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— Franks & Zalev - This Week in Family Law

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The Interim Alienation Switch-er-oo Two Step

JLZ v. CMZ (2021), 58 R.F.L. (8th) 313 (Alta. C.A.)

It is relatively rare for a court to order a full custody reversal as a remedy for parental alienation. And while courts regularly refer to the fact that alienation must be addressed early [*Ene v. Ene* (2015), 56 R.F.L. (7th) 332 (Ont. S.C.J.); *Williamson v. Williamson* (2016), 74 R.F.L. (7th) 18 (B.C. C.A.); *Kwan v. Lai* (2016), 98 R.F.L. (7th) 437 (B.C. S.C.); *Hazelton v. Forchuk* (2017), 93 R.F.L. (7th) 254 (Ont. S.C.J.); *MacLeod v. MacLeod*, 2019 CarswellOnt 5172 (S.C.J.); *Hajji v. Al-Jammou* (2020), 48 R.F.L. (8th) 401 (Ont. S.C.J.)], it is almost unheard of for this type of relief to be granted on an interim basis.

But in *JLZ v. CMZ*, the Alberta Court of Appeal is clear that, where a motion judge is satisfied that such extraordinary relief is necessary to protect a child's best interests, it can and should be done.

The parties were married. Their children were only four and one when they separated in 2019.

After separation, the mother engaged in a campaign to alienate the children from the father, and repeatedly interfered with the father's court-ordered parenting time.

In August 2020, the case management judge found the mother in contempt of two parenting orders, and made a specific finding that the mother was trying to alienate the children from the father. She ordered the parties to engage in reunification therapy, and set up a schedule for the father's parenting time. [2021 CarswellAlta 1142 (Q.B.)]

The mother appealed the case management judge's order to the Alberta Court of Appeal, but her appeal was dismissed. [2020 CarswellAlta 2303 (C.A.)]

The parties next appeared before the case management judge on February 8, 2021. By that point, the father had not seen the children since June 2020. The case management judge stayed the father's court-ordered parenting time with the older child while the reunification counsellor tried to deal with the situation, but gave the father parenting time with the younger child on February 11, 19, and 25, 2021.

On February 11, 2021, instead of facilitating the father's access with the younger child as ordered, the mother went to the police station, and alleged that the father had sexually abused the younger child. In an email exchange with the reunification counsellor, the mother claimed she had decided to pursue a "formal avenue" because she had "not successfully leveraged the

case management sessions as a mode of dealing with matters of safety and concern" and had instead "been accused of 'parental alienation' in interim findings, which has not been substantiated by tested evidence, and attempting to delay the process."

The RCMP investigated the mother's allegations, but were unable to corroborate them, and advised the parties that it had no concerns about the children's safety with the father.

As a result of the mother's failure to comply with the February 8, 2021 Order, the father brought a further application for contempt. The case management judge heard the application, and found the mother in contempt of court. She also determined that it would be in the children's best interests to be placed in the father's primary care pending a further hearing that had been tentatively scheduled for late April 2021, and ordered accordingly.

The mother appealed. After quickly disposing of the mother's claims that she had been denied due process and that the case management judge was biased against her, the Court of Appeal considered the mother's arguments that: (a) she had a "reasonable excuse" for not complying with the February 8, 2021 Order; and (b) changing the parenting schedule was not an appropriate way to sanction the mother's contempt.

Pursuant to rule 10.52(3) of the *Alberta Rules of Court*, a judge may find a person in contempt of court if s/he does not comply with an order, other than an order for the payment of money, "without reasonable excuse". For further discussion of the "without reasonable excuse" defence to contempt in Alberta, see *Envacon Inc v. 829693 Alberta Ltd*, 2018 CarswellAlta 2097 (C.A.) at paras. 30-41.

Other jurisdictions across Canada allow for similar defences when dealing with allegations of contempt. See, for example, *Janowski v. Zebrowski* (2019), 29 R.F.L. (8th) 186 (Ont. S.C.J.), where Justice Trimble explained that when a parent argues justification as a defence to an allegation that s/he has breached an access order:

> There must be clear and compelling reasons to legally justify violation of an order. In order to do this, the parent must show, by admissible evidence, that he or she has a reasonably held belief that there is a good reason to defy the order, such as imminent harm to the children. Putting it another way, the defaulting parent's belief must be sincerely held. A sincere belief of immanent harm or danger, alone, is not sufficient. There must be a validly objective justification for the breach based on the child's needs and interests, based in evidence (*Kassay v. Kassay*, [2000] O.J. No. 3373 (Ont. S.C.J.), at para. 25; *Docherty v. Catherwood*, 2015 ONSC 5240 (Ont. S.C.J.), at para. 19; and *Houben v. Maxwell*, 2016 ONSC 2846 (Ont. S.C.J.), at p. 12 and 23, *Jackson v. Jackson*, 2016 ONSC 3466 (Ont. S.C.J.), at para. 59 to 61).

If a parent can show they did not act with the intention of disobeying a court order, but both subjectively ***and*** objectively in the best interests of the child, a finding of contempt may be avoided. See also *Gaudet v. Soper* (2011), 95 R.F.L. (6th) 32 (N.S. C.A.); *L. (A.G.) v. D. (K.B.)* (2009), 65 R.F.L. (6th) 182 (Ont. S.C.J.); *Campo v. Campo*, 2015 CarswellOnt 3130 (S.C.J.); *Paton v. Shymkiw* (1996), 26 R.F.L. (4th) 22 (Man. Q.B.); *Docherty v. Catherwood*, 2015 CarswellOnt 12595 (S.C.J.).

In this case, the Court of Appeal was not persuaded that the mother had a reasonable excuse to not comply with the February 8, 2021 Order. The case management judge had found that after the Order was made, the mother "commenced a series of actions to provide her with an excuse to breach the order", and there was ample evidence in the record to support this conclusion.

The Court of Appeal then turned to the mother's argument that the case management judge had erred in changing the parenting arrangements as a punishment for her contempt. However, this argument ignored the key distinction between changing parenting arrangements to punish a parent for contempt, versus changing them in order to protect a child from a parent who refuses to comply with court orders:

> [60] Although the [Ontario Court of Appeal] was clear [in *Chan v. Town* (2013), 34 R.F.L. (7th) 11 (Ont. C.A.) at para. 6] that a change in parenting is not an appropriate punishment for contempt, we do not read this decision as foreclosing the possibility that a change in parenting may be required to protect the best interests of the child when a parent fails to comply with court orders and is found in contempt. **A change in parenting where required to protect the children's best interests is available, not as a punishment per se, but as a consequence of a parent who fails to comply with**

> **court orders. Failure to comply with a court order made in the children's best interests is not in their best interests. Nor is persistent failure to do so.**
>
> . . . . .
>
> [62] In summary, **a change in parenting is available following a finding of contempt. It should be used with restraint. It must be proportionate** to the gravity of the conduct and the personal culpability of the contemnor and the court must consider other, less drastic measures. **The overriding principle is whether the order is in the best interests of the child**. Two of the courts' fundamental obligations form the foundation of this case: the obligation to safeguard the dignity of the courts and the force of their orders, and the obligation to safeguard the best interests of children. The primary mechanism by which the courts protect children is the making of orders. **A parent's wilful and repeated contempt of court orders may force the court to consider whether it can effectively maintain its *parens patriae* role while the children are in that parent's care. In rare circumstances, a change of parenting might be necessary in service of the children's best interests and the courts' ongoing obligation to protect them.** [emphasis added]

In this case, the Court of Appeal was of the view that the case management judge placed the children with the father, not to punish the mother, but because it would be in their best interests to live with the father, at least for the time being. Accordingly, the Court of Appeal dismissed the mother's appeal from the contempt finding.

That being said, the Court of Appeal was still required to determine whether the mother had raised any basis for overturning the case management judge's finding that it would be in the children's best interests to reside with the father.

The Court started by explaining that when dealing with alienation cases, there are usually only four options available to the court

> [63] In the context of parental alienation generally, although not specific to contempt, there are four options available to the court:
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> Do nothing and leave the child with the alienating parent;
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> Direct a custody reversal by placing the child with the rejected parent;
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> Leave the child with the favoured parent and order therapy; or
>
> Provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.
>
> *B(RM) QB* at para 112; Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 8th ed, (Toronto: Irwin Law, 2020) at 622, citing *WC v CE*, 2010 ONSC 3575 at para 129.

In this case, the case management judge had considered the provisions of s. 16 of the *Divorce Act*, including the mother's refusal to facilitate a relationship between the father and the children, and concluded that it would be in the children's best interests to be placed with the father (at least temporarily). And, given the high standard of review that applies in parenting cases (see *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) at para. 13), there was simply no basis to interfere with the case management judge's order in this case.

As a result, the appeal was dismissed.

Hopefully, this decision will serve as a wakeup call to the mother to stop trying to prevent the children from having a relationship with their father. But if it doesn't, and we suspect that it won't given the mother's conduct to date, she is now at very serious risk of losing her children.

What Do the Dodo, the Betamax, the Floppy Disk and the Doctrine of *Forum Non Conveniens* Have in Common?

Kore Meals LLC v. Freshii Development LLC, 2021 CarswellOnt 5748 (S.C.J.) — Morgan J.

This is not a family case, but any judgment suggesting that Zoom (and other like platforms) has made the doctrine of *forum non conveniens* "obsolete" is probably worth knowing about.

This was an application to stay an Ontario court proceedings in favour of arbitration in the U.S. In considering the matter, Justice Morgan of the Ontario Superior Court of Justice suggested that arguments of *forum non conveniens* have "gone the way of the VCR player" and that, in the age of Zoom no forum is any "less conveniens" than any other. All forums are equally convenient for virtual hearings.

The plaintiff and defendant were in a contract dispute. Although the contract contained an arbitration clause requiring any disputes to be arbitrated in Chicago, the plaintiff started an action in Ontario.

In deciding that the Ontario proceeding should be stayed in favour of arbitration in Chicago, Justice Morgan considered the test set out by the Court of Appeal in *Haas v. Gunasekaram*, 2016 CarswellOnt 16116 (C.A.):

- Is there an arbitration agreement?
- What is the subject matter of the dispute?
- What is the scope of the arbitration agreement?
- Does the dispute arguably fall within the scope of the arbitration agreement?
- Are there grounds on which the court should refuse to stay the action?

The plaintiff argued that Chicago was an inconvenient forum because of the added cost to both parties. Although not the focus of this comment, it is worth noting that *forum non conveniens* is not usually considered in a contest between court and arbitration. However, in this case, Justice Morgan held that *forum non conveniens* is a material consideration when determining if arbitration is either unfair or impractical.

Justice Morgan then explained that *forum non conveniens* is generally inapplicable in the age of Zoom. Hearings are held by videoconference; documents are served and filed electronically; and witnesses are examined from remote locations. No one location is more convenient than any other in the age of digital hearings. "[W]itnesses or documents may be located in Canada's Northwest Territories or in the deep south of the United States, and no location would be any more or less convenient than another." As a result, Justice Morgan was of the view that the doctrine of *forum non conveniens* as we currently understand it is "all but obsolete":

> [31] It is by now an obvious point, but it bears repeating that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. Judges cannot say *forum non conveniens* we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse.
>
> [32] And what is true for *forum non conveniens* is equally true for the access to justice approach to the arbitration question. Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another.

While we are of the view that it may be a bit premature to bury the doctrine of *forum non conveniens* - there are, after all, other components of the test such as a juridical advantage offered by one forum [see, for example, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CarswellBC 1257 (S.C.C.)] — it is certainly clear that the doctrine has suffered a significant blow.

Ohhhh . . . You Mean *that* House . . .

Capar v. Vujnovic, 2021 CarswellOnt 10572 (S.C.J.) — Emery J.

This case involves section 56(4) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 — the steam engine that drives the Ontario cottage industry of claims to set aside domestic contracts.

Now, full disclosure is, of course, of *fundamental* importance. Without proper disclosure, parties to a domestic contract — such as a marriage contract — cannot truly understand the effect of the contract on their rights and entitlements. Full disclosure is, indeed, the most basic obligation in family law: *Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.); *Arenburg v. Arenburg*, 2016 CarswellNS 937 (C.A.); *Smith v. Smith* (2016), 84 R.F.L. (7th) 1 (Alta. C.A.); *Burke v. Poitras* (2018), 22 R.F.L. (8th) 266 (Ont. C.A.). And courts are asked to set aside domestic contracts all the time.

But with great power comes great responsibility.

There are too many cases where one party looks to set aside a valid contract in the hopes of shaking loose a more favourable settlement — this causes a chilling effect on the legal profession: *Balsmeier v. Balsmeier* (2016), 80 R.F.L. (7th) 274 (Ont. S.C.J.). Courts should strive to uphold domestic contracts without presumption or hesitation, and there is no presumption that courts should be hesitant in enforcing a proper contract: *Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.); *Butty v. Butty* (2009), 75 R.F.L. (6th) 16 (Ont. C.A.); *Hojnik v. Hojnik* (2010), 81 R.F.L. (6th) 288 (Alta. C.A.); *Bradshaw v. Bradshaw* (2011), 7 R.F.L. (7th) 441 (B.C. S.C.); *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.).

It has even been suggested that the court should treat the reasonable best efforts of parties to address their affairs in a contract as presumptively dispositive: *Ramdial v. Davis (Litigation guardian of)* (2015), 68 R.F.L. (7th) 287 (Ont. C.A.); *Cheng v. Li* (2015), 69 R.F.L. (7th) 306 (Alta. C.A.); *Toussaint v. Toussaint*, 1982 CarswellNB 70 (C.A.).

In this case, Justice Emery gave effect to these principles.

The parties started dating in 2011. At that time, the wife owned a home on Grey Owl Run that she had owned since 2004. When the parties married in 2012, *the husband moved into the Grey Owl Run property with the wife* such that it became the matrimonial home. They had a child in 2013.

The parties signed a Marriage Contract in 2016. In the Contract, the Grey Owl Run property — the wife's only material asset — was excluded from equalization, along with any assets into which the proceeds of that property could be traced.

When the parties separated in 2019, the husband contested the validity of the Marriage Contract on the basis that the wife had not disclosed the *value* of the Grey Owl Run property in 2016, or the significant increase in its value since 2004.

There was no question that the husband had signed the Marriage Contract, and with the benefit of Independent Legal Advice. There was no question of duress, misrepresentation, or any misunderstanding. The only issue was whether or not the wife had provided "full disclosure."

After concluding that the issue of the enforcement of the Marriage Contract lent itself to a motion for summary judgment, Justice Emery considered the issue of disclosure. A challenge to set aside or to nullify a marriage contract in Ontario is brought under s. 56(4) of the *Family Law Act*:

> **Setting aside domestic contract**
>
> 56.(4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party **failed to disclose** to the other **significant assets**, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract. [emphasis added]

Notably, s. 56(4)(a) makes no mention of the "value" of assets or liabilities. Nor, for that matter, does it refer to income disclosure — but both requirements have, to a certain extent, been "read in" to the section: *Underwood v. Underwood* (1994), 3 R.F.L. (4th) 457 (Ont. Gen. Div.), var'd (1995), 11 R.F.L. (4th) 361 (Ont. Div. Ct.); *Dewling v. Dewling* (2009), 72 R.F.L. (6th) 405 (N.L. U.F.C.).

The first consideration in the process is whether the party looking to set aside the marriage contract can demonstrate that one of the listed circumstances within s. 56(4) has been engaged. Second, the court must then consider whether it is appropriate to exercise its discretion to set aside the contract (or a provision within it): *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (Ont. C.A.).

The husband argued that the wife did not disclose the value of the Grey Owl Run property at the time they entered into the Marriage Contract. This was the sole asset at issue regarding the Marriage Contract in the application and on the motion.

The wife argued that *awareness* of the other's assets is sufficient to avoid setting aside a marriage contract. This is probably a slight overstatement of the law. The present state of the law seems to be that a party cannot enter into a marriage contract knowing of shortcomings in disclosure at the time, and then rely on those very shortcomings in a later effort to set aside the contract: *Quinn v. Epstein Cole LLP* (2007), 44 R.F.L. (6th) 337 (Ont. S.C.J.); *Butty v. Butty* (2009), 75 R.F.L. (6th) 16 (Ont. C.A.); *Golton v. Golton* (2018), 19 R.F.L. (8th) 129 (Ont. S.C.J.); *Hartshorne v. Hartshorne* (2004), 47 R.F.L. (5th) 5 (S.C.C.); *P. (J.L.) v. R. (J.)*, 2014 CarswellSask 754 (Q.B.).

There are also cases that suggest there is no need to provide specific financial disclosure where the other party was *aware* of the specific assets **and had as much ability to value those assets**: *Armstrong v. Armstrong* (2006), 32 R.F.L. (6th) 244 (Ont. C.A.); *Bhupal v. Bhupal* (2009), 69 R.F.L. (6th) 43 (Ont. C.A.); *Faiello v. Faiello* (2019), 30 R.F.L. (8th) 1 (Ont. C.A.).

In this case, it was not necessary for the wife to provide the husband with the value of the Grey Owl Run property at the time the Marriage Contract was entered into; the husband was aware of it (he was living in it), and he was just as capable of determining the value, or alternatively, he could have asked questions.

As a result, Justice Emery concluded there was no genuine issue requiring a trial to determine that the husband had adequate disclosure of the wife's interest in the Grey Owl Run property at the time they entered the Marriage Contract. There was no failure to disclose a significant asset.

Nor did his Honour accept that the husband "did not understand" what he was signing or that the legal advice he received was not truly "independent". For the husband, there was also the problem of the Certificate of Independent Legal Advice provided by the husband's lawyer, which was, absent evidence to the contrary, dispositive evidence of the fact of independent advice. As the Court explained in *Mantella v. Mantella* (2006), 27 R.F.L. (6th) 57 (Ont. S.C.J.):

> [39] But even in the unique and complex area of family law, a solicitor's duty is to her own client, and not to the other side. If the solicitor fails to provide competent legal advice, that is an issue for her own client. **Where a solicitor certifies that she has provided independent legal advice, so far as the opposite party is concerned that should end the matter**: *non est factum* will not be available unless the opposite party knew or was willfully blind to the fact that the other party did not understand the agreement. The solicitor's certification is **dispositive evidence** of comprehension on the part of the signatory, and not a representation from the solicitor herself to the opposite party. . . . [emphasis added]

The word "dispositive" is never good when used against you. And as the husband did not put forward any contradictory evidence from his lawyer, that was the end of that

Finally, the husband alleged duress on the ground that he believed that the marriage would end if he did not sign the Marriage Contract. But, unfortunately for the husband, that is not duress. Duress or illegitimate pressure cannot come from within. One's own perceptions cannot amount to duress: *M.D. v. A.C.*, 2017 CarswellOnt 16333 (S.C.J.) at paras 82-83. Furthermore, most cases suggest that "sign or no marriage" is not illegitimate pressure: *Melnyk v. Melnyk* (2010), 84 R.F.L. (6th) 137 (Man. Q.B.); *Toscano v. Toscano* (2015), 57 R.F.L. (7th) 234 (Ont. S.C.J.); *Verkaik v. Verkaik* (2009), 68 R.F.L. (6th) 293 (Ont. S.C.J.), aff'd

(2010), 85 R.F.L. (6th) 233 (Ont. C.A.); *Balsmeier v. Balsmeier*, 2016 CarswellOnt 1794 (S.C.J.). Were it otherwise, many contracts would be susceptible to being overturned on this basis.

Ultimately, Justice Emery concluded (properly, in our view) that the husband regretted signing the Marriage Contract. But that was not sufficient to set it aside. A marriage contract should not be set aside because one of the parties later regrets signing it: *McCall v. Res*, 2013 CarswellOnt 5865 (C.J.).

And that, as they say, was that — or at least for the husband it was.

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