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— Franks & Zalev - This Week in Family Law

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Contents

COVID-19 Update

While things are certainly not yet back to normal - whatever that means in family law - courts across the country are slowly expanding their capacity to deal with family law cases. We have also all learned that there can be significant advantages to serving and filing materials electronically, page limits, attendances by videoconference or telephone, and dealing with (some) issues in writing.

It remains to be seen how cases that require *viva voce* evidence from multiple witnesses are going to be managed. And, in Ontario, there is a question as to what steps need be taken before in-person attendances can resume - as evidenced by an application for an injunction that was recently filed by the Ontario Crown Attorneys' Association to stop the Ministry of the Attorney General for Ontario from "requiring its employees to return to work at the 44 courthouses across Ontario that it is re-opening on July 6, 2020, when it has not taken every reasonable precaution to protect the health and safety of its employees in these courthouses in the midst of the ongoing COVID-19 pandemic."

But those issues aside, things seem to be moving in the right direction. And now that most jurisdictions are hearing non-urgent matters and courts have generally sorted out how they are going to deal with most COVID-19 related family law issues, we are going to stop updating the Epstein Cole COVID-19 Chart.

We will, however, continue to keep you apprised of any interesting COVID-19 related cases through *TWFL*. This week, we have two new COVID-19 cases for you: Justice Pazaratz's decision in *Dhaliwal v. Dhaliwal*, 2020 CarswellOnt 8983 (S.C.J.); and (b) Justice Finlayson's decision in *Catholic Children's Aid Society of Toronto v. A.A.*, 2020 CarswellOnt 8537 (C.J.).

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Benjamin Franklin: "Nothing Can Be Said To Be Certain, Except Death and Taxes and Perhaps Interim Partition and Sale of a Jointly Owned Property"

Dhaliwal v. Dhaliwal, 2020 CarswellOnt 8983 (S.C.J.) - Pazaratz J.

When a decision starts like this, you know its going to be a good read:

> [1] COVID-19 has instantly made most of our "He Said/She Said" disputes sound pretty petty.
>
> [2] We're still in the midst of an existential crisis. Medically. Economically. Socially.

[3] But rather than brace together against the common enemy, parents are pounding on the family court door, begging us to open up so they can get a few more kicks in - as if a judge has the power to wake anyone from this pandemic nightmare.

[4] *Business as Usual?* Gone.

[5] *Nonsense as Usual?* Here to stay.

If you have a case involving a request to sell a matrimonial home prior to trial, *Dhaliwal v. Dhaliwal* now offers an excellent starting point. At paragraph 16 Justice Pazaratz synthesized the case law, and set out **19 principles** that courts consider when deciding to grant a request for the interim sale of jointly owned property - including a matrimonial home. This summary will be very useful for counsel across the country:

[16] The applicable legal principles include the following:

a. Section 2 of the Partition Act empowers the court to order the sale of a jointly owned property, including a matrimonial home. *McNeil v. McNeil* 2020 ONSC 1225 (SCJ).

b. A joint tenant has a prima facie right to an order for the partition or sale of property held with another joint tenant. *Kaphalakos v. Dayal* 2016 ONSC 3559 (SCJ); *Marchese v. Marchese* 2017 ONSC 6815 (SCJ); *Jama v. Basdeo* 2020 ONSC 2922 (SCJ); *Davis v. Davis* 1953 CanLII 148 (ON CA); *Brienza v. Brienza* 2014 ONSC 6942 (SCJ).

c. A court is required to compel partition and sale unless the opposing party has demonstrated that such an order should not be made. *Jama v. Basdeo*; *Steele v Doucett* 2020 ONSC 3386 (SCJ).

d. The other joint tenant has a corresponding obligation to permit the sale. These are fundamental rights flowing from joint tenancy. *Steele v Doucett*.

e. The onus is on the party who opposes a sale to establish that there is a sufficient reason, recognized in law, why the court should exercise its discretion to refuse a sale. *Afolabi v. Fala*, 2014 ONSC 1713 (SCJ).

f. Generally, the party opposing the sale must show malicious, vexatious or oppressive conduct relating to the partition and sale issue in order to avoid the sale. *Silva v. Silva* (1990) 1990 CanLII 6718 (ON CA), 1 O.R. (3D) 436 (ON CA); *Jama v. Basdeo*; *Steele v Doucett*.

g. Each case must be considered on its own facts. The court must consider all relevant factors in exercising its discretion. *Davis v. Davis* 1953 CanLII 148 (ON CA), [1954] O.R. 23 (C.A.); *Steele v Doucett*.

h. In family law cases, an order under the Partition Act should generally not be made until any dispute related to the property has first been determined. *Maskewycz v. Maskewycz* (1973) 1973 CanLII 603 (ON CA), 2 O.R. (2d) 713 (ON CA).

i. The *Family Law Act* does not displace the *Partition Act*. But in family cases a partition application should generally not be granted where it can be shown that a legitimate family law claim would be unfairly prejudiced. *Silva v. Silva*; *Parent v. Laroche* 2020 ONSC 703 (SCJ); *Latcham v. Latcham* (2002) 2002 CanLII 44960 (ON CA), 27 R.F.L. (5th) 358 (ON CA); *Dulku v. Dulku* 2016 CarswellOnt 16066 (SCJ).

j. In assessing and guarding against potential prejudice, the court must take a realistic view of the potential impacts of a sale - both positive and negative - in relation to the interests of both joint tenants, and the family as a whole. Where the financial or other circumstances of the parties are such that a sale would be the inevitable result at trial, there is little justification for delaying the sale. *Zargar v Zarrabian* 2016 ONSC 2900 (SCJ); *Giglio v Giglio* 2015 ONSC 8039 (SCJ); *Keyes v. Keyes* 2015 ONSC 1660 (SCJ).

k. More to the point, where it is evident at the temporary motion stage that monthly carrying costs are currently unsustainable, it is inappropriate to indefinitely perpetuate financial hardship for the entire family. Quite commonly, house expenses which were barely affordable when the family unit was intact immediately become unaffordable once the same income has to fund two separate households. Sometimes harsh new realities need to be faced sooner as opposed to later - in order to avoid even more painful consequences such as power of sale proceedings or even bankruptcy.

l. The court must consider the impact of a proposed sale on children or a vulnerable spouse - including the emotional impact, and the fundamental need to ensure that they have appropriate housing. *Delongte v. Delongte* 2019 ONSC 6954 (SCJ); *Kaing v. Shaw* 2017 ONSC 3050 (SCJ). The availability and affordability of alternate housing must be considered. As part of the analysis, support obligations may need to be co-ordinated - even on a temporary basis - to ensure that any party displaced by a sale will have the resources to arrange reasonable replacement accommodation.

m. Orders for sale of a matrimonial home at the interim stage should not be made as a matter of course. *Fernandes v Darrigo* 2018 ONSC 1039 (SCJ). The court must be mindful of the whole of the proceeding, and the need to achieve a final resolution for the family as fairly and expeditiously as possible. *Kereluk v. Kereluk*, 2004 CanLII 34595 (SCJ).

n. Timing can be a relevant consideration in dealing with a motion for sale at a temporary stage. The availability of a trial within a short period might reduce the pressure for an immediate sale. *Goldman v. Kudeyla*, 2011 ONSC 2718 (SCJ).

o. On the other hand, a request for sale during summer months may entail some timeliness if seasonal market opportunities are favourable; or to reduce the likelihood of a child having to change residence (and possibly catchment area) while a school year is in session.

p. The stage of a child's academic progress might also be relevant. Sale might be delayed if it would allow a child to complete a certain grade level before an inevitable switch to another school. On the other hand, immediate sale might be more appropriate if the child happens to be transitioning to a new school in any event.

q. But the mere existence of children in a household is not in itself a sufficient basis to oppose a sale. A generic statement that children enjoy living in their current house or that they will be unhappy if they have to move, is not sufficient. The party opposing a sale must establish a likely negative impact more serious than the inevitable adjustments and disruptions which all families face when parents decide to separate.

r. A pending equalization claim may also be relevant. The court cannot compel one joint tenant to sell to the other. *Martin v. Martin* 1992 CanLII 7402 (ON CA). Nor can it give either joint tenant a right of first refusal. *Dibattista v. Menecola* 1990 CanLII 6888 (ON CA). But a recipient of an equalization payment may propose to set that entitlement off against their former spouse's share of the equity in the home. If a sufficiently particularized proposal seems viable -- and especially if it would benefit a child - sale should be delayed to allow proper consideration of that option. *Chaudry v. Chaudry* 2012 ONSC 2149 (SCJ).

s. The court must consider and attempt to guard against potential prejudice. Are there realistic issues or claims yet to be determined on a final basis, which would be prejudiced or precluded if a property is ordered to be sold at the temporary stage?

This listing, along with the considerations in *Delongte v. Delongte*, 2019 CarswellOnt 20274 (S.C.J.) (wherein Justice Shaw lists what arguments will *not* suffice to resist a motion for interim sale), are now the starting points for counsel.

In *Dhaliwal*, the father brought a motion to sell two jointly owned properties, including the matrimonial home where the mother and the parties' two young children were living. His optometry practice had been closed since March, and he could no longer afford to cover the significant costs for both properties. The mother strenuously resisted the father's motion, and put forward all

of the usual arguments, including that a sale would not be in the children's best interests, and that the father had not provided full disclosure.

While Justice Pazaratz was sympathetic to the mother's situation, he nevertheless granted the father's motion for sale. In doing so, he made it clear that arguments that *might* have succeeded in delaying the sale of a matrimonial home prior to the pandemic no longer carry much weight in the COVID-19 era:

> [17] These temporary sale motions are never easy - and unfortunately COVID-19 has made just about everything in family court a whole lot harder.
>
> . . . . .
>
> g. In pre-COVID-19 times, "disclosure" was our mantra, and judges were reluctant to impose any financial decision until every reasonable inquiry had been fully addressed.
>
> h. But this pandemic has created such immediate financial crisis for so many individuals and businesses, that it would be unrealistic and inhumane not to understand that people are really hurting - and they need help now.
>
> . . . . .
>
> k. COVID-19 has at least temporarily ruined the financial prospects of both of these parties. And neither of them is to blame.
>
> [18] Which leads us to where most of these cases are going to have to go: Reality.
>
> a. The parties simply don't have enough money. And family court can't print money for them.
>
> b. At the best of times - even when the Respondent was working and the parties were together - their financial situation was barely sustainable.
>
> c. Now - with less money divided between two households - the only real mystery is why these parties are spending their few remaining dollars paying lawyers to debate the inevitable.

We certainly agree with his Honour's comments, save only possibly for the fact that the listed principles, grouped this way, tend to belie the actual frequency of orders for interim partition and sale - and that is because courts tend to start with the principle that a joint owner has the *prima facie* right to partition and sale. As noted in some recent decisions, sale of the home can help move a case forward and promote settlement: *Vittery v. Vittery*, 2008 CarswellBC 1177 (S.C.); *McNeil v. McNeil* (2020), 37 R.F.L. (8th) 153 (Ont. S.C.J.); *Jiang v. Zeng*, 2019 CarswellOnt 3135 (S.C.J.). Since a trial judge has almost no discretion to do anything other than order that a jointly owned property be sold, allowing a spouse [in the words of the Ontario Court of Appeal in *Silva v. Silva* (1990), 30 R.F.L. (3d) 117 (Ont. C.A.)] to "hold the house hostage" pending trial usually only makes it harder for parties to settle their dispute.

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Lesson No. 1: How to Annoy a Busy Judge

Catholic Children's Aid Society of Toronto v. A.A., 2020 CarswellOnt 8537 (C.J.) (C.J.) - Finlayson J.

Catholic Children's Aid Society of Toronto v. A.A. involved a typical motion for temporary relief in a child protection case. We mention it because of Justice Finlayson's reminder that as courts are operating at less than full capacity, it is more important than ever to ensure that matters are dealt with within allotted time limits, and that court time is not wasted on issues that lack merit and/or are unlikely to have any impact on the ultimate outcome:

> [9] This motion was booked for a 1-hour teleconference during the Court's reduced operations because of Covid-19. That would have been ample time to hear the motion, but for these preliminary objections. **The trial coordinator in this Court is busy trying to coordinate the case load, with reduced staff and reduced court rooms due to Covid-19. This mostly meritless motion to strike consumed close to 35 minutes of the 1 hour that had been allocated for argument of the main motion.** Counsel for the Society then rightly became concerned that she would have insufficient time to make proper submissions about the matters raised in the affidavit material, let alone would there be sufficient time for the parents to make their submissions.
>
> [10] In the result, given the timeliness and importance of the issues raised in the motion, **court staff had to re-arrange the Court's schedule and court rooms, in order for the Court to be in a position to devote ample time for this motion to proceed.**
>
> [11] **At no time during the motion to strike was I told that counsel for the mother made any attempt to discuss the concerns about the affidavit with counsel for the Society in advance,** nor was I told that any attempt had been made to narrow or focus the evidentiary objections. **In the future, regardless of Covid-19, this should be done.** [emphasis added]

To this we would add that when dealing with an issue like a motion to strike parts of a Reply affidavit, counsel may want to consider dealing with it by way of a motion in writing.

Or, even better, you should seriously think about whether the issue is even worth raising in the first place. Judges are very familiar with the rules of evidence, and, as Justice Kurz noted in *Alsawwah v. Afifi*, 2020 CarswellOnt 6295 (S.C.J.), "[a] pebble of proof is worth a mountain of innuendo or bald allegation", and inadmissible evidence on a motion is "generally ignored, whether judges feel it necessary to say so or not." That said, it is often paragraphs (if not pages) of irrelevant, inflammatory material that wastes court time - and a few decisions striking such material, and awarding costs, may curb the practise.

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

The Taxman Cometh

Canada v. Colitto (2020), 38 R.F.L. (8th) 289 (F.C.A.) - Dawson, Stratas and Laskin, JJ.A.

Husband owes taxes. Husband transfers property to wife. Husband goes bankrupt. CRA comes after wife. Lawyer gets sued. Section 160 of the *Income Tax Act* is the sort of sweeping statutory provision that keeps lawyers up at night and makes us want to double check our excess coverage.

Section 160(1)(e) of the *Income Tax Act* (the "*Act*") imposes joint and several tax liability on a spouse or common-law partner, minor, or otherwise non-arm's length party, where that person receives any property from a transferor who has a tax liability owing at the time of the transfer to the extent that the consideration paid is less than fair market value.

This appeal from the Tax Court of Canada (the "TCC") offers a very important clarification about the application of s. 160(1)(e).

The taxpayer/husband in *Canada v. Colitto* was *not* separated from his spouse, but the lesson would be the same if the parties were separated. At the time the husband transferred some real property to his wife for nominal consideration, the corporation that he was a Director of had failed to remit source deductions. Subsection 227.1(1) of the *Act* imposes joint and several liability on a Director of a corporation for the unpaid liabilities in such circumstances. As such, the Minister certified the liability and tried to collect the source deductions from the corporation.

The Minister was unable to recover from the corporation and, almost three years later, it issued a Notice of Assessment to the husband/Director pursuant to ss. 227.1(2) of the *Act* for the corporate tax liability.

About five years after that, the Minister issued Notices of Assessment against the wife under the s. 160(1)(e) "chasing" provisions. The wife objected and the matter was heard by the TCC.

The TCC interpreted ss. 227.1(1) and (2) of the *Act* in a manner that saved the transfers from being attacked by s. 160(1)(e). It held that although s. 227.1(1) imposes liability on the Directors at the time the corporation failed to remit, it is s. 227.1(2) that specifies **when** that liability arises, being when the Minister has certified its assessment against the corporation ***and*** has been unable to recover from the corporation. It is not uncommon for such collections to take years before the Minister looks to individual Directors. Therefore, pursuant to the TCC, the wife was untouchable.

The FCA, rightly, went back to a contextual and purposive interpretation of the *Act* (including consideration of the French version of the section for guidance), and overturned the TCC decision. It held that *the liability of a Director arises upon a failure to remit*. The purpose of s. 227.1(1) is to encourage Directors to ensure that corporate tax obligations are paid. Subsection 227.1(2) was, therefore, not to set up some further condition of liability.

The Federal Court of Appeal also noted that s. 227.1(1) of the *Act* was meant to protect against double taxation - requiring the Minister to first seek to recover from the corporation before looking to the individual Directors - but does not relieve the Directors of their obligation to direct the corporation to pay its proper taxes/remittances at first instance.

The 2019 TCC decision ostensibly created a short-lived opportunity for taxpayer Directors to divest property to non-arm's length parties even though there has been a failure to remit/pay corporate taxes while the Minister was making efforts to collect from the corporation. This strategy was soundly shut down by the FCA.

We note that the term "spouse" in the *Act* generally includes even separated spouses and, therefore, transfers of property are caught under s. 160(1) even between separated spouses. This means that a transferee spouse may be at risk if consideration for a transfer is less than fair market value and the transferor owes taxes.

For this reason, family law practitioners must know how s. 160(4) of the *Act* can insulate transferee clients from such joint and several liability, especially when consideration is not clearly set out in the context of various "trades" that may be part of a complete matrimonial settlement. Subsection 160(4) states:

> **Special rules re transfer of property to spouse or common-law partner**
>
> 160(4) Notwithstanding subsection 160(1), where at any time a taxpayer has transferred property to the taxpayer's spouse or common-law partner **pursuant to a decree, order or judgment of a competent tribunal** *or* **pursuant to a written separation agreement** *and*, **at that time, the taxpayer and the spouse or common-law partner were separated and living apart as a result of the breakdown of their marriage or common-law partnership**, the following rules apply:
>
> (a) in respect of property so transferred after February 15, 1984,
>
> (i) the spouse or common-law partner shall not be liable under subsection 160(1) to pay any amount with respect to any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
>
> (ii) for the purposes of paragraph 160(1)(e), the fair market value of the property at the time it was transferred shall be deemed to be nil, and . . .
>
> but nothing in this subsection shall operate to reduce the taxpayer's liability under any other provision of this Act. [emphasis added]

Accordingly, counsel must exercise extreme caution if separated parties are transferring assets *prior to an Order or written separation agreement for nominal consideration*, because joint and several liability can descend upon the transferee if the transferor is liable for taxes, known or unknown, and does not pay them. For assets of significance, transfers should occur pursuant to written separation agreements or orders to guard against this unanticipated result.

Family Arbitrations in Friendly Manitoba

Flood v. Dale (2020), 39 R.F.L. (8th) 172 (Man. Q.B.) - Horst J.

In Ontario and British Columbia, where family law arbitrations have already been relatively common for many years, courts are loath to allow parties to escape the confines of a valid agreement to arbitrate. The purpose of provincial legislation that provides for family law arbitration (and arbitration in general) is to encourage parties to resort to arbitration and to then require them to hold to that course. The provincial arbitration acts are meant to entrench the *primacy* of arbitration proceedings over judicial proceedings where the parties have made that choice. [See, for example, *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Gen. Div.), *Hopkins v. Ventura Custom Homes Ltd.*, 2013 CarswellMan 355 (C.A.) (which contains an excellent summary of the primacy of arbitration from a Manitoba point of view); *Grosman v. Cookson* (2012), 25 R.F.L. (7th) 284 (C.A.); *Haratsis v. Haratsis* (2007), 36 R.F.L. (6th) 142 (Ont. S.C.J.); and *Klapman v. Abitbol*, 2010 CarswellOnt 12367 (S.C.J.).]

While Manitoba has had an *Arbitration Act* since 1997, it is one of the newer players on the family arbitration scene. In this case, the father applied to enforce a family arbitration award that was made pursuant to the *Arbitration Act*, C.C.S.M. c. A120 (the "*Act*"). Amendments to the *Act* came into force on July 1, 2019, which recognized and set out the requirements for family arbitrations. An application to enforce a family arbitration award is made pursuant to s. 49 of the *Act*, and as a result of the recency of the legislation, there have not yet been many decisions interpreting those provisions of the *Act*.

The parties were married on August 10, 2002, and their son was born on December 12, 2008. They separated on July 13, 2009, and they were divorced on October 9, 2013. Concurrent with the divorce, a final order issued that provided that the parties would have joint custody of their son. The mother had primary care and control and the father had periods of physical care and control on alternate weekends, an additional period of care and control each week, alternate weeks during the summer months of July and August, and other times as agreed.

Over the years, the parties returned to court a few times to deal with variations, often on consent.

A consent variation Order was made in November 2018, which specified the father's summer and Christmas periods of care and control going forward. On consent, Justice Thatcher ordered that the parties would attend for private mediation/arbitration, and that all outstanding relief in the Notice of Motion to Vary would be dealt with in the mediation/arbitration process.

The parties signed an Arbitration Agreement. Both parties were represented by counsel, and they both received independent legal advice about the meaning and effect of the Arbitration Agreement. The parties agreed on who the Arbitrator would be, and the Arbitrator met the requirements set out in the Regulations to the *Act* to act as an arbitrator in a family arbitration. The parties also agreed that the Arbitrator would first act as a mediator, and if no resolution was forthcoming, the Arbitrator would then arbitrate the matters in issue.

The Arbitrator delivered Reasons for Decision on July 29, 2019. The Arbitrator confirmed that the parties attended mediation sessions and reached some agreements. The remaining issues were scheduled for arbitration on July 3, 2019.

The family arbitration award determined the following issues:

(a) Prospective care and control of the parties' son, including pick up and drop off times;

(b) General and specific decision making protocols for medical issues and extracurricular activities; and

(c) Travel and passport issues.

In the Reasons for Decision, the Arbitrator confirmed that the guiding principle for the decision was the best interests of the child.

The Reasons for Decision were put into the form required by s. 38.1 of the *Act* for a family arbitration.

The father sought an Order enforcing the Family Arbitration Award, but the mother resisted.

Section 49 of the *Act* reads as follows:

Enforcement of Award

49(1) A person who is entitled to enforce an award made in Manitoba or elsewhere in Canada may make an application to the court to that effect.

Application for enforcement

49(2) The application shall be made on notice to the person against who enforcement is sought, in accordance with the Queen's Bench Rules, and shall be supported by the original award or a certified copy of the award.

Procedure re family arbitration award

49(2.1) An application to enforce a family arbitration award is to proceed directly to a judge for a determination, without any case management or other intervening process.

Enforcing Manitoba award

49(3) The court shall give a judgment enforcing an award made in Manitoba unless

(a) the 30 day period for commencing an appeal or an application to set the award aside has not yet elapsed;

(b) an appeal, an application to set the award aside or an application for a declaration of invalidity is pending; or

(c) the award has been set aside or the arbitration is the subject of a declaration of invalidity.

. . . . .

Where appeal still allowed

49(5) If the period for commencing an appeal, an application to set the award aside or an application for a declaration of invalidity has not yet elapsed, or if such a proceeding is pending, the court may

(a) enforce the award; or

(b) order, on such conditions as the court considers just, that enforcement of the award is stayed until the period has elapsed without such a proceeding being commenced, or until the pending proceeding is finally disposed of.

Where proceeding pending

49(6) If the court stays the enforcement of an award made in Manitoba until a pending proceeding is finally disposed of, it may give directions for the speedy disposition of the proceeding.

Change of remedy

49(7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may

(a) grant a difference remedy requested by the applicant; or

(b) in the case of an award made in Manitoba, remit it to the arbitral tribunal with the court`s opinion, in which case the arbitral tribunal may award a different remedy.

Court may enforce awards

> 49(8) The court has the same powers with respect to the enforcement of awards as with respect to the enforcement of its own judgments.
>
> **Enforcement of support awards**
>
> 49(9) An application is not required under this section to enforce a family arbitration award respecting child support, spousal support or common-law partner support made in accordance with The Family Maintenance Act. Instead, such an award may be registered with the court and, upon registration, is enforceable as a maintenance order under Part VI of that Act.

The mother opposed the father's request to enforce the Award on the basis that neither party had strictly complied with it. This, noted Justice Horst, was not a basis not to enforce an arbitration award under the *Act*.

Justice Horst found that s. 49(3) of the *Act* provides that the court ***shall*** give judgment enforcing an award made in Manitoba unless one of the three enumerated exceptions apply, and none of them applied in this case. Justice Horst also noted that the Manitoba Court of Queen's Bench has given clear direction that parties should make every effort to resolve their family disputes, including by using mediation/arbitration.

Pursuant to section 49(8) of the *Act*, Justice Horst had the same powers to enforce an arbitration award as one of her own judgments and, noted as follows:

> I would not require strict compliance with a court order to grant orders of enforcement. For example, a parent who may be minutes late for pick up or drop off of a child for periods of care and control would not result in the court denying that parent enforcement of any periods of care and control.

It was clear that the mother simply did not agree with the Arbitrator's decision. This was no different than the position that many litigants find themselves in after a judge has made a decision. It is important to note that the role of the court in determining enforcement is not to review an arbitrator's award and substitute a different decision. A motion for enforcement is not an appeal.

Justice Horst, quite properly, enforced the Award. There are many advantages to the mediation/arbitration process, including that: a hearing can usually be scheduled more quickly than in Court; a mediator has more flexibility to help parties consider "interest-based settlements" than "rights based settlements"; and, critically, the parties are able to select a decision maker. Once parties opt into arbitration, it is critical that courts not undermine that process.

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