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

Aaron Franks and Michael Zalev

Contents

NEWS

The amendments to the *Divorce Act* in former Bill C-78 were scheduled to come into force on July 1, 2020. As a result of delays to implementation efforts at both the provincial/territorial and federal levels caused by the COVID-19 pandemic, a new coming into force date of March 1, 2021 has been approved by Treasury Board. For details, see: English: https://www.canada.ca/en/department-justice/news/2020/06/government-delays-divorce-act-amendments-coming-in-to-force-in-response-to-requests-from-justice-partners-due-to-covid-19-pandemic.html

COVID-19 Update

This week we have three COVID-19 related cases that deal with our limited ability to conduct litigation and trials right now: (a) Justice MacLeod's decision in *Scaffidi-Argentina v. Tega Homes Developments Inc*; (b) Judge Mundstock's decision in *E.D. v. B.G*; and (c) Justice Diamond's decision in *Capone v. Fotak*.

There are two important lessons to take from these cases. First, in certain circumstances, it may be possible to have a court revisit an earlier interim ruling that was made on the assumption that a case could be tried within a reasonable period of time.

Second, and most importantly, we need to start seriously thinking about how we can modify the rules and processes that we relied on prior to COVID-19 to ensure that parties are still able to have timely access to the justice system. While a truncated hearing based on a paper record and limited (or no) opportunity for cross-examination is certainly not ideal, it is better than telling Canadians that there is no way for them to have their disputes resolved by a neutral and objective third party for the foreseeable future. Justice delayed is justice denied. Even more problematic is the fact that one side will usually benefit from the delay.

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Scaffidi-Argentina v. Tega Homes Developments Inc, 2020 CarswellOnt 7152 (S.C.J.) **- MacLeod J.**

In *Scaffidi-Argentina v. Tega Homes Developments Inc*, which is obviously not a family law case, Justice MacLeod was faced with a situation where the Court had previously declined to let one of the defendants bring a motion for summary judgment because, at that point, it was more efficient to just schedule the case for trial.

The trial was supposed to have been scheduled in March 2020, but because of COVID-19 it was unlikely to be scheduled until 2021. As a result, Justice MacLeod, very sensibly, agreed to revisit his earlier decision so that the summary judgment motion could proceed:

> [7] As a consequence of the above, I have now been asked to reconsider this issue. **The chaos which has now overtaken the court schedule means a change in the calculus and there is far less justification for the court to stand in the way of a party which wishes to exercise its right to bring a Rule 20 motion**.
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> [8] Under the circumstances, **I cannot realistically schedule this trial in the latter part of 2020 or the first six months of 2021**. In those circumstances, it is more efficient to test the legitimacy of the insurance defences through the mechanism of a summary judgment motion. If the motion is successful, it will shorten the trial and eliminate certain issues. If it is unsuccessful it may remove the issues from contention. I am not overlooking the possibility of an appeal, but it would be an appeal on a question of law. I am also not overlooking the possibility that the motions judge could refuse judgment because he or she is of the view that this a genuine issue requiring a trial, a result which would leave the question open for trial. Nevertheless, **as the action is now at least a year away from trial, I am prepared to schedule the summary judgment motion**. [emphasis added]

In his reasons, Justice MacLeod also expressed significant concerns about the enormous backlog that is building up, and about the court's ability to conduct virtual trials:

> [1] A case conference was convened to review the progress of the action in light of the suspension of in-court appearances due to COVID-19. The adjournment and delay of scheduled events which began in March shows no sign of ending soon. **There is very little likelihood of traditional trials resuming before July or September and even then, it may be possible to use court rooms only with precautions and safeguards in place**. This may significantly impact the number of cases that may be heard at one time, the number of matters that can proceed at all and the pace at which trials proceed. **Virtual hearings are likely to retain a permanent place in the judicial tool box**.
>
> [2] The problem of course is that the pandemic continues to spread worldwide and while Ontario has been successful in avoiding some of the apocalyptic scenarios that have unfolded elsewhere, it is far too early to predict what "normal" may look like in September. **With each passing week, the court has obtained the experience, resources and technology to conduct more of its regular business in a digital setting. We are a long way from being able to conduct significant numbers of digital trials**. Motions and applications that are primarily based on written evidence, written advocacy and oral submissions can much more readily take place in writing, by teleconference or by videoconference.
>
> [3] **This has a significant impact on the ability to schedule civil trials. A backlog of trials and other proceedings originally scheduled in March, April and May has already accumulated in all areas of the court's responsibility**. It is impossible to predict if the trials now scheduled for September will be able to proceed or whether some or all of those will also be affected and there cannot be effective backlog reduction measures until much more is known. **It would therefore be foolhardy to add additional trials to the schedule**. In short, the ability to schedule a trial in this matter, which seemed a simple matter before March has now been effectively stalled. [emphasis added]

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E.D. v. B.G, 2020 CarswellBC 1247 (Prov. Ct.) **- Mundstock Prov. J.**

The parties' son lived with the mother in Chilliwack, British Columbia. The father lived about 70 km away in Pitt Meadows.

In 2019, the mother commenced a proceeding to vary the child support arrangements. The father responded by asking to have the child reside primarily with him.

The Court appointed an expert under s. 211 of the *Family Law Act*, S.B.C. 2011, c. 25, which provides as follows:

> 211(1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:
>
> (a) the needs of a child in relation to a family law dispute;
>
> (b) the views of a child in relation to a family law dispute;
>
> (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

After conducting his investigation, the assessor recommended changing the child's primary residence from the mother to the father.

The case was supposed to have gone to trial in May and June 2020, but had to be adjourned because of COVID-19. Presumably because the assessment report was favourable to his case, but was at risk of becoming stale if the trial did not proceed soon, the father brought a motion to allow the trial to proceed.

After reviewing the leading cases about urgency and COVID-19, including *Ribeiro v. Wright*, 2020 CarswellOnt 4090 (S.C.J.) and *Thomas v. Wohleber*, 2020 CarswellOnt 4494 (S.C.J.), Judge Mundstock determined that while the matter was clearly very important to the parties, it was not urgent for the purposes of being able to proceed. The child was doing reasonably well, and it was simply not feasible to proceed with the trial right now, especially since it was expected to last seven days and involve approximately 20 witnesses:

> [26] At issue in the trial of this matter is the long term parenting plan for F., a plan that takes in to consideration his long term best interests. The issues are not immediate in the circumstances of a pandemic in which the court is not operating in full capacity and in which its resources must be reserved for the most urgent of cases.
>
> [27] I also do not see this as a case in which a telephone hearing is suitable. The trial is scheduled to take place over 7 days. [The father] intends to call 5 to 8 witnesses in addition to himself and his current spouse. [The mother] intends to call 10 witnesses in total. [The mother] also wishes [the assessor] to attend for the purposes of cross-examination. This is not a matter where the evidence may be tendered by affidavit because credibility findings will be necessary given that many facts are in dispute. A trial involving an application to change an existing parenting time order that has been in place since 2014 is not a simple issue. Finally, [the father] seeks a final order where the court is being asked to determine the long term best interests of F. rather than an interim order in which the court is being asked to impose a temporary solution to a problem that will be adjudicated fully at a date in the near future. In my view, a trial of this nature is not suited to a telephone hearing.
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> [28] Accordingly, the scheduled trial dates will be cancelled and the matter will be adjourned to September 11, 2020 to fix a date for trial.

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Capone v. Fotak, 2020 CarswellOnt 7050 (S.C.J.) **- Diamond J.**

In an earlier round of litigation between the parties, a number of orders were made against the former husband with which he failed to comply. As a result, his pleadings were struck, and a final (uncontested) order was made against him in 2016.

In 2019, the former husband brought a motion to set aside all of the orders that had been made against him. He argued that the Court had lacked jurisdiction to make the orders because he was not properly served in accordance with the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. [See, for example, *Wang v. Lin* (2015), 69 R.F.L. (7th) 65 (Ont. S.C.J.), aff'd (2016), 80 R.F.L. (7th) 42 (Ont. Div. Ct.); *Dong v. Jiang*, 2019 CarswellBC 3620 (S.C.); and *Acciona Infrastructure Canada Inc. v. Posco Daewoo Corporation*, 2019 CarswellAlta 1169 (C.A.)]

The former husband's motion was supposed to have been heard on March 19, 2020, but did not proceed because of COVID-19.

On April 30, 2020, the former husband brought a motion for an order to let him proceed with his motion to set aside the earlier orders "on an expedited and urgent basis" as he was in the United States and was going to lose his health insurance coverage at the end of July, but he could not return to Canada because the Family Responsibility Office had seized his passport as part of trying to enforce his court ordered support obligations.

Justice Diamond determined that the former husband's motion was not urgent enough to be heard during the COVID-19 pandemic, and determined that, "to the extent that [the former husband] finds himself in an urgent situation, much of that situation was self-made." He also expressed some serious doubts about the merits of the former husband's motion to set aside the prior orders:

> [28] . . . While I do not intend to bind the hands of the judge who ultimately hears the [former husband's] long motion, this is not the first time that the [former husband] has sought to set aside court orders made in his absence. While the [former wife] may seek to rely upon the doctrine of issue estoppel (which may or may not prove successful), the fact that the [former husband] served and filed a pleading (as evidenced by the [former wife's] motion to strike that pleading and the Chiappetta Order granting that relief), coupled with the [former husband] taking substantive steps on the merits in this proceeding to set aside orders on the basis that the [former wife] allegedly misled the court, lead to a concern that the [former husband] has attorned to the jurisdiction of Ontario, thereby rendering his argument that this Court originally lacked jurisdiction to be potentially moot. Again, this is an issue to be determined by the judge hearing the [former husband's] long motion, and that issue is obviously still live. However, as held by the Court of Appeal for Ontario in *Di Gregorio v. Sunwing Vacations Inc.*, 2018 ONCA 655 (CanLII), a substantive step made by a party in an Ontario proceeding (such as the filing of a defence) results in that party attorning to the jurisdiction of Ontario.

This is an important, and correct, distinction that Justice Diamond has made. While evidence that a claim has come to the attention of a defendant will *not* count as service under the *Hague Convention on Service* (which, by-the-by, is in dire need of updating for the modern world), evidence of attornment makes further proof of compliance with the *Hague Convention on Service* superfluous and/or redundant. Once a party has attorned, they have attorned, and the mode of service is no longer relevant.

We also certainly agree with Justice Diamond that the former husband's motion was not urgent as that term has been interpreted by the case law about urgency vis-à-vis COVID-19. While it seems unlikely that the former husband's motion will ultimately be successful, it is nevertheless troubling that although we are almost three months into the COVID-19 pandemic, we have still not reached the point where a contested motion that was supposed to have been heard in-mid March can be dealt with on the merits. No one group or entity is responsible. But it is clear that past governments - going back to the 1990s - have not properly prepared our justice system. The result has been the current judiciary doing their best to control the chaos. But we worry about the chaos to come.

And now, on that sombre note, some cases that have absolutely nothing to do with COVID-19.

An Out-of-the-Ordinary Parenting Schedule . . .

Wyatt v. Reindl (2020), 36 R.F.L. (8th) 253 (Sask. C.A.) - Richards C.J.S., Schwann, Tholl JJ.A.

Conventional wisdom tells us that children - especially young children - should generally not go for extended periods of time without seeing a parent. For example, in its recently released Parenting Plan Guide, the Ontario Chapter of the Association of Family and Conciliation Courts ("AFCC-O") recommended that even in cases where the parents are involved in a shared parenting arrangement, they should still ensure that "separations from each parent [for children under 3] are not too long (no more than two to three days or two nights for example)", and that while "it may be appropriate to have an arrangement with roughly equal care" for three to five year olds, they should still not be spending "more than 3 nights away from either parent." AFCC-O's Parenting Plan Guide is available at: https://afccontario.ca/parenting-plan-guide-and-template/. It is an excellent resource.

Accordingly, it is exceedingly rare for a court to order a schedule for a very young child whereby the child goes for a week or more without seeing one of his/her parents. And, it is even more rare for such an order to be made on an interim basis, and then upheld on appeal. But in *Wyatt v. Reindl*, that is precisely what happened.

The parties had a young daughter who was born in the summer of 2016. Although the child initially lived primarily with the mother, by January 2019, she was spending approximately equal time with both of her parents.

In January 2019, the father started a new job in Alberta that resulted "in him being unavailable to parent for eleven consecutive days, but being available to parent full-time for the next nine days." The father attempted to negotiate changes to the schedule with the mother, but they could not reach an agreement, and the mother unilaterally and significantly reduced the father's time with the child. She also told the father that the child could not attend his wedding, although this issue was, fortunately, resolved on consent prior to the wedding.

After the wedding issue was resolved, the father brought an interim motion to have the court determine the parenting schedule pending trial. The Chambers judge ordered a shared parenting arrangement whereby the child would spend 11 consecutive days with the mother (while the father was unavailable because of work), and would then spend nine consecutive days with the father while he was off work (with a 3-1/2 hour visit with the mother in the middle of the father's time).

The mother appealed the Chambers judge's decision. In dismissing the mother's appeal, the Saskatchewan Court of Appeal noted that, "[w]hen reviewing an interim parenting order, considerable deference is accorded to the discretionary decision made by a Chambers judge", and that it "has consistently attempted to discourage parties from appealing such orders barring exceptional circumstances." The Court also reiterated that:

- An "Appellate Court is not entitled to simply re-make a custody and access decision from the ground up along the lines that it might have preferred or thinks best". [(*Bolan v. Bolan*, 2013 CarswellSask 644 (Sask. C.A.)]

- "In most cases, the interests of the parties, and the children, are best served by proceeding quickly to the pre-trial settlement conference stage rather than expending time and scarce resources on an appeal from an interim order". [*Hall v. Hall*, 2011 CarswellSask 499 (C.A.)]

The mother tried to get around the high standard of review for appeals from interim parenting orders by arguing that the matter was "exceptional" because the order was inappropriate for a young child and represented a drastic change from the prior parenting arrangement. The Court of Appeal disagreed. In doing so, the Court accepted that the schedule the Chambers judge had ordered for the parties' young child was unusual, and acknowledged that it might have reached a different result at first instance. However, the Court determined those facts alone to be insufficient to warrant interfering with the Chambers judge's decision:

> [12] . . . [The mother] is correct that shared parenting schedules for pre-school children usually involve relatively shorter periods of time with each parent and more frequent exchanges: see, for example, *Chaisson v. Williams*, 2012 NSSC 224 (N.S. S.C.) at paras 9 and 16, and *Bromm v. Bromm*, 2010 SKQB 85 (Sask. Q.B.) at paras 39-40, 353 Sask. R 198 (aff'd 2010 SKCA 149, 91 R.F.L. (6th) 268 (Sask. C.A.)). However, each inquiry into a child's best interests is child-centered, focussed on the best interests of the specific child and based on the evidence in relation to that child's circumstances. **Generalizations regarding parenting schedules do not trump specific and compelling evidence that supports a shared parenting order different than the type typically made for pre-school children. While the length of parenting time ordered for each parent in this matter is unusual for a child of this age, and might not be the order I would have been inclined to make, that does not mean the Chambers judge made a reviewable error by deciding as he did**. [emphasis added]

The mother also tried to argue that the Chambers judge "impermissibly disturbed the status quo and changed a situation where she was the primary parent into a shared parenting arrangement." The problem with this argument, however, was that, in the words of the Court of Appeal, "prior to [the mother's] move to restrict [the father's] parenting in 2019, the arrangement had evolved into a situation where there was a near-shared parenting arrangement in place and that [the mother] supported shared parenting. The only dispute was about setting a schedule for such parenting."

While literature and generalizations about parenting schedules for young children do not (and should not) trump the evidenced best interests of the specific child before the court, we do have some concerns about the outcome of this case. While the 11-day on/9-day off shared parenting schedule that was put in place certainly made sense from the father's perspective because it fit with his new job, the father's best interests and conveniences are irrelevant. The only thing that mattered was the child's best interests, and there does not appear to have been sufficient evidence to establish whether it was actually in this child's best interests to regularly keep her away from a parent who was ready, willing, and able to care for her for nine days at a time. The child was going to be away from the father for extended periods of time, and that was going to be the case no matter how much time she was able to spend with him while he was actually in the province.

We wonder if the outcome of this case might have been different had the mother not significantly, and unilaterally, restricted the father's time with the child, and had not tried to prevent him from taking the child to his wedding. In the view of the Court, this may have been a bad "signal" of things to come.

We find that, more and more frequently, courts are taking action to prevent "parental gatekeeping." See, for example, *J.Y. v. L.F.-T.* (2019), 22 R.F.L. (8th) 272 (Ont. Div. Ct.); *Brissett v. Coughlan*, 2019 CarswellOnt 11513 (S.C.J.); and *Teeple v. Millington* (2020), 37 R.F.L. (8th) 355 (Ont. S.C.J.) (also awarding approximately equal time for a 3-year-old child to prevent gatekeeping). Sometimes, courts will order an equal residency schedule to protect a child's relationship with a parent: *Cojbasic v. Cojbasic* (2008), 52 R.F.L. (6th) 191 (Ont. S.C.J.); *Mikan v. Mikan*, 2004 CarswellOnt 772 (S.C.J.); *Baker-Warren v. Denault*, 2009 CarswellNS 402 (S.C.); and *Bushell v. Griffiths* (2013), 30 R.F.L. (7th) 306 (N.S. S.C.).

While the Court of Appeal did not expressly say so in its reasons (and the Chambers judge's reasons have not been reported), we suspect that both levels of court were concerned that the mother's behaviour showed that she could not be trusted to ensure that the child was able to have maximum contact with her father pending trial without the type of Order that was ultimately made in this case.

Court Restraint in Restraining Orders

Noriega v. Litke, 2020 CarswellOnt 6641 (S.C.J.) - Price J.

This was a motion by the mother for "an urgent restraining order" against the father, and offers an excellent review of the test for a restraining order.

In her Notice of Motion, the mother listed a series of somewhat general allegations about the father's conduct. Of course, noted Justice Price, allegations in a Notice of Motion are not evidence.

In her supporting Affidavits, the mother offered some further details, including that:

(a) The father refused to give the parties' adult daughter funds which she had been saving for school;

(b) In 2018, the father sent bullying emails to the mother's former lawyer;

(c) The father allegedly attended at the mother's home and moved her garbage can and recycling from her yard toward the door and then tried to open the front door;

(d) The father allegedly had committed acts of violence years ago against people in Peru, where the parties met, during the early years of their relationship

There was also evidence that the father had a historic record of a conditional discharge from 2008, according to which the father had been found guilty of criminally harassing the mother over a period of three days in 2007.

Based on this evidence, the mother claimed that she was "extremely scared of the [father's] unstable behaviour" and afraid that he may try to hurt her, any member of her family, her pets, and her property.

The evidence of both parties made it clear that this was an unhappy marriage from the very beginning. However, "unhappiness" does not comprise any part of the test for a restraining order.

The current litigation involved the father's request to terminate child support for their youngest child, who was 19 years old.

The father acknowledged that he attended at the mother's property on February 28, 2020, for the purpose of serving her with the Trial Record - probably not the best choice - but he denied the balance of mother's allegations about what occurred on that date (although he did acknowledge ringing her doorbell in order to try to serve her personally).

In Ontario, the authority of the court to make a restraining order is set out in s. 46(1) of the *Family Law Act*. That section (which is similar to like provisions in other provinces) provides:

> **46** (1) On application, the court may make an interim or final restraining order against a person described in subsection (2) if the applicant has **reasonable grounds** to fear for his or her own safety or for the safety of any child in his or her lawful custody.
>
> **46** (3) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:
>
> 1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating **with the applicant or any child in the applicant's lawful custody**. [emphasis added]

That is, a party seeking a restraining order must establish "reasonable grounds to fear for . . . **his or her own safety or for the safety of any child in his or her lawful custody**."

As noted by Justice Price, the mother's request for a restraining order based on her claimed fear that the father may hurt her pets and her property failed because they did not fit under the enumerated considerations that are set out in ss. 46(1) and 46(3)(1).

Similarly, because the parties' children were then adults, none were "in the lawful custody" of the mother. As a result, the mother's request for a restraining order based on her claimed fear that the father might hurt a member of her family also failed.

As a result, that left the mother to establish that she "has reasonable grounds to fear for . . . her own safety."

This is a failing of the restraining order provisions of the *Family Law Act*. Notably, in the upcoming amendments to the *Divorce Act*, "family violence" is defined to specifically include "threats to kill or cause bodily harm to any person"; "threats to kill or harm an animal or damage property; and the killing or harming of an animal or the damaging of property." Hopefully, when Ontario amends its legislation to bring it in line with the amendments to the *Divorce Act*, the legislature will include similar provisions to the ones that the British Columbia legislature included when it amended its *Family Law Act* [see the definition of "family violence" in s. 1 of the B.C. *Family Law Act*, S.B.C. 2011, c. 25]. See also, for example, s. 6.1 of Manitoba's *Domestic Violence and Stalking Act*, C.C.S.M. c. D93.

The question then arose of whether the mother's "reasonable grounds" should be assessed objectively - from the point of view of the mythic "reasonable person"; or subjectively - from the point of view of the mother herself.

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

This question was thoroughly discussed by Justice McDermot in *Fuda v. Fuda*, 2011 CarswellOnt 146 (S.C.J.):

> [31] The test for whether a restraining order?should be granted is, under both s. 46(1) of the *Family Law Act* and s. 35(1) of the *Children's Law Reform Act*, whether the moving party "has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody." This test was considered in *Khara v. McManus*, 2007 ONCJ 223 (CanLII), [2007] O.J. No. 1968 , 2007 CarswellOnt (C.J.) which was a trial of an application for a restraining order. Justice P.W. Dunn stated, at para. 33 as follows:

> When a court grants a restraining order in an applicant's favour, the respondent is restrained from molesting, harassing, or annoying the applicant. **It is not necessary for a respondent to have actually committed an act, gesture, or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. However, an applicant's fear of harassment must not be entirely subjective, comprehended only by the applicant. A restraining order cannot be issued to forestall every perceived fear of insult or possible harm, without compelling facts**. There can be fears of a personal or subjective nature, but they must be related to a respondent's actions or words. A court must be able to connect or associate a respondent's actions or words with an applicant's fears. [emphasis added]

Therefore, as Justice Price correctly noted, the notion of "reasonable grounds to fear" has both a subjective and an objective component. This makes good sense. Subjectively, a spouse that has lived with an oppressive or abusive domestic partner may know the signs of an anticipated incident of family violence. There may be a regular cycle of behaviour or "special words" used by a responding party that, historically, have given an applicant good reason to be scared, but that might not seem at all sinister to a third party. On the other hand, statements and behaviours that cannot, without subjective interpretation, support "reasonable grounds to fear" should not be sufficient to support a restraining order.

That said, subjective fear with proper and detailed evidence may be sufficient, as long as the evidence convinces the court that a reasonable person in the shoes of the party requesting the restraining order would have reason to fear for his/her psychological or physical safety: *McCall v. Res*, 2013 CarswellOnt 5865 (C.J.) - sort of a "modified subjective test". This makes sense because a reasonable person armed with the history of the matter may very well have reason to fear something that might not give an uninformed reasonable person a basis to be fearful.

In this case, there was not much beyond the bare assertions of the mother that she feared the father. In considering what Justice Price found to be conclusory and mostly unsupported statements, his Honour made an analogy to the process of obtaining a search warrant, and cited the Ontario Court of Appeal case of *R. v. Debot*, 1986 CarswellOnt 135 (C.A.):

> . . . a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found at a certain place would be an insufficient basis for the granting of the warrant. **The underlying circumstances disclosed by the informer for his or her conclusion must be set out**, thus **enabling the justice to satisfy himself or herself that there are reasonable grounds for believing** what is alleged. **I am of the view that such a mere conclusory statement made by an informer** to a police officer **would not constitute reasonable grounds** for conducting a warrantless search or for making an arrest without warrant. [emphasis added]

By analogy, Justice Price concluded that he could not just rely on the mother's bare assertions of fear. More was required for her to establish, from a subjective perspective, "reasonable grounds to fear" for her safety.

Helpfully, Justice Kristjanson very recently considered the type of evidence required for an applicant to establish a subjectively held "reasonable grounds to fear" for his or her safety in *Yenovkian v. Gulian*, 2019 CarswellOnt 21614 (S.C.J.):

> A restraining order will be made where a person has demonstrated a lengthy period of harassment or irresponsible, impulsive behaviour with the objective of harassing or distressing a party. There should be some persistence to the conduct complained of and a reasonable expectation that it will continue without court involvement. See: *Purewal v. Purewal*, 2004 ONCJ 195.

In this case, Justice Price found, correctly in our opinion, that the mother's evidence was lacking. A restraining order is a serious remedy with potentially serious repercussions and implications on the liberty of a person restrained. Here, the mother's evidence lacked the specific, detailed evidence that is (and should be) required to obtain a restraining order.

Justice Price then turned to consider the matter from the objective standard - did the mother have objectively reasonable grounds to fear for her safety?

In considering the objective test, Justice Price again considered *R. v. DeBot*, *supra*, in which Justice Martin wrote:

> On an application for a search warrant, the informant must set out in the information the grounds for his or her belief **in order that the justice may satisfy himself or herself that there are reasonable grounds for believing what is alleged** . . . The standard of "reasonable ground to believe" or "probable cause" is not to be equated with proof beyond a reasonable doubt or a prima facie case. **The standard to be met is one of reasonable probability**. [emphasis added]

Based on the very dated and general evidence offered by the mother, she also failed the objective test. On the one specific incident, the father had a valid reason to attend at the mother's residence - to deliver the Trial Record. Again, it may not have been wise, but it was not, in and of itself, sufficient to meet an objective fear. Notably, the incident took place on or around March 7, the motion for the restraining order was dated May 7, and the mother offered no explanation for the two-month delay.

As a result, the mother's motion for a restraining order was dismissed.

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