

FAMLNWS 2021-04  
**Family Law Newsletters**  
February 1, 2021

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

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***Habeas Corpus, Anyone?***

*Hicks v. Gazley*, [2020 CarswellAlta 2289](#) (Q.B.) - Manderscheid J.

In the November 2, 2020 and November 9, 2020 editions of *TWFL*, we discussed Justice Lema's decisions to dismiss two successive motions by Mr. Hicks to sever the divorce from the corollary relief. The first motion was dismissed because Mr. Hicks had not answered his undertakings ([2020 CarswellAlta 1634](#) (Q.B.)). The second was dismissed because it would have been an abuse of process to allow Mr. Hicks to try to prove that he had, in fact, answered his undertakings at the time of the first motion, when all of the additional evidence that he wanted to rely on could have been adduced at the initial hearing ([2020 CarswellAlta 1683](#) (Q.B.)).

These were actually not Mr. Hicks' first requests to sever the divorce; he apparently also brought an unsuccessful motion for that exact same relief about a year before the two motions that were ultimately dismissed by Justice Lema.

Mr. Hicks, however, is apparently desperate to get remarried, and before Justice Lema had even released his reasons for dismissing the second of the two severance motions that were brought before him, Mr. Hicks brought yet *another* motion to sever the divorce.

Not surprisingly, Justice Manderscheid quickly dismissed Mr. Hicks' motion as it was clearly both *res judicata* and an abuse of process. Justice Manderscheid also directed Mr. Hicks not to bring any further motions to sever the divorce without first obtaining leave of the court.

At this point, it seems that Mr. Hicks will only be able to get his divorce if he either makes a deal with Ms. Gazley, or gets the case to trial so that all of the outstanding issues, including his request for a divorce, can be dealt with on a final basis. While Mr. Hicks has proven to be persistent, this situation does raise an interesting question. If Mr. Hicks' claim for severance has been held to be *res judicata* - can he ever move for divorce again?

**What You Permit, You Promote - Part 3<sup>1</sup>**

*Hakim v. Hakim* and *Caskie v. Caskie*

***Hakim v. Hakim*, [2020 CarswellOnt 16250](#) (S.C.J.) - Nadeau J.**

In *Hakim*, Justice Nadeau presided over six Case Conference teleconferences from May 21 to July 8, 2020.

The Wife asked that the Husband pay her \$11,410 in costs of the Case Conferences on a full recovery basis. The Husband denied that he had acted in bad faith and denied that the Wife was entitled to costs - to say nothing of costs on a full recovery basis.

Justice Nadeau noted that the starting point in addressing the issue of costs is section 131 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that subject to the provisions of an Act or rules of court, costs are within the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Rule 24 of the Ontario *Family Law Rules*, O. Reg. 114/99, also addresses the issue of costs, and states that there is a presumption that a "successful party" is entitled to the costs of a motion.

Modern costs rules are designed to foster four fundamental purposes; (1) to partially indemnify successful litigants; (2) to encourage settlement; (3) to discourage and sanction inappropriate behaviour by litigants and; (4) to ensure that cases are dealt with justly under Rule 2(2) of the *Family Law Rules: Mattina v. Mattina*, 2018 CarswellOnt 17838 (C.A.).

In *Lawrence v. Lawrence* (2017), 96 R.F.L. (7th) 456 (Ont. C.J.), in what has become a frequently-quoted passage, Justice Carole Curtis noted:

[52] The justice system is a precious public resource. Access to the justice system by individuals must be balanced with the need to ensure that the resource is available for all those who need it. This is one of the purposes of Rule 2.

She then continued:

[54] Parties to litigation must understand that court proceedings are expensive, time-consuming and stressful for all concerned. They are not designed to give individual litigants a forum for carrying on in whatever manner they may choose, oblivious to the impact of that conduct on the other side and, perhaps most importantly for the purposes of this case, oblivious to the mounting costs of the litigation . . .

In considering the matter, His Honour was tempted to find that the Husband had acted in bad faith during the series of Case Conferences (so as to attract full indemnity costs) by requiring the Court to provide six appearances to finally be in a position to run a productive Case Conference. However, appreciating the difference between "bad faith" and "unreasonable conduct," Justice Nadeau could not find that the Husband's behaviour was sufficiently egregious as to warrant a finding of bad faith.

Justice Nadeau then considered Rules 17(18) and 17(18.1) of the Ontario *Family Law Rules*. Rule 17(18.1) is a relatively new provision that clarifies the court's jurisdiction to award costs in relation to a conference at a later stage in the case. Before this amendment, if costs were not specifically reserved or awarded immediately after the attendance, they could not be claimed later.

The Wife argued that the Husband failed to provide disclosure in advance of the Case Conference, which made the Conference unproductive. Justice Nadeau agreed.

In order for the Wife to establish an entitlement to costs of each Case Conference, Justice Nadeau had to satisfy himself that the Wife had shown that the Husband "was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow [the Ontario *Family Law Rules*.]" And the series of endorsements from the Conferences confirmed that to be the case.

Because the Husband did not make all of the required disclosure and did not follow the rules, he had contributed to the Case Conferences being less productive than they should have been. And based on his unreasonable conduct during the Case Conferences, the Court was satisfied that the Husband was "not properly prepared to deal with the issues at that step or otherwise contribute[d] to that step being unproductive[.]"

As a result, the Husband was ordered to pay the Wife \$3,000 in costs.

Quite candidly, less time would be wasted at Conferences if more judges were prepared to order costs where, as in this case, Conferences were rendered useless or not as productive as they should be.

***Caskie v. Caskie*, 2020 CarswellOnt 16830 (S.C.J.) - Price J.**

A Case Conference was held on September 14, 2020.

The Husband's financial situation was not simple. He was the sole and/or controlling shareholder of multiple corporations, the trustee of the Family Trust, and an indirect beneficiary of the Family Trust through his interest in a numbered company.

On February 28, 2019, the Wife's counsel sent a detailed disclosure request to the Husband's counsel. The Husband, however, failed or refused to provide disclosure beyond personal tax returns, some financial statements and corporate tax returns (which were provided late).

Instead of a business valuation, the Husband provided an Excel spreadsheet to support the value he had attributed to one of his companies for a date other than the date of separation. He also provided an appraisal of a commercial property for a date well displaced from the date of separation.

The Husband subsequently produced a business valuation and an income report, but did not provide the "Scope of Review" documents, even after repeated requests. Eventually, some - but not all - of the Scope of Review documents were produced; but some of the Excel spreadsheets had been locked such that the columns could not be expanded to permit a review of the complete information.

To make matters worse (for the Husband), many of the documents clearly had been printed in 2019 and significant portions of the Family Trust Settlement/Deed were unreadable.

As a result of all of this, the Wife asked the Case Conference judge, Justice Price, to order the Husband to reimburse her for the costs she had incurred on requesting and receiving piecemeal and incomplete disclosure.

The Husband argued that he had "substantially complied" with his disclosure obligations, and relied particularly on a BDO Estimate Valuation Report. An Estimate Valuation Report is not a Valuation Report, which is given with the highest level of assurance. That said, it is also not a mere Calculation Report.

The Court called out the Husband for not explaining why he chose this level of Report. This was perhaps unfair, especially if the level of Report to be provided had not been previously discussed. However, the Court considered the Report's limitations in determining whether it should relieve the Husband of the obligations that would otherwise lie on him to provide the full financial disclosure that the Wife was seeking. It did not. And it did not assist that the Report relied heavily on representations made by "management" - the Husband.

As one would expect, the Court reviewed Rule 17(18) of the Ontario *Family Law Rules*.

The Husband did not respond to the Wife's request for disclosure dated February 28, 2019, until 17 months later, and he had still not provided the items requested by the Wife's Chartered Business Valuator. For almost 30 months post-separation, the Husband left the Wife to "ferret out" his financial circumstances and to identify the various issues that required further investigation, including trying to determine shareholdings through schedules on tax returns. He failed to disclose the Family Trust Deed, over which, as trustee, he had control. The Wife spent over \$20,000 seeking disclosure, following up, piecing information together, and making independent inquiries to obtain information that should have been provided.

You can see where this is going.

The Husband was ordered to pay the Wife \$20,000 to reimburse her for the expenses she incurred as a result of his delayed and incomplete disclosure, including the expense of her having to redo her Case Conference Brief following the additional disclosure that he provided after she had already served her Brief.

The Wife also requested \$10,000 in costs for the Case Conference. Finding that "[t]he litigation strategy the Husband has adopted has delayed the resolution of the issues and contributed to this Case Conference being unproductive[.]" Justice Price granted this request.

Again, if these kinds of orders were made more often in appropriate circumstances, there would be far less time wasted at Case Conferences. Perhaps the fact of three cases over the course of several months suggests that courts are growing tired of seeing time wasted that could have been put to better use.

### **Ladies & Gentlemen . . . Watch While I Magically Change an Equalization Obligation into Lump Sum Spousal Support (I Just Hope the Court of Appeal Isn't Watching . . . )**

*Cousin v. Cousin* (2020), 47 R.F.L. (8th) 285 (Alta. Q.B.) - Sidnell J.

The parties were married in 2008 and separated in 2016. After they separated, they signed a Separation Agreement that resolved the property and support issues on a final basis, and included a standard *Miglin* spousal support release.

The Wife subsequently obtained a court order requiring the Husband to pay her \$39,551.57 within 30 days to reimburse her for various debts that he was supposed to have paid pursuant to the Separation Agreement.

Instead of paying the Wife the money that he owed her, the Husband made an assignment in bankruptcy. This allowed him to avoid having to pay the Wife the additional funds he owed her, while also letting him keep his pension as it was an exempt asset pursuant to s. 67(1) of the *Bankruptcy and Insolvency Act*.

When the Wife found out that the Husband had gone bankrupt, she commenced an application against him for spousal support. She argued that the Husband could not rely on the spousal support release in the Separation Agreement because the Husband had repudiated the Agreement, and the release was conditional on him paying her the \$39,551.57 that he still owed her on account of property.

Justice Sidnell did not accept the Wife's argument that the Husband had repudiated the Agreement, as "it cannot be said that [the Wife] has been deprived of substantially the whole benefit of the Agreement[.]" However, she agreed with the Wife that the spousal support release was conditional on the Husband paying the Wife the money he owed her:

[42] Section 6.1(a) of the Agreement provides for the release of [the Husband] from any spousal support obligation upon completion of the property settlement set out in the Agreement:

As a result of the terms of this Agreement, and **upon completion of the property settlement set out** in this Agreement [the Wife and Husband] . . . release his or her rights to spousal support from the other, now and forever.

. . . . .

This language, like that in [Justice Rady's decision in *Fenton v. Fenton*, 2017 CarswellOnt 10040 (S.C.J.)], is a condition precedent as it clearly states that the release of spousal support follows completion of the property settlement. The acknowledgements set out in section 6.1(c) for "greater certainty" do not take away from the conditional spousal support release in 6.1(a). The language in section 6.1(e) to the effect that "the parties expect the courts to fully enforce this spousal support release no matter what occurs in the future" only shores up the conditional release language in section 6.1(a). [emphasis in original]

After determining that the spousal support release did not bar the Wife from claiming spousal support, Justice Sidnell had to determine how much spousal support, if any, the Husband should have to pay her. Not surprisingly, she ordered the Husband to pay the Wife the exact same amount that he would have had to pay her on account of property had he not gone bankrupt (i.e. \$39,551.57):

[48] Similar to the conclusion of the Ontario Superior Court in [Justice Gillese's decision in *Bradley v. Bradley*, 2000 CarswellOnt 1704 (S.C.J.)], at para 46, I find that I can also recognize the debts and costs incurred by [the Wife] as part of [the Wife's] need for spousal support. **[The Wife's] need for support arises as a result of incurring \$39,551.57, plus the costs of this application (the Application Costs), due to [the Husband's] breaches of the Agreement, together with the recognition of [the Husband's] indemnity obligation in the Agreement to cover the same.**

[49] Based on the foregoing, including the test in [Justice Campbell's decision in *Moore v. Moore*, 1988 CarswellOnt 182 (S.C.)], **I find that [the Husband's] obligation under the Agreement to complete the property settlement was directly tied to the release of [the Wife's] spousal support.** As a result, the property settlement was, as a matter of fact, a form of spousal support. There is further support for this proposition in the Supreme Court of Canada's decision in *Schreyer v. Schreyer*, 2011 SCC 35 (S.C.C.) [*Schreyer*], which arose in the context of an equalization payment (and I note, again, that Alberta is not an equalization jurisdiction). The Court said, at para 37: "If a support order were made in a case like this one, the court might well aim to mitigate the inequities arising from the bankruptcy, such as the release of the debtor spouse from an equalization claim or the retention by the debtor spouse of an exempt asset (see *Turgeon v. Turgeon*, [1997] O.J. No. 4269 (Ont. Gen. Div.) (QL); and Sim . . .)".

[50] As a result, **I find that the amounts [the Wife] has proven are owing to her under the Agreement, being \$39,551.57, plus the Application Costs, are spousal support.** In response to [the Husband's] assertion that this Court should not set aside the wishes of the parties as expressed in a pre-existing agreement, I agree that in this case the Agreement is operational and should not be set aside. However, [the Husband] cannot rely on the waiver of spousal support because the property settlement condition precedent was not met.

.....

[56] **After considering the condition, means, needs, and other circumstances of each of [the Wife] and [the Husband], including the specific matters set out in section 15.2(4) of the *Divorce Act*, to the extent the affidavit evidence sheds light on them;** having regard to the *Bradley* and *Schreyer* decisions relating to the proposition that other obligations thrust on the over-paying spouse in the context of a bankruptcy can be considered in an award of spousal support; and given [the Wife's] admission that had the Agreement been completed as contemplated she would not have made this application, **I find that a lump sum award of interim spousal support would be appropriate. In the circumstances, it would be inappropriate to make a court order for interim spousal support in an amount either more or less than the amount owed under the Agreement. I also find that such an award of lump sum interim spousal support meets the objectives of section 15.2(6) of the *Divorce Act*.**

[57] **Accordingly, if I am wrong about characterizing [the Wife's] entitlement under the Agreement to \$39,551.57, plus the Application Costs, as spousal support, then I would also consider this to be an appropriate case in which to award interim spousal support in a lump sum amount of \$39,551.57, plus the Application Costs.** Of course, as an alternative remedy, this amount is not in addition to the amount of spousal support owed to [the Wife] under the Agreement, but it is a recognition that [the Wife] is alternatively entitled to the same amount as interim spousal support under the *Divorce Act*. [The Wife] has sought, and to the extent that it is required, I lift the stay in [the Husband's] bankruptcy for her to make this application for court-ordered spousal support. [emphasis added]

We certainly understand why Justice Sidnell made the order that she did - it does, after all, make intuitive sense. However, respectfully, we have some difficulty with her reasoning. The fact that the spousal support release in the Separation Agreement was conditional on the Husband completing the property settlement did not "convert" the property obligation into "a form of

spousal support." Furthermore, although her Honour's reasons refer to the statutory spousal support factors and objectives set out in s. 15.2 of the *Divorce Act*, she does not really explain how those factors and objectives actually applied in this case. This appears to run afoul of the *obiter* from the Alberta Court of Appeal in *Frank v. Beaver*, 2016 CarswellAlta 144 (C.A.):

[17] During oral argument, counsel for the respondent pointed out that support payments survive bankruptcy. Counsel encouraged the chambers judge to make a generous order of partner support to give the respondent an advantage in the event of a bankruptcy. **The appellant correctly points out that it would be an error of principle to inflate a partner support award simply to achieve some advantage on bankruptcy; that would be unsupported by the *Family Law Act*, and inconsistent with the principles underlying the *Bankruptcy and Insolvency Act*. Further, any retroactive support order eventually given by the trial judge would itself survive bankruptcy. It is not, however, apparent that the chambers judge's order was ultimately motivated by such considerations. Questions asked during oral argument are not an operative part of the reasons for decision: *Toliver v Koepke*, 2013 ABCA 390 (Alta. C.A.) at para. 6, (2013), 566 AR 24 (Alta. C.A.).** [emphasis added]

Even more on point is the decision of the Ontario Court of Appeal in *Mwanri v. Mwanri* (2015), 72 R.F.L. (7th) 25 (Ont. C.A.), a case with very similar facts. A court cannot just effectively "convert" a property payment that was discharged by a bankruptcy into a lump sum spousal support award. Rather, any decision about spousal support must be decided based on the statutory spousal support factors and objectives that are set out in s. 15.2 of the *Divorce Act*, and the principles that govern claims for lump sum spousal support:

[77] Both the *FLA* and the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) afford family law judges a broad discretion to award periodic or lump sum spousal support, or to make an award comprising both forms of support. **But that discretion does not allow for the redistribution of assets by means of an award of spousal support.** As the [Ontario Court of Appeal in *Davis v. Crawford*, 2011 ONCA 294] emphasized, at para. 60: **"a lump sum award should not be made in the guise of support for the purpose of redistributing assets."**

[78] The mother's change motion was clearly premised on converting her unpaid equalization payment into spousal support, in order to avoid the release of the father's equalization debt on his discharge from bankruptcy. **In these circumstances, it was incumbent on the motions judge to address fully the relevant considerations relating to the father's bankruptcy.** In my view, with respect, he failed to do so.

[79] More particularly, **although the motions judge referenced both *Schreyer* and *Crawford*, he failed to consider the father's status as an undischarged bankrupt, the effect of a lump sum spousal support award on the father's ongoing bankruptcy, and the implications of the father's eventual discharge from bankruptcy on the parties' financial circumstances and assets.**

[80] In the present case, **these were necessary and pertinent considerations. Yet, the record suggests that, in awarding lump sum spousal support to the mother and regardless of the status of the father's bankruptcy, the motions judge simply converted the mother's equalization claim into an entitlement to lump sum spousal support, in addition to the periodic spousal support that the father was already paying. This was impermissible.** [emphasis added]

The circumstances in *Cousin* serve as an important reminder: when drafting a Separation Agreement, it is essential to at least try to obtain adequate security for any unpaid amounts that are owed to your client, and to ensure that the Agreement clearly sets out what the remedy will be if the payor defaults or goes bankrupt. Had that been done here, we would likely be reporting on a different case.

#### Footnotes

1 For Parts 1 and 2, see the October 19, 2020 and November 9, 2020 editions of *TWFL*.

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