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

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Family Law Oddities

It has been reported in a story picked up by the Associated Press that a Kansas man has brought a motion (in Iowa) to allow him to settle his family law matter by way of a sword fight with his ex-wife and/or her lawyer. In his argument, the husband claimed that the court has the power to allow parties to "resolve disputes on the field of battle" because trial by combat has never been explicitly banned as a right in the United States. The husband further asked that the court allow him three months lead time so as to be able to secure (or self-forge) the necessary katana sword.

To be fair, the husband suggested that the wife need not face battle herself. Rather, she should be afforded the opportunity to select a "champion" as her stand-in fighter.

The court has yet to rule on the motion.

You can't make this up.

(Thank you to Jack Straitman of Ontario for bringing this to our attention.)

Income Reports for High Income Payors (Or maybe not)

Fiorellino-Di Poce v. Di Poce, 2019 CarswellOnt 19969 (Ont. S.C.J.) - Akbarali, J.

This case is deserving of brief comment with respect to the court's determination that an income report was not necessary for a high-net-worth and high-income payor with very complicated holdings and income. But it may be of interest in any case where support is to be primarily non-compensatory or budget based, and where the payor's income is significant.

In this case, the applicant was claiming very significant interim disbursements for legal fees and to pay for a valuation and income report with respect to the respondent's assets and income.

While Justice Akbarali ordered interim disbursements for legal fees and a valuation report, she determined that the applicant was not entitled to interim disbursements for an income report. The respondent, himself, did not provide an income report on the basis that he earned very significant income such that he had the means to pay whatever support award might be made.

Therefore, a report as to his income was not necessary, required, or proportional. Her Honour agreed that there was "little point" in trying to determine the respondent's income with precision because support would be driven by the applicant's needs, as measured against her standard of living during the six or seven-year marriage (the applicant was 62 and the respondent was 84). Whatever amount was ordered, the respondent would be able to pay it.

Justice Akbarali relies on the concept of proportionality as a "core principle" that is specifically applicable to fixing costs under the *Family Law Rules*. However, while the concept of proportionality is regularly considered when considering costs payable to a successful party after a motion or trial, her Honour applies the concept of proportionality to the question of interim disbursements. She finds that a court should not order interim disbursements to fund steps that are not proportional to the litigation as a whole. She concludes that "if costs would not be awarded for steps that are not proportional, a litigant intending to take such steps ought not be able to receive interim disbursements to fund them either."

This is a clever way to apply the concept of proportionality to a claim for interim disbursements. In fact, it would be inconsistent with Rule 2 of the *Family Law Rules* to require a party to fund a report that would, at the end of the day, serve no purpose and that would only add expense and delay. That is, it would be disproportionate.

This is certainly not the sort of issue that is going to come along every day; but when it does, this case may prove to be useful.

Provisional Orders - They Seemed Like Such a Good Idea at the Time - But Hope is on the Horizon

Davidson v. Davidson, 2019 CarswellOnt 19152 (Ont. S.C.J.) - Sanfilippo, J.

Sections 18 and 19 of the *Divorce Act* set out the following process for dealing with support variation applications where the spouses live in different provinces:

> (a) the court in the applicant's province makes a provisional order based on the evidence that it receives from the applicant;
>
> (b) the provisional order is sent to the court in the respondent's province (apparently by the slowest means possible);
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> (c) the respondent is then given an opportunity to respond to the applicant's evidence; and
>
> (d) the court in the respondent's province can either confirm the provisional order (with or without variation), refuse to confirm it, or send it back to the court in the applicant's province to give the applicant an opportunity to provide further evidence.

This incredibly slow, cumbersome, and inconvenient process has been *repeatedly* criticized by courts throughout Canada. For example, see paragraph 18 of *Burgie v. Argent*, 2013 CarswellBC 1714 (B.C. C.A.) where the B.C. Court of Appeal referred to it as "unwieldy and unsatisfactory" and a "yo-yo process". The New Brunswick Court of Appeal is also not a fan of what it describes as a cumbersome, expensive, time-consuming, awkward, and ungainly process: *E. (C.A.) v. D. (M.)* (2011), 99 R.F.L. (6th) 8 (N.B. C.A.); *LeParque v. LeParque* (2005), 20 R.F.L. (6th) 305 (N.S. C.A.).

The provisional order process is described in such terms because that is exactly what it is, and it is anachronistic in these times. *Davidson* offers yet another example of the significant problems with it.

The parties lived in Nova Scotia. In 2010, the Supreme Court of Nova Scotia (Family Division) granted a final order under the *Divorce Act* that provided, among other things, that neither party would pay child support to the other for their two children.

The wife subsequently moved to Ontario, and the husband issued a Variation Application in Nova Scotia to require the wife to start paying him child support.

The Court in Nova Scotia granted the husband's Application, and ordered the wife to pay him $880 a month in ongoing child support and almost $40,000 in retroactive support. However, the court also determined that since the wife had moved to Ontario,

it could only make a provisional order under s. 18 of the *Divorce Act* that would be of no force and effect until it was confirmed by a court in Ontario under s. 19.

For reasons that are not entirely clear from the decision, more than three years passed before the confirmation hearing in Ontario took place (such delays are quite common, although the length of this delay is remarkable).

Justice Sanfilippo heard the matter, but he refused to confirm the provisional Order because of flaws with the initial process in Nova Scotia. Susection 18(2) of the *Divorce Act* provides that a provisional Order can only issue *if* the respondent is ordinarily resident in another province *and* has not accepted the jurisdiction of the court in the applicant's province, *or* if both spouses have consented to the matter proceeding in the applicant's province. However, in this case, there was no evidence to show that the wife had not accepted the jurisdiction of the Nova Scotia court, and it did not even appear that the wife had been served with the husband's Application before the provisional Order was made. That, of course, was a problem.

This result could had been avoided had the husband simply proceeded with a variation application in the ordinary course by having the wife served personally with the Nova Scotia originating process. Then, had the wife responded by objecting to the Nova Scotia court's jurisdiction, the husband could have either properly proceeded under ss. 18 and 19 of the *Divorce Act*, or withdrawn his claims in Nova Scotia and commenced a variation proceeding against the wife in Ontario. While litigating in Ontario would certainly have been less convenient for the husband, it would have allowed him to avoid the enormous problems associated with the provisional order process (including the more than three years that it took for the matter to be heard in Ontario).

That being said, it does not appear that the result would have been any different had it been dealt with on the merits, as Justice Sanfillipo also indicated that he would have refused to confirm the provisional order in any event as the wife established that there had not actually been a material change so as to have allowed the court to vary the original order in any event.

With respect to the general cumbersome nature of the provisional orders process, help may be on the way. Bill C-78 (An Act to Amend the Divorce Act, etc.), in force in July 2020, has overhauled the provisional orders process to hopefully offer a more summary procedure akin to that in the uniform Interjurisdictional Spousal Support Orders Acts (for example, *Interjurisdictional Support Orders Act*, 2002, S.O. 2002, c. 13). The amendments are *intended* to make it easier for families to *obtain or vary* a support order when they live in different jurisdictions. They will also, hopefully, offer more consistency between inter-jurisdictional proceedings, whether they are conducted under provincial legislation or the *Divorce Act*. And, notably, the new process will apply to *domestic and international* matters.

According to the Department of Justice, the amendments introduce an application-based procedure to establish or vary a support order when the parties reside in different provinces or when the parties live in a province and a "designated jurisdiction" (a term which is also defined). The amendments also introduce a mechanism to *recognize* a decision made in a designated jurisdiction that has the effect of varying an order under the *Divorce Act*.

For a review and explanation of the amendments: see https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/art15.html.

Here's hoping.

Child Protection: Is History Destiny?

C.R. v. Nova Scotia (Community Services), 2019 CarswellNS 809 (N.S. C.A.) - Beveridge, Hamilton, and Farrar, JJ.A.

The trial judge found the appellant's daughter continued to be in need of protection, and that it was in the child's best interests to be placed in the permanent care of the Minister. In making that determination, the trial judge relied on the mother's past behaviour (refusing to take anti-psychotic medication) in predicting her future behaviour.

In this short decision, the Nova Scotia Court of Appeal considers (and dismisses) the mother's appeal based on her allegation that it was an error for the trial judge to rely on her past behaviour in finding that the child was in continued need of protection.

The Court of Appeal emphasized that the test for substantial risk continues to be that set out in *B. (M.J.) v. Family & Children's Services of Kings County*, 2008 CarswellNS 364 (N.S. C.A.). When deciding whether there is "substantial risk", a judge must only be satisfied that: (a) the "chance of danger" is real, rather than speculative or illusory; (b) "substantial" in that there is a "risk of serious harm or serious risk of harm"; and (c) that it is more likely than not (a balance of probabilities) that this "risk" or "chance of danger" exists on the evidence presented.

Here the whole of the judge's reasons set out the real chance of future harm to the child if the mother stopped taking her medications as she had in the past.

The Court of Appeal agreed that the best predictor of future behaviour is past behaviour. While there is no legal principle that "history is destiny", a trial judge does not err if, based on the evidence, she finds that past behaviour signals the expectation of future risk.

While this is a child protection case, the discussion of "risk of harm" is generally applicable to custody/access cases where one parent alleges that a child may be in danger in the care of the other parent - such as in the case of allegations of improper sexual conduct. For example, see *Bates v. Bates*, 2011 CarswellOnt 3876 (Ont. S.C.J.); *Daya v. Daya* (2015), 69 R.F.L. (7th) 457 (Ont. S.C.J.); *K.G.C. v. G.A.C.* (2017), 97 R.F.L. (7th) 467 (B.C. Prov. Ct.); and *G (JD) v. G (SL)* (2017), 2 R.F.L. (8th) 255 (Man. C.A.).

Undue Hardship and Access Costs

AMB v. AD, 2019 CarswellAlta 2614 (Alta. Q.B.) - Graesser, J.

This is a must-read decision if you have a case involving a claim for undue hardship based on high access costs under s. 10(2)(b) of the *Child Support Guidelines*.

The issue of relief for high access costs continues to be a thorny issue, with some courts determining that child support cannot be reduced by access costs; some finding that the court can avail itself of s. 16(6) of the *Divorce Act* to deal with high access costs; some finding that access costs can only be reduced on account of a s. 10 *CSG* claim for undue hardship; and some finding that only arrears or claims for retroactiave support can be reduced for high access costs. [See, for example, *Greene v. Greene*, 2010 CarswellBC 3532 (B.C. C.A.); *Kelly v. Kelly*, 2011 CarswellBC 842 (B.C. C.A.); *Witts v. Witts* (2016), 2016 CarswellBC 108 (B.C. C.A.); *Morrone v. Morrone* (2007), 44 R.F.L. (6th) 389 (Ont. S.C.J.); *Storey v. Simmons* (2013), 30 R.F.L. (7th) 130 (Alta. Q.B.); *Lebouthillier v. Manning*, 2014 CarswellOnt 9426 (Ont. S.C.J.); *Cantave v. Cantave* (2014), 49 R.F.L. (7th) 368 (Ont. S.C.J.); *Ruel v. Ruel*, 2006 CarswellAlta 673 (Alta. C.A.); *F. (R.) v. M. (J.)* (2017), 93 R.F.L. (7th) 381 (Sask. Q.B.)].

The parties had 11-year-old twins and lived in Edmonton during their marriage. However, after separation, the father moved to Fort McMurray because he was offered a job that paid significantly more than he had been able to earn in Edmonton. When the mother sought increased support, the father responded by asking for relief under the undue hardship provisions of the *Child Support Guidelines* (s. 10) because of the significant access costs travel between Fort McMurray and Edmonton to see the children. This gave Justice Graesser an opportunity to thoroughly review Justice Lema's excellent summary of the principles that apply to undue hardship claims based on "unusually high" access costs in *SDH v. ARH*, 2019 CarswellAlta 579 (Alta. Q.B.), where he explained that:

> 1. The threshold for finding undue hardship is high. Something more is required than simply an allegation that the payor cannot afford to pay the *Guideline* amount;
>
> 2. Hardship is a consideration in favour of a payor who, for valid reasons, may be unable to pay the *Guideline* support otherwise payable. Hardship does not give rise to a claim by the recipient for an increase in support otherwise payable;
>
> 3. Access costs will not be "unusually high" in the "normal situation where parents still live within the same municipality and access costs are a small fraction of the total expenses the parents must pay for child support." However, "where the parents do not live in sufficiently close proximity so that, for example commercial overnight accommodation is required

to exercise access or where, for any other reason, the access costs add a considerable cost to the cost which a parent must already pay for child support, the cost of exercising access is unusually high";

4. Access costs can include incremental costs of the child residing with the "access parent" as well as travel costs of visiting the child;

5. Whether the payor has exercised, and is anticipated to exercise, access is a factor;

6. The undue-hardship adjustment to child support, where warranted, is not necessarily 1:1;

7. A comparison of household standard-of-living requires at least some evidence . . . Household standard of living can be gauged by household net income;

8. No adjustment to child support is warranted when the access costs are "minimal relative to [the payor's] income";

9. Same for an extravagant expense;

10. Even where both undue hardship and the requisite differential standard of living are shown, the court retains a discretion to deny an adjustment;

11. The reason access costs are high is relevant;

12. Reduced living expenses for the parent with primary custody (there on account of living with her parents) may justify a larger reduction of child support for access costs (such as a deduction of actual access costs);

13. An adjustment to child support is warranted where, without it, the payor would be unable to see her children. The Court invoked s. 16(1) of the *Divorce Act*: "a child of the marriage should have as much contact with each spouse that is consistent with the best interests of the child";

14. The adjustment can take many forms: equal sharing of travel expenses; offset of travel costs against child-support payments; reimbursement by primary-care parent of access parent's travel costs, among others; and

15. The ability to write off all or some portion of the travel expenses incurred for combined business- and access-related travel may eliminate or lessen undue hardship.

Justice Graesser was satisfied that the father's move to Fort McMurray was reasonable because it had allowed him to earn more than he had earned historically. He also accepted that, based on the father's income, the approximately $1,400 a month it was going to cost him to travel between Fort McMurray and Edmonton and for accommodations in Edmonton when he was with the children was "unusually high" within the meaning of s. 10(2)(b) of the *Guidelines*.

However, that was not the end of the matter. Pursuant to s. 10(3) of the *Guidelines* the court ***must*** deny an undue hardship claim, "if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse."

After noting that the parties had not put forward all of the evidence he needed to be able to compare their household standards of living, Justice Graesser asked the parties to file the additional evidence he needed in order to deal with the father's claim on the merits. This was a very fortunate result for the father, as Justice Graesser could have easily just dismissed his claim on the basis that he was the applicant and bore the onus of proving his case.

Now, we must wait to see how much of a reduction, if any, Justice Graesser ultimately decides that the father is entitled to.

Stay tuned.

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