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

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**Condolences**

We are sad to announce that Patrick D. Schmidt passed away on October 14, 2020.

Patrick was a partner at Thomson Rogers for 35 years leading their Family Law Group. He was a passionate litigator with a legendary reputation. Those that had the pleasure of working with or against Patrick will miss him and his uncanny ability to see the humour in almost everything. He was a fierce rival, an excellent mentor, and a good friend. He will be missed.

**What You Permit, You Promote**

*Ni v. Yan*, 2020 CarswellOnt 14206 (S.C.J.) - Jarvis J.

In the June 22, 2020 edition of *TWFL*, we commended Justice Jarvis for his decision in *Natale v. Crupi*, 2020 CarswellOnt 8063 (S.C.J.), where he refused to hear a motion because the parties had completely ignored the page limits in the applicable COVID-19 practice direction.

Well, Justice Jarvis has done it again. In his brief decision in *Ni v. Yan*, Justice Jarvis has once again sent a clear message to both lawyers and litigants that they are required to comply with the rules, and that their matters will not be heard unless they do so.

In *Ni*, both parties filed lengthy Settlement Conference Briefs with voluminous attachments. They also each alleged that the other had not provided all of the necessary disclosure (the wife, in particular, alleged that disclosure about more than 35 assets was still outstanding), but it does not appear that either one of them ever brought a motion to deal with the disclosure issues.

Instead of allowing the parties to waste court time on a Settlement Conference that neither one of them was remotely ready for, the day before the Settlement Conference was supposed to have occurred, Justice Jarvis advised the parties, who were both represented by counsel, that he was simply cancelling it:

> [8] Family law litigants are entitled to one settlement conference unless otherwise permitted by the case management judge. They are expected to come to that conference fully compliant with all the *Family Law Rules*. **A settlement conference should not be the forum to dispute** and adjudicate upon disclosure issues where there are numerous items in dispute the relevance and proportionality of which can only be determined by a motion. **To hold a settlement conference otherwise is a complete waste of the court's valuable time and the parties' resources**. Either parties come to a settlement conference prepared to discuss settlement confident that they have as much relevant information as obtainable to assist them or they

> come unprepared. **The parties in this case are clearly unprepared**. Non-compliance with the above *Rules* is evidence of that. None of the *Rules* is permissive.
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> [9] **It is inconceivable that a party who raises serious disclosure shortcomings can make an informed settlement decision or that a lawyer can competently give settlement advice to such a client**. ***A settlement conference is not a disclosure dartboard***.
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> [10] As noted by Kiteley J. in *Greco-Wang v. Wang*, 2014 ONSC 5366 **"[m]embers of the public who are users of civil courts are not entitled to unlimited access to trial judges"**. While that observation was made in the context of a Trial Scheduling Conference, it is equally, if not more, pertinent to settlement conference events. **Too often serial settlement conference events are permitted in circumstances where there are continuing complaints about inadequate or refused disclosure impacting a party's ability to make an informed settlement decision**. ***That practice must end***. [emphasis added]

To this we would add that, as Justice Rogers made clear more than 15 years ago in *Chernyakhovsky v. Chernyakhovsky*, 2005 CarswellOnt 942 (S.C.J.), the disclosure process ***must*** be completed quickly and efficiently, but requests for disclosure must also be proportionate to the actual issues in the case:

> [6] The new approach to fact finding under the *Family Law Rules* has been to make disclosure a given. Fact-finding is not to be a battleground. **There ought to be an orderly, prompt request for disclosure with an organized speedy reply. The process is not to go on forever and the case is to move on because the facts point to a resolution or to the necessity of a trial**. Obtaining the factual evidence is no longer a game of hide and seek.
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> [8] **The courts must, however, be clear that the disclosure process cannot be used to cause delay or to reap tactical advantage. The court must consider the burden certain disclosure requests bring for the disclosing party**. Is the probative value of the sought-after disclosure so great in relation to the difficulty of obtaining the disclosure that said disclosure would be ordered and sanctions imposed for failure to comply? How does the disclosure request fit into the overall context of the case? Is the issue for which disclosure is requested a central issue in the case? Or is it peripheral? Does the cost of obtaining the disclosure outweigh the value of the issue in the case? Is there a more expeditious and cheaper way of getting the same information? As the case develops, is the disclosure still related to an important issue in the case? **As always, the court must balance these competing interests to ensure fairness**. [emphasis added]

Or, as Justice Perell eloquently put it in in *Boyd v. Fields*, 2006 CarswellOnt 8675 (S.C.J.):

> [12] **Full and frank disclosure is a fundamental tenet of the *Family Law Rules***. However, there is also an element of proportionality, common sense, and fairness built into these rules. **A party's understandable aspiration for the outmost disclosure is not the standard. Fairness and some degree of genuine relevance, which is the ability of the evidence to contribute to the fact finding process are factors**. I also observe that just as non-disclosure can be harmful to a fair trial, so can excessive disclosure be harmful because it can confuse, mislead or distract the trier of fact's attention from the main issues and unduly occupy the trier of fact's time and ultimately impair a fair trial. [emphasis added]

See also *Mullin v. Sherlock* (2018), 19 R.F.L. (8th) 1 (Ont. C.A.), where the Ontario Court of Appeal indicated that "a litigation strategy that involves repetitive motions for disclosure untethered from the disclosure already made may give a false impression of the extent of the non-disclosure. It must be recognized that given the size and complexity of some estates, it may be easier to ask the question than to give the answer."

In order to ensure that the parties would not try to schedule another Settlement Conference before they were ready, Justice Jarvis made an order prohibiting them from booking a further conference without his permission. He also advised them that his permission would not be forthcoming unless the party requesting the conference filed an affidavit confirming that s/he was

 

prepared to proceed based on the disclosure that had already been provided, and that no disclosure requests from the other party remained outstanding.

This is a welcome development. Ensuring that parties know that their cases will not be heard unless they are properly prepared should help to reduce the number of wasted attendances, and maximize the chances of having a productive conference. In turn, this should help avoid wasting our already scarce judicial resources trying to deal with matters that are clearly not ready to proceed, while ensuring that those parties who are actually ready can be heard. However, if this sort of rule is going to be enforced, just as with page limits, it must be enforced *consistently*.

**A Problem: Reasoned Consent without Reasons or Consent**

*Office of the Children's Lawyer v. Catholic Children's Aid Society of Toronto*, 2020 CarswellOnt 9851 (S.C.J.) - Penny J.

This is interesting. In the middle of a child protection trial, the Catholic Children's Aid Society of Toronto (the "Society") and the mother reach an agreement to end the trial. But the Office of the Children's Lawyer (the "OCL"), representing the children, does not agree and opposes the consent. Now what? That was the question considered by Justice Penny of the Ontario Superior Court of Justice (sitting in appeal) in this case.

The child, DP, was 11 years old. He first came into the care of the Society in July 2017, when he and five siblings were apprehended. In January 2018, all six children were found to be in need of protection. In April 2018, the Court appointed the OCL to represent DP.

In the summer of 2018, DP's siblings were returned to their parents' care. DP, however, expressed anxiety about contact with his family and a strong wish to remain in care. In December 2018, an order was made placing DP in Society care for four months, with access to his parents that would be subject to his views and wishes, and informed by the recommendations of his treating healthcare professionals.

In July 2019, the Society sought an extended care order. While the trial began on November 18, 2019, a medical witness (an assessing psychologist) was unable to testify due to illness. The trial was adjourned to November 21, 2019, to hear evidence from the last two witnesses.

When the trial resumed, the Society and the parents advised the Court that they had reached a Consent on a consecutive order under s. 101(1)(4) of the *Child Youth and Family Services Act*, 2017 ("*CYFSA*") providing for a further six months of interim care, to be followed immediately by a six month supervision order. That is, under the proposed Consent Order, DP would return to the care of his parents without a status review by the Court at the end of the interim Society care order.

The OCL opposed the part of the proposed Consent Order that required DP to return to the care of his parents automatically after the six-month interim care order. The OCL took the position that, without DP's consent, there could be no consent, and that, therefore, no order could be made until the conclusion of the trial.

After hearing submissions, in late December 2019 - over the OCL's strong objection - the trial judge granted a final order on the terms of the Consent of the parents and the Society based on the agreed statement of facts that the Society and the parents previously filed.

The OCL asked that the trial judge provide written reasons to explain why she was prepared to accept a mid-trial Consent that DP, who had the rights of a party, had opposed. No written reasons were provided.

The OCL appealed on the following grounds:

a. The trial judge erred in law in making the "Consent" order despite DP's opposition; and

b. the trial judge erred in law by predetermining issues prior to hearing submissions from the OCL, as DP's legal representative.

  

Justice Penny, sitting in appeal, was of the view that the trial judge erred in making a final order before the completion of the trial without DP's consent. Section 79(6) of the *CYFSA* entitled DP, as a child who had legal representation in the proceeding, to participate in the proceeding *as if he were a party*. According to Justice Penny, the trial judge had no jurisdiction to make a "Consent" Order without all of the parties' consent. To Justice Penny, it was just that simple - as the OCL did not consent and did not accept the "agreed facts" on which the proposed order was based, that was the end of the matter. Issuing the Consent Order in these circumstances trammelled upon DP's right to participate as a party.

The Preamble to the *CYFSA* significantly enhances the importance of recognizing children as individual rights holders in several respects:

- Children are individuals with rights to be respected and voices to be heard;
- The aim of the *CYFSA* is to be consistent with and build upon the principles expressed in the *United Nations Convention on the Rights of the Child*, which includes a child's right to have a voice in decisions that are being made about their lives;
- Services provided to children should be provided in a manner that includes the child or young person in the decisions;
- A child's views and wishes are now one of two mandatory considerations under the best interest test in Part V (Child Protection) and Part VIII (Adoption);
- Children are given expanded participatory rights in openness proceedings under Part VIII. The Guide to the Implementation of Selected Provisions of the *CYFSA* explains that the rationale for this change is to ensure that "the child can participate as if they were a party, without restriction."

Pursuant to s. 79(6) of the *CYFSA*, a child participates in a proceeding as if s/he were a party, where, among other things, s/he has legal representation. Although not all children in protection proceedings have the rights of a party, once the Court orders legal representation (as here), the child has the rights of a party, without restriction - in contrast, for example, to Rule 4(7) of the *Family Law Rules*. Under s. 79(6), the court does not have the power to place any limits on the child's rights as a party.

Although this was sufficient justification to allow the appeal, Justice Penny also briefly commented on the remaining two grounds of appeal. He found that the trial judge had not predetermined the matter. However, the lack of reasons was an issue. It is said that the most important person in the courtroom is the party that is going to lose. And reasons are meant to justify the result and to explain to the losing party why they lost.

Here, the trial judge did not provide any reasons for her decision and a review of the transcript did not assist.

Therefore, DP had no idea why the Consent Order was made over his objection, and meaningful appellate review was impossible. This amounted to an error of law. While inadequate reasons will not always amount to a free-standing reason for appeal, in this case, the lack of reasons required a new trial.

**Time, Time, Time, See What's Become of Me**

*Bredenkamp v. Bredenkamp* (2020), 41 R.F.L. (8th) 129 (B.C. S.C.) - Shergill J.

*Bredenkamp* is yet another case about a payor who has either retired or wants to retire, and is seeking to end a long-standing spousal support obligation (for a discussion of some other recent cases that have dealt with this issue, see the August 5, 2019, October 14, 2019, November 11, 2019, and March 16, 2020 editions of *TWFL*).

The parties in *Bredenkamp* were married in 1973 in South Africa. They moved to Canada in 1987, and separated in either 1993 or 1994 when they were both in their early 40s. They had two children together, both of whom were adults.

During the marriage, the husband worked as a psychiatrist, while the wife took care of the children and the home.

  

The husband started paying support to the wife when they separated. In 2000, Justice Ritter made a final order that the husband pay the wife $2,500 a month in spousal support on an indefinite basis, based on the husband's then-income of more than $150,000 a year, and the wife's then-income of less than $10,000 a year. In making this order, Justice Ritter found that the wife was entitled to compensatory support based on her role as a homemaker, but that she should also be encouraged to become self-sufficient and obtain employment.

Although the wife had earned a university degree before the parties moved to Canada, and she made some efforts to upgrade her education after the parties separated, she never actually made a serious attempt to enter the workforce or earn income. She also spent a significant amount of time in South Africa. The husband, on the other hand, continued working, and was ultimately able to increase his income to approximately $250,000 a year.

In 2017, the husband filed a petition under s. 17 of the *Divorce Act* to terminate Justice Ritter's order on the basis that his obligation to the wife had terminated. The wife responded with a cross-application to retroactively increase the husband's support payments.

Justice Shergill was satisfied that the husband had established a material change in circumstances that would allow the 2000 order to be varied because of the passage of time:

> [54] The parties were in their early 40s when they separated. By November 2017, 17 years had transpired since the making of Justice Ritter's Order and over 23 years had passed since the parties' separation. Thus, ***simply by the passage of time, there has been a material change of circumstances***.
>
> [55] In addition, **[the husband's] circumstances have also changed. He is almost 70 years of age, in ailing health, and on the cusp of retirement**. He has since remarried, and has financial obligations to his new spouse and stepson. While he has continued to enjoy a lucrative career, since the separation his current wife has aided him significantly in this regard. [emphasis added]

Keep the italicized sentence in mind for later.

After finding that there had been a material change in circumstances so as to give her jurisdiction under s. 17 of the *Divorce Act* to vary Justice Ritter's order, Justice Shergill had to decide what variation, if any, "is justified by that change": *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.) at para. 47.

In determining that the change in circumstances warranted a complete termination of the husband's support obligation and a dismissal of the wife's claim for a retroactive increase, Justice Shergill confirmed that "indefinite support does not mean permanent", and that the support payments should end because:

- The wife had already been adequately compensated for the sacrifices that she had made during the marriage;
- While the wife had contributed to the husband's career, his success was also attributable to his own hard work and the assistance of his current spouse who worked with him in his practice; and
- Any financial difficulties that the wife was experiencing arose out of her own failure to make reasonable efforts to become economically self-sufficient many years earlier.

At first glance, an immediate termination may seem harsh, especially as the wife may never have been able to become fully self-sufficient, even had she made reasonable efforts to do so. However, the potential harshness is tempered by the fact that:

- Based on the husband's significantly reduced income in retirement, and the wife having at least some minimal income on her own - whether real or imputed - the husband's obligation under the *Spousal Support Advisory Guidelines* would have been nominal in any event (e.g. based on the husband having an income of $57,000 a year and the wife having an imputed income of $30,000 a year, the husband's obligation would have only been between $102 and $493 a month).

  

• The husband's retirement appeared to be reasonable and justified in the circumstances, and there was no suggestion that he was retiring in order to avoid having to pay support.

• The wife received spousal support from the husband for more than 25 years even though they were only married for just over 20 years.

We largely agree with Justice Shergill's decision. However, we do want to point out that her comment that the "passage of time" can, in and of itself, constitute a material change in circumstances, is not without controversy, and is inconsistent with another line of decisions, including, for example, *Rushton v. Rushton*, 2002 CarswellAlta 1579 (Q.B.) where Justice Slatter (now Slatter, J.A.) stated as follows:

> [27] **Section 17(4.1) requires that there be a change in circumstances before a variation of a spousal support order can be made**. This change of circumstances must be one that was not reasonably anticipated at the time the original order was made. Obviously **the mere passage of time cannot suffice, as that would render the subsection meaningless**. In addition, **the normal process of aging, and the maturation of the family unit would not suffice as a change of circumstances, as such changes are universal**. [emphasis added]

See also *Rondeau v. Rondeau* (2011), 90 R.F.L. (6th) 328 (N.S. C.A.); *Kenyon v. Kenyon*, 2011 CarswellBC 1344 (S.C.); *Favero v. Favero*, 2013 CarswellOnt 8414 (S.C.J.); *Hess v. Hamilton* (2018), 5 R.F.L. (8th) 287 (Ont. S.C.J.); and *MacLeod v. MacLeod* (2017), 100 R.F.L. (7th) 87 (N.S. S.C.).

That being said, Justice Shergill's conclusion that there had been a material change in circumstances was likely still reasonable given her other findings that the husband was in poor health and was going to retire imminently, and that his income would decrease to only $57,000 a year when he retired. Since the original order was based on the husband earning more than $150,000 a year, an imminent decrease to only $57,000 a year clearly constituted a material change in circumstances. And while courts do not particularly like variation applications *in advance* of a change (see, for example *Vaughan v. Vaughan* (2014), 44 R.F.L. (7th) 20 (N.B. C.A.)), there may be an exception for imminent retirement: *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.).

The more interesting question, however, is what would have happened had the evidence been that the husband's income in retirement was still going to be in the range of $150,000 a year (i.e. what he was earning when the initial order was made). Or what if the husband was not planning to retire?

On the first question, it is clearly income, not retirement status, that determines whether there has been a material change: *Winseck v. Winseck* (2008), 49 R.F.L. (6th) 296 (Ont. Div. Ct.) at para. 18.

And what of the second question - if the husband was not, in fact, planning to retire? If the mere passage of time cannot be a material change, support would never end, and "indefinite" support would, indeed, become "permanent" support. With respect to courts that have found that the mere passage of time cannot be a material change, that cannot be correct. Compensatory support should continue until compensation for the economic disadvantage has been achieved: *Tedham v. Tedham* (2005), 20 R.F.L. (6th) 217 (B.C. C.A.); *Chutter v. Chutter* (2008), 60 R.F.L. (6th) 263 (B.C. C.A.); *Zacharias v. Zacharias* (2015), 66 R.F.L. (7th) 1 (B.C. C.A.); and *Miolla v. Miolla* (2016), 79 R.F.L. (7th) 1 (B.C. C.A.).

Stated another way, continuing entitlement is always in issue in a variation proceeding - or at least it *should* be - and once compensation has been achieved, there is no more entitlement, and support should terminate: *Price v. Price* (2010), 92 R.F.L. (6th) 1 (B.C. C.A.); *Eichen v. Eichen*, 2012 CarswellBC 148 (C.A.); *Rozen v. Rozen* (2016), 86 R.F.L. (7th) 56 (B.C. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Hancock v. Rutherford*, 2018 CarswellOnt 757 (Div. Ct.); and *Choquette v. Choquette* (2018), 8 R.F.L. (8th) 414 (Ont. S.C.J.), aff'd (2019), 25 R.F.L. (8th) 150 (Ont. C.A.). It seems intuitive that support should be subject to termination when the basis for entitlement disappears: *Broaders v. Broaders*, 2017 CarswellNfld 10 (C.A.).

  

The suggestion that the "mere passage of time" is not a material change appears to have actually been imported from variation cases involving parenting, such as *Wiegers v. Gray* (2008), 47 R.F.L. (6th) 1 (Sask. C.A.); *Brown v. Lloyd*, 2015 CarswellOnt 790 (C.A.); *D. (H.) v. D. (L.M.)* (2016), 81 R.F.L. (7th) 357 (B.C. S.C.); and *Coppin v. Arboine*, 2018 CarswellOnt 19895 (Ont. S.C.J.). But if the "mere passage of time" is not a material change, that can become a problem in a significant number of parenting cases, as an appropriate parenting plan for a 3-year-old will often be very different than what is appropriate for an 8-year-old.

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