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

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The Court Exercises its "Power" - Do Not Pass "Go", Do Not Collect $200, We Hope You Look Good in Orange, etc.

Power v. Power, 2020 CarswellNS 833 (N.S. S.C.) - Jollimore J.

The father was found in contempt of court of an order that he pay child support. Between January 2007 and October 2015, he paid only about $22,000 of the $270,000 he owed in child support. [2015 CarswellNS 782 (S.C.) and 2013 CarswellNS 179 (S.C.)]

Here, Justice Jollimore had to determine the father's penalty for contempt. The mother sought a period of incarceration and further asked that the father pay a fine of $276,000.

The father argued that he should not be imprisoned and that he should not be fined. He proposed that the matter be adjourned for six months to allow the Court to further consider his "efforts" to purge his contempt.

A judge of the Supreme Court of Nova Scotia (as in all provinces and territories) has inherent jurisdiction to impose a penalty for contempt: *McLean v. Sleigh*, 2019 CarswellNS 595 (C.A.) at para. 42.

After the original contempt application was filed, the father applied to vary his child support, prospectively and retroactively. His efforts failed, and his variation application was dismissed. That decision was not appealed, nor was the finding of contempt. The father then chose to not attend the penalty hearing.

The focus of a penalty for contempt is primarily to coerce compliance - in this case, to make the father pay the child support that he was ordered to pay. A penalty for contempt is also meant to ensure respect for court orders, to denounce the father's conduct, and to enforce the rule of law. The public must understand that there are consequences - sometimes very severe - for ignoring orders of the Court. Unless and until stayed, varied, or reversed on appeal, Court orders are to be followed. At the same time, the penalty must be in proportion to the gravity of the contempt.

There was not much call for sympathy for the father: it had been "easy" for him to ignore the Order because he moved his second family - along with his bank accounts and his employment - to Denmark in August 2015. Although the father knew he had been found in contempt, and even though his passport had been suspended and his Canadian bank accounts seized, he decided to not attend the penalty phase of the hearing in October 2015.

Unfortunately for the father, he was deported from Denmark in February 2019. He was arrested on a Canada-wide warrant in Montreal in November 2020, and returned to Nova Scotia.

So, what was the appropriate penalty here?

It was clearly important to denounce the father's conduct here and to "send a message" that this sort of intentional conduct will not be tolerated. As stated by Justice Jollimore, "[p]eople must be deterred from ignoring their child support obligations and those who ignore them must be denounced."

As found by Her Honour, from the date of the original support Order to the finding of contempt, the father had made, at best, "token efforts" to support his children, being quite content to foist the support of his children on the mother and *his* parents. From the time they were 6 and 12 until they were 15 and 19, the children went without meaningful financial support from their father, an IT professional, who was inferentially more than capable of supporting them.

There were no mitigating factors. Although the father tried to suggest (through the affidavit of his second spouse) that he tried to "cut a deal" with the mother by proposing to sell his home and pay the mother 50 percent of the net proceeds, Her Honour noted, quite properly, that the father was not so much trying to purge his contempt, but to give himself a 63 percent discount on what he owed in child support. This is an important distinction: the father actually selling his home and *actually paying* the mother half the net proceeds from the sale of his home (about $90,000) would have gone a fair way to mitigate his contempt. But only *offering* to do so in exchange for reducing the arrears otherwise owing was not mitigation at all. In the end, the father did not sell his home.

Nor was there any evidence that the father had expressed any meaningful regret, even though an apology can be a mitigating factor. Although he suggested that he had made "lots of mistakes", he said his biggest regret was not "fighting harder" for the children. He offered no apology for not paying child support. In fact, as found by Justice Jollimore, "[t]here was no evidence that [the father] had ever expressed any regrets until yesterday afternoon - after he had spent a month in jail."

The father did not accept any responsibility for breaching the Order. He blamed the mother, and he blamed the Maintenance Enforcement Program. But he took no responsibility himself. While his remorse was genuine, his remorse was not for defying the Order. It was for the situation in which he found himself.

Her Honour also implied an aggravating factor: in the five years since being found in contempt, the father had made only four support payments, totalling $3,237 - less than one month's child support.

In Nova Scotia, as in the other provinces and territories, the court can impose a term of incarceration as a penalty for contempt: Rule 89.13(1)(e) of the Nova Scotia *Civil Procedure Rules*.

The father argued that, before he could be sent to prison, there had to be "clear and compelling evidence of his ability to purge his contempt." Whether or not that is actually the law (and it does not appear to be), the evidence did not satisfy Her Honour that the father was not able to purge his contempt, particularly given that:

- The father still owned property in Nova Scotia which was valued at $300,000 in 2016. There was no evidence of its current value.
- The father offered no evidence to contradict the finding that he had moved his financial affairs out of Nova Scotia.
- Mr. Power had been employed in Denmark, but only paid $3,237 in child support, offering no evidence as to where the rest of his earnings went.

In Nova Scotia, the recent high-water mark (and high-water penalty) for contempt had been *Armoyan v. Armoyan* (2015), 64 R.F.L. (7th) 83 (N.S. S.C.), where a 4-year custodial sentence was imposed. However, Justice Jollimore found the father's conduct here to be worse:

- Mr. Armoyan's contempt was unpurged for 11 days when his penalty was imposed. Here, the father's contempt was unpurged for 64 months.
- The father in this case had paid a far lower percentage of the child support owing.

Her Honour summed up the case before her, quite eloquently, as follows: "The dullest description of his actions doesn't disguise the depths of his disregard for the court and his children."

The father had already been in jail for 31 days. To compel his respect for court orders, to recognize the gravity of his actions, to denounce his conduct, and to deter others, he was sentenced to an *additional* 4-1/2 years of prison.

The mother also asked for a significant fine, for interest to accrue on previous child support and costs orders, and for costs. This would add another $454,590.48 to the $247,125 that the father already owed. Justice Jollimore, however, found that the requested penalty, interest and costs were disproportionate, and that they would not add to the coercive force of imprisonment. As such, those claims were denied.

As a final lifeboat, Her Honour ordered that, should the father purge his contempt, the penalty would cease to be in effect.

The next time a recalcitrant payor asks "really . . . what's the worst the Court can do if I don't pay?" You need only answer: "The Court can exercise its Power."

More on *Moore* in *LaMorre* . . . Sweet!

LaMorre v. Kershaw (2020), 37 R.F.L. (8th) 342 (N.S. S.C.) - Smith C.J.N.S.

LaMorre reminds us, yet again, that when securing a support obligation with life insurance, it is ***critical*** to ensure that the settlement documents are drafted clearly, and that the support payor cannot simply change the beneficiary designation(s) without the recipient's knowledge and consent.

The husband and wife were married in 1996 and had twins. They separated in 1999.

After they separated, they signed an agreement that required the husband to pay child support and maintain the children as the beneficiaries of his life insurance through employment. They also agreed that the wife would be the trustee of the insurance proceeds if the husband died before they reached the age of majority. The terms of the parties' agreement were incorporated into a consent order.

The husband eventually started a relationship with Ms. Kershaw. Contrary to his agreement with the wife, in 2009, the husband named Ms. Kershaw as the beneficiary of 50 percent of his life insurance, and the children as the beneficiaries of 25 percent each with Ms. Kershaw as the trustee (he was presumably able to do this because the parties' agreement did not require him to make the wife the *irrevocable* beneficiary of his life insurance in trust for the children). The husband died in an accident in 2011.

As a result of the husband's death, Ms. Kershaw received $189,000 of the husband's life insurance, for herself, and $189,000 for the children as their trustee (i.e. $94,500 for each child). She also received other significant assets from the husband, including his interest in their jointly owned home, and the commuted value of his pension.

Ms. Kershaw knew that the wife was struggling financially, and relied on the $1,100 a month in child support that the husband had been paying until he died. However, instead of using the money she was holding in trust to help the wife pay for the children's expenses, and instead of making the wife the trustee as required by the husband and wife's agreement, Ms. Kershaw invested all of the children's money in a locked-in GIC. And, when the children turned 18 in 2016, Ms. Kershaw gave them each $100,638.68, which represented the $94,500 that she had invested for each of them, plus interest.

In 2017, the wife commenced an unjust enrichment claim against Ms. Kershaw to recover the rest of the money that she had received from the husband's life insurance policy. The children brought similar claims against Ms. Kershaw in 2019. It is not clear from the reasons why the wife and children waited so long to bring their respective claims, but they are fortunate that they did not miss a limitation period, and that Ms. Kershaw did not try to defend their equitable claims against her on the basis of *laches*.

The wording of the life insurance provisions of the husband and wife's agreement was less than clear, and it did not actually specify how much insurance the husband was required to maintain for the children. As a result, Ms. Kershaw argued that the agreement and order obligated the husband to maintain "suitable and appropriate insurance coverage for the benefit of the boys in the event of [the husband's] death", and that the $100,638.68 that each child ultimately received was reasonable in the circumstances. Fortunately for the wife and children, Chief Justice Smith rejected this argument, and found that the agreement and order obligated the husband to maintain the children as the sole beneficiaries of the life insurance policy in issue.

Chief Justice Smith then considered the merits of the wife and children's claims for unjust enrichment against Ms. Kershaw. This required her to determine: (1) whether Ms. Kershaw had been enriched; (2) whether the wife and/or children had suffered a corresponding deprivation; and (3) whether there was a juristic reason to allow Ms. Kershaw to retain the benefit at the wife and/or children's expense (see *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) at paras. 36-45).

With respect to the first two parts of the test, Ms. Kershaw conceded that she was enriched by the $189,000 she received from the husband's life insurance policy, and that the children had suffered a corresponding deprivation. Chief Justice Smith was also satisfied that the wife had suffered a corresponding deprivation because she had lost the opportunity to use these funds to help pay for the children's expenses (as trustee) while they were still minors:

> [35] Ms. Kershaw submits that any loss that [the wife] claims to have suffered is not sufficiently linked to Ms. Kershaw's receipt of the funds to ground a claim in unjust enrichment. She notes that [the wife] had no personal entitlement to the insurance proceeds as they were to be held in trust for the boys until they attained the age of majority. She says that [the wife] cannot be found to have been deprived of her children's money.
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> [36] In my view, [Ms. Kershaw's] position fails to recognize the use of the funds that [the wife] could have made as trustee.
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> [37] . . . Although the Agreement does not specify that [the wife] was entitled to use the funds for the maintenance and support of the boys, that omission is not fatal. Had [the wife] been named trustee of the funds, as [the husband] was contractually obliged to do, she could have applied any income earned on the funds for the maintenance, education or benefit of the boys pursuant to s. 30(1) of the *Trustee Act*, R.S.N.S. 1989, c. 479. Further, as trustee she could have applied to the court to encroach upon the capital for the boys' maintenance (see, for example, *Mason, Re*, [1946] 4 D.L.R. 299 (N.S. S.C.)), s.51 of the *Trustee Act, supra*, and the *Variation of Trusts Act*, R.S.N.S. 1989, c. 486. [The wife's] corresponding deprivation was her inability to use, or apply to use, this $189,000.00 for the benefit of the boys during their infancy.

Chief Justice Smith then had to consider whether there was a juristic reason to allow Ms. Kershaw to retain the benefits she had received. This required, as the Supreme Court explained in *Moore v. Sweet*, 2018 CarswellOnt 19478 (S.C.C.), Chief Justice Smith to first determine whether the wife and children could establish that Ms. Kershaw's retention of the benefits she had received at their expense "cannot be justified on the basis of any of the 'established' categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations[.]"

If the Court was satisfied that none of the traditional categories applied, the onus would then shift to Ms. Kershaw to "establish some residual reason why the enrichment should be retained. Considerations such as the parties' reasonable expectations and moral and policy-based arguments come into play at this stage of the analysis[.]"

Prior to the Supreme Court's 2018 decision in *Moore*, it was unclear whether unjust enrichment could be used to deal with a situation where, as in this case, a deceased spouse failed to comply with an agreement or order that required a specific person to be named as the beneficiary of a life insurance policy. The law was unclear because some courts (including the majority of the Ontario Court of Appeal in *Moore v. Sweet*, 2017 CarswellOnt 2958 (Ont. C.A.)) had determined that provincial insurance legislation requiring insurance companies to pay the proceeds of a life insurance policy to the named beneficiary, constituted a "juristic reason" for allowing the named beneficiary to retain the proceeds.

In 2018, however, the majority of the Supreme Court made it clear in *Moore* that provincial insurance legislation is not a juristic reason for allowing an enrichment and corresponding deprivation to stand unless the legislation "operates with the necessary

'irresistible clearness' to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary":

> [80] My colleagues take the position that the *Insurance Act* provides a juristic reason for Risa's enrichment because it specifically provides that the proceeds, once paid to the irrevocable beneficiary, are immune from attack by the insured's creditors. They say that because "Michelle's rights are contractual in nature, she is a creditor of Lawrence's estate and thus, by the provisions of the *Insurance Act*, has no claim to the proceeds" (para. 122). While there is no dispute that Michelle may have a claim against Lawrence's estate, my view is that she is *also* a person at whose expense Risa has been enriched - and therefore a plaintiff with standing to claim against Risa in unjust enrichment. **And while the *Insurance Act* specifically precludes claims by creditors suing on the basis of some obligation owed by the insured's estate, it does not state "with irresistible clearness" that a claim *in unjust enrichment* - i.e. a claim based on a different cause of action - brought by a plaintiff who also has a contractual entitlement to claim the insurance proceeds must necessarily fail as against the named beneficiary**. [emphasis added]

(See also Philip Epstein's discussion of the Supreme Court's decision in *Moore* in the December 3, 2018 edition of *TWFL*.)

As a result of the Supreme Court's decision in *Moore*, Ms. Kershaw conceded that she could not meet any of the traditional categories of juristic reason, and that she bore the onus of establishing a residual juristic reason why she should be able to retain the funds. She argued that she had a reasonable expectation of receiving funds from the husband's life insurance policy, and that the arrangements that the husband had put in place were appropriate because they ensured that both his common law spouse and the children would be taken care of in the event of his death.

In rejecting Ms. Kershaw's arguments, Chief Justice Smith determined that Ms. Kershaw's expectation that she would receive part of the insurance proceeds could not take priority over the wife and children's expectations that the husband would comply with his contractual and court ordered obligations, and that public policy required her to hold the husband to his bargain:

> [41] In the case at bar, Ms. Kershaw was designated beneficiary of 50% of the proceeds of [the husband's] insurance *after* [the husband] and [the wife's] prior agreement that the proceeds would be held by [the wife] in trust for the boys. **Ms. Kershaw's expectation to receive the funds cannot take priority over [the wife's] expectation in the circumstances of this case**.
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> [42] In addition, in my view, **public policy dictates that Ms. Kershaw not be permitted to keep the funds. Spouses who enter into contractual arrangements to secure the payment of child support should be held to those bargains**. It would be improper to allow [the husband's] designation of Ms. Kershaw as a 50% beneficiary to stand, in the face of his previous agreement to name [the wife] trustee of these funds for the benefit of the boys. [emphasis added]

As for Ms. Kershaw's argument that the arrangements that the husband had put in place were appropriate in the circumstances, Chief Justice Smith determined that it failed "to recognize that [the husband] was not in a position to name Ms. Kershaw a partial beneficiary of his life and accidental death insurance in light of his contractual obligations under the Minutes of Settlement", and that Ms. Kershaw had already received other significant assets from the husband in any event.

As a result, Chief Justice Smith found that the wife and children had met the test for unjust enrichment with respect to the money that Ms. Kershaw had received from the husband's life insurance personally. The parties had agreed that if the court accepted the wife and children's claims, Ms. Kershaw would owe them a total of $210,572, the wife would receive 48.9 percent of these funds, and the children would receive 51.1 percent, so Chief Justice Smith did not have to consider what the remedy should be.

Chief Justice Smith also had to decide whether Ms. Kershaw had been unjustly enriched by having held the children's share of the life insurance proceeds in trust from 2011 to 2016. In several cases, including *Moore*, the Supreme Court has made it clear that in order for there to be an enrichment, the allegedly enriched party must have actually received a "tangible benefit". In *Garland v. Consumers' Gas Co.*, 2004 CarswellOnt 1558 (S.C.C.), the Supreme Court defined a "tangible benefit" as "either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred."

Chief Justice Smith was not satisfied that Ms. Kershaw had received any tangible benefit from having held the money in trust for the children, and dismissed the wife and children's claims with respect to the funds that Ms. Kershaw had held in trust for the children.

While the wife and children were fortunate to be able to recover the money that they should have received in the first place, the result would have been very different if *Moore* had been decided differently, or if the husband had cancelled his insurance instead of just changing the beneficiary.

The significant costs and risks of litigation could have been avoided entirely had the husband and wife's agreement specified the exact amount of life insurance that the husband was required to maintain, and had the wife insisted that the husband name her as the *irrevocable* beneficiary of his insurance in trust for the children. These small changes to the parties' agreement would have avoided the need for litigation about what the agreement actually meant, and prevented the husband from being able to change the beneficiary designation without the wife's knowledge and consent in the first place.

The Test for *Interim* Variation of a *Final* Order - A "Drastic Intervention and an Exceptional Remedy"

Brown v. Brown, 2020 CarswellOnt 17044 (Ont. S.C.J.) - Minnema J.

This was a motion by the husband to stay the enforcement of a Separation Agreement (dated August 22, 2018), and to temporarily reduce his spousal support obligation.

This case reinforces just how difficult it is in Ontario to vary a support obligation on an interim basis - a view shared by the courts of most provinces and territories. In *Brown*, the Court referred to an interim variation as a "drastic intervention" and an "exceptional remedy."

The parties were married in 1981 and separated in 2014 after 32 years of marriage.

The Separation Agreement expressly acknowledged that there was no agreement on the amount of income available to the husband to pay support, and did not refer to the SSAG. Rather, in setting the amount of spousal support at $10,000 per month, the Agreement set out the parties' positions about the husband's income.

For the year prior to the Agreement being signed (2017), the husband's salary from his company ("Limestone") was $139,681, and the company's pre-tax income was $231,859, for a total of $371,540.

For 2018, the husband's salary from Limestone was $133,028 and the company's pretax income was $477,347, for a total of $610,385.

In 2019 the husband "hived off" two of Limestone's operations into two new corporations, thereby creating three operating companies.

The husband alleged that the earnings of Limestone and its related companies after the creation of the new companies and after the year end April 30, 2018, had been a disaster. He said that things started to slow down prior to COVID-19, and that the pandemic then further restricted corporate sales.

In 2019, the husband's salary from Limestone was $133,028 again. However, Limestone had a net loss of $113,745; the second operating company had a net loss of $50,392; and the third operating company had a net loss of $77,701.

At some point, and no later than January of 2020, the husband's salary from Limestone increased to $13,290 per month ($160,000 per year).

After a brief increase in salary, the husband alleged that, as of August 1, 2020, his salary was going to be halved to about $80,000. The husband explained that he had hired a new General Manager such that his own value to the company was reduced. He called this a "partial retirement".

In 2020, Limestone had a net profit of $77,003; the second operating company had a net loss of $57,947; and the third operating company had a net loss of $266,542.

On the basis of reduced operating income, the husband sought a stay of enforcement of the Agreement and to partially suspend or reduce his obligation to pay spousal support pending trial. As the three companies together showed net operating losses, the husband asked to reduce his support obligation to $3,000 per month based on his new employment income of $80,000.

The wife argued that the husband had not met the test for either a stay of enforcement or a suspension of the existing obligation. She also argued that the husband could not rely on his poor (or perhaps purposeful) business decisions to defeat an appropriate level of spousal support.

The wife was 62 years old and relied almost entirely on spousal support to meet her expenses.

In Ontario, if a Separation Agreement has been filed with the court pursuant to section 35 of the *Family Law Act*, R.S.O 1990, c. F.3, it may then be varied or enforced "as if" it was an Order of the Court.

Justice Minnema suggested that suspending or staying a final order is indistinguishable in practical effect from an interim variation of that order. That is correct - while there are technical differences, the practical effect is the same. However, for some time, this meant the court had to deal with two different legal tests: one for the stay of enforcement (see, for example, *Yip v. Yip* (1988), 15 R.F.L. (3d) 211 (Ont. H.C.)), and one for an interim variation of a final support order (see, for example, *Dancsecs v. Dancsecs* (1994), 5 R.F.L. (4th) 64 (Ont. Gen. Div.) and *Carter v. Carter* (1998), 42 R.F.L. (4th) 314 (Ont. Gen. Div.)).

Justice Minnema provided a good summary of how the two tests had melded and amalgamated over time to become a test that required the moving party to show "a *prima facie* case on the merits of the variation application", and that s/he was coming to court with "clean hands" [See also *Hayes v. Hayes* (2010), 87 R.F.L. (6th) 435 (Ont. S.C.J.)]. Some other cases also required that the moving party show "hardship."

Some cases have interpreted the "hardship" requirement as requiring a finding that continuation of the Order would be "incongruous and absurd" or "inappropriate, unreasonable or ridiculous." See, for example: *Clark v. Vanderhoeven* (2011), 4 R.F.L. (7th) 191 (Ont. S.C.J.); *Crawford v. Dixon* (2001), 14 R.F.L. (5th) 267 (Ont. S.C.J.); and *Innocente v. Innocente* (2014), 54 R.F.L. (7th) 93 (Ont. S.C.J.).

Very recently, Justice Kurz took the opportunity to synthesize, summarize and restate the test for an interim variation in *Berta v. Berta* (2019), 23 R.F.L. (8th) 201 (Ont. S.C.J.). Justice Kurz also helpfully noted that the same principles would apply under both Federal and provincial legislation. Justice Kurz was of the view that the need for a "clear case of hardship" meant a "strong prima facie case."

Therefore, the test for an interim variation of a final support order - and by extension, the interim stay of a previous one, requires the moving party to prove:

1. A strong *prima facie* case on the merits of the variation application *as a whole* (not just a strong case to show a material change);

2. A clear case of hardship;

3. Urgency; and

4. That s/he has come to court with "clean hands".

So, had the husband shown a strong *prima facie* case on the merits of the variation application?

Here, there was no suggestion that the wife's circumstances had changed at all. The husband's argument was based exclusively on the alleged change in his income for support purposes.

Justice Minnema was not persuaded that the husband had a strong *prima facie* case that his employment income had decreased. The husband had voluntarily reduced his income to $80,000 a year because he had "partially retired" (at age 63) and hired a General Manager. These were voluntary decisions that he made only two years after the Separation Agreement, and did not establish a strong *prima facie* case for a variation.

With respect to the earnings of the corporations, His Honour noted that the gross sales for Limestone had fallen from $2,197,071 in 2018 to $1,624,417 in 2019 - a significant reduction. They were lower yet again at $1,423,444 in 2020. While the husband argued that the Court should consider the *combined* performance of all the companies, Justice Minnema was not convinced. Limestone showed pretax income of $77,003 for the April 30, 2020 year end. If the husband's employment income was imputed at $160,000, then the husband's total income available to pay spousal support would be $237,003, considering only his imputed employment income and the pretax income of Limestone. And this was within the ranges of income that the husband had himself estimated for himself in the Separation Agreement.

The husband argued that the loss from the third "new" operating company should be considered and should reduce the earnings of Limestone when calculating the income that was available to the husband for spousal support purposes. However, Justice Minnema found that this new business was a very different, start-up entrepreneurial venture, that was wholly unrelated to Limestone's core business. It had significant losses, and there would be legitimate questions on the variation application about whether the husband could force the wife to suffer a material reduction in spousal support because he had decided to undertake a speculative new venture.

As noted by Justice Minnema - the third company's losses would be a live issue on the hearing of the actual variation application. But this was not that. *This* was a motion for an interim variation. While the husband may be able to show a material change in circumstances on the variation application later, he did not, at the time of the motion, have a "strong *prima facie* case." It will be interesting to see how this plays out at the actual variation application. On the one hand, if the new venture is shown to be nothing more than a "hobby business", the losses should not be subsidized by the wife (see *Smith v. Smith*, 2007 CarswellMan 312 (Q.B.); *Proulx v. Proulx*, 2009 CarswellOnt 2189 (S.C.J.); *Hargrove v. Holliday*, 2010 CarswellAlta 174 (Q.B.); *Putnam v. Putnam* (2010), 83 R.F.L. (6th) 403 (N.S. S.C.); *Thomas v. Thomas*, 2019 CarswellNfld 209 (N.L. C.A.); *Lamb v. Lamb*, 1998 CarswellSask 258 (Q.B.); *Van Boekel v. Van Boekel*, 2020 CarswellOnt 12926 (S.C.J.)). But if the husband can show the new business to be a *bona fide* attempt to earn more income, it is hard to understand why he would not get the benefit of some reduction. After all, if his income had increased, the wife would have been free to claim increased spousal support.

While this ended the inquiry, Justice Minnema helpfully took the opportunity to comment on the "clean hands" part of the test. Here, there was no question that the husband had come before the court with clean hands. His support payments were up to date; he gave the wife notice of his intent to seek variation, and he had been forthcoming with his disclosure.

As the husband was not able to show a strong *prima facie* case, the husband's motion was dismissed. This matter should now move quickly to the actual variation application because, if the husband's income for support purposes has, in fact, decreased it is important for the matter to proceed expeditiously (although, unfortunately, that is easier said than done these days).

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