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

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**WELCOME**

This is intimidating.

I don't have the encyclopedic knowledge and photographic memory of Jay McLeod; the 30-year institutional memory and smarts of Philip Epstein; or the wit of either (but don't tell Philip I admitted that). So how am I qualified to assume the reigns of the *Newsletter* Jay started and Philip so ably continued for so many years?

I have given that question a fair amount of thought as many have kindly offered their sincere wishes of "good luck" over the past few months. But I don't really have an answer.

So, I offer this: While the *Newsletter* will, of necessity, be different, with the assistance of my partner, Michael Zalev, we will continue to try to keep it what it was meant to be - informative, current, (occasionally) critical and (hopefully sometimes) humorous commentary on recent family law cases of note from across the country.

I certainly welcome your comments and feedback.

So, with that, once more unto the breach, dear friends . . . and a healthy, happy 2020 to all those who toil in the vineyards of marital discord.

- Aaron

**Bankruptcy, Discharge and Equalization - Oh No!**

*Re Galeano*, 2019 CarswellOnt 18341 (Ont. S.C.J.)

**Ontario Superior Court of Justice - Kershman, J.**

## Bankruptcy, Discharge and Equalization - Oh Yes!

*Marino (Re)*, 2019 CarswellAlta 2555 (Alta. Q.B.)

### Alberta Court of Queen's Bench - Registrar in Bankruptcy J.T. Prowse

*Re: Galeano*, an Ontario decision from Justice Kershman (who was a bankruptcy specialist before he was appointed to the Bench), is another stern warning to counsel that if your client's spouse goes bankrupt, your client's rights will be *severely* prejudiced if you (or your client) do not take *immediate steps* to deal with the situation.

The husband and wife separated in April 2016. About seven months before they separated, they filed a joint consumer proposal. However, they were unable to keep up with the payments after they separated, and they both ended up filing for bankruptcy in the fall of 2016. As a result, all of their assets, including their matrimonial property claims, vested in their respective trustees. However, the husband was able to keep his pension - it was exempt from the bankruptcy as a result of the combined operation of s. 67(1)(b) of the *Bankruptcy and Insolvency Act* (the "BIA") and s. 83(c) of the *Canadian Forces Superannuation Act* which *Act* governed the husband's pension.

The wife was discharged from bankruptcy in August 2017, and the husband was discharged in October 2018. Pursuant to s. 178(2) of the *BIA*, the discharges released both parties "from all claims provable in bankruptcy", including their respective matrimonial property claims.

Even though the husband had already been discharged, in April 2019, the wife commenced a proceeding to try to have the husband's military pension divided. Justice Kershman dismissed the wife's claim because the husband had already been discharged, and the wife had not established any basis for setting the discharge aside. His Honour also rejected the wife's creative argument that the Court could "deem" her equalization claim to have survived the husband's discharge because her position was contrary to the Supreme Court of Canada's conclusion at paragraph 21 of *Schreyer v. Schreyer* (2011), 1 R.F.L. (7th) 1 (S.C.C.), that a discharge from bankruptcy releases a debtor from all claims that are provable in bankruptcy, including equalization claims.

This was a very unfortunate result for the wife, as the husband got to keep his entire pension while the wife was left with nothing. It is even more unfair considering that the result would likely have been completely different had the parties lived in a "non-equalization" jurisdiction (that is, a division of property province such as Alberta, New Brunswick, Nova Scotia, Newfoundland or Saskatchewan) rather than an "equalization" jurisdiction such as Ontario, Manitoba or P.E.I. A proprietary claim (such as a claim for statutory property division in a non-equalization province) is not a claim provable in bankruptcy and, accordingly, is not released by the discharge: *Schreyer v. Schreyer*, *supra* at para. 14 and *Re Marino*, *supra*. Although there is a fine line between an "equalization" jurisdiction and a "division" jurisdiction, that fine line can make all the difference.

The difference is set out by the Supreme Court of Canada in *Schreyer*, as follows:

[14] Every Canadian province has tried to address in some way the inequities or difficulties arising out of the distribution of family assets after the breakdown of a marriage or of a common law relationship to which the same rules apply. Broadly speaking, the provincial legislatures have chosen between two different models: equalization and division of property. [citations omitted]

[15] The equalization model involves a valuation of the family assets and an accounting. The value of the assets is then divided between the spouses, usually in equal parts, although family courts have a limited discretion to order an unequal division. The valuation and the division give rise to a debtor-creditor relationship in the sense that the creditor spouse obtains a monetary claim against the debtor spouse. But the assets themselves are not divided. Each spouse retains ownership of his or her own property both before and after the breakdown of the marriage. Neither acquires a proprietary or beneficial interest in the other's assets. Assets are transferred only at the remedial stage, as agreed by the parties or as ordered by the family court in exercising its discretion, as a form of payment or execution of the judgment. The division

of property schemes, on the other hand, give rise to a proprietary or beneficial interest in the assets themselves, not just in their value. [citations omitted]

If you are dealing with a case where the opposing party has gone bankrupt (in an equalization jurisdiction), you can avoid this type of result (and a call on your deductible) by immediately commencing a claim for an equalization payment, and obtaining leave under s. 69.4 of the *BIA* to pursue the claim against exempt assets (e.g. a pension or an RRSP). See, for example: *Cunningham v. Cunningham* (2009), 79 R.F.L. (6th) 88 (Alta. Q.B.); *Scott, Re* (2014), 51 R.F.L. (7th) 223 (Ont. S.C.J.); *Fiorito v. Wiggins* (2017), 1 R.F.L. (8th) 61 (Ont. C.A.); and *Shirkie v. Shirkie* (2015), 67 R.F.L. (7th) 274 (Sask. Q.B.).

Alternatively, have your client move to Alberta. Or Saskatchewan. Or New Brunswick . . .

### **Penalties For Breaching Court Orders**

*Bouchard v. Sgovio*, 2019 ONSC 6158

#### **Ontario Superior Court of Justice - Hughes J.**

This is an interesting case that considers creative ways of trying to enforce compliance with a parenting order without having to resort to what Justice McDermot recently referred to as the "nuclear option of a contempt motion" in *Michener v. Carter*, 2018 CarswellOnt 6908 (Ont. S.C.J.). Notably, contempt motions in family law have also recently been eschewed by the Ontario Court of Appeal: *Hefkey v. Hefkey* (2013), 30 R.F.L. (7th) 65 (Ont. C.A.).

The parties were married for almost 14 years and had two children together. They separated in 2017, and they signed a detailed Parenting Agreement in 2019 that was incorporated into a Consent Order. Before the ink was dry, the father started breaching the Order by over-holding the 13-year-old and by discussing "adult issues" with the children. The father also refused to take the children to their therapist as required by the Consent Order.

The father claimed that the 13-year-old did not want to see the mother because of her own behaviour and that he could not afford the cost of counselling. He also claimed that he could not physically force the child to go and that he should not be penalized "when he is physically unable to force [the 13-year-old] to visit his mother, and it is [the mother's] own fault that the situation has come to this."

Justice Hughes would have none of this, in large part because the father's own emails showed that, contrary to the terms of the Consent Order, he had been directly involving the child in the conflict. She reviewed a number of the cases that stand for the proposition that, "[a] parent has an obligation to actively require the child to comply with the order by exhortation, reward, and even the threat of discipline, much like a parent would if a child was refusing to attend school," and confirmed that 13-year-olds do not get to make decisions about where they will live:

[14] The law does not accept that a 13-year-old's views about access are determinative. It is not acceptable for a party to say that there has been (little or) no access because their 13-year-old child is choosing not to see the other parent. Parents governed by access orders cannot simply leave access up to the children.

Justice Hughes also rejected the father's claim that he could not afford the counselling expenses.

Having found that the father had repeatedly breached the consent parenting order, Justice Hughes then considered what to do about it. Since it appeared to Justice Hughes that the father had been breaching the Parenting Order to extract financial concessions from the mother, Her Honour determined that the best way to deal with the father's non-compliance would be to impose "monetary penalties and monetary incentives" to compensate the mother, to denounce the father's poor parental conduct, to deter the father from similar conduct in the future, and to coerce the father to comply with his obligations - a penalty that was clever, practical and directly related to the offensive behaviour.

Bearing in mind the father's lack of remorse, multiple breaches, failure to take responsibility and support (or encouragement?) of the child's non-compliance, Her Honour decided to fine the father a total of \$18,000 for his six prior breaches (\$3,000 each),

and \$3,000 per breach for any future breaches. Her Honour also ordered that the father could not receive any additional child support or tax benefits/credits as a result of the additional time that the child had been with him during the over-holding, and that he could not schedule any conferences or motions without leave.

While these penalties were significant, Her Honour also cleverly gave the father incentive to change his behaviour by allowing him to ask to have the penalty stayed if he stopped breaching the order going forward. She also scheduled a further attendance before her so that she could monitor the father's compliance. This is exactly the sort of penalty/incentive provision that should be awarded in these kinds of cases: impose a penalty for the behaviour to be extinguished and reward the behaviour to be encouraged.

While Justice Hughes' order was clearly a sensible (and hopefully effective) way of dealing with a difficult situation, her decision does not *specifically* address whether a court actually has jurisdiction to make this type of Order (likely because it appears that the husband accepted that the Court had jurisdiction to do so). While there are numerous examples of courts imposing fines pursuant to the *Family Law Rules* for things like non-disclosure,<sup>1</sup> there are competing authorities in Ontario about whether a court can order a monetary payment as a penalty for a breach of a court order absent a finding of contempt.<sup>2</sup> As these types of orders are interlocutory, we will have to wait until the Divisional Court grants leave to appeal in order to get a clear answer on this important point. In the meantime, these kinds of orders accomplish the required objective without the need for a full contempt inquiry and, in my view, should be encouraged. In the words of Justice Diamond in *Granofsky v. Lambersky* (2019), 26 R.F.L. (8th) 328 (Ont. S.C.J.):

The Court has jurisdiction to monitor and police its own case management process. In the circumstances of the case before me, it cannot lie in the respondent's mouth to interpret Rule 1(8) so strictly, while at the same time choosing to consistently not play by the rules (including the *Family Law Rules*). Rule 1(8) permits the Court to make "any order that it considers necessary for a just determination of the matter". The list of options available to the Court under Rule 1(8) is not exhaustive in nature, but inclusive. A just determination of any family proceeding is rooted in the protection of the administration of justice as a whole, and when a party chooses to consistently disobey a court order, the administration of justice itself is called into question.

### **Surrogacy and Parentage**

*C.P.B. v. L.M.B.*, 2019 CarswellSask 636 (Sask. Q.B.)

#### **Saskatchewan Court of Queen's Bench - D.N. Robertson, J.**

Saskatchewan needs to change its provincial legislation dealing with parentage - most specifically the *Children's Law Act 1997*, SS 1997, c. C-8.2 and the *Vital Statistics Act*, 2009, SS 2009, c.V-7.21.

Although many provinces have now changed their legislation to contemplate "intended", rather than biological, parentage, in Saskatchewan, parents that resort to some forms of assisted human reproduction (availing of donors and surrogacy) must still invoke the court process to put in place proper declarations of parentage.

This is one such case dealing with surrogacy and parentage. It arises from a without notice application seeking declarations to confirm who is - and who is not - a parent of a child born with the aid of assisted reproduction.

The petitioners, C and T are a male same-sex married couple. The respondents L and D are an opposite-sex married couple. Notably, there is no *lis* between the petitioners and respondents; the petitioners and respondents agree about what is to happen here.

C and T wanted to have a child. To that end, they arranged with L and D for L to be impregnated with an embryo (using sperm from C and an ova from an unidentified donor) and act as a surrogate. The parties entered into a Gestational Carrier Agreement, commonly known as a Surrogacy Agreement.

The child was born on November 6, 2019, and had been in the care of the petitioners - the intended parents - since birth. The Registration of Live Birth was submitted with L (the surrogate) as "mother", C (the biological father) as "father" and T (C's husband) as "other parent". The respondents relinquished all parental rights with respect to the child.

Obviously, all four parties wanted C and T to be identified as the parents and for L to be removed as "mother". But the parties had to apply to the Court to do so.

The Court first considers the law in Canada and Saskatchewan with respect to surrogacy. The Court notes that surrogacy is a matter of both federal (the criminal power) and provincial (property and civil rights in a province) constitutional competence and then goes on to consider the *Assisted Human Reproduction Act*, SC 2004, c.2, which regulates forms of assisted human reproduction and criminalizes "commercial surrogacy" (paying for surrogate services) while, at the same time, expressly prohibits discrimination on the basis of sexual orientation [see. s. 2(f)].

While the law often needs time to catch up to social constructs and changing social norms (such as the nature of "parents" and "family"), this has clearly been an issue in Saskatchewan for quite some time. It was, for example, an issue in *M. (W.J.Q.) v. A. (A.M.)* (2011), 2 R.F.L. (7th) 405 (Sask. Q.B.), when Justice Ryan-Froslic (as she then was) had to rely on s. 43 of the *Children's Law Act, 1997* to declare that a gestational carrier (who was not the biological mother) was not the mother of a child, and s. 29(1) of the *Vital Statistics Act, 2009* to direct the Registrar of Vital Statistics to remove her from the birth certificate. That was nine years ago. It is time for legislative change.

In Ontario, the process of legislative reform was started in *A. (A.) v. B. (B.)* (2007), 35 R.F.L. (6th) 1 (Ont. C.A.), a case from the Ontario Court of Appeal that availed of the *parens patriae* jurisdiction of the Court to declare the same sex spouse of the biological mother to be a parent along with the biological father (providing for three parents). As a result (and although not without the Herculean efforts of some very dedicated lawyers such as Joanna Radbord), the Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C.12 was recently amended so as to contemplate intended and multiple parents without the need for court intervention.

Justice Robertson notes the Final Report of the Saskatchewan Law Reform Commission which summarized the current required procedure in Saskatchewan in such cases:

#### 4.7.111 Procedural Requirements

[204] Currently in Saskatchewan, a court order is required to remove the surrogate from the birth certificate, and to add one or both of the intended parents on to the birth certificate. As discussed above, if the intended father's genetic material was used to create the embryo, the intended father can be listed on the registration of live birth and he will then be on the birth certificate as the child's father. The intended father's partner could also be listed on the registration of life [sic] birth as "other parent". Once the birth certificate has been acquired by the intended parents, a declaration can then be sought to remove the surrogate from the birth certificate. This process typically takes months and costs several thousand dollars.

Justice Robertson also notes that all the criteria for a declaratory order referenced in the Uniform Child Status Act (2010) developed at the Uniform Law Conference of Canada are met in this situation.

Although he was satisfied that the Court has jurisdiction to grant the requested relief, Justice Robertson found himself unable, without further evidence and procedural hurdles, to grant the requested declaration (for example, the parties did not serve the Registrar of Vital Statistics; provide evidence that this was not a "commercial surrogacy"; or show that L and D had received Independent Legal Advice). Therefore, the application was dismissed, but with leave to return the matter to court after addressing the procedural and evidentiary deficiencies - with the attendant further cost of time and dollars.

Clearly, change is needed.

### **"Return of the Dog"**

*DORKA v. KUMAR*, 2016 CarswellOnt 22153 (Ont. S.C.J.)

**Ontario Superior Court of Justice - McSweeney, J.**

Although this is a 2016 case, it was only just received, and regular readers of this *Newsletter* will know that a "dog case" cannot pass without comment. This dog case is no exception. For those of you that do not particularly care about dogs, this will be short; but I cannot promise there will not be another dog case in this *Newsletter*.

This case is about a claim for the return of Casper, the dog.

Past *Newsletters* have highlighted the tension in the case law in cases involving animals. While to many, animals are far more than mere chattels, in this case, it is in fact common ground between the parties and the Court that, at law, a dog is nothing more. That said, Justice McSweeney does bestow upon Casper the special status of a "living chattel".

It is also of interest that Justice McSweeney considers whether or not there were any allegations of cruelty with respect to Casper - an unlikely consideration in the case of "non-living" chattels. Of even further interest is the fact that Her Honour notes the 'close bond' each party has with this particular chattel". Therefore, while in form, the Court is determining ownership and return of a chattel, in substance, the Court is dealing with the return of a "living chattel" to which both parties share a "close bond." This comes close to bestowing some form of special status on Casper - a special status of which Hoegg, J.A. (in dissent) would be proud: *Baker v. Harmina* (2018), 7 R.F.L. (8th) 283 (N.L. C.A.).

In this case, it was common ground that Casper had lived with both parties for varying lengths of time after separation. There was evidence of shared ownership such that the alternating attempts of the parties to involve the police in the return of Casper were unsuccessful. Ultimately, the parties agreed that ownership of Casper was the main issue in the dispute.

Justice McSweeney was not happy with the situation before her. One of the parties engaged in self-help by going to the other party's home, where Casper had been living, and removed him while the other party was not home. In noting that courts are required to promote resolution of cases in a manner which is fair, just and proportionate to the issues, Justice McSweeney found that she could not condone such self-help, and Her Honour ordered that Casper be returned. She further ordered that the parties take prompt steps to settle the ultimate issue of ownership.

I have never seen such consideration, or such an order, with respect to a kitchen table, to which a dog is often compared.

I bet that Justice McSweeney has a dog.

**Joint Custody Surprise**

*O'Donoghue v. Walker*, 2019 CarswellBC 3291 (B.C. Prov. Ct.)

**British Columbia Provincial Court - E. Gordon, J.**

The applicant and respondent decided to adopt. They were ultimately successful in adopting a girl, Akiro.

The applicant, Ms O'Donoghue, worked from home. Therefore, she attended to most of Akiro's daily needs and medical appointments.

When the relationship ended, the parties could not agree on which of them should have custody of Akiro. However, immediately after separation, the parties shared joint legal and physical custody of Akiro, alternating monthly, for about two years.

The Court relied on this conduct as a tacit agreement between the parties to share custody, and the Court tasked itself with determining that which is "in Akiro's best interests."

The respondent testified as to times when she was concerned for the applicant's care of Akiro, by or example, believing it to be alright to transport Akiro on her motorcycle. There was also some concern that the applicant did not properly feed Akiro. Once Akiro was returned limping to the respondent from the applicant's residence.

Justice Gordon had no difficulty finding that both parties loved Akiro very much, and openly asked, ". . . is it in [Akiro's] best interest to be in the shared custody of both of them." She ultimately found that, "it is 100 per cent in Akiro's best interest to be with both her mothers," and she ordered that the parties continue to share legal custody of Akiro and to alternate physical custody monthly.

Justice Gordon imposed some conditions, including a right of first refusal if one of the parties had to be away for more than two nights. Each "mother" was also ordered to notify the other if there were "any sign of any illness."

There were also conditions as to the amount of exercise Akiro was allowed to have (one long walk a day of no more than five kilometers and two shorter walks in the afternoon and evening).

Both parties were also ordered to have at least two water bowls to be filled two or three times a day . . .

Akiro is a dog (apparently a "remarkably cute" mix of miniature poodle, miniature schnauzer and fox terrier). And the Court considered the issue of best interests and awarded joint legal and physical custody of that dog, contrary to a host of cases on this issue.

I will go double-or-nothing on Justice Gordon owning a dog.

#### Footnotes

- 1 See, for example, *Mantella v. Mantella* (2008), 61 R.F.L. (6th) 252 (Ont. S.C.J.), and *Service v. Service*, 2011 CarswellOnt 9035 (Ont. S.C.J.).
- 2 For example, see Justice Monahan's decision in *Shapiro v. Feintuch*, 2018 CarswellOnt 19129 (Ont. S.C.J.), where His Honour concluded that a court can only order a monetary penalty as part of a contempt order, and Justice Diamond's decision in *Granofsky v. Lambersky* (2019), 26 R.F.L. (8th) 328 (Ont. S.C.J.), where His Honour disagreed with Justice Monahan's decision and ordered the husband to pay the wife a penalty of \$500 a day until he complied with his court-ordered disclosure obligations.