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

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Contents

Invitation to Join Philip M. Epstein and Friends in a Celebration of his Career

The "6 Minute Family Law" Tribute to Philip M. Epstein, O.Ont, Q.C., LSM, LL.D

Please join us online to celebrate the career of Philip Michael Epstein, his recent appointment to the Order of Ontario, receipt of an Honorary LL.D. from the Law Society of Ontario, and his contribution to family law in Canada. Colleagues from the bench and bar will share insights on Philip's more well-known (and perhaps lesser-known) attributes. And Philip will have the "right of reply."

CPD accreditation is pending for 1.5 hours of appreciation, warm-hearted ribbing, and perhaps some not-so-gentle roasting.

In honour of Phil's contributions to the profession, voluntary contributions may be directed to the Majengo Children's Home in Tanzania, an organization near to Phil's heart. Majengo is home to 95 vulnerable children between the ages of 3 and 20. Each child receives all the necessities: food, clothing, medical care, education, and love. A team of 22 local staff members care for the children and live as one big happy family. www.majengo.org

When: Aug 24, 2020 07:30 PM Eastern Time (US and Canada)

Register in advance for this webinar:

https://us02web.zoom.us/webinar/register/WN_eQwCrbFIQySc96ReEoxeQw

After registering, you will receive a confirmation email containing information about joining the webinar.

PLEASE FEEL FREE TO FORWARD THIS INVITATION TO OTHERS!

If you would like to share any messages, memories or anecdotes with Phil, please email PhilTribute@epsteincole.com. They will be collated and presented to Phil after the event.

A Brief Case About Briefs

Girao v. Cunningham, 2020 CarswellOnt 5363 (C.A.) - Lauwers, Fairburn, and Zarnett JJ.A.

While *Girao v. Cunningham* is a personal injury case, the Ontario Court of Appeal's decision in *Girao* is an important case because of its summary of the duties owed to unrepresented litigants by both judges and opposing counsel. It also contains a very useful discussion about how to properly prepare joint document briefs for trial (or, for fans of the double negative, how to not prepare them improperly).

The plaintiff was injured in a car accident, and claimed to have suffered significant damages. She represented herself at trial, and needed assistance from a Spanish interpreter because English was not her first language.

The plaintiff's claims were dismissed, and the trial judge ordered her to pay the defendants more than $310,000 in costs.

The plaintiff appealed, and argued that she had not received a fair trial. The Court of Appeal agreed that the plaintiff had not received a fair trial for a number of reasons, including that:

• Even though the defence knew that English was not the plaintiff's first language, it inexplicably waited until the eve of trial to serve her with a massive and selectively redacted 16-volume document brief. It also labelled the new document brief as a "Joint Trial Brief", even though the plaintiff had not been involved in its preparation, and had not approved it or even reviewed it prior to trial. Notwithstanding the late delivery of these briefs, however, the trial judge admitted them into evidence without requiring the defendant to prove the documents.

• The trial judge made evidentiary rulings that the Court of Appeal described as having left the plaintiff "to fend for herself in a pitched battle with seasoned trial lawyers, with one hand effectively tied behind her back."

In its reasons for ordering a new trial, the Court of Appeal took the opportunity to comment on the obligations of trial judges to balance their obligations to remain impartial while still ensuring that unrepresented litigants receive a fair trial:

> [149] **Numerous trial fairness concerns arise for self-represented litigants. In *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, at para. 4, the Supreme Court endorsed the Statement of Principles on Self-represented Litigants and Accused Persons (2006) issued by the Canadian Judicial Council. The Statement provides guidance to the judiciary on how to ensure litigants "understand and meaningfully present their case, regardless of representation"**: at p. 2. The enumerated principles appear under the following headings: promoting rights of access, promoting equal justice, and responsibilities of the participants in the justice system. The Statement sets out directions for the judiciary, court administrators, self-represented persons, and members of the bar. **The section on promoting equal justice is particularly relevant. It states**:
>
> > 1. **Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.**
> >
> > 2. **Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency** in their case.
> >
> > 3. **Where appropriate, a judge should consider engaging in such case management activities as are required to protect the rights and interests of self-represented persons.** Such case management should begin as early in the court process as possible.
> >
> > 4. When one or both parties are proceeding without representation, **non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard**. Depending on the circumstances and nature of the case, the presiding judge may:
> >
> > > a. explain the process;
> > >
> > > b. inquire whether both parties understand the process and the procedure;

c. make referrals to agencies able to assist the litigant in the preparation of the case;

d. provide information about the law and evidentiary requirements

e. modify the traditional order of taking evidence; and

f. question witnesses.

. . . . .

[151] Although fairness concerns may animate how a trial judge exercises control over their courtrooms, **there are clear limits to a trial judge's duty to assist a self-represented litigant. The actuality and the appearance of judicial impartiality must be maintained**. As Brown J.A. said in *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, at para. 22: "A defendant is entitled to expect that a claim of liability brought against it will be decided by the same rules of evidence and substantive law whether the plaintiff is represented by counsel or self-represented." **In order to preserve fairness in a trial, "the trial judge must, of course, respect the rights of the other party"**: *Davids*, at para. 36. [emphasis added]

The Court also discussed the obligations that *opposing counsel* owes to unrepresented litigants and to the court, and concluded that, in this particular case, counsel for the defendants ought to have done more to ensure that the trial judge was in a position to properly assist the plaintiff with the legal issues in the case:

[152] Turning now to counsel's duties as officers of the court. I note that **the professional ethical obligations of a lawyer toward a self-represented litigant is fairly limited** under the Law Society of Ontario's *Rules of Professional Conduct*: see Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2000, (as amended), ch. 7, s. 7.2-9. I would further note that **lawyers have more general ethical obligations when acting as an advocate, such as the duty to bring to the court's attention any binding authority that the lawyer considers to be directly on point** that has not been mentioned by an opponent: see generally, *Rules of Professional Conduct*, ch. 5, s. 5.1-2.

. . . . .

[154] In this case the defence advanced evidentiary positions that were problematic on legally complex topics. In advancing those positions, **the defence ought to have assisted the trial judge, as officers of the court, with the legal issues embedded in the positions**. [The plaintiff] needed the active assistance of the trial judge to deal with those positions.

[155] In my view, **it was open to the trial judge faced with a legally contentious issue to require counsel to assist**. In this trial, for instance, the trial judge could have asked for a briefing note on the interplay of ss. 35 and 52 of the *Evidence Act* in relation to the medical evidence, including the relevant authorities. The same would apply to the introduction of the evidence of the totality of the statutory accident benefits settlement on which there are several relevant cases.

The lesson from all of this? Although dealing with some unrepresented litigants can be beyond challenging, you must do what you reasonably can to help the trial judge ensure that the trial is fair and the issues decided on their merits. Things as basic as sending the other party a proposed trial plan and inviting input and comments, and providing your document briefs and case books as far in advance of trial as possible, will go a very long way towards ensuring that a trial will be conducted fairly.

The Court of Appeal also used the defence's 16 volume last minute "Joint Trial Brief" as an opportunity to discuss how joint document briefs should be prepared, and the questions that will need to be answered before a joint document brief can be admitted into evidence:

[33] . . . 1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?

2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?

3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?

4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?

5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?

6. Does any party object to a document in the document book, if it has not been prepared jointly?

The Court of Appeal also made it clear that counsel are required to come prepared to deal with these questions on the record and at the very beginning of the trial:

> [34] **It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record** to ensure that there are no misunderstandings.
>
> [35] In my view, none of these issues or questions are novel. **The answers to these questions are not implicit in the filing of a joint document book and must be expressly addressed on the record or by written agreement. The problem frequently comes because the parties have not turned their minds to the issues in sufficient detail before the document book is tendered as an exhibit. *This must change as a matter of ordinary civil trial practice***. Had the trial judge taken himself, counsel and [the plaintiff] through this list of questions relating to the document book, some of the problems identified in these reasons could have been avoided. [emphasis added]

Stay With Me . . . Stay With Me . . .

Jonzon v. Yuill, 2020 CarswellAlta 991 (C.A.) - Wakeling J.A.

In this case, Justice Wakeling of the Alberta Court of Appeal provides a concise summary and reminder as to the test for a stay of custody or access order.

While any motion for a stay pending appeal starts with a consideration of the test as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F (S.C.C.) and *Harper v. Canada (Attorney General)*, 2000 CarswellAlta 1158 (S.C.C.), the second and third parts of the *RJR-MacDonald* test are somewhat modified when dealing with a custody/access matter. [For example, see *Kwon v. Schembri*, 2017 CarswellAlta 757 (C.A.); *A. (D.) v. K. (H.)*, 2014 CarswellAlta 1983 (C.A.) (the stay test should reflect that the dominant consideration is the best interests of the children involved); *G. (E.) v. Alberta (Director of Child and Family Services)*, 2014 CarswellAlta 1183 (C.A.) (referring to the "modified tripartite" test); *Lefebvre v. Lefebvre*, 2002 CarswellOnt 4325 (C.A. [In Chambers]) (the over all overriding consideration is the best interests of the child(ren)); *F. (D.M.) v. Nova Scotia (Minister of Community Services)*, 2004 CarswellNS 376 (C.A. [In Chambers]); *Power v. Wiseman* (2012), 23 R.F.L. (7th) 282 (N.L. C.A.); *Alleyn-Dornn v. Dornn*, 2011 CarswellMan 247 (Q.B.) (must consider best interests of the child(ren) as part of "irreparable harm" and "balance of convenience"); and *P. (D.H.) v. P. (P.L.)* (2012), 29 R.F.L. (7th) 89 (N.B. C.A.)]

First, the applicant must show that there is a serious question to be tried, in other words, that the appeal is not frivolous or vexatious. The court will not stay an order if the prospects of a successful appeal border on "hopeless" or "nearly hopeless." This part of the test is the same whether the stay is sought in the context of a commercial or a family law matter.

Second, the applicant must show that the child, or the applicant, will suffer irreparable harm if the stay is not granted. In this context, "irreparable" refers to the *nature* of the harm suffered rather than the *magnitude* of the harm suffered. Specifically,

in a custody/access case, the second part of the *RJR-MacDonald* stay test is modified to take into account the interests of the child(ren).

At this point, Justice Wakeling suggests that, if the court concludes that the failure to grant a stay will cause the child or the applicant irreparable harm, assuming that the applicant passes the other two parts of the test, the proper disposition is clear - issue a stay. However, this statement appears to be a tautology (if the applicant meets the test for a stay, the applicant gets a stay). Therefore, we assume that Justice Wakeling simply meant to emphasize the importance of irreparable harm to the child(ren) in the overall analysis. This would be consistent with earlier decisions from the Alberta Court of Appeal: the best interests of the child(ren) in issue is a matter which impacts all three parts of the test: *S. (C.L.) v. S. (B.R.)* (2013), 37 R.F.L. (7th) 112 (Alta. C.A.).

Third, the applicant must show that the balance of convenience favours a stay - that the harm the child(ren) or the applicant will suffer if a stay is *not* granted exceeds the harm the child(ren) or the respondent will suffer if a stay *is* granted. Again, this stage of the test has been modified to specifically deal with the best interests of the child(ren).

Justice Wakeling found that the applicant did not meet any of the components of the stay test.

In dealing with the first part of the test, Justice Wakeling states:

> [14] The likelihood her appeal will succeed is so low that her appeal can be characterized as frivolous. It is exceedingly difficult to convince an appeal court that it is appropriate to set aside a decision of a case management judge in a family law dispute that involves the application of generally accepted legal principles to largely uncontested facts.

What is interesting here is that, in considering the first part of the test (the "serious question" test) Justice Wakeling considers the applicable standard of review - not just the issue itself. This is consistent with *A. (A.) v. A. (S.N.)* (2007), 40 R.F.L. (6th) 267 (B.C. C.A. [In Chambers]) where, in determining a motion for a stay pending appeal to the Supreme Court of Canada, the British Columbia Court of Appeal considers how difficult it is to get leave to appeal to the Supreme Court.

Justice Wakeling then notes, "[e]ven if the applicant met the test for a stay, I would not have exercised my discretion in her favor and granted a stay." This was because the applicant had not complied with the terms of the orders that are the subject of her appeal:

> An applicant who fails to comply with a court order without good reason should not be surprised if the Court holds this noncompliance against the applicant and refuses to exercise its discretion in the applicant's favor.

This is a good reminder to counsel. An order - even an order under appeal - is still an order of the court. It is to be obeyed until varied, reversed on appeal or stayed: *Berthin v. Berthin*, 2016 CarswellBC 3143 (C.A.). It is ignored at the peril of the person ignoring it, as was the case here

How is Waiving Privilege Like Picking Cherries?

T.O.E. v. I.S. (2020), 39 R.F.L. (8th) 413 (Ont. S.C.J.) - Nakonechny J.

Solicitor-client privilege is absolutely essential to the proper functioning of our legal system. As the Supreme Court of Canada confirmed in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 CarswellAlta 2247 (S.C.C.):

- "It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice[.]"
- "Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive[.]"
- "For this reason, 'privilege is jealously guarded and should only be set aside in the most unusual circumstances'[.]"

Solicitor-client privilege has been elevated to a principle of fundamental justice within the meaning of section 7 of the *Charter*; it is a substantive right that cannot be overridden by the court or subjected to a "balancing of interests on a case-by-case basis." It is to remain as absolute as possible. [see *R. v. McClure*, 2001 CarswellOnt 496 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, 2002 CarswellAlta 1818 (S.C.C.); *Canada (Procureur général) c. Chambre des notaires du Québec*, 2016 CarswellQue 4459 (S.C.C.); *British Columbia (Attorney General) v. Lee*, 2017 CarswellBC 1489 (C.A.); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 CarswellAlta 2247 (S.C.C.); and *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2015 CarswellBC 295 (S.C.C.)]

However, despite its sacrosanct nature, there are exceptions to solicitor-client privilege. And it can be waived - sometimes unintentionally. Justice Nakonechny's brief decision in *T.O.E. v. I.S.* provides an important reminder that disclosing some, but not all, of the privileged documents in a lawyer's file will, in most cases, mean that privilege over the rest of the file has also been waived. It is what is often called the "cherry-picking" exception: one cannot "cherry-pick" for disclosure only those privileged documents that assist one's case.

The basic facts of *T.O.E.* are as follows:

- I.S. (the "Mother") and M.S. (the "Father") had a child together. As part of resolving their family law dispute, in 2013, the Father purchased a home for the Mother for $1,187,000, and registered title to the property in the Mother's sole name.

- The money to purchase the property came from the Father's company, T.O.E. (the "Company"), and was secured by an interest-free mortgage against the property in the Company's favour.

- In 2015, the Mother and Father signed an agreement that gave the Mother the option to purchase the property by paying two-thirds of the balance of the mortgage (approximately $783,000) before it came due in 2018.

- The Mother claimed that she tried to exercise the option to purchase the property in 2017. Although she claimed to have obtained financing and retained a real estate lawyer to assist her (the "Lawyer"), she alleged that she had not been able to complete the purchase because the Company refused to provide a discharge statement for the mortgage.

- When the Company's mortgage came due in 2018, it claimed that the Mother had defaulted on the mortgage, and tried to force the Mother to vacate the property

Litigation ensued between the Mother, the Father, and the Company.

During the litigation, the Mother agreed to produce the Lawyer's file with respect to the Mother's attempts to purchase the property in 2017. The parties also agreed that the Mother would identify any documents that she claimed were privileged, and explain the basis for her claim(s).

While the Mother produced part of the Lawyer's file, she ultimately refused to produce 36 documents that she claimed were protected by solicitor-client privilege. However, the Mother subsequently voluntarily produced 12 of the 36 privileged documents, and claimed that she had done so "to reduce the conflict in the case and because 'nothing turned on' the documents."

The Company responded by bringing a motion to compel the Mother to produce the rest of the Lawyer's file.

In *Leitch v. Novac*, 2017 CarswellOnt 18669 (S.C.J.), Justice Faieta reviewed the law of implicit waiver of solicitor-client privilege, and concluded privilege can be implicitly waived by voluntarily disclosing some, but not all, of the privileged information in a lawyer's file; or by otherwise relying on privileged information in a legal proceeding. He also noted that once "privilege is waived, the waiver applies to the entire subject-matter of the communications: a party may not 'cherry-pick' privileged communications, disclosing what is helpful for that party and claiming privilege over the rest[.]"

Based on *Leitch* and a number of other cases that have dealt with the implied waiver by partial disclosure, including *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CarswellOnt 4488 (S.C.J.) and *Canadian Appliance Source Inc. v. Utradecanada.com*

Inc., 2018 CarswellOnt 7391 (S.C.J.), Justice Nakonechny had no difficulty concluding that by voluntarily disclosing the 12 privileged documents, the Mother had also waived privilege over the 24 other privileged documents:

> [23] In my view, **the production by [the Mother] of documents previously claimed as privileged amounts to an implicit waiver of privilege of all of the documents. "When privilege is waived, the waiver applies to the entire subject matter of the communications: a party may not 'cherry-pick' privileged communications, disclosing what is helpful for that party and claiming privilege over the rest"**. *Leitch*, *supra*, at para. 60 citing *Guelph (City)*.
>
> [24] The e-mails between [the Lawyer], [the Mother] and the family law lawyers took place during the period of the refinancing. The Agreement gives [the Mother] the right to retain the home by paying two thirds of the principal amount of the mortgage on or before June 30, 2018. The ability of [the Mother] to refinance and pay out the mortgage to [the Company] at the relevant time that is at issue in the litigation.
>
> [25] **[The Mother] cannot produce some privileged documents from the file she says, "nothing turns on" and refuse to produce other emails. This amounts to "cherry-picking"**. The e-mails between [the Lawyer], [the Mother] and her family law lawyers about the validity of the Agreement and [the Mother's] rights under it are part of the subject matter of the litigation and must be produced. [emphasis added]

A quick read, this case offers an important reminder about the likely/possible consequences of voluntarily producing privileged information. While privilege is usually impenetrable, the first crack in the defensive armour of privilege is sometimes self-inflicted.

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