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

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Contents

COVID-19 Update

In several cases over past months, courts have been sending the message that court materials that do not comply with the rules of court and the rules of evidence will no longer be tolerated.

If family courts are going to be able to clear the significant backlog that has been building up over the last three months, it is critical that they be provided with materials that are clear, concise, and relevant so as to ensure efficiency. Judges should not have to wade through paragraphs (or pages) of petty, scandalous allegations; pointless character assassination; irrelevant and inflammatory rhetoric; and pointless allegations of "bad conduct". That was important before, and it is even more important now.

Pandemic or no pandemic, such material should be struck from affidavits. See, for example: *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.); *Krahn v. Krahn*, 2007 CarswellMan 214 (Q.B.); *Kwas v. Swaile*, 2002 CarswellSask 903 (Q.B.); *Rosen v. Rosen*, 2005 CarswellOnt 68 (S.C.J.); *Csak v. Mokos* (1995), 18 R.F.L. (4th) 161 (Ont. Gen. Div.); *Senechal v. Muskoka (District Municipality)*, 2003 CarswellOnt 854 (S.C.J.); *Antoine v. Campbell*, 2010 CarswellSask 822 (Q.B.); *Stening-Riding v. Riding* (2006), 55 R.F.L. (6th) 111 (N.S. S.C.); *Reyher v. Reyher*, 2010 CarswellMan 77 (Q.B.).

And we hope that courts more readily consider striking such material in the future. What we permit, we promote; and what we allow, we encourage.

Two examples are discussed below: Justice Kurz's decision in *Alsawwah v. Afifi*, and Justice Jarvis' decision in *Natale v. Crupi*.

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***Alsawwah v. Afifi*, 2020 CarswellOnt 6295 (S.C.J.) - Kurz J.**

Alsawwah v. Afifi involved a motion by the father for exclusive possession of the parties' matrimonial home. While we discussed the exclusive possession aspect of this case in the May 18, 2020 edition of *TWFL*, we did not delve into Justice Kurz's comments about the problems with the materials that the mother had filed (and family court materials in general), or his helpful suggestions for "lowering the rhetorical temperature" in future family law cases. So we are going to do so now - *carpe diem*.

In resisting the father's motion for exclusive possession, the mother filed materials that Justice Kurz found were "unnecessary, excessive, distracting, and unhelpful to the resolution of the sole issue in this motion." He also found that the mother had needlessly chosen to "attack the [father's] character and drag collateral issues into the case with a rhetorical fierceness that one would expect of a mixed martial arts cage match." In her affidavit, the mother referred to the father "as 'ruthless',

'conniving' (twice), malicious (eight times), and cruel (four times). She describes him as acting in 'bad faith' (six times) and for 'hidden motives' (four times)."

After finding that it would be in the children's best interests to grant the father's motion for exclusive possession, Justice Kurz took the time to comment on the adverse impacts of "rhetorical excess in family litigation", and to provide some incredibly useful tips about advocacy that, in our view, make this a "must read" decision for every family law lawyer, litigant and judge:

> [1] The famous American trial lawyer, Louis Nizer, once wrote that "[w]hen a man points a finger at someone else, he should remember that four of his fingers are pointing at himself." This aphorism, pointing to the ubiquity of human foible, is one that more lawyers who pride themselves on their aggressive family law advocacy, should take to heart.
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> . . . . .
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> [103] Having been required by the exigencies of this motion to closely and frequently review the materials filed in this motion, I feel constrained to offer a few words of caution to the parties, their counsel and to the profession as a whole.
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> [104] **Family litigation is far too corrosive of once-loving relationships and far too soul destroying for emotionally scarred litigants to be exacerbated by an unnecessary war of invective.** Yet far too often that is just what occurs. Litigants feel that they can leave no pejorative stone of personal attack untilled when it comes to their once loved one. **Many lawyers, feeling dutybound to fearlessly advocate for their clients, end up abetting them in raising their discord to Chernobyl levels of conflict.**
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> [105] Often those parties and their lawyers forget that **once the war is over, the financially and emotionally drained family still has to pick up the pieces. And the children whose best interests are ostensibly the central concern of their parents' struggle, can leave their field of battle scarred for life.**
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> [106] The role of lawyers in family law cases is a complicated one. That role involves a balancing act of duties towards the client, the administration of justice and even the child before the court.
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> [107] Beyond the balance of those duties, **many capable family law lawyers realize that if the cost of victory is too great, everyone loses.** Those lawyers realize that their role as advocate should often be as rational counsel not flame-throwing propagandist. Where the client wants to raise the emotional stakes with invective and personal attack, that lawyer must often counsel restraint. **While many lawyers who appear before this court recognize the truth of Mr. Nizer's aphorism that began these reasons, all too many, unfortunately, fail to do so.**
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> [108] In the hopes of lowering the rhetorical temperature of the future materials of these parties and perhaps those of others who will come before the court, I repeat these essential facts, often stated by my colleagues at all levels of court, but which bear constant repetition:
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> 1. **Evidence regarding a former spouse's moral failings is rarely relevant** to the issues before the court.
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> 2. **Nor are we swayed by rhetoric against the other party** that verges on agitprop.
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> 3. **Our decisions are not guided by concerns of marital fidelity.** A (non-abusive) partner can be a terrible spouse but a good parent. Everyone is supposed to know this, but all too often I see litigants raise these issues for "context".
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> 4. **Exaggeration is the enemy of credibility.** As it is often said, one never gets a second chance to make a first impression. If that impression, arising from a parties' materials or argument, is one of embellishment, that impression will colour everything that emanates from that party or their counsel.
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> 5. **Affidavits that read as argument rather than a recitation of facts are not persuasive.** They speak to careless drafting.

> 6. Similarly, **hearsay allegations against the other side which fail to comply with r. 14(18) or (19) are generally ignored**, whether judges feel it necessary to explicitly say so or not.
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> 7. **A lawyer's letter, whatever it says, unless it contains an admission, is not evidence of anything except the fact that it was sent.** The fact that a lawyer makes allegations against the other side in a letter is usually of no evidentiary value.
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> 8. **Facts win cases.** A pebble of proof is worth a mountain of innuendo or bald allegation.
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> 9. **Relevance matters.** If the court is dealing with, say an issue regarding parenting, allegations of a party's failures regarding collateral issues, say their stinginess or the paucity of their financial disclosure, are irrelevant and counter-productive. They do not reveal the dark soul of the other side or turn the court against the allegedly offending spouse. Rather, they demonstrate that the party or their counsel is unable to focus on the issue at hand. Often those materials backfire leading the court to place greater trust in the other side.
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> 10. **One key to success in family law as in other areas of law is the race to the moral high ground.** Courts appreciate those parties and counsel who demonstrate their commitment to that high ground in both the framing and presentation of their case.
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> 11. **While dealing with that moral high ground, many capable counsel advise their clients against "me-too" ism.** One side's failure to obey a court order or produce necessary disclosure does not give licence to the other side to do the same. Just because the materials of one side are incendiary or prolix, that does not mean that the other side is required to respond in kind. Judges are usually aware when a party has crossed the line. Showing that you or your client does not do the same is both the ethical and the smart thing to do.
>
> [109] None of these comments should be taken as a comment on present counsel. Nor should they be seen to minimize the kind of resolute advocacy that the court has come to expect from so many of its best lawyers. That type of advocacy is often necessary and valued. But even then, **rhetorical excess is the enemy of good advocacy.** [emphasis added]

We completely agree with Justice Kurz, and we hope to see more judges take the time to take lawyers and parties to task when they file the type of materials that the mother filed in this case.

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***Natale v. Crupi*, 2020 CarswellOnt 8063 (S.C.J.) - Jarvis J.**

The parties could not agree on the location for weekday access exchanges. At a Case Conference on May 13, 2020, Justice Bennett granted the father leave to bring a motion to deal with this issue, and directed the parties to comply with the page limits set out in the Chief Justice of Ontario's Notice to the Profession.

The parties did not comply with Justice Bennett's direction or the Notice to the Profession and, instead, filed voluminous materials (the father filed an 11 page affidavit with 120 pages of exhibits, and the mother filed a 12 page affidavit with 180 pages of exhibits). As a result of the parties' failure to comply with the prescribed page limits, Justice Jarvis refused to hear the matter unless and until they redid their materials, and ensured that their affidavits did not exceed 10 double spaced pages (including exhibits):

> [6] **Neither party's material complies with the Chief's Notice and clearly disregards Bennett J.'s direction to be mindful of it.** Moreover, in *Greco-Wang v. Wang*, [2014 ONSC 5316 (S.C.J.)] Kiteley J. observed that **"[m]embers of the public . . . are not entitled to unlimited access to trial judges".** While that was said in the context of trial scheduling it is equally, if not more pertinent, to temporary motions, especially in light of the Chief's Notice. Without understating the matter, the parties' material is disproportionate to the issue and an abuse of process.

> [7] **The father's motion will not be heard as presently constructed.** . . . [emphasis added]

While this is an unfortunate result for the parties as they now have to incur further costs to deal with an issue as straightforward as where weekday access exchanges would take place, we commend Justice Jarvis for sending a clear message to lawyers and litigants that if they are not going to abide by rules that are as basic as page limits, their matters will simply not be heard.

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

Some Support from the Alberta Court of Appeal on Interim Support

Furry v. Goodwin, 2020 CarswellAlta 553 (C.A.) - Wakeling, Strekaf, and Feehan JJ.A.

Interim spousal support is rarely denied after a reasonably long marriage where the parties had children together, and where need and ability to pay are not really in issue. But that is exactly what happened in *Furry v. Goodwin* - at least until the Alberta Court of Appeal intervened.

The parties were married in 2006 and had two children together. When they separated in 2016, the father was employed and earning between $150,000 and $210,000 a year, while the mother was unemployed and had no income.

The mother brought a motion for interim spousal support, and claimed that she needed support because she was not legally able to work in Canada and that she was completely dependent on charity from government agencies and additional help from one of her friends.

Interim spousal support orders, as Justice Zuber noted in *Sypher v. Sypher* (1986), 2 R.F.L. (3d) 413 (Ont. C.A.), "are intended to cover a short period of time between the making of the order and trial", and their purpose "is simply to provide a reasonably acceptable solution to a difficult problem until trial." Furthermore, as Justice McDermot recently explained in *Lamb v. Watt*, 2017 CarswellOnt 15286 (S.C.J.), "on a motion for temporary spousal support, the claimant does not have to prove entitlement on the balance of probabilities as he or she would have to at trial. He or she need only show a *prima facie* case for entitlement: see *Samis (Litigation Guardian of) v. Samis* (2011), 2 R.F.L. (7th) 476 (Ont. C.J.) at para. 44; *Carnegie v. Carnegie* (2008), 60 R.F.L. (6th) 192 (Man. Q.B.)."

Accordingly, on a motion for interim spousal support, the parties' means and needs are the court's primary considerations. As the Alberta Court of Appeal noted in *Anand v. Anand* (2016), 73 R.F.L. (7th) 33 (Alta. C.A.):

> [56] **Interim spousal support orders are often treated differently than spousal support awarded after trial**, in that evidence concerning family assets and economic consequences of the marriage breakdown may not be fully developed, so **greater significance is placed on the parties' means and needs, while the other factors in s 15.2(4) and the objectives in s 15.2(6) are to be taken into account as far as is practicable** . . .
>
> [57] Although other s 15.2(4) factors and s 15.2(6) objectives must be taken into account, **the needs of the dependent spouse and the ability of the payor spouse to pay take on greater significance in interim applications.** The ultimate question for the court on an interim application is to determine what is reasonable on a temporary basis pending trial . . . This Court has recognized that interim orders are often made on an incomplete record and **chambers judges do the best they can to set an interim balance between the parties until the matter can go to trial.** [emphasis added]

Notwithstanding these widely accepted principles, the motion judge dismissed the mother's request for interim support because:

> 1. While the parties cohabited for 10 years, the uncontested affidavit evidence was that the [mother] was engaged in business enterprises and the [father] was actively involved with the children's lives and well-being, as outlined in his affidavit. The [mother] stated that the marriage was traditional but did not provide any information about her involvement with the children during the marriage in her affidavit;

2. The [father] is bearing all the costs and responsibilities in relation to the parties' children and has documented the economic constraints on his ability to do so; and

3. While the [mother] says that she is a citizen of Indonesia who is not legally entitled to work in Canada, she provided no meaningful information about the legal prohibitions that prevent her from doing so, and the evidence provided was not sufficient to satisfy the court that she was unable to work.

This was a surprising and seemingly harsh result on an interim motion. While the motion judge's reasons may have justified imputing the mother with income and/or ordering support at the low end of the Spousal Support Advisory Guidelines (the "SSAG's"), it is hard to see how the facts supported the conclusion that the mother had absolutely no entitlement to interim support. It is hard to see how this result placed greater significance on the means and needs of the parties.

Fortunately for the mother, and despite the very high standard of review that applies to interim support appeals, the Court of Appeal was willing to intervene. While the Court recognized "the challenges facing a chambers judge, particularly in regular chambers, to determine what level of interim support would be appropriate when faced with highly conflicting affidavit evidence, that was not subject to cross-examination", it was "not satisfied that a complete denial of interim support to an unemployed spouse after a 10-year marriage can survive appellate review, having regard to the parties' needs and means, in the face of the highly conflicting evidence and in the absence of cross-examination. That determination was clearly wrong on the record."

Instead of forcing the parties to incur additional costs on a rehearing, the Court of Appeal determined that the appropriate result would be to order the father to pay the mother spousal support of $1,200 a month based on the father's disclosed current income of $134,000 a year and the mother having no income. While this amount was slightly below the low range of the SSAGs, it also did not take into account the s. 7 expenses that the father claimed he was paying without contribution from the mother, the mother's *potential* income, or the government support that the mother was receiving.

This was a very sensible result, and a useful case to have on hand when dealing with a support payor who refuses to acknowledge that the recipient has even a basic entitlement to interim spousal support.

Sometimes "Friendly Manitoba" Ain't So "Friendly"

Horbas v. Horbas (2020), 37 R.F.L. (8th) 1 (Man. C.A.) - Hamilton, Cameron, and Spivak JJ.A.

The parties were married in 2005 and had three children together. They separated in 2016 after 11 years of marriage.

The parties initially lived in Winnipeg, but in 2007, they moved to Alberta to facilitate the husband's career in the pipeline industry.

In 2010, the parties moved back to Manitoba. The wife gave up her career as a civilian employee for the Canadian Armed Forces to take care of the children and the home, while the husband supported the family financially by continuing to work in Alberta.

The husband was successful in his career, and by 2015 he was earning more than $375,000 a year as a Superintendent for a pipeline company. Shortly before the parties separated in 2016, however, the husband left his job in the pipeline industry, and took employment in Manitoba to be closer to the children. Although the husband continued working, he only earned about $60,000 in 2017 and $18,000 in 2018. At trial, his evidence was that he anticipated earning $52,000 in 2019 as a gas pipeline inspector and meter reader for Manitoba Hydro.

At trial, the wife claimed that the husband was intentionally underemployed, and that he should be imputed with an income of $300,000 a year based on what he had most recently been earning during the marriage. She argued that the husband "was not credible in regards to his employment situation and was attempting to punish her financially for leaving him."

The trial judge rejected the wife's request to impute income to the husband as he found the husband's decision to prioritise his relationship with his children and pursue local employment to be reasonable, and ordered the husband to pay support based on his anticipated income of $52,000 a year.

Although the Manitoba Court of Appeal recognized that, as the Supreme Court of Canada noted in *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.), "appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong", it nevertheless found that the trial judge had erred in law by not imputing the husband with additional income.

Pursuant to s. 18(1)(a) of the *Manitoba Child Support Guidelines* and s. 19(1)(a) of the *Federal Child Support Guidelines*, a court can impute income to a spouse who is "intentionally underemployed".

In *Donovan v. Donovan* (2000), 9 R.F.L. (5th) 306 (Man. C.A.), the Manitoba Court of Appeal confirmed that in Manitoba, as in most provinces (with the notable exception of Alberta - see e.g. *Keating v. Keating* (2017), 5 R.F.L. (8th) 126 (Alta. C.A.)), "[a] specific intent to evade child support obligations is not required nor is a finding of bad faith" before income can be imputed to a parent on the basis that s/he is intentionally underemployed. Instead, a "parent required to pay is intentionally underemployed if that parent chooses to earn less than he or she is capable of earning." However, even if a parent chooses to earn less than s/he is capable of earning, "the court may exercise its discretion not to impute income where the parent establishes the reasonableness of his or her decision."

The trial judge found that the husband's decision to leave his career in the pipeline industry so that he could spend more time with the children was reasonable, and declined to impute him with any additional income.

The Court of Appeal, however, concluded that the trial judge had erred by focusing exclusively on whether it had been reasonable for the husband to change careers to spend more time with the children without also considering other important factors, including "past income, the income-earning situation at present, and future capacity to earn."

Based on the record below, the Court of Appeal was not satisfied that the husband had met his onus of establishing that his decision to leave his job and earn significantly less than he had earned historically had, in fact, been reasonable:

> [35] In my view, the husband failed to satisfy the onus of establishing that it was reasonable for him to leave high-paying employment and accept a job locally earning drastically less given his past earnings, his work experience, his skills, his health, his age and his education. **He provided no evidence of efforts to secure higher-income employment opportunities in Manitoba to maximise his earnings.** In fact, there was evidence that he had worked on pipeline projects for Somerville in Manitoba in the past. As well, the husband earned $1,000 per day as a superintendent and $900 per day as an assistant superintendent at Michels Canada. **There was no evidence as to whether Michels Canada could have accommodated different hours or a reduced work structure**, to allow him to have sufficient and regular opportunity to see his children. **There was no evidence that the husband explored with the wife any possible schedule of care and control which could have allowed him to continue this lucrative employment** in the pipeline industry in some capacity and still have frequent contact with his children. [emphasis added]

Respectfully, there are two problems here:

> 1. The Court of Appeal found that the trial judge had erred by focusing exclusively on whether it had been reasonable for the husband to change careers to spend more time with the children without also considering other important factors, including "past income, the income-earning situation at present, and future capacity to earn." In doing so, the Court of Appeal conflated the issue of the reasonableness of the husband's decision to move back to Manitoba with the income that should be imputed to the husband should his decision have been found to be unreasonable. This was an issue squarely dealt with by the court below and, as such, the Court of Appeal actually ran afoul of the strictures of *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.). That the Court of Appeal would have done something different is not a determination of error. That is re-weighing the evidence. And that, very respectfully, is not the job of the Court of Appeal.

2. In not being satisfied that the husband had met *his onus* of establishing that his decision to leave his job and earn significantly less than he had earned historically had, in fact, been reasonable, the Court of Appeal improperly shifted the onus to the husband to justify what he had done.

The onus is on the party requesting an imputation of income (in this case, the wife) to establish an evidentiary and rational basis for a finding of intentional under-employment: *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *T. (S.L.) v. T. (A.K.)* (2009), 77 R.F.L. (6th) 67 (Alta. C.A.); *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.); *Nielsen v. Nielsen* (2007), 47 R.F.L. (6th) 26 (B.C. C.A.); *Berta v. Berta* (2015), 75 R.F.L. (7th) 299 (Ont. C.A.); *Spiring v. Spiring* (2002), 31 R.F.L. (5th) 433 (Man. Q.B.).

Even in jurisdictions that suggest there is then a shift in onus back to the payor to justify their decision, the payor must only show that the decision was "reasonable, thoughtful and highly practical." [See, for example, *MacDonald v. MacDonald* (2010), 83 R.F.L. (6th) 243 (N.S. C.A.); *Pey v. Pey* (2016), 79 R.F.L. (7th) 107 (Ont. S.C.J.).] This is because not all decisions that reduce income are unreasonable - see *Duffy v. Duffy* (2009), 73 R.F.L. (6th) 233 (N.L. C.A.). Again, this was an issue squarely before and determined by the trial judge.

Having found that the husband was intentionally underemployed and should be imputed with income, the Court of Appeal was then faced with the difficult question of how much income should be imputed. This is usually the most difficult part of any imputation case, and it was particularly difficult in this case.

While the wife's request to impute the husband with an income of $300,000 a year based on what he had earned historically had a certain logic to it, this would have left the husband in the untenable position of owing significantly more child support than he was actually earning (although the husband was only earning $52,000 before tax a year, child support for three children based on an income of $300,000 would have cost the father more than $58,000 after tax).

In rejecting the wife's argument, the Court of Appeal noted that "[w]hen imputing income based on intentional underemployment, a court should consider what is reasonable and fair", and concluded that "[i]t would be unfair to impute to the husband an income that reflects the full amount of what he previously earned which required travelling often and for lengthy periods of time and would impact substantially on his ability to care for his children."

The Court of Appeal recognized that "the amount of income to be imputed must not be arbitrary", "[t]here must be a rational basis underlying the figure", and it "must be grounded in the evidence[.]" Nevertheless, and even though there was limited evidence about the husband's ability to return to the pipeline industry, the Court found that "[g]iven the delay and cost involved, it is not reasonable to remit the matter back to the trial division for further evidence. In the circumstances, it is appropriate for this Court to do the best it can on the available evidence."

Doing the best that it could based on the record before it, the Court of Appeal imputed the husband with an income of $100,000 a year - double his actual income - based on the limited evidence that was before it about what the husband could earn from working in the pipeline industry in Manitoba.

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