it expired.

The parties were married. They separated in June 2016. The plaintiff started a claim for divorce, but did not claim property division. The Court granted a divorce judgment on **February 13, 2017**.

The parties each retained counsel to deal with property division in May 2018. They engaged in the usual process of gathering and disclosing information and negotiating. The lawyers never discussed the need to commence a matrimonial property action and were clearly trying to resolve the matter out of court - as all good counsel should. However, to be clear, at no time did the defendant explicitly represent that he would not rely on any limitation periods.

The last communication between counsel was a letter from plaintiff's lawyer dated December 11, 2018. The defendant's lawyer was appointed to the bench on February 19, 2019. Shortly thereafter, the plaintiff's lawyer learned that the defendant had ended his retainer with his lawyer in late December 2018. Until late February 2019, the plaintiff was unaware that the defendant's retainer with his lawyer had ended.

The plaintiff's lawyer communicated with the defendant directly for a time, and the plaintiff met with the defendant directly to discuss the division of property. When the plaintiff concluded that the negotiations were going nowhere, the plaintiff started a matrimonial property action - on March 26, 2019 - about two years and five weeks after the divorce judgment.

Of course, the defendant immediately responded that the plaintiff was out of time.

In matrimonial property actions in Alberta, the court may infer an agreement to extend or suspend the limitation period from the parties' words and conduct. The *Limitations Act*, R.S.A. 2000, c. L-12, does not apply to the limitation periods in the *MPA*

(by virtue of s. 2(4)(b) of the *Limitations Act*). Therefore, the usual requirement in the *Limitations Act* that a standstill or similar agreement be in writing did not apply.

The Court first considered the principles of promissory estoppel as described by the Supreme Court of Canada in *Maracle v. Travelers Indemnity Co. of Canada*, 1991 CarswellOnt 450 (S.C.C.):

[13] The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

The essence of promissory estoppel is that it may arise from an otherwise gratuitous oral promise: *Brar v. Roy*, 2005 CarswellAlta 1096 (C.A.).

The Court relied on two Ontario cases for the proposition that ongoing, normal dealings between parties attempting to resolve a claim are not sufficient to infer a waiver or promise to suspend a limitation period: *CAA Insurance Co. v. Botsis*, 2006 CarswellOnt 5087 (Div. Ct.) and *Gillis v. Bourgard*, 1983 CarswellOnt 1353 (Ont. C.A.), leave to appeal refused.

Notably, both of these cases dealt with insurance contracts. In *Gillis*, the Ontario Court of Appeal justified its conclusions as follows:

[6] It seems to us that what occurred here was, at best, no more than normal dealings between parties attempting to resolve an insurance claim. To hold that it could or did give rise to any admission of liability or a promise not to rely upon a condition of the contract, the limitation period, is completely unwarranted and puts in jeopardy the benefit of such dealings to litigants.

But query whether negotiations between separated spouses - at least *one* of whom is negotiating in good faith - is the same as negotiations about an insurance contract. Surely it is the policy of the courts - including courts in Alberta - to encourage parties to negotiate and to keep matrimonial matters out of court. It would be one thing if the limitation period was very substantially missed. But five weeks?

The Court also referred to the Alberta case of *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2017 CarswellAlta 1437 (Q.B.):

[40] Nor does the evidence concerning the parties' expressed desire to attempt to settle the matter without recourse to the Courts satisfy the test to constitute a standstill agreement under s 9 of the [*Limitations Act*]. To the contrary, it appears to be no more than normal dealings between parties attempting to resolve a claim and, therefore, as was the case in *Maracle*, it constituted neither an extension of the limitation period, nor a promise not to rely on the limitation period.

However, not only were the parties in *Weir-Jones* both sophisticated commercial parties, but in that case, the correspondence expressly noted that legal proceedings would follow if negotiations were unsuccessful.

Justice Eamon generally agreed with these cases, "at least where the parties have legal advice *and one is not taking advantage of the other*" [emphasis added]. But, respectfully, does it not appear that may have been *precisely* what happened here?

Here, the Court was satisfied that the matter was suitable for summary judgment under the principles of *Weir-Jones* at the Alberta Court of Appeal: 2019 CarswellAlta 204 (C.A.). Thus Justice Eamon determined that the record was sufficient to fairly resolve the dispute on a summary basis, and his Honour had confidence in the state of the record such that he was prepared to exercise his discretion to summarily resolve the dispute. That is, there was no genuine issue requiring trial.

The parties provided the Court with a summary of the communications between their lawyers, from the start of the property action in May 2018 through December 11, 2018 - the final communication from the plaintiff's lawyer - just two months shy of the expiration of the limitation period. The communications showed that the parties requested and provided information

and disclosure, the usual stuff of negotiation over matrimonial property division. After December 11, 2018, there was no correspondence.

The plaintiff submitted that a standstill agreement was in place by words or conduct, and/or that the defendant was estopped from asserting the expiry of the limitation period. The plaintiff's lawyer argued that:

- Her client relied to her detriment on the defendant's words and conduct, and came to believe that no action would be taken while negotiations were ongoing; and
- It was common practice for family lawyers, particularly those who have an ongoing professional relationship, to engage in negotiations with an understanding that the need to take action is suspended while negotiations are in progress.

Unfortunately, the plaintiff's lawyer (who represented her during the negotiations) did not provide any affidavit evidence to suggest that she relied on the defendant's lawyer that no action would be necessary. However, Justice Eamon assumed that, if the matter went to trial, the plaintiff's lawyer would testify to that belief.

Therefore, the Court then went on to consider whether a court could infer a standstill agreement or a promise intended to affect legal relations based on "common matrimonial law practice."

As part of her case, the plaintiff did not provide any evidence in support of an alleged practice among family lawyers that limitation periods are suspended during negotiations. To the extent such evidence was necessary, this was an evidentiary gap as it could not properly be the subject of judicial notice: *R. v. Find*, 2001 CarswellOnt 1702 (S.C.C.).

The Court found that, even had the plaintiff wanted to adduce such evidence through an expert, there was "no reasonable prospect of a qualified expert opinion that would support the plaintiff's case." To the contrary, the Court held that "such a practice would be imprudent and unnecessary":

- (a) It is contrary to case law and the clear wording of the limitation provision. [Well . . . it may be contrary to case law when dealing with sophisticated commercial parties. But for matrimonial litigation?]
- (b) It would add uncertainty to the limitations regime, forcing disputes over when the parties stopped negotiating and the limitation started running. [Well, ok. Fair point. But as noted above, there is a difference between missing the limitation period by a matter of weeks or by significantly more. And if the defendant is not purposefully "lying in wait", why can the defendant not make it clear at some point that lack of agreement will result in court action?]
- (c) Usually, there is no need to defer filing a claim in order to successfully settle it. The vast majority of civil and matrimonial property claims filed in court do end with a negotiated settlement. [While it is true that the vast majority of matrimonial claims filed in court do not end in trial but with a settlement - there certainly would be need to defer filing a claim in many cases.]
- (d) A party can file a statement of claim to preserve an expiring limitation. It is not necessary to serve it for 12 months, so the procedural formalities that follow service can usually be deferred. [Do courts really want to put parties to the expense of filing a claim and then force them to serve it within 12 months - when the parties could still be negotiating? We've never known serving a claim during negotiations to be a good thing: "Here are all the reasons you're a terrible person . . . now let's keep talking . . . ".]

The Court also relied on commentary to Rule 7.2-3 of the Law Society of Alberta Code of Conduct. That commentary provides:

- [4] . . . a defendant in a lawsuit has a legal right to insist that proceedings be brought within a certain period of time. Accordingly, while the missing of a limitation date by plaintiff's counsel may be an obvious mistake, the defendant's lawyer does not violate this rule by allowing the limitation period to expire.

The Court also noted the lack of evidence that the defendant's former lawyer actually believed there was a standstill in place, or accepted the existence of the alleged practice. In the end, Justice Eamon did not accept there was a genuine issue for trial. He found the conduct of the parties and counsel in this case to be typical of parties negotiating a disputed matter, bereft of any suggestion that the defendant agreed, offered, or promised to modify any applicable limitation period. The limitation period had expired.

The lesson from this? Absent an express standstill or tolling agreement, or an implicit agreement to toll the limitation period, the time limits in the Alberta *Matrimonial Property Act* (renamed the *Family Property Act*) are going to apply. A pattern of "regular" negotiations will not serve to extend the limitation periods. So be careful. Be very, very careful.

I Would Have Gotten Away with it Too - If it Weren't for You Meddling Kids . . . and that Damn *Audi Alteram Partem* Rule

C.H. v. S.F., 2021 CarswellSask 87 (C.A.) - Caldwell, Schwann and Leurer, JJ.A.

Audi alteram partem is a rule of natural justice that "requires that courts provide an opportunity to be heard to those who will be affected by the decisions" [*A. (L.L.) v. B. (A.)*, 1995 CarswellOnt 955 (S.C.C.)]. It seems simple enough. Where, as in this case, a party is denied the right to be heard, the result will almost invariably be a new hearing.

C.H. v. S.F. involved a dispute over the parenting arrangements for the parties' two teenage children. The children initially lived primarily with the mother, but moved in with the father when the mother was hospitalized because of a mental health event in March 2020.

After the mother was released from the hospital, she brought a motion to require the father to return the children to her care. The father responded by bringing his own motion for, among other things, an order suspending the children's contact with the mother.

The motions were adjourned several times, but were ultimately scheduled to be heard by teleconference on July 7, 2020.

Two business days before the return date, the father served a further affidavit. As a result, on the morning of July 7, 2020, the mother's lawyer advised the father's lawyer that she needed an adjournment. The father's lawyer consented to the request for an adjournment, and agreed *in writing* to adjourn the motions to July 28, 2020.

In accordance with her understanding of procedures that were in place at the time, the mother's lawyer had provided the registrar with phone numbers where both she and her client could be reached for the telephone attendance on July 7, 2020.

Unbeknownst to the mother's lawyer, however, the court had recently changed its procedures such that parties and their lawyers were actually required to call into the court using a phone number that would be emailed to them prior to the hearing. Unfortunately, the email the court sent to the mother's lawyer on July 3, 2020, advising her of the change in practice and providing her with the phone number ended up in her junk mail folder (along with e-mails offering duct cleaning service and offers to repatriate foreign lottery winnings). As a result, neither the mother nor her lawyer called into the court for the motion at the scheduled time.

For reasons that are not entirely clear, it does not appear that anyone tried to contact the mother's lawyer to find out why she had not called into the court. But that wouldn't have mattered if the father's lawyer had simply advised the court that the parties had agreed to adjourn the motions to July 28, 2020. Shockingly, that is not what happened.

Instead of telling the judge that the parties had agreed to a brief adjournment, the father's lawyer advised the judge that the father was opposed to any further adjournments, and wanted to proceed.

Based on only what the father's lawyer had told him, the Chambers judge declined to adjourn the matter, and proceeded to hear submissions on the merits - from only the father's lawyer. Not surprisingly, given that he only heard one side of the story, the Chambers judge granted the husband interim custody of the children pending trial. What is surprising, however, is that the Chambers judge apparently did not provide any reasons for his decision. So we have one lawyer that was not aware of a change

in procedure; another lawyer that did not tell the court of an agreed-upon adjournment; and a decision made without reasons. This would seem to be a problem.

As soon as the mother's lawyer found out what had happened, she wrote to the court to ask that the matter be reopened. The registrar responded that the Chambers judge had declined to reopen the matter because "the Order had already been made", but provided no further explanation. Another problem.

The mother appealed the Chambers judge's Order to the Saskatchewan Court of Appeal on a number of grounds, including the absence of reasons. However, the primary thrust of her appeal was that she had been denied the most basic rules of natural justice and procedural fairness: the right to be heard.

The mother filed fresh evidence to show what had actually happened leading up to the motion (including the father's lawyer's agreement to adjourn the matter), and to explain why she and her lawyer did not attend the hearing. The Court of Appeal admitted the fresh evidence, and it persuaded the Court that it needed to intervene.

A court is not *functus officio* and has jurisdiction to reconsider a matter until the formal order has been issued and entered. As the Court of Appeal noted in this case:

[25] . . . Until the order was issued, the Chambers judge had jurisdiction to reconsider or withdraw it. This point was made by Martin J.A. (as he then was) in *Friesen v. Saskatchewan Mortgage & Trust Corp.*, [1926] 4 D.L.R. 496 (Sask. C.A.) at 497 [*Friesen*]:

. . . Until a judgment or order has been entered or drawn up, there is an inherent power in every Court to vary its own order so as to carry out what was intended, and to render the language used free from doubt. The Court has power, so long as the order has not been perfected, to reconsider and even to withdraw the order made, so that the decision may be reconsidered[.]

[26] Justice Martin reiterated this point in *Ryigus v. Zawitkowski*, [1928] 2 D.L.R. 539 (Sask. C.A.) at 539, wherein he held that "[f]ormal judgment has not been entered, and so long as an order has not been perfected the Judge has power to reconsider; but when once the order has been completed, the jurisdiction over it is at an end". See also: *Peltier v. Peltier*, 2008 SKCA 151 (Sask. C.A.) at para 8, (2008), 314 Sask. R. 211 (Sask. C.A.). That said, while the Chambers judge had the jurisdiction to amend or vary his order, courts generally only do so in exceptional circumstances: *Metx v. Marshall* (1922), [1923] 1 D.L.R. 367 (Sask. C.A.) at 368; *Storey v. Zazelenchuk* (1985), 40 Sask. R. 241 (Sask. C.A.) at paras 2-7; and *Saskatchewan v. Mountain Pacific Transport Ltd.* (1995), 129 Sask. R. 9 (Sask. Q.B.) at paras 13-14.

Alternatively, if the Chambers judge had been *functus* because the formal order had already been issued and entered before he received the mother's lawyer's letter, appellate intervention was still required as the process had been patently unfair to the mother:

[27] In our view, the circumstances here were exceptional and required that the Chambers judge reconsider the order he had made in the absence of [the mother] or her counsel. The record does not allow us to be certain that [the mother's lawyer's] July 7, 2020 letter to the local registrar, advising that her client wished to have the matter reopened, was brought the Chambers judge's attention before the order issued the next day. If it was, then the Chambers judge committed an error in principle by failing to recognize that he had jurisdiction to reopen the matter. If there was a delay within the registry office in providing the letter to the Chambers judge, the error may be seen to be more institutional in nature, but the procedure was nonetheless unfair. Under both scenarios, on the face of what was before the court prior to the issuance of the order, it was patent that [the mother] had intended to provide submissions, but she had not been heard. Under either scenario, this Court must intervene.

[As an aside, in some jurisdictions, the rules of court give a court authority to vary or set aside an order if a party did not attend the hearing for a reason that is satisfactory to the court - see e.g. Rule 25(19) of Ontario's *Family Law Rules*. However, that does not appear to be the case in Saskatchewan.]

The other significant problem with the Chambers judge's decision was that he did not provide any reasons for his decision, which the Court of Appeal found was "a second, and independent, breach of the duty of fairness[.]" While a failure to give adequate reasons is not "a free standing basis for appeal" (*F.H. v. McDougall*, 2008 CarswellBC 2041 (S.C.C.) at para. 99), the complete absence of reasons is generally a problem and was a significant problem in this case. That being said, even if the Chambers judge had provided comprehensive reasons, that would still not have cured the *audi alteram partem* problem.

Surprisingly, the Court of Appeal did not admonish the father's lawyer for engaging in what was, at best, sharp practice. It is simply unacceptable for lawyers to mislead the court and breach clear agreements with opposing counsel, and this type of behaviour ought not to be tolerated. If lawyers cannot trust each other, and if the court cannot trust lawyers, the system falls apart.

In addition to being highly unethical - this was not a "grey area" - the type of conduct that occurred in this case will quickly ruin your reputation, which is really all you have as a lawyer.

So remember the words of Warren Buffet: "[i]t takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently."

***LiSanti* Lives On**

Chrisjohn v. Hillier, 2021 CarswellOnt 3681 (S.C.J.) - Mitrow J.

The father brought an urgent motion for the return of the parties' child, age three, to his care. The mother was withholding the child, alleging that the father had been intoxicated (or at least had been drinking) at an access exchange on February 19, 2021. The mother admitted that she should not have allowed the father to leave with the child, but that she was fearful of a confrontation.

The mother swore that the police later confirmed that the father had been drinking. The father swore that he had not been drinking, and his mother (with whom he lived) also swore that the father had not been drinking that day.

The mother refused to return the child to the father, who was in fact the primary residential parent - thus prompting the father's emergency motion. The mother actually had somewhat restrictive access.

The mother responded with a motion to increase her access (although the basis for that motion was not entirely clear).

The important part of this case is not the substantive issue. Rather, Justice Mitrow took the opportunity to address the unfortunate trend of inadmissible hearsay evidence being included in affidavits.

This "trend" was the subject of comment by Justice Vogelsang over 30 years ago in *LiSanti v. LiSanti* (1990), 24 R.F.L. (3d) 174 (Ont. Fam. Ct.). In that case, during a motion, Justice Vogelsang struck an exhibit to the wife's affidavit that consisted of a lengthy prose statement tendered as part of the wife's evidence on the motion. The exhibit was not in affidavit form.

In *LiSanti*, Justice Vogelsang stated:

[4] An interesting issue arose, before argument of the motion, concerning the propriety of Ex. D annexed to the wife's affidavit. Mr. Mamo brought an oral motion to strike that portion of the affidavit which, after submissions, I granted. The exhibit is a lengthy prose statement consisting of material headed "History of Abuse", "Interaction with Children", "Interactions During Visits with Mr. LiSanti" and "Interactions with Staff of Women's Community House". The allegations made in the exhibit are clearly stated to be hearsay. The tone is highly pejorative and prejudicial to the husband. The exhibit is not in affidavit form. No one swears as to the source of information outside his or her personal knowledge and deposes to a belief that the statements are true. Not the subject of an affidavit, no one can cross-examine on the statements, or the source of the information.

[5] **There has been a disturbing tendency in recent months to attempt to incorporate, in motion material, renditions of statements allegedly made by parties or other sources without their inclusion in an affidavit.** The rules, however, require evidence on a motion to be by way of affidavit. The basis of that requirement is obvious. **Without the possibility of testing an allegation through cross-examination, there is an incentive to swell the evidence freely with unsupported statements by persons not clearly identified and, therefore, safe from inquisition.** That is the situation with this exhibit. [emphasis added]

Here, the mother had appended as an exhibit to her affidavit some text messages from the father's girlfriend that the mother argued showed that the father had been drinking on the occasion in question. The mother also made allegations about the father's alleged history of substance abuse, and attached a copy of an email from the mother of one of the father's other children, alleging drinking and substance use by the father, as an exhibit to her affidavit.

In the 30 years since *LiSanti* was decided, the use of electronic evidence and emails has increased geometrically, and it is regularly used in an attempt to adduce inadmissible hearsay into the record: "Attached as Exhibit 'X' is an email from Sarah Smith where in she says . . . ". That is not evidence. It is - or ought to be - inadmissible; and it is unfair and often prejudicial.

As noted by Justice Mitrow,

[18] The lesson from *Lisanti* has withstood the test of time and remains the law today. Litigants should remain vigilant in ensuring that motion material is restricted to admissible evidence. The temptation to append as exhibits to affidavits text messages, or email strings from third parties, who do not swear to their truth, must be avoided.

In Ontario, the Court of Appeal has taken a step further. In the case of what purports to be probative evidence, the party must not only clearly identify the source of the information, but must also explain why the original source of the information did not swear an affidavit: *Berger v. Berger* (2016), 85 R.F.L. (7th) 259 (Ont. C.A.).

The offending emails were ruled inadmissible.

Equally inadmissible (at least for the truth of their contents) were statements in the mother's affidavit swearing to what the "police" told her and what the "officers" said. That evidence contravened Rule 14(19) of the *Family Law Rules*: an affidavit may contain information learned from someone else, but only if the source of the information is identified by name and the affidavit states that the person signing it believes the information is true. This is another provision more honoured in the breach.