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

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This week, we have three COVID-19 related cases to tell you about. One deals with virtual trials (Justice Lafrenière's decision in *Rovi Guides, Inc. v. Videotron Ltd.*), and two deal with situations where a parent has refused to comply with a parenting agreement and/or Order (Justice Diamond's decision in *Gillespie v. Jones*, and Justice Bale's decision in *Brazeau v. Lejambe*).

We also have an interesting solicitors negligence case that deals with a lawyer's professional responsibilities during the mediation process (Justice Gates' decision in *Raichura v. Jones*).

And, back by popular demand, we also have the latest dog case (Judge Frame's decision in *Almaas v. Wheeler*).

Finally, and most importantly, we have *Leitch v. Novac*, 2020 CarswellOnt 5201 (C.A.), where the Ontario Court of Appeal: (a) made one of the strongest statements yet that non-disclosure in family law cases will not be tolerated; and (b) confirmed that the tort of conspiracy ***is*** available in family law cases in order to ensure that third parties cannot try to help one spouse hide income and/or assets to try to defeat the other spouse's claims with impunity.

COVID-19 Update

Rovi Guides, Inc. v. Videotron Ltd., 2020 CarswellNat 1530 and 2020 CarswellNat 1637 (F.C.)**- Lafrenière J.**

Although not a family law case, *Rovi Guides, Inc. v. Videotron Ltd.* is an important case to read as it provides a detailed and comprehensive road map for how a virtual trial should be conducted.

The trial of the plaintiff's patent infringement claim began on March 9, 2020, and was expected to take 22 days to complete. Four days after the trial started, however, it had to be adjourned because of COVID-19.

The defendant initially opposed having the trial proceed virtually, and submitted the position "that the trial should not resume unless and until its fact witnesses are able to testify in person before the trial judge." Justice Lafrenière, however, rejected the defendants' request because granting it would have meant that the trial would be adjourned indefinitely:

> [21] Until a vaccine to prevent COVID-19 is widely available in Canada, or until public health officials lift stay-at-home orders and relax restrictions so as to allow people to travel safely, assemble and return to work, hearings of the Federal Court will have to be conducted remotely using the appropriate, available technology. Given that Court facilities will remain closed for the foreseeable future, Videotron's objection must be rejected since it would result in delaying the trial indefinitely.

After a subsequent trial management conference, Justice Lafrenière released a comprehensive Endorsement that covers all of the potential issues that might arise during a virtual trial, including:

- Technological requirements;
- Document management;
- Counsel preparation;
- Witness preparation and testimony;
- Witness documents;
- Loss of internet connections;
- Objections;
- The open court principle and confidentiality;
- Testing prior to trial; and
- General rules for using Zoom during the trial.

The decision also includes an incredibly helpful schedule called "Handout for Witnesses" that Justice Lafrenière ordered the parties to distribute to the witnesses to help them understand virtual trials, their obligations as witnesses, the rules that apply while they are testifying, and the best practices for testifying virtually.

If a virtual trial is in the cards, this decision is a must-read.

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Gillespie v. Jones, 2020 CarswellOnt 5720 (S.C.J.) - **Diamond J.**

The parties were married in 2012 and had one child together. They separated in British Columbia in 2015, but in 2017 Justice Bowden granted the mother's request to be able to move to Toronto, Ontario with the child.

The father was scheduled to have the child with him for a week in April. He originally planned to take the child to Whistler, British Columbia, but ultimately agreed to stay in Toronto because of COVID-19. However, the day after he picked up the child, he texted the mother that "you're not getting away with the crap you pulled yesterday", and refused to engage in any further discussions with her.

As the father refused to disclose the child's location to the mother, she contacted the police in British Columbia. The police went to the father's house, confirmed that the father and the child were there, and advised the mother accordingly.

After the police left the father's home, he emailed the mother that "his agreement to stay with their son in Toronto was made 'under duress due to the applicant's threats', and that he was keeping their son in Whistler for his entire vacation time until their return to Toronto on April 17, 2020."

Justice Diamond was clearly not impressed by the father's behaviour, and found that his decision to take the child on "[t]wo long flights, four trips to and from two airports, and time spent outside the respondent's Whistler home, all in the face of the COVID-19 pandemic, place the respondent's parental judgment squarely into issue." Justice Diamond also found that the father had breached Justice Bowden's Order by not telling the mother that he and the child had landed safely in British Columbia within 12 hours of their arrival.

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After reminding the parties that "there should be zero tolerance for any parent who recklessly exposes a child to any COVID-19 risk", and that "[t]he Court will not condone the unnecessary exposure of risk to a child", Justice Diamond ordered that the father's in-person access would take place in Ontario pending a further order or agreement, and prohibited him from taking the child "on any public transit including flights, buses, subways and trains". He also ordered the father to "follow, abide by and comply with all federal and provincial COVID-19 protocols and directives, both on his own and while their parties' son is in his care, including practicing and maintaining social distancing and avoiding all social gatherings".

Given the father's conduct and his breach of Justice Bowden's Order, he is lucky that Justice Diamond did not resort to Rule 1(8) of the Ontario *Family Law Rules*, which provides that, "[i]f a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter", to try to deter him from engaging in this type of behaviour in the future. The breaching party in the next case, *Brazeau v. Lejambe*, was not so lucky.

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Brazeau v. Lejambe, 2020 CarswellOnt 6923 (S.C.J.) - **Bale J.**

The parties were married in 2005. They had two children together, who were 11 and 8-years old respectively when the motion was argued on May 14, 2020. The parties separated in 2012, and in 2016 Justice Chappel made a final Order that provided that the children would reside primarily with the mother, and would reside with the father one night a week and every other weekend.

The mother took the children to Mexico for March Break from March 9, 2020, to March 22, 2020. When they returned to Ontario, the children had to spend 14 days in quarantine with the mother. When the 14-day period ended on April 4th, however, the mother told the father that the children did not want to come to his house, "because they were too frightened to leave the home", and that she was not going to force them to do so. As a result, by the time the motion was argued, the father had already not seen the children for more than two months.

The mother opposed the father's motion to reinstate his parenting time, and raised the usual defences to these types of motion in the hope that something would stick, including that the father's new partner's job and children from a prior relationship could expose the parties' children to COVID-19, that the children were at increased risk from COVID-19 because they both had asthma, and that they did not want to go to the father's house.

In her detailed reasons, Justice Bale rejected all of the mother's various arguments, and found that she was trying to take advantage of COVID-19 to marginalize the father's role in the children's lives:

> [25] On review of the materials filed, I am satisfied that this is one of the unfortunate situations wherein one parent is seeking to capitalize on the public health crisis in order to marginalize the children from the other parent. I have considered both of the arguments advanced by the mother in support of her position, namely the wishes of the children and COVID-19 safety concerns, and I reject both on the facts of this case.

After reminding the mother that "[a] court Order is not a suggestion; it is to be obeyed", Justice Bale used Rule 1(8) of the *Family Law Rules* to give the father a significant amount of makeup time to replace the 17 overnights that he was not able to spend with the children as a result of the mother's refusal to comply with the court order. Her Honour also temporarily varied the schedule to reduce the number of transitions between the parties' homes:

> [42] The father and children have missed seventeen overnight visits with one another since March Break. These missed visits are not justified on the facts of this case. In my view it is in the best interests of the children to adjust the upcoming schedule to make up for this lost time. I have considered the father's request for an uninterrupted two-weeks of time with the children, as well as the upcoming regular schedule. In my view, the order necessary for a just determination of this matter, which arises from the Respondent mother's failure to comply with the Final Order of Justice Chappel dated September 19, 2016, provides for roughly equivalent overnight make-up time for time lost. Further, in my view, reducing the number of

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> exchanges of the children during this modified time period will (a) serve to reduce the number of outings of the children into the community during the COVID-19 health crisis, (b) reduce the number of emotional transitions required by the children between their respective homes, and (c) reduce the number of potential interactions between the parties, and therefore the increased stress that likely flows from those interactions during this time of conflict.

We commend Justice Bale for taking steps to make it clear to the mother, and to other parents like her who refuse to comply with a court Order, that it is not acceptable to breach a court Order, and that when they do, the Courts will step in to provide meaningful and child-focused remedies to the victims of such breaches.

Because How Can There Not be a Dog Case During a Pandemic?

Almaas v. Wheeler, 2020 CarswellBC 784 (B.C. Prov. Ct.) - Frame J.

This one was easy.

The parties acquired two dogs, Aurora and Zeus, early in a four-year common law relationship. Mr. Almaas, the defendant, wanted to have equal "shared custody", but Ms. Wheeler, the claimant, wanted "sole custody" of both dogs. After confirming that dogs are property, and considering some of the previous canine cases reviewed in *TWFL*, Judge Frame stated:

> [63] If I were to determine ownership entirely upon who paid for and financially supported these dogs from the time of purchase to the time of separation, I would find that Mr. Wheeler was the sole owner of both dogs. As the cases - and common sense - show, this is not the only factor.
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> [66] If I were to determine ownership entirely upon who primarily cared for the dogs and attended to their needs, I would find that Ms. Almaas performed a substantial amount of that care. Certainly, Mr. Wheeler also participated in their care when he was home from work.
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> [68] The most compelling factor in this case is the conduct and communication of the parties. While they were together, they consulted on the purchase, care and keeping of the dogs. They treated the dogs like they were part of their family and presented themselves as joint owners. After separation, they shared the dogs as joint owners would.

As a result, it was determined that the dogs were jointly owned as both parties had contributed to their acquisition and care.

So . . . two people . . . two dogs . . . too easy. It was decided that each party was to have a pooch (Ms. Almaas got Aurora and Mr. Wheeler got Zeus). If only all property cases were so simple.

Conspiring with the "Invisible Litigant"

Leitch v. Novac, 2020 CarswellOnt 5201 (C.A.) - Lauwers, Hourigan and Thorburn JJ.A.

Disclosure: Epstein Cole LLP represented the appellant.

This is an important appellate case about family law, disclosure, and conspiracy.

Since the Supreme Court of Canada's decision in *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.), there has been a general feeling that most torts should not extend into the family law realm given the "undesirability of provoking suits within the family circle." See, for example, *Waters v. Michie* (2011), 3 R.F.L. (7th) 273 (B.C. C.A.); *P. (P.) v. D. (D.)* (2016), 73 R.F.L. (7th) 108 (Ont. S.C.J.), aff'd, (2017), 90 R.F.L. (7th) 1 (C.A.); *Saul v. Himel* (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), aff'd (1996), 22 R.F.L. (4th) 226 (C.A.); *Lo v. Lo* (2009), 70 R.F.L. (6th) 309 (S.C.J.); and *Jeerh v. Jeerh*, 2014 CarswellBC 2796 (S.C.).

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And this seemed to be particularly true of the tort of conspiracy: *Hughes Estate v. Brady*, 2006 CarswellAlta 1668 (C.A.). Even in *Waters v. Michie* (2011), 3 R.F.L. (7th) 273 (C.A.), where the British Columbia Court of Appeal suggested that a claim for conspiracy in a family law case should not necessarily be *automatically* struck as a matter of policy, use of the tort was tightly circumscribed at best.

But with the release of *Leitch v. Novac*, 2020 CarswellOnt 5201 (C.A.), the Ontario Court of Appeal breathed new life into the tort of conspiracy, and with a shockingly simple rational that seems to have otherwise eluded courts for decades: sometimes a claim in conspiracy is necessary to do justice between the parties.

The appellant wife, Leitch, commenced an application for a divorce and corollary relief from the respondent husband, Novac. She later amended her application to seek damages in conspiracy from Novac, his parents, certain family trusts, and a related corporation, Sonco Group Inc. ("Sonco"). Leitch alleged that the respondents had conspired to keep money out of Novac's hands specifically for the purpose of reducing her family law entitlements.

The respondents to the conspiracy claim (apart from Novac) brought a motion for partial summary judgment. In response, Leitch sought summary judgment on the conspiracy claim in her favour, with damages to be assessed at trial. The *summary judgment* hearing lasted nine days (perhaps a hint that these motions were not particularly well-suited to summary judgment).

The motion judge granted partial summary judgment in favour of the added respondents, as she found that Leitch's conspiracy claim did not raise a genuine issue requiring trial (2019 CarswellOnt 1432 (S.C.J.)). The motion judge also concluded that while Leitch could not succeed in her conspiracy claim, she could still pursue a claim to impute additional income to Novac for the purpose of determining support at trial.

The motion judge also ordered Leitch to pay a total of $1,200,000 in costs for the motions (2019 CarswellOnt 3402 (Ont. S.C.J.)), and ordered her to preserve all of her assets as security for those costs (2019 CarswellOnt 3651 (S.C.J.)).

Leitch appealed the order granting partial summary judgment, as well as the very significant costs award against her. She also obtained leave to appeal the order that required her to post security for costs.

Ultimately, the Court of Appeal determined that the motion judge erred in law by allowing partial summary judgment, bifurcating the issues, and in her analysis of the tort of conspiracy; and that she had also made palpable and overriding errors of fact about critical evidence that Leitch had relied on in support of her conspiracy claim.

While this is a factually complex case (another hint that the case was ill-suited to summary judgment), for the purpose of this summary, the facts can be distilled to this: Leitch alleged, and there was evidence capable of supporting, that the added respondents had conspired with Novac to purposefully and very materially reduce his income for support purposes. The evidence of the alleged conspiracy included two memos drafted by Sonco's external accountant generally referring to keeping money "out of Novac's hands."

The motion judge held that the conspiracy claim was appropriate for partial summary judgment. In addition to the extensive record that was before her after a nine-day hearing that included five days of cross-examination on Novac and Novac's father's evidence, the motion judge was of the view that all parties had put their best foot forward, and that summary judgment would allow the parties to streamline the remaining issues.

The motion judge set out the elements of the tort of conspiracy and then referred to *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.), in which the Supreme Court of Canada ruled that the tort of conspiracy did not apply in the context of custody or access claims. Her Honour then stated that the same policy concerns from *Frame* applied to support claims, and that the comprehensive legislation and guidelines contained in the *Divorce Act*, *Family Law Act*, *Child Support Guidelines*, and the *Spousal Support Advisory Guidelines* offered a comprehensive code for dealing with both child and spousal support issues. That is, the tort of conspiracy was not necessary because the family law statutes could provide relief by, for example, imputing income to Novac.

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The motion judge also found that there was no genuine issue requiring a trial because, "apart from any policy considerations, [Leitch] has failed to meet the required threshold with respect the tort of conspiracy."

The Ontario Court of Appeal, however, took serious issue with the motion judge's decision to grant partial summary judgment.

In several previous cases, the Ontario Court of Appeal has been quite firm in the position that partial summary judgment is reserved for issues that may appropriately be bifurcated without creating a material risk of inconsistent outcomes, and that may be dealt with expeditiously and cost-effectively: *Butera v. Chown, Cairns LLP*, 2017 CarswellOnt 15856 (C.A.); *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.*, 2019 CarswellOnt 273 (C.A.); *Baywood Homes Partnership v. Haditaghi*, 2014 CarswellOnt 7670 (C.A.); *Mason v. Perras Mongenais*, 2018 CarswellOnt 20502 (C.A.); *Toor v. Toor*, 2018 CarswellOnt 11403 (C.A.); and *Service Mold + Aerospace Inc. v. Khalaf*, 2019 CarswellOnt 6869 (Ont. C.A.).

But in this case, the motion judge did not actually engage with the question of whether bifurcating the issues was appropriate. Specifically, noted the Court of Appeal, the reasons were "conspicuously silent" as to whether there is an inherent risk here of inconsistent findings. Even though the parties both took the position that partial summary judgment was appropriate, the motion judge was still required to consider whether summary judgment was, in fact, appropriate in this case, and to turn her mind to the material risk of inconsistent outcomes: *Aird & Berlis LLP v. Oravital Inc.*, 2018 CarswellOnt 2375 (C.A.).

Here, Leitch submitted that the risk of inconsistent outcomes was genuine because, "the factual footprint of the conspiracy claim is substantially the same as the support issues that remain for trial." The Court of Appeal agreed: the very same evidence brought in support of the conspiracy allegation would be relevant to a request to attribute additional income to Novac for support purposes. The risk of inconsistent outcomes, therefore, was very real.

The Court of Appeal also determined that the motion judge erred in law in her analysis of the tort of conspiracy. And this is where the Court of Appeal made significant, and we suspect mostly welcome, advances in the law.

The Court of Appeal first clearly summarized the motion judge's stated concern about importing the tort of conspiracy into family law:

> [41] The motion judge articulated a concern about the far-reaching implications of extending the tort of conspiracy where family members are involved. She worried that if the damages Jennifer requested were permitted, policy concerns would arise about claims for damages in every case where a payor spouse, in conjunction with a new spouse/relative/business partner, did not fully disclose income, unreasonably deducted expenses, or received income in the form of cash or goods. Her concern was that conspiracy claims would "become the new norm." She concluded that, given the existing mechanisms for recovery, damages for conspiracy "would effectively be a form of punitive damages". According to the motion judge, any concerns about bad faith conduct can be remedied by imputing income to the payor for the purposes of calculating support obligations or through costs awards.
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> [42] In rejecting the availability of the tort of conspiracy in the family law context, the motion judge was clearly motivated by the view that the family law statutory scheme creates a complete code for addressing all issues related to support and that there are sound policy reasons not to permit additional tort claims. In my view, it is not accurate to say, as the respondent does, that the trial judge's analysis of the availability of the tort was obiter. In fact, it obviously motivated her analysis of whether the tort had been established. Despite her stated acceptance that the case law does not preclude the application of the tort of conspiracy in family cases, her approach was that all claims should be determined under the family law regime and this approach imbued her analysis of whether the tort had been established.

These are the "classic" concerns advanced in cases such as *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.) (referring to the "undesirability of provoking suits within the family circle"); *Waters v. Michie* (2011), 3 R.F.L. (7th) 273 (C.A.) (as a matter of public policy a claimant should not be permitted to entangle an ex-spouse's new partner in family law litigation); *P. (P.) v. D. (D.)* (2016), 73 R.F.L. (7th) 108 (S.C.J.), aff'd (2017), 90 R.F.L. (7th) 1 (Ont. C.A.); and *Saul v. Himel* (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), aff'd (1996), 22 R.F.L. (4th) 226 (Ont. C.A.).

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However, the Court of Appeal found an overriding public policy concern, in what are surely to become four regularly quoted paragraphs in future family law cases:

> [44] As the Supreme Court suggested in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34, **nondisclosure is the cancer of family law**. This is an apt metaphor. **Nondisclosure metastasizes and impacts all participants in the family law process. Lawyers for recipients cannot adequately advise their clients, while lawyers for payors become unwitting participants in a fraud on the court**. Judges cannot correctly guide the parties to a fair resolution at family law conferences and cannot make a proper decision at trial. Payees are forced to accept an arbitrary amount of support unilaterally determined by the payor. Children must make do with less. All this to avoid legal obligations, which have been calculated to be a fair quantification of the payor's required financial contribution. **In sum, nondisclosure is antithetical to the policy animating the family law regime and to the processes that have been carefully designed to achieve those policy goals**.
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> [45] **There is a related malady that often works hand-in-hand with nondisclosure to deny justice in family law proceedings. The problem is what I will call "invisible litigants." These are family members or friends of a family law litigant who insert themselves into the litigation process. They go beyond providing emotional support during a difficult time to become active participants in the litigation. Usually their intentions are good, and their interference makes no difference in the ultimate result. However, sometimes they introduce or reinforce a win-at-all-costs litigation mentality. These invisible litigants are willing to break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income**.
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> [46] If we were to accept the analysis of the motion judge, co-conspirators who engage in such behaviour could do so with impunity. Contrary to the observation of the motion judge, conspiracy is not a "blunt instrument" to respond to this misconduct. It is a valuable tool in the judicial toolbox to ensure fairness in the process and achieve justice. **If the tort of conspiracy is not available, then co-conspirators have no skin in the game. Their participation in hiding income or assets is a no-risk proposition. If their conduct is exposed, all that happens is that the payor will be forced to pay what is appropriately owing. If there is to be deterrence, there must be consequences for co-conspirators who are prepared to facilitate nondisclosure**.
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> [47] There is a further practical reason for permitting the use of the tort of conspiracy in family law claims. Where income or assets have been hidden with the assistance of a co-conspirator, often the family law litigant will be effectively judgment-proof. **That, after all, is the whole purpose of the conspiracy. In those circumstances, the imputation of income or the inclusion of hidden assets into the net family property calculation will be a futile exercise, as the recipient cannot collect on what is owing**. A judgment against a co-conspirator will often be the only means by which a recipient will be able to satisfy a judgment. [emphasis added]

Finally, the Court of Appeal dispensed with the motion judge's concerns regarding the possibility of double-recovery. The motion judge was concerned that a claim in conspiracy "would effectively be a form of punitive damages" because the claimant would already have an imputation remedy under the family law framework. But that was not a fair statement of the law of damages. It is not overlapping remedies that are a concern; it is double-recovery. Overlapping remedies arising out of the same loss are always subject to the limiting principle of double recovery. However, the risk of double recovery does not arise simply because there are two damages awards: *SFC Litigation Trust v. Chan*, 2019 CarswellOnt 10809 (C.A.), at para. 133.

In the end, the Court of Appeal was of the firm view that the case should proceed to trial, and that Leitch should be free to pursue her conspiracy claim at trial. The Court of Appeal also set aside the motion judge's costs order and her order that required Leitch to preserve all of her assets as security for costs, and indicated that it was troubled by both the size of the costs order against Leitch, and the motion judge's decision to order her to preserve all of her assets:

> [58] Nothing in these reasons should be considered an approbation of the quantum of costs awarded or of the motion judge's ancillary costs orders. There are aspects of these orders that are troubling. In particular, **it is concerning that in**

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> **making the order for security for costs and preservation of assets, the motion judge did not consider the justice of the case and whether [Leitch] would be able to pursue her claims, including those on behalf of her children, in light of the order made**.
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> [59] As stated in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 827, 138 O.R. (3d) 1, at para. 23, in a discussion of orders for security for costs, "Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits". In considering an order for security for costs, "the correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made": see *Yaiguaje*, at para. 25. [emphasis added]

Some will surely argue that the Court of Appeal is courting disaster in opening up the tort of conspiracy in family law. We do not agree. Most cases will not involve claims of conspiracy. But where over-zealous family and friends might otherwise tend to become involved in hiding assets and/or income for a litigant - conspiring - perhaps fear of potential consequences will discourage that behaviour. Up until now, as noted by the Court of Appeal, it could be done with impunity. So, prospectively, they may be "invisible", but as a result of the Court of Appeal's decision, they will no longer be "untouchable."

To Mediate . . . Or Not to Mediate . . . That is the Question

Raichura v. Jones, 2020 CarswellAlta 356 (Q.B.) - Gates J.

Mediation can be an incredibly useful process in family law. It offers the chance for creative solutions to problems in which the parties can bargain over interests and not positions. If the parties get "stuck", it can allow for neutral evaluation about the merits of respective positions. But it also has limitations, including that, despite what some might think, it is ***not*** the mediator's job to ensure that a potential settlement is consistent with what the parties might actually be entitled to if the case was litigated - that is the job of the lawyers.

Accordingly, when preparing for a mediation, counsel must ensure that s/he has all of the information necessary to help the client make an informed decision, and has taken appropriate steps to manage the client's expectations about what the process will involve, the range of possible outcomes, and what the next steps will cost in terms of time and dollars if the mediation fails. It is not enough for the parties and lawyers to just show up, and let the mediator tell them what to do. That is not what mediation is for or what the mediator is supposed to do.

This family law solicitor's negligence case illustrates some of the problems that can arise if a client is not properly prepared going into a mediation.

The husband and wife were married for 11 years and had two children together. The husband was a successful businessman, and the wife stayed home and took care of the children and the home.

When the husband and wife separated in 2000, they tried to settle their family law issues through mediation and the collaborative law process, but were not successful. As a result, in 2004 the wife retained the defendant lawyer (the "lawyer") as her litigation counsel in order to try to bring the matter to a conclusion. Despite multiple court attendances, however, the parties were unable to resolve the matter.

In October 2005, the lawyer agreed to move the case into binding mediation/arbitration, but it does not appear that he actually obtained the wife's instructions before he did so. This, of course, is a problem. Furthermore, according to the wife, when she attended the first mediation session, she, "felt unprepared, and unsure of what she could reasonably expect at the mediation. She did not know where she stood on the division of property, on the disclosure of the investment accounts, or on her claims to retroactive child and spousal support. She felt unable to participate in the mediation process."

This was not a good start, and things went downhill from there.

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According to the wife, when she told the lawyer that she wanted to end the mediation and proceed with an arbitration, the lawyer "responded that the cost of arbitration would be $42,000 and that [the husband] would likely declare bankruptcy and that she would 'get nothing as a result and she could not be protected.'" As a result, the mediation continued, and the parties reached an agreement. However, according to the wife, she only agreed to the settlement because she felt, "she had run out of options and gave up during the course of the mediation", and concluded that she had no other option but to sign the agreement.

The wife subsequently terminated the lawyer's retainer, and told him that she was not happy with how the process had unfolded. And, she eventually sued him for negligence and claimed that the mediated settlement had been improvident.

In Alberta (and throughout Canada), family law lawyers are required to "exercise the standard of care of a reasonably competent member of his profession similarly situated in the discharge of his retainer": *Alberta (Workers' Compensation Board) v. Riggins*, 1992 CarswellAlta 140 (C.A.). Furthermore, in *Webb v. Birkett* (2011), 94 R.F.L. (6th) 265 (Alta. C.A.), which was discussed in the April 19, 2011 edition of *TWFL* (*volume* 2011-16), the Alberta Court of Appeal confirmed that the standard of care for a family law lawyer does not somehow change just because the parties are engaged in an alternative dispute resolution process:

> [56] While clients are entitled to forfeit legal entitlements through the collaborative family law to achieve benefits that may not be available through litigation, including the hope of maintaining civility among family members, the collaborative family law process does not excuse their lawyers from obtaining the information required to give the advice needed to support informed settlement decisions. **Interest-based bargaining does not excuse a lawyer from first advising his or her client of their legally-based rights, or at least giving a comprehensive and even compelling description of the risks faced by proceeding without having received full disclosure. Without that information, the client cannot make an informed decision to forfeit anything in the hopes of achieving extra-legal goals such as ongoing parental harmony**. The fact that a collaborative family law lawyer may leave control of the outcome with their client does not excuse that lawyer from giving the client the information needed to exercise that control in her own best interests. Family law clients are often particularly vulnerable, either emotionally, financially or both, and can fall victim to the "quick fix" offered by collaborative family law at a time when they are in a poor condition to exercise proper control over outcomes.
>
> [57] **Many, if not most, persons involved in the end of a marriage hope for a civilized, minimally-stressful resolution**. That is, no doubt, the attraction of the collaborative family law process. **However, these desires cannot be equated with a deemed willingness to give up entitlements to money, other property or spousal or child support in the absence of full disclosure of the value of same**. When the dust settles, and each of the parties moves on to live with the results of the settlement negotiated, hindsight can foster the stress and dissatisfaction the collaborative family law process aims to avoid, just as it did here. **The parties are required to live with that dissatisfaction only where they had full information available to them - either as to their legal entitlements when they made a decision to take less or different benefits than those to which they were entitled, or, if they decided to waive receipt of full information, a full explanation of the risks and losses attendant upon so doing**. [emphasis added]

After considering the evidence, Justice Gates concluded that even though a mediator had helped the parties reach a negotiated settlement, the lawyer had not met the standard of care for several reasons, including that the wife had agreed to a settlement that she thought gave her substantially less than she was entitled to because, among other things:

- The wife "was not properly prepared for the mediation and went in unaware of her legal entitlements. This meant she could not make an informed choice when settlement options arose."

- Had the wife "had proper legal representation, she would not have been at mediation, or not have been so ill-prepared and underinformed so as to accept a very compromised settlement, and instead would have proceeded to arbitration."

After concluding that the lawyer had not met the standard of care, Justice Gates found that the wife had established that she had received almost $132,000 less than she would have received if the matter had proceeded to arbitration, and ordered the lawyer to compensate her accordingly.

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This case stands for the proposition that, although in a "litigation free zone", settlements are always negotiated in the "shadow of the law." No matter the process used to resolve a case, whether mediation, litigation, arbitration, direct negotiation, etc., a lawyer's job is to make sure that the client can understand and weigh the costs and benefits of taking certain steps or accepting a particular settlement against the costs and benefits of not doing so. To not do so, robs the client of the chance to truly assess the settlement.

It is our understanding that this case is under appeal, and we look forward to seeing what the Court of Appeal has to say about this provocative decision.

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