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— Franks & Zalev - This Week in Family Law

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Late-Breaking News:

On Friday, November 27, 2020, Philip Epstein, Q.C., C.M., O.Ont., LL.D (Hon.), L.S.M., was invested as a Member of the Order of Canada. We all wish him congratulations.

Conflicts: Discretion Is the Better Part of Valour

Harder v. Sartorio (2020), 46 R.F.L. (8th) 193 (Alta. Q.B.) - Devlin J.

It is rarely a good idea to act on a matter that will require you to attack a domestic contract that you (or another member of your firm) drafted and/or negotiated. You (or the other member of your firm) will be potential witnesses at trial about the events leading up the execution of the agreement. And, if privilege has been expressly or implicitly waived, you (or the other member of your firm) will be a potential witness about the advice that the client was given (or not given). For a helpful discussion about implicitly waiving privilege by putting the advice that was received (or not received) in issue, see *Spicer v. Spicer*, 2016 CarswellOnt 1745 (Ont. S.C.J.) at para. 9.

Furthermore, depending on the basis for the attack on the domestic contract, you could also be faced with a conflict because the client could have a potential claim against the law firm. For example, if a party alleges that an agreement should be set aside because there was inadequate financial disclosure, your client might have a claim against you (and/or your firm) for not taking adequate steps to obtain the additional information before the agreement was signed.

But a "bad idea" does not equate to a prohibition, and there is no such prohibition against attacking an agreement that was done by you or another member of your firm. *Harder v. Sartorio* provides an example of a situation where, although the firm was clearly faced with a potential conflict, the Court still allowed it to continue acting for the client.

In Ontario, as a general rule, counsel should not appear when the agreement at issue is one they prepared or negotiated (save for exceptional circumstances): *Kudoba v. Kudoba* (2007), 43 R.F.L. (6th) 98 (Ont. S.C.J.).

In *Harder v. Sartorio*, the husband and wife signed a Marriage Contract in 1992 to protect the husband's interest in his family's automobile dealerships. They separated in 1997, and signed a Separation Agreement that affirmed the Marriage Contract. The Separation Agreement also provided that, "[t]he division of matrimonial property in this Contract shall not be affected by any

reconciliation of the parties" and "shall remain in force unless the parties agree in writing to change or terminate the Contract in accordance with [its terms]."

The parties initially reconciled after they signed the Separation Agreement, but they separated again in 2019.

After the parties separated for the second (and final) time, the wife retained the same firm that had acted for her on the Separation Agreement in 1997. However, she was not represented by the same lawyer who acted for her on the Separation Agreement, as he had retired.

After she retained the firm, and notwithstanding the terms of the Marriage Contract and Separation Agreement, the wife commenced a claim to divide the parties' matrimonial property equally. The husband responded to the wife's claim by bringing a motion to remove her lawyers as her solicitors of record as they had a conflict of interest.

The wife opposed the husband's motion, and swore an Affidavit confirming that:

- She knew that her lawyers had a potential conflict;
- She understood that her choice of counsel could limit the arguments that she could raise; and
- She had made an informed decision to have her lawyers continue representing her.

The wife's lawyers also advised the court that the wife was not planning to allege duress, to challenge the advice that she had received before she signed the Separation Agreement, or to waive solicitor-client privilege. Instead, the wife was going to challenge the Separation Agreement based on the "interpretation of the Contract in light of the passage of time, on an alleged failure to carry out its terms, and potentially a challenge to its enforcement on public policy grounds."

In considering the parties' respective positions, Justice Devlin started by providing the following summary of the principles that have been established in the case law, including the Supreme Court of Canada's seminal decision about conflicts in *MacDonald Estate v. Martin*, 1990 CarswellMan 384 (S.C.C.):

- Conflicts of interest must be avoided;
- Examining related lawyers as witnesses creates a conflict;
- Attacking one's own legal work creates a conflict;
- Choice of counsel is jealously guarded;
- Courts will not rush to remove counsel; and
- Removal of counsel must not be permitted as an improper tactic.

Justice Devlin also reviewed the principles that apply when dealing with a request to remove counsel because s/he (or a member of his or her firm) is potentially going to be a witness at trial:

> [33] A helpful and widely accepted template for the decision to remove counsel is provided by the Ontario Divisional Court's decision in [*Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573 (Div. Ct.)]. There the Court articulated a number of factors to be considered when determining whether a law firm or solicitor should be disqualified from acting where a partner will be called as a witness. These factors include:
>
> a) the **stage of the proceeding**:
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> b) the **likelihood that the witness will be called**;
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> c) the **good faith** of the party making the application;

d) the **significance of the evidence** to be led;

e) the **impact of removing counsel** on the party's right to be represented by counsel of choice;

f) whether trial is by **judge or jury**;

g) the **likelihood of a real conflict arising** or that the evidence will be "tainted";

h) **who will call the witness**;

i) the **connection or relationship between counsel, the prospective witness and the parties** involved in the litigation.

[34] A rigourous [sic] application of these principles leads to the conclusion that **the mere potential that a related lawyer will be called is insufficient to remove counsel of choice at a very early stage in the litigation**: *Gerow v. Dobko*, 2018 SKQB 128 (Sask. Q.B.) at para 74; *Alexander v. Alexander*, 2018 ONSC 728 (Ont. S.C.J.) at para 61. **Rather, it must be objectively likely that this will happen**. On this point I adopt the statement of law in *Graham v. Ontario*, [2006] O.J. No. 763 (Ont. S.C.J.) at para 35, that:

> . . . It is not sufficient for a moving party to suggest opposing counsel is a potential witness or allege only that he or she might provide material evidence. Rather, it must be established there is a real basis to believe counsel can likely, or probably, provide material evidence. . . .

[35] It is important to note that the level of probability being discussed here is distinct from that determined by the Supreme Court as the appropriate threshold for finding a conflict in *MacDonald Estate*. There is no question that a conflict would arise if the lawyer were called as a witness. Rather, what is being considered is the likelihood of that eventuality. [emphasis added]

After weighing all of these factors, Justice Devlin decided to not remove the wife's lawyers from the case. Although the wife's lawyers were faced with an initial potential conflict, the wife had waived it, and made an informed decision not to pursue any claims against the husband that could give rise to an actual conflict:

[39] In this case, however, **the wife has definitively stated that she does not intended [sic] to pursue any of the problematic claims and understands what, if anything, she is giving up by making that choice**. Her counsel, who are experienced lawyers from a respected family law firm, made the clearest possible representations to the Court that all the issues and options in this case have been thoroughly discussed with their client. The wife is a mature, sophisticated person who has the resources to ensure that her interests are protected.

[40] I am satisfied, based on her affidavit evidence and her counsel's submissions, for which she was present, that **the wife has made an informed waiver of the conflict arising from [the firm's] prior involvement and the consequent limitations on their representation of her**. She heard the identification of the issues and concerns, and what was said on her behalf to address them. If there is any doubt in her mind as to what all this means, **she may still choose to get further independent advice or change counsel before this matter advances further**. I specifically direct that she be provided with a copy of these reasons, which I am certain her counsel would have done in any event.

[41] For all of these reasons, if **the wife remains with [the firm] as her counsel of choice from this point forward, she will be estopped from asserting in the future that she was under duress when the Contract was signed, that [the firm's] advice to her [on the Separation Agreement] was inadequate, that she was unaware that [the firm] might have a conflict of interest if certain arguments were made and that she did not understand what arguments she was giving up by staying with them as her counsel choice, or that she was in any way misled or uninformed** when deciding how to protect and advance her interests. **The wife is bound by this estoppel even if she changes counsel and law firms at some later date in these proceedings**. [emphasis added]

No good can come of this. While we agree that Justice Devlin's decision not to remove the wife's lawyers from the case may have been strictly correct based on the wife's evidence and the representations of counsel, we have some serious concerns about the propriety of a lawyer allowing a client to agree to not raise potentially viable arguments in order to avoid a potential conflict. At the very least, independent legal advice should have been *required* if only to preserve the integrity of the administration of justice.

What if evidence were to arise during the course of the proceeding - or at trial - that the wife could have relied on in support of her claims, but that she was estopped from raising because of her choice of lawyers? What if there is a subsequent breakdown in the wife's solicitor-client relationship with her current lawyers, and she blames them for putting her in this position in the first place? What if it came to light that the wife did not, in fact, understand a component of the Agreement or was mistaken as to its impact on her? One never knows what might come up or happen during the course of litigation. These types of situations would be incredibly problematic for both the wife (as the one who gave up the ability to pursue potentially viable arguments) and the lawyers (as they allowed their client to be put in this position). There are many excellent lawyers in Alberta (including counsel involved in this case), and perhaps the wife should have been directed elsewhere on this matter.

It is also unclear from the decision whether the wife obtained independent legal advice before she waived the potential conflict and agreed never to raise certain issues in the proceeding; but as noted above, it should be a requirement to protect the administration of justice.

We have difficulty seeing how an independent lawyer could advise the wife to irreversibly give up the ability to pursue various arguments rather than simply use different counsel at this early stage of the litigation.

Have Infant Will Travel (and Spend Overnights)

Holomey v. Hillis, 2020 CarswellOnt 15482 (Ont. S.C.J.) - George J.

This was the father's motion for joint custody and a parenting schedule for a child, Emma, born May 13, 2019. With respect to parenting time, the father sought an order that would have the child in his care:

> i) Two non-consecutive overnights every week, with each visit to be no less than 24 hours long, with the dates and times of such visits to be determined by the parties in accordance with the father's work schedule; and
>
> ii) Two visits during the day every week for no less than six hours, with the dates and times of such to be determined by the parties in accordance with the father's work schedule.

Then, from November 1, 2020 until April 30, 2021, the father sought increased parenting time.

Ultimately, the motion ended up being about whether or not the father's parenting time should be increased to include overnights for the parties' 18-month-old child.

The current access schedule came about as a result of a court order on March 5, 2020, which allowed the father parenting time every other day, for two hours, from 10 a.m. to 12 p.m. The father faithfully availed himself of that time.

The father's evidence was that, from the very beginning, the mother had tried to restrict and gatekeep his time with the child, such that an Order was necessary to get any regular time. The more the father pushed for time, the more the mother resisted. The mother's evidence was that the father was a barely competent parent, and that he had been abusive during their relationship. Her evidence was also that she was still breastfeeding, so overnight access was not practical.

Justice George was not taken with the mother's allegations regarding the father or his parenting. Her opinions of the father were not supported by the evidence. Justice George noted that the mother's allegations only went to show the lengths to which the mother would go to disparage the father. That said, His Honour did accept that the mother had always been the child's primary caregiver.

With respect to the mother's argument regarding breastfeeding, the father argued that, as important as that was, it had to be balanced against the child's right to have a meaningful relationship with her father, and to have the chance to bond with him further.

With respect to custody, while Justice George was of the view that both parents were good parents and had only the child's best interests at heart, there was simply no need to weigh in on the issue of custody on an interim motion.

Justice George found that the mother's resistance to increased parenting time for the father was "punitive." There was no other way to explain or characterize what His Honour found to be her staunch and intractable position. He found that the mother's complaints rang hollow.

On the breastfeeding issue specifically, Justice George noted that he was not aware of any cases that stand for the proposition that breastfeeding automatically overwhelms any other relevant factors. The cases that come *closest* to that proposition would be the decisions of Justice Sandomirsky in *McDonald v. Deagnon*, 2009 CarswellSask 271 (Q.B.), where access was ordered to fit within a breastfeeding schedule (but in which the mother was ordered to adjust that schedule to make access work), and *H. (C.T.) v. M. (N.P.)*, 2014 CarswellBC 4181 (Prov. Ct.), which discusses the importance of breastfeeding.

Other cases suggest that early and regular bonding with the father might take precedence: *S. (G.) v. S. (A.)* (2016), 79 R.F.L. (7th) 140 (N.L. T.D.); *Cavannah v. Johne* (2008), 64 R.F.L. (6th) 203 (S.C.J.); *Young v. Trigg*, 2004 CarswellAlta 2504 (Q.B.); *Stoklosa v. Stoklosa*, 2017 CarswellOnt 4689 (S.C.J.); and *Zubaid-Ahmad v. Butt* (2017), 98 R.F.L. (7th) 190 (Ont. S.C.J.).

Justice George ultimately found that the fact of continued breastfeeding was but one factor, among many. It is hard to argue with that position, especially for a child less than two years old.

With respect to the question of overnight access for young children, Justice George considered what Justice Spence said in *Heuss v. Surkos*, 2004 CarswellOnt 3517 (C.J.):

> [30] I have referred to these cases in order to provide a sense of what direction the courts have taken in recent years in dealing with young, preschool children. What I glean from these cases are the following principles: First, it is important to maximize the contact between access parents and young children. Second, it is important that this contact be meaningful such that the relationship between them is allowed to flourish. Third, unless specific circumstances exist which point in a different direction, that contact should include regular overnight visits. And fourth, the overnights should be of sufficient duration and frequency to permit the relationship to flourish.

He also considered Justice Wilson's decision in *Lygouriatis v. Gohm* (2006), 33 R.F.L. (6th) 354 (Sask. Q.B.), where Justice Wilson rejected the idea that an infant was "not ready" to spend overnight visits away from her primary parent. In that case, Justice Wilson cited Joan Kelly and Michael Lamb's work in "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children", which was originally published in the Family and Conciliation Courts Review:

> [7] The mother is opposed to the father having overnight parenting time with Emily. It is her position that Emily, who is only three months old, is not ready to spend overnights away from her home. I disagree. Although at one time social scientists were of the view that overnight access for infants was less than desirable, opinions have changed. As set out by Joan B. Kelly and Michael E. Lamb in Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children, Family and Conciliation Courts Review, Vol. 38, No. 3, July 2000, 297-311, at 3-18:
>
> > Such unnecessarily restrictive and prescriptive guidelines were not based on child development research and, thus, reflected an outdated view of parent-child relationships. Furthermore, such recommendations did not take into account the quality of the father-child or mother-child relationship, the nature of both parents' involvement, or the child's need to maintain and strengthen relationships with both parents after separation. Research and experience with infant day care, early preschool, and other stable caretaking arrangements indicate that infants and toddlers readily adapt to such transitions and also sleep well, once familiarized. Indeed, a child also thrives socially, emotionally, and cognitively if

> the caretaking arrangements are predictable and if parents are both sensitive to the child's physical and developmental needs and emotionally available.
>
> The evening and overnight periods (like extended days with nap times) with non-residential parents are especially important psychologically not only for infants but for toddlers and young children as well. Evening and overnight periods provide opportunities for crucial social interactions and nurturing activities, including bathing, soothing hurts and anxieties, bedtime rituals, comforting in the middle of the night, and the reassurance and security of snuggling in the morning after awakening, that 1 to 2 hour visits cannot provide. These everyday activities promote and maintain trust and confidence in the parents while deepening and strengthening child-parent attachments. [citations omitted]

(Some might ask how a 2020 case can rely on a 2006 decision in which a study from 2000 is quoted without the authors actually being in court. Good question. But let's ignore that prickly evidentiary issue for now.)

Justice George fully adopted these sentiments, in a paragraph we predict will be quoted regularly in the future where a party is looking to increase access with a very young child:

> [20] This says it all and highlights just how untenable the [mother]'s position is. The reality is the [mother] needs to start, now, adjusting the way she thinks about this. The fact she breastfeeds the child cannot rule the day. Furthermore, the fact she thinks she is a better parent than the [father] is not dispositive. For the sake of the child she must immediately begin to recognize the value in her having a full and loving relationship with her father, which cannot even start to grow and develop until the child spends more, and higher quality time, with him. While perhaps not as expansive as the [father] suggests (and I do question the appropriateness of an interim, gradually increasing, schedule), there is simply no need to delay the start of this process. In fact, it is essential that it begin now, as I get the distinct impression that once the child is no longer breastfed the [mother] will simply advance yet another reason to limit the [father]'s time with her.

Justice George fully believed that the child's best interests required increased time with her father, including some overnights. He ordered that the child be with her father for one 7-hour period each week, and for an additional 24-hour period each week.

However, His Honour rejected the father's request for a gradually increasing schedule, finding that consistency and routine was, at least for now, more important than automatic increases at artificial deadlines.

His Honour also wanted to make it very clear that in making his decision, he was fully aware of the mother's views on breastfeeding:

> It should be apparent that I find this to be subordinate to the fostering of the child's relationship with the [father]. The long and short of it is, the [mother] has until October 4th to plan accordingly and to do what she must in order to prepare for the transition.

This Friendly Reminder Brought to You by the Ontario Court of Appeal and $1,169 a Month

Mudronja v. Mudronja, 2020 CarswellOnt 13038 (C.A.) - van Rensburg, Pardu and Huscroft JJ.A.

This was a fairly run-of-the-mill appeal and cross-appeal. However, in the course of dismissing the appeal and allowing the cross-appeal, the Court of Appeal reminded us of an important yet often forgotten provision of the *Child Support Guidelines*.

The parties had been litigating for years. After a trial in 2014, Mr. Mudronja was ordered to pay, *inter alia*, periodic spousal support of **$7,500** per month.

Mr. Mudronja did not make the payments required after the trial.

While the hearing below mostly concerned enforcement issues, there was one child support issue - one of the children had gone to live with Mr. Mudronja. Therefore, the court below had to determine Ms. Mudronja's income for support purposes so as to decide how much child support Ms. Mudronja should be paying Mr. Mudronja for that child.

In her cross-appeal, Ms. Mudronja argued that the judge below erred in calculating the child support she was to pay. Specifically, she argued that the court below erred by including the $7,500 a month in spousal support she was receiving from Mr. Mudronja in her income for support purposes. This is a common error that can very significantly impact the support equilibrium between spouses.

While s. 16 of the *Child Support Guidelines* provides that a payor's annual income for support purposes is determined using the sources of income set out under the heading "Total Income" (formerly Line 150 income - now Line 15000 income) on the T1 General form issued by the Canada Revenue Agency, it also requires that various adjustments be made in accordance with Schedule III.

Schedule III of the *Child Support Guidelines* provides:

> **Spousal support and universal child care benefit**
>
> **3** To calculate income for the purpose of determining an amount under an applicable table, **deduct**
>
> (a) the **spousal support received from the other spouse**; and
>
> (b) any universal child care benefit that is included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency. [emphasis added]

That is, in calculating Ms. Mudronja's income for child support purposes, the $7,500 a month in spousal support she was receiving from Mr. Mudronja (i.e. "the other spouse") should have been deducted. But that is not what was done. Rather, the motion judge *included* the spousal support payments in determining Ms. Mudronja's child support obligations:

> [33] At trial Ms. Mudronja's income was inputted to be $20,000.00. In addition, since January 1, 2014, she has received monthly periodic spousal support of $7,500.00. Thus, an annual income of $110,000.00 is imputed to Ms. Mudronja. As per the Child Support Guidelines, the amount of monthly child support is $1,369.00. Over the 51-month period the amount of retroactive child support payable is $69,819.00.

This was an error - a somewhat common error - but an error nonetheless. And the error resulted in an over-statement of Ms. Mudronja's child support obligation by $1,169 a month.