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— Franks & Zalev - This Week in Family Law

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Using Assessor Custody/Access Recommendations on an Interim Motion: Being "High Conflict" is "Exceptional"

Jonczyk v. Tilsley, 2021 CarswellOnt 5124 (S.C.J.) - Mackinnon J.

For years, courts have grappled with the question of whether the report/recommendations of a custody/access assessment can be used on an interim motion or only at trial. That was the question in *Jonczyk*, where the conflict between the parents forced 11 different contacts by the Children's Aid Society (the "Society"), and 13 by local police services since the parents separated in September 2019.

In answering this question, Justice Mackinnon summarized the law, and posited that the question is easier to answer in high-conflict cases.

Originally, courts were generally of the view that assessments were for trial where they could be tested - not for interim motions: *Robinson v. Robinson* (1985), 49 R.F.L. (2d) 43 (Ont. C.A.); *Genovesi v. Genovesi* (1992), 41 R.F.L. (3d) 27 (Ont. Gen. Div.); *Grant v. Turgeon* (2000), 5 R.F.L. (5th) 326 (Ont. S.C.J.); *Mayer v. Mayer* (2002), 34 R.F.L. (5th) 69 (Ont. S.C.J.); *Kirkham v. Kirkham* (2008), 57 R.F.L. (6th) 120 (Ont. S.C.J.); *Winn v. Winn* (2008), 60 R.F.L. (6th) 203 (Ont. S.C.J.); *Batsinda v. Batsinda*, 2013 CarswellOnt 18635 (S.C.J.).

Over the years, that standard was somewhat relaxed such that assessment reports could be used on interim motions in "exceptional circumstances" - such as when the report itself mandated immediate action: *Genovesi v. Genovesi* (1992), 41 R.F.L. (3d) 27 (Ont. Gen. Div.); *Marcy v. Belmore* (2012), 27 R.F.L. (7th) 412 (Ont. S.C.J.); *Stuyt v. Stuyt*, 2006 CarswellOnt 7783 (S.C.J.); *O'Connor v. O'Connor*, 2017 CarswellOnt 2366 (C.J.); *Krasaev v. Krasaev*, 2016 CarswellOnt 14693 (S.C.J.); *Wang v. Grenier*, 2016 CarswellOnt 13513 (S.C.J.).

And more recently, courts have considered whether "exceptional circumstances" should be required: *Bos v. Bos*, 2012 CarswellOnt 7442 (S.C.J.). In *J.D. v. N.D.* (2020), 50 R.F.L. (8th) 62 (Ont. S.C.J.), the Court considered if it might not be time to reconsider routinely deferring implementation of assessments to trial. In *Horvat v. Cross*, 2010 CarswellBC 2817 (S.C. [In Chambers]), the Court suggested that assessments were, in fact, particularly useful for interim proceedings. And in *Batsinda v. Batsinda*, the Court suggested that the caution applied to the assessor's *recommendations*, but not to the assessor's reported *observations*.

In *Jonczyk*, the Mother sought sole decision making authority, primary residence, and supervised exchanges. She also asked that the Father have parenting time starting at step two as recommended by the assessor (Tuesdays from 8:30 a.m. to 6:30 p.m. and Saturdays from 8:30 a.m. to Sunday at 8:30 a.m.) for three months, and additional access if all went well.

The Society supported the assessor's recommendations.

The Father served his own motion asking to increase his parenting time. He argued that the Court should exercise caution in implementing an untested parenting report on a motion, especially where an interim order is already in place (as it was here). He also argued that an assessment report should not be used to work a strategic gain in the litigation and to create a new *status quo*.

The main issue on the motion was whether the Father's parenting time should be increased gradually or immediately.

This case gave Justice Mackinnon the chance to review her discussion in *J.D. v. N.D.* about the use of an assessment on a motion before trial, which serves as a useful "all-in-one-place" review for all:

> [17] The legal landscape has also changed since *Grant v. Turgeon*, which itself followed an earlier decision in *Genovesi v. Genovesi*, [1992] O.J. No. 1261 (Ont. Gen. Div.). While its traditional test is still applied in some cases, for example *Scutt v. St. Cyr*, 2020 ONSC 1159 (Ont. S.C.J.) (child significantly impacted by parents' inability to make timely decisions for child's mental health); and *Matteliano v. Burt*, 2018 CarswellOnt 12417 (Ont. S.C.) (countless unsubstantiated allegations of abuse giving rise to parental alienation), other cases say that the jurisprudence has evolved. In *Bos v. Bos*, 2012 ONSC 3425 (Ont. S.C.J.) Mitrow J. stated at para. 23 and 27:
>
> > [23] . . . In my view, the jurisprudence has evolved to the point that although the general principle enunciated in *Genovesi* continues to be well founded, it is not so rigid and inflexible as to prevent a court on a motion to give some consideration to the content of an assessment report where that assessment report provides some additional probative evidence to assist the court, particularly where the court is making an order which is not a substantive departure from an existing order or status quo. In such circumstances, the court may consider some of the evidence contained in an assessment report without having to conclude that there are "exceptional circumstances" as set out in *Genovesi*.
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> > . . . . .
> >
> > [27] It must be cautioned that the existence of an assessment report should not make it "open season" for parties to automatically bring motions attempting to implement some aspects of the report or to tweak or otherwise change existing interim orders or an existing status quo. Clearly, the facts of each case will be critical and will guide the exercise of the court's discretion.
>
> [18] The court in *Bos v. Bos* at para 26 set out the following alternative factors to consider in lieu of requiring exceptional circumstances:
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> > a. How significant is the change that is being proposed as compared to the interim status quo?
> >
> > b. What other evidence is before the court to support the change?
> >
> > c. Is the court being asked to consider the entire report and recommendations, or only some parts, including statements made by children, or observations made by the assessor?
> >
> > d. Are the portions of the report sought to be relied on contentious and if so has either party requested the opportunity to cross-examine the assessor?
>
> [19] Other decisions agreeing with *Bos* include *CHELSOM v. HINOJOSA-CHELSOM*, 2020 ONSC 6926 (Ont. S.C.J.); *Krasaev v. Krasaev*, 2016 ONSC 5951 (Ont. S.C.J.); and *Calabrese v. Calabrese*, 2016 ONSC 3077 (Ont. S.C.J.).
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> . . . . .
>
> [21] The mother accurately submits that there are many factual disputes between the parties reflected in the assessment. The question for the motion court ought not to be whether it can determine all the factual disputes between the parties, but

whether it can determine essential facts showing whether or not a temporary change in the children's living arrangements is in their best interests.

[22] Delaying a change in residential arrangements until trial is not always appropriate. Making a change sooner can be the better option. Courts have found this to be true in parental alienation cases. In *Hazelton v. Forchuk*, 2017 ONSC 2282 (Ont. S.C.J.) (CanLii) the court said:

> [75] However, as noted at the outset of these reasons, there is one thing on which all participants agree - where parental alienation exists, it is manifestly important that steps be taken immediately. If they are not, the situation will only get worse. If the alienating parent continues to have unfettered access to the children, there is little doubt that the poisoning of the children's minds will continue. At some point, the restoration of a relationship with the other parent becomes much more difficult, if not impossible.

See also *MacLeod v. MacLeod*, 2019 ONSC 2128 (Ont. S.C.J.) (CanLii) where a finding of alienation was made at the interim stage and residential changes were made to address it.

[23] In my view **the law has evolved to the point where the approach of deferring parenting changes to trial in highly conflicted cases characterized by family violence and/or child parent contact issues should be re-examined, along with the related approach of routinely deferring implementation of family assessments to trial.** A reconsidered process of active judicial case management and timely single judge decision making may provide children more hope for better outcomes and at the same time provide procedural fairness to their parents. [emphasis added]

As noted above, in *Batsinda*, Justice Chappel extensively reviewed the case law and the principles that applied in dealing with assessment reports on an interim basis as the law existed at the time, and added the following:

> [32] . . . The caution that applies with respect to the weight to be given to assessment reports at the interim stage of proceedings applies primarily to the conclusions and recommendations of the assessor, rather than the evidence and observations set out in that report. Information such as statements made by children to the assessor, the assessor's observations respecting the parties, and their impressions regarding the parties' interactions with the children may be of considerable value to the motions judge in their attempt to reach a decision respecting the best interests of the children, provided that the evidence appears to be probative . . .

Here, Justice Mackinnon noted that even though the child was only two years old, she had already been impacted by parental conflict and exposed to CAS and police on multiple occasions. Furthermore, the earliest available trial date would be in September 2021, closing in on a year after the assessment was released. Justice Mackinnon also noted that the Father had plenty of time to cross-examine the assessor before the motion. Therefore, at the very least, if an "untested" assessment report is to be used on an interim motion, it behooves the other party to bring a motion to question/cross-examine the assessor before the motion - and it behooves the court to let them do it.

Justice Mackinnon then extends these principles further and suggests that, even though the motion before her could have been decided without relying on the assessor's recommendations and conclusions, "**high conflict parenting disputes generally do meet the test of exceptional circumstances**." Therefore, parents in such cases who dispute the recommendations in an assessment would be well advised to assert their procedural rights *before* the motion rather than simply argue that consideration of the report should be left to trial. On the one hand, this will encourage the additional step of questioning the assessor before the motion; on the other hand, in these days of delay, it also ensures that children are left in possibly unsatisfactory situations for unacceptable lengths of time.

What is the Difference Between a Tax Rate and an "Effective" Tax Rate? Inquiring Minds Want to Know.

Pousette v. Janssen (2021), 55 R.F.L. (8th) 80 (B.C. S.C.) - Jackson J.

Justice Jackson's decision in *Pousette* provides a welcome, clear and concise framework for calculating a non-Canadian resident's income for support purposes.

The parties were married in 1994 and had one child together. After they separated in 2004, the parties consented to an order that required the husband to pay the wife $385 a month in child support based on an income of $45,500 a year.

In 2011, the husband started working for the US State Department and became a resident of the United States for tax purposes.

In or around 2019, the wife applied for retroactive child support back to 2011. Although the husband had increased his child support payments voluntarily over the years, the wife claimed that he had still not paid what he was supposed to have paid, and argued that his income had to be grossed up to reflect the fact that his taxes in the United States were significantly less than they would have been in Canada.

Pursuant to s. 19(1)(c) of the *Guidelines*, a court can impute income if one of the parties "lives in a country that has effective rates of income tax that are significantly lower than those in Canada[.]" After reviewing some of the leading cases in BC about s. 19(1)(c), Justice Jackson established the following framework for calculating a non-resident parent's income for support purposes:

> [10] In summary, based on the *FCSG* and the interpreting case law, determining total income of a non-resident parent who earns income in a foreign currency involves the following stages:
>
> 1. **Determining whether there is a difference in effective tax rates in Canada and the foreign jurisdiction**, which in turn involves the following steps:
>
> a. determine the annual gross foreign income (GFI) by including all types of earnings that would form part of a payor parent's total income in Canada and making any adjustments to income for deductions as permitted under Schedule III of the FCSG;
>
> b. determine the foreign tax rate (FTR) paid, which can be calculated by dividing the total amount of foreign tax paid by the GFI;
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> c. using the average exchange rate over the preceding twelve months or the annual rate where it is available, convert the GFI to Canadian funds (CGFI);
>
> d. determine the Canadian tax rate (CTR) that would be levied on the CGFI; and
>
> e. Compare the two tax rates.
>
> 2.**If there is no difference in the effective tax rates, the non-resident parent's GFI can simply be converted to Canadian currency using the average exchange rate over the preceding year**. This will be the parent's total income to which the *FCSG* can simply be applied.
>
> 3. **If there is a significant difference in the effective tax rates, an additional amount of income can be imputed where the court considers it appropriate**, which involves the following steps:
>
> a. Calculate the non-resident parent's net foreign income (NFI, i.e. GFI less tax paid);
>
> b. Convert the NFI to Canadian currency (CNFI); and
>
> c. Using Canadian tax rates, determine what Canadian gross income would be required to yield the equivalent of the NFI (CGIENFI, which is calculated by dividing the CNFI by [100% less the Canadian tax rate]). The resulting CGIENFI is the parent's "total income" to which the *FCSG* can be applied.

> 4. In either scenario, if appropriate, **consider whether, based on a bundle of services analysis, adjustments to the total income should be made**. [emphasis added]

After reviewing the applicable tax rates in the United States and Canada, Justice Jackson found that the husband's effective tax rate in the United States had ranged from 10.4 percent to 16.4 percent between 2011 and 2017, whereas it would have ranged from 28.2 percent to 47 percent in Canada over that same period.

Based on the husband's 2017 income of $215,160.55 (in CAD), for example, the husband paid just over $35,000 in tax in the United States, but would have owed more than $100,000 in tax in Canada. A tax savings of approximately $65,000 on a gross annual income of $215,000 is clearly significant for the purposes of s. 19(1)(c).

With respect to the "bundle of services" issue, both parties' experts acknowledged that they "were unable to provide an opinion on the issue with any certainty because the issues are so complex and because a great deal of information that would be required to provide an opinion was not available." Fortunately for the wife, however, although expert evidence can be helpful in trying to compare the public benefits that are available in Canada to those in a foreign jurisdiction, Justice Jackson was satisfied that it is not actually necessary:

> [9] In some circumstances it may also be necessary to examine the "bundle of services" that Canada and the payor parent's foreign jurisdiction each provide in exchange for the tax dollars paid, in order to account for additional expenses a payor parent who earns their income in foreign currency may incur to enjoy tax-funded benefits made available in Canada. However, **while expert evidence about "bundle of services" comparisons can sometimes be helpful, there is no legal rule that expert evidence on that issue is required for a court to exercise its discretion to impute income under ss. 19(1)(c) and 20, and there may be sound policy reasons not to require such an intensive and potentially costly** inquiry: *Devathasan v. Devasathan* 2019 BCSC 661 at paras. 265-271, Gomery J. [emphasis added]

Then, as Justice Gomery noted in *Devathasan v. Devathasan* (2019), 27 R.F.L. (8th) 388 (B.C. S.C.):

> [270] In my view, **these cases do not establish a legal rule that expert evidence from an economist who has conducted a "bundle of services" review is an essential foundation in this case for the exercise of my discretion under ss. 19(1)(c) and 20 of the *FCS Guidelines***. The *FCS Guidelines* direct me to consider the difference in effective rates of income tax. **While a broader inquiry may inform the exercise of the court's discretion, it is not essential in every case**: if it were, *Patrick* would be wrongly decided and Newbury J.A. would not have referred to it with apparent approval.
>
> [271] For what it is worth, I should add that **a full review of the bundle of government services offered in two different countries strikes me as a large, expensive and probably controversial undertaking**. With respect for what may seem to be contrary views expressed in *Ward* and *Watson*, **I doubt that it would be good policy or consistent with the intention underlying the *FCS Guidelines* to require such an inquiry as a matter of course.**
>
> [272] I **do not think that the absence of expert evidence from an economist addressing the bundle of services is necessary on the evidence in this case to persuade me that the effective tax rate in Singapore is significantly lower than in Canada. The evidence is clear that it is**. It was open to Dr. Devathasan to attempt to persuade me of the contrary by leading evidence of the bundle of services, but no such evidence was tendered. [emphasis added]

In our view, we must be very careful with this reasoning. In some cases, it may be plainly obvious that the "bundle of services" a person receives for their tax dollars in a foreign jurisdiction is significantly less than what they would receive in Canada. But sometimes it is not, and it should not be that difficult to get evidence detailing those differences.

Furthermore, the wording of s. 19(1)(c) of the *Guidelines* seems to require this inquiry: the court may impute income where the spouse lives in a country that has ***effective*** rates of income tax that are significantly lower than those in Canada. The word "effective" must mean something, and we suggest that imports an inquiry as to what residents receive for their tax dollars. In the United States, for example, tax rates are lower, but there is no socialized medicine or "free" health care.

Then, there is also the fact that the burden should be on the recipient to show that the spouse lives in a jurisdiction with lower effective tax rates. The evidentiary onus is on the party asking that income be imputed: *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.).

Also of note, the husband tried to argue that various additional payments he received from working for the State Department (danger pay, "post differential earnings" to compensate him for environmental conditions during his postings, and a "post allowance" to compensate him for the higher costs of living during his postings), and income that he had chosen to defer to his retirement plan should not be included in his income for support purposes.

In dismissing these arguments, Justice Jackson concluded that the husband's danger pay, post differential earnings, and post allowance should properly be included in his income for support purposes in order to ensure that, as Justice Sandomirsky noted in *Reynolds v. Andrew*, 2008 CarswellSask 583 (Q.B.), the children of service people "whose parents serve abroad, share the benefits and emoluments for which allowances are paid and deserved. These children endure the hardship of an absentee parent and they endure the risk of losing a parent to injury or death. Thus, they too should be benefactors of such allowances and enhanced income generated therefrom."

Justice Jackson was also satisfied that while Schedule III of the *Guidelines* requires various adjustments to a person's income for support purposes, it does **not** permit a deduction for either mandatory or voluntary retirement savings or pension plans:

> [15] In *T.B. v. R.B* 2015 BCPC 194, Judge Wyatt considered the issue of whether a parent's RRSP contributions ought to be deducted in determining guideline income. In *T.B*, the evidence was that the deductions were mandatory through the parent's employment and the RRSP was locked in. The evidence in this case satisfies me the claimant's contributions and deductions were elective, not mandatory. In *T.B.*, Wyatt P.C.J. concluded that Schedule III of the FCSG does not permit the downward adjustment of a parent's income for pension and RRSP deductions or contributions (whether voluntary or mandatory): at para. 42; see also *Ellacott v. Paliy* 2018 ONSC 3327 at paras. 37-38.
>
> [16] I agree that Schedule III of the FCSG does not allow such an adjustment. I find the [husband's] deferred income amounts reported as Thrift Savings Plan and Thrift Savings Plan Loan are to be included in the calculation of his GFI.

In the end, Justice Jackson was persuaded that the husband should be imputed with additional income pursuant to s. 19(1)(c). She was also satisfied that the order should be made retroactive to 2011 because of the husband's "failure to take appropriate steps to correctly determine his ongoing child support obligations, and his failure to provide the information to the [wife] as she requested". As a result, Justice Jackson ordered the parties to calculate the specific amount that the husband owed the wife based on her decision, and gave them leave to seek further directions from her if they could not finalize the matter on their own.

Whose Medical Records Are These?

D.M.M. v. E.H.M, 2021 CarswellBC 1153 (S.C.) - Punnett J.

This case was in the nature of an appeal from the British Columbia Provincial Court, where the petitioner sought to set aside an order in a family law proceeding that required her to produce her "medical records relating to diagnoses or treatment for depression, anger management, mood swings, or memory loss."

The parties lived together from February 2008, until October 2019. They had two children. There was a trial scheduled in April 2021, about parenting issues, guardianship, and child support.

The respondent applied for the order in issue in provincial court. Section 5 of the B.C. *Family Law Act*, S.B.C. 2011, c. 25 requires parties to provide full information for the purposes of resolving a family law dispute. Rule 20(6) of the *Provincial Court (Family) Rules*, B.C. Reg. 417/98 provides:

> On application by notice of motion to a judge under Rule 12, the judge may order a person who possesses or controls a record that is relevant to the proceedings and on whom notice has been served in accordance with Rule 12(1)(b) to produce the record for inspection and copying on the date, at the time and place and in the manner the judge thinks is fair.

The judge concluded the records sought were relevant to the main issues in the litigation.

The petitioner, however, claimed that the records in question were not in her possession or control. Rather, she argued, the records were in the possession and control of her treating doctors.

Justice Punnett concluded (correctly) that, as the petitioner had a right to her own medical records, she was caught by Rule 20(6), even if those records were in the actual possession of her doctors.

The petitioner also argued that, unlike the Supreme Court, there was no right of discovery in Provincial Court, and no Rule under which the order in question could have been made. The petitioner further argued that the matter turned on the meaning of "possession or control", and that control "does not mean you can go and get [the records]." Rather, the doctors were in "possession and control" of the records.

The respondent argued that he could not make an application for the production of the records directly from the doctors because he did not know who the third-party medical practitioners were. Further, he argued, the petitioner had control of the records, was entitled to obtain them, and could require her treating physicians to release them to her.

The question, therefore, was whether a party's medical records held by a medical professional were in that party's possession or control within the meaning of Rule 20(6)?

While no Provincial Court authority on point was provided, the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 offered some assistance. Rule 7-1(a)(i) refers to documents "that are or have been in the party's possession or control," and several authorities have considered the meaning of "possession or control."

In *Henry v. British Columbia (Attorney General)*, 2014 CarswellBC 1601 (S.C.), Chief Justice Hinkson stated:

> [22] Possession of a document for the purposes of Rule 7-1(1) requires more than mere access to the document: *Lacker v. Lacker* (1982), 42 B.C.L.R. 188 (B.C. S.C.), at 192-94 [1982] B.C.J. No. 1514 (B.C. S.C.).
>
> [23] Control of a document for the purposes of the predecessor to Rule 7-1(1) has been held to be an enforceable right to a document and as such includes all documents which, though not in the party's possession, that party has a right to obtain from the person who has them: *Royal Bank v. Hale (No. 1)*, (1960), 35 W.W.R. 236, [1960] B.C.J. No. 44 (B.C. C.A.); *Western Union Insurance Company v. Nihill*, [1972] 6 W.W.R. 241, 31 D.L.R. (3d) 124 (Alta. T.D.).
>
> [24] Power over a document for the purposes of the predecessor to Rule 7-1(1) has been held to be broader than mere control and to connote that the litigant has access to the documents: *Net1 Products (Canada) Ltd. v. Mansvelt Estate*, 2001 BCSC 906 (B.C. Master) at para. 14, [2001] B.C.J. No. 1282 (B.C. Master).

Then, Justice Punnett referred to *Cantlie v. Canadian Heating Products Inc.*, 2014 CarswellBC 365 (S.C.):

> [67] The plaintiffs say I should order Monessen Canada to seek out and produce documents from its US parent company, Monessen Systems. The plaintiffs claim it is within Monessen Canada's "power" to get these documents from Monessen Systems notwithstanding that it does not have possession or control of the documents. To support this assertion, the plaintiff argues that "control" in Rule 7-1(1) includes the "power to obtain".
>
> [68] The plaintiffs provided me with no case authority supporting this novel argument. Other than inconvenience and cost, which I do not suggest are irrelevant, the plaintiffs provided no explanation as to why they should not be required to apply under Rule 7-1(18) to seek the documents directly from the parent companies. Rather, the plaintiffs suggest that under

> Rule 7-1(1) I can order Monessen Canada to seek out those documents. They say that only if Monessen Canada returned to say the parent company would not provide the documents would an application under Rule 7-1(18) be necessary.
>
> [69] The plaintiffs are wrong. Rule 7-1(1) obligates parties to prepare a list of all documents that have been or are in a party's "possession or control" and that could be used at trial to prove or disprove a material fact, or upon which a party intends to rely. This test is narrower than under the previous Court Rules and it would be inconsistent with the object of the current Rules to essentially broaden the meaning of "control" through inference.
>
> [70] Moreover, Rule 7-1(11) to (14) set out specific procedures to be used if a party believes that the list of documents should include additional documents that "are within the listing party's possession, power or control". Rules 7-1(11)-(14) do not apply to this application; it can only be invoked after the list of documents is delivered. If Rule 7-1(1) was meant to obligate parties to produce documents in their "power to obtain", I think the Rule would have said so.

Notably, the law in BC is different from Ontario (and elsewhere), where a party can be forced to bring a motion for production from third parties if they have the right to obtain the documents from them. See, for example: *Di Luca v. Di Luca* (2004), 1 R.F.L. (6th) 162 (Ont. S.C.J.); *K. (S.D.) v. Alberta (Director of Child Welfare)*, 2002 CarswellAlta 116 (Q.B.); *Catholic Children's Aid Society of Toronto v. S. (A.)* (2007), 47 R.F.L. (6th) 208 (Ont. C.J.), aff'd (2008), 64 R.F.L. (6th) 219 (Ont. S.C.J.); *Peerenboom v. Peerenboom* (2018), 16 R.F.L. (8th) 451 (Ont. S.C.J.). Or stated more succinctly, disclosure obligations extend to the ability of a party to make a formal request for documents from a non-party with the expectation that the request will be granted: *Matthys v. Foody* (2009), 72 R.F.L. (6th) 376 (Ont. S.C.J.).

The respondent argued that the petitioner had control of her medical file and could request and obtain the records. He referred to *McInerney v. MacDonald*, 1992 CarswellNB 63 (S.C.C.), where the Supreme Court of Canada held that a patient was entitled to examine and copy all information in their medical records relied on by the physician considered in the doctor-patient relationship (including records prepared by other doctors). The actual physical records, however, belonged to the physician.

A patient has the right to access their own medical records. Those records are within the patient's control, and must be produced. Logic really dictates no other result. And it seems Justice Punnett agreed.

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