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— Franks & Zalev - This Week in Family Law

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Trusts in La Belle Province (or, "In Matrimonial Homes we Trust")

Yared v. Karam, 2019 CarswellQue 10729 (S.C.C.) - Rowe J. (Wagner C.J. and Abella, Brown, and Martin JJ. concurring)

This recent decision from the Supreme Court of Canada confirms that assets owned by a trust can, in some circumstances, be included as part of the matrimonial property (i.e. family patrimony in Quebec) that is to be divided between spouses when they separate. As the decision involves the interpretation of the Civil Code of Quebec, the specific details of how the Supreme Court reached its conclusion may be of limited use to counsel and judges in the common law provinces. However, the case does provide another example where, in dealing with family law cases, the Supreme Court of Canada interprets legislation so as to give trial judges sufficient discretion to be able to do justice between the parties.

During the marriage, the husband set up a trust that he used to purchase a home in which the family then lived. The husband was the trustee of the trust, and the wife and the parties' four children were discretionary beneficiaries. The husband was not a beneficiary of the trust, *but* he had the ability to add or remove beneficiaries, and he had complete discretion to decide what should happen to the trust's income and capital. That is, having sole control over the identity of the beneficiaries and as to the use of the trust's capital and income, the husband was not well placed to argue that he did not solely "control" the trust.

Article 415 of the Civil Code of Quebec provides that the family patrimony includes "the residences of the family or the rights which confer use of them".

The Quebec Court of Appeal found that the trust, and therefore the home, should *not* be included in the family patrimony because there was no evidence that the trust had been established to defeat the wife's claims and, "in the absence an intention to avoid the rules of the family patrimony, the contractual freedom of spouses who decide to reside in a property held in a trust for investment purposes ought to be respected."

The majority of the Supreme Court of Canada disagreed with the Quebec Court of Appeal's reasoning, and held that trial judges should have broad discretion to include a family residence that is "controlled" by one of the spouses as part of the family patrimony even if it is not directly owned by one of the spouses, and even if there is no evidence of improper intent:

> [37] **What may or may not constitute a "right which confers use" within the meaning of art. 415 C.C.Q. is therefore dependent on the circumstances and will generally be determined in relation to the level of control exercised by either spouse with respect to the residence.** As such, I agree with my colleague that simple occupation of a property

> not owned by the spouses will not automatically give rise to "rights which confer use" within the meaning of art. 415 C.C.Q. However, **given the purpose of the family patrimony and the rationale for including the "rights which confer use" in the text of art. 415 C.C.Q., it is preferable to accord wide discretion to the trier of fact** when making such a determination. . . .
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> . . .
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> [52] When applying art. 415 C.C.Q. to a family residence not directly owned by the spouses, the question is therefore relatively simple: **Does the record support a finding of rights which confer use of the residence? If so, the fact that the spouses were pursuing a legitimate objective in organizing their affairs the way that they did is not a bar to inclusion of the residence in the partition of the family patrimony.**
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> [53] **This is not to say that the intention of the spouses is never relevant** when applying art. 415 C.C.Q. to a family residence. In fact, the intention of the spouses is essential to characterize a property as a "residence of the family" within the meaning of art. 415 C.C.Q. (see, for example, *J. (Y.) c. B. (M.)* [1999 CarswellQue 3330 (C.S. Que.)], 1999 CanLII 10838, at paras. 32-39, conf. on appeal by 2000 CanLII 10021 [2006 CarswellQue 9035 (C.A. Que.)], at paras 17-19). **But in so far as the intention to use a property as a residence of the family has been established, art. 415 C.C.Q. does not require any further demonstration of intention**. [emphasis added]

This interpretation of the Quebec Civil Code mirrors s. 18(2) of the Ontario *Family Law Act*. That section specifically designates as a "matrimonial home" a property that is owned indirectly by a spouse through a corporate intermediary that would otherwise be a matrimonial home. Specifically, ownership of a corporation that entitles the owner to occupy a matrimonial home owned by the corporation is deemed to be "an interest" in a matrimonial home. It is a statutorily mandated piercing of the corporate veil: *Debora v. Debora* (2006), 33 R.F.L. (6th) 232 (Ont. C.A.)] .

While it does makes sense that ownership by a trust would not be treated differently, somewhat ironically, it is not entirely clear that the same result would arise in Ontario (or the other common law provinces) given the result in *Spencer v. Riesberry* (2012), 17 R.F.L. (7th) 94 (Ont. C.A.). In *Spencer*, the Ontario Court of Appeal held that, unless the terms of a trust so provide, a beneficiary has no actual property interest in any specific asset of the trust - even where the beneficiary is also a trustee.

Pursuant to the Ontario Court of Appeal in *Spencer*:

> [52] Second, to ignore or conflate the separate roles of trustee and beneficiary would be contrary to the fundamental nature of a trust and would render the trust unworkable.
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> [53] A trust is a form of property holding. It is not a legal entity or person. A trust does not hold title to property nor can it. It is the trustee who holds legal title to the trust property.
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> [54] A trust is also a type of relationship, namely, the fiduciary relationship that exists between trustee and beneficiary. The foundation of the trust relationship is the separation of roles between the trustee and beneficiary with the trustee being the legal owner of the trust property and the beneficiary being the equitable owner of the trust property. The trustee holds legal title to the trust property so that it can manage, invest and dispose of the trust property solely for the benefit of the beneficiaries. A trust can only exist when there is a separation between legal ownership in the trustee and equitable ownership in the beneficiaries.
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> [55] If the court were to ignore or conflate the separate entities, it would destroy the foundation of the trust relationship. Put another way, absent the separate entities, there is no trust relationship and, therefore, no trust. That is not the case when the corporate veil is pierced. In that situation, the corporation as a separate legal entity remains - it is simply that the court can look through the veil, in very limited circumstances, to attribute ownership to the corporation's alter ego.

As a result, in *Spencer*, a beneficiary of a trust that owned what would otherwise have been a "matrimonial home" was found to not have an interest in the actual property so as to meet the statutory definition of "matrimonial home", even though she was

also a trustee. The decision in *Spencer* was based on the distinction between trustees and beneficiaries, such that absent the separate entities, there would be no trust relationship.

Therefore, the result in *Yared v. Karam* must, to a large extent, have been driven by the complete and total control the husband had over the trust, the beneficiaries, and the assets of the trust. And that is probably the way it should be.

Family Arbitration Without a Family Arbitration Agreement?

Giddings v. Giddings, 2019 ONSC 7203 - Gray, J.

Prior to 2007, parties in the Ontario family law system regularly mediated and arbitrated (and mediated/arbitrated) their disputes rather than litigating in court. It was effective. It helped relieve an over-burdened court system. It allowed parties to pick a specialist as their "judge". And it allowed parties, in conjunction with the arbitrator, to design a made-to-measure process particular to them so as to save costs and time.

But there was a problem.

Because there were no "rules" specific to family law arbitrations, some participants in the system, particularly some women with specific cultural backgrounds and/or that had been victims of intimate partner violence, were possibly being treated unfairly by "arbitrators" that were not bound to apply any particular law or follow any set rules.

In 2007, to address these issues, through amendments to the *Arbitration Act*, 1991 and the *Family Law Act*, the Ontario government significantly overhauled the ability of parties to enter into binding arbitration in the realm of family law. As a result, parties can no longer "informally" bind themselves to an arbitration process to do anything in family law (say by referring to arbitration in Minutes of Settlement, for example), and parties must now take several specific procedural steps to enter into a binding arbitration agreement.

The difficulty is that it is sometimes very inconvenient to take those steps when parties want to settle their case "now" - at a Settlement Conference or four-way meeting, for example. As a result of the amendments to the *Arbitration Act*, 1991 and the *Family Law Act*, it is not (or, subject to what we suggest below, may not be) possible for parties in a four-way meeting, before a motion, in a Settlement Conference or pretrial - or at the courtroom door - to settle their matters in any way that includes a binding commitment to arbitration without actually signing an Arbitration Agreement at that time (and having the chosen arbitrator sign it as well).

Although impractical, it is what it is: If, in submitting to arbitration, the parties do not strictly comply with the provisions of the *Family Law Act*, *Arbitration Act, 1991* and the Regulations under the *Arbitration Act, 1991*, they **do not have** a Family Arbitration Agreement; they *cannot have* a Family Arbitration; and they **will not have** an enforceable Family Law Arbitration Award. So what do they have? Well, it depends. And that is what *Giddings v. Giddings* is all about.

In *Giddings*, the parties had been engaged in matrimonial litigation for several years. Both were represented. They entered into final Minutes of Settlement on August 9, 2018. In the Minutes, the parties agreed to submit specific issues to an arbitrator for determination. They did not sign a Family Arbitration Agreement, but there is no doubt that they meant to submit the issue of property division to arbitration.

The parties had several procedural conference calls with the arbitrator, and after receiving submissions from both parties, the arbitrator made a ruling on his jurisdiction to make an award with respect to a particular issue regarding the value of a property. The unhappy appellant then challenged the arbitrator's jurisdiction to arbitrate in the absence of a signed Family Arbitration Agreement. In opining on his jurisdiction, the arbitrator found:

> There is an additional layer of concern, however, that I must address, namely the parties have yet to sign an Arbitration Agreement with me although I have made at least one ruling along the way let alone conducted a number of procedural/ substantive conference calls with counsel . . .

> To be sure, the parties have certainly acted on the basis that I have arbitral authority and, frankly, despite jurisprudence that might suggest otherwise (regarding lack of screening, etc.) I find the parties are estopped, by course of conduct at least, from claiming I do not have it.

The Appellant then appealed to the Ontario Superior Court of Justice, and the matter was headed by Justice Gray, who was obviously (and understandably) troubled by the whole situation. While the appellant, not satisfied with the arbitrator's award, was now taking advantage of the situation and acting in a highly opportunistic manner - the legislation really leaves no room for doubt, and this was certainly not merely an "irregularity". It was the wholesale absence of a Family Arbitration Agreement - a Domestic Contract which must be in writing pursuant to s. 51 of the *Family Law Act*. This would not be an issue in, say, Alberta, where an arbitration agreement need not be in writing: *Arbitration Act*, RSA 2000, c. A-43, s.5(1) and *Heinzelman v. Heinzelman* (2017), 98 R.F.L. (7th) 381 (Alta. Q.B.).

Here, Justice Gray got quite creative and relied on both the Supreme Court of Canada decision of *Bhasin v. Hrynew*, *supra* (dealing with good faith in contractual performance) and *Lopatowski v. Lopatowski* (2018), 3 R.F.L. (8th) 411 (Ont. S.C.J.), a 2018 decision in which he was faced with a similar situation:

> [42] In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the Supreme Court of Canada recognized a general organizing principle of good faith contractual performance. In *Lopatowski v. Lopatowski*, 2018 ONSC 824, 140 O.R. (3d) 731 (S.C.J.), I applied that principle in circumstances similar to those before me. At para. 58, I stated:
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> > In this case, the parties had entered into a clear agreement to the use of a parenting coordinator with broad powers to assist them in parenting disputes, which was to include arbitral authority if necessary. The principle of good faith and honest contractual performance would require that the parties take the steps necessary to make that agreement operative. In a case such as this, the parties, represented by experienced counsel, would know that certain formalities would be required, including statutory formalities.
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> [43] In the case before me, the parties have expressly recognized that statutory formalities will be required. Notwithstanding, they have entered into a clear agreement to execute a family arbitration agreement, in order to give Mr. Grant the necessary arbitral authority.
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> [44] In this case, the only reason offered for refusing to execute a family arbitration agreement is the fact that Mr. Grant has expressed his opinion that upon the execution of a family arbitration agreement, he will have the authority to decide the value of the Chartwell property. This was something the parties, including the appellant, had asked Mr. Grant to decide. In my view, it does not lie in the mouth of the appellant, having asked Mr. Grant to decide the scope of his authority, to then use Mr. Grant's answer as the only reason to decline to execute an arbitration agreement when he had agreed, in writing, that he would execute such an agreement. His refusal to execute a family arbitration agreement is not consistent with his obligation of good faith contractual performance. The court must have the power, in these circumstances, to require him to live up to his obligation.
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> [45] For these reasons, I am satisfied that I should order the appellant to execute a family arbitration agreement, as requested by the respondent.

His Honour held that, while the arbitrator had no authority to proceed further in the absence of a Family Arbitration Agreement, the award that had been previously made by the arbitrator (that was the subject of the appeal), was enforceable. His Honour also held that the Appellant "is required to enter into a Family Arbitration Agreement, as he specifically agreed to do in the Minutes of Settlement."

This decision must be viewed with some caution. We know that hard facts make bad law, and these were some pretty hard facts, with one party literally refusing to participate in an arbitration in which he clearly agreed to participate solely because the decision did not go his way. The urge to "do something" clearly proved irresistible.

However, that said, first and foremost, an Ontario court does not have the jurisdiction to force someone to sign a Family Arbitration Agreement - in fact, no common law court can force anyone to sign any kind of Agreement. Furthermore, as the law presently stands, an Ontario court also cannot order parties to submit to arbitration. They can in British Colombia; but they can't in Ontario. So that ends that.

Second, while according to *Bhasin*, there is absolutely a general duty of "honest contractual performance" as part of the general organizing duty of contractual good faith that underlies many facets of contract law, the duty deals with good faith performance of an existing contract. The problem here is that there is no Family Arbitration Agreement to perform. There are now a few decisions that go each way on this issue. In one corner, we have cases like *Giddings* and *Lopatowski*; and in the other corner, we have cases such as *Horowitz v. Nightingale* (2017), 94 R.F.L. (7th) 151 (Ont. S.C.J.), *Wainwright v. Wainwright* (2012), 21 R.F.L. (7th) 415 (Ont. S.C.J.), *Davies v. Davies* (2011), 11 R.F.L. (7th) 348 (Ont. S.C.J.) (where an Arbitration Agreement was found invalid for want of a Certificate of Independent Legal Advice), *Imineo v. Price* (2011), 14 R.F.L. (7th) 193 (Ont. C.J.) and *Michelon v. Ryder*, 2016 CarswellOnt 8764 (Ont. C.J.) (which suggests arbitration cannot even be awarded on consent).

Clearly, this is going to have to get resolved one way or the other, as it is important that parties not be subject to "limping" Family Arbitration Agreements. However, as the statute presently stands, it is hard to see how a future panel of the Court of Appeal or Divisional Court can do anything other than follow the cases that hold that a Family Arbitration Agreement must be in writing and must come with all the bells and whistles mandated by the legislation. What is really needed are some legislative changes to make it easier to enter into a binding and enforceable Family Arbitration Agreement while, at the same time, maintaining the protections that are now in place.

In the meantime, consider this. Again, s. 55(1) of the *Family Law Act* requires that all Domestic Contracts be in writing (and signed by the parties and witnessed). The section could not be more clear: "A domestic contract and an agreement to amend or rescind a domestic contract are **unenforceable** unless made in writing, signed by the parties and witnessed." A Family Arbitration Agreement is a Domestic Contract [s. 51].

In *Geropoulos v. Geropoulos*, 1982 CarswellOnt 253 (Ont. C.A.), the Court of Appeal confirmed that this section [at the time, s. 54(1)] was not intended to apply to agreements between counsel in the resolution of pending litigation between spouses. That is, counsel (and parties) are always free to resolve litigation - and that resolution need not comply with the formalities of (now) s. 55(1). This is because such agreement required the intervention of the court to be effective and their authenticity was assured by the court's supervision and control over them. That is, whether they were to be enforced or not was, ultimately, a matter for the discretion of the court. The Court of Appeal further noted that no purpose would be served by requiring that such agreements comply with the formalities of (now) s. 55(1).

To borrow from the Court of Appeal in *Geropoulos*:

> I share the view that settlement agreements concluded by solicitors or counsel resolving outstanding claims in pending litigation under the Act are beyond the reason and purview of s. 54(1). The formal requirements laid down by the section are intended to ensure that asserted domestic contracts, be they marriage contracts (s. 51), cohabitation agreements (s. 52) or separation agreements (s. 53), are reduced to writing and in fact agreed to by the parties as evidenced by their witnessed signatures; this in essence is a Statute of Frauds type provision made referable to domestic contracts by the *Family Law Reform Act*.
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> In my opinion, the section plainly is not aimed at or intended to apply to authorized settlement agreements like the present, made with legal advice during the pendency of court proceedings which, to be effective, require the intervention of the court. Such agreements derive their effect from an act of the court; their authenticity is assured by the court's supervision and control over them; and ample protection is afforded the parties to these agreements, wholly independent of the section. The court's jurisdiction to enforce settlements or refuse to do so, notwithstanding any agreement between solicitors or counsel, is well established; whether they should be enforced or not, in the final analysis, is a matter for the discretion of the court and, in litigation under the *Family Law Reform Act*, a matter that would be subject to the court's overriding

> jurisdiction with respect to domestic contracts. *Scherer v. Paletta*, *supra*; 3 Hals. 4th ed., paras. 1182-83, pp. 650-651 and ss. 18(4) and 55 of the Act.
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> No purpose is to be served in compelling agreements of this kind to comply with the formalities of s. 54(1) and, if not, permitting parties to withdraw at will from compromises properly entered into by their legal representatives before trial of their action or, if the appellant's position were to be accepted, compromises concluded even during the trial of the action. It may well be that, given the nature of matrimonial litigation, prudence would dictate that lawyers ensure that settlement agreements are signed by the parties personally witnessed. But I cannot construe the section as requiring that an otherwise valid compromise of an action must be rendered void and defeated on this ground alone, nor do I believe that the legislation could have contemplated or intended that result. Such a construction would be wholly inconsonant with the established policy of encouraging the settlement of disputed claims and recognizing and preserving the validity of settlements freely and properly entered into under advice.
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> Indeed, such a construction of s. 54(1) would be wholly inconsonant with the established policy of encouraging the settlement of disputed claims and recognizing the validity of settlements freely and properly entered into under advice.

So, unless and until the legislature addresses the issue, to quote Montell Jordan, "this is how we do it." If parties resolve litigation by referring an issue (or issues) to arbitration, and if it is impractical (as it always is) to comply with some of the more formal requirements of the *Arbitration Act* and Regulations and the *Family Law Act* (such as, for example, getting a certificate from the arbitrator in advance), perhaps *Geropoulos* can assist when asking a court to find that there is a binding Family Arbitration Agreement. To be clear, I am not suggesting that courts should routinely ignore the formalities of a Family Arbitration Agreement or that screening is not a crucial element of that process (as screening is meant to "screen in" not "screen out", subsequent screening can still be used to show how an arbitration can be conducted safely). However, there will certainly be some occasions, such as *Giddings*, where a court could use *Geropoulos* to bind parties to that which they **clearly** intended.

There is some, albeit indirect, support for this approach in *Owers v. Owers* (2009), 65 R.F.L. (6th) 1 (Ont. C.A.). In *Owers* (which involved an Arbitration Agreement ostensibly entered into by counsel for the parties before the new legislation), the Court of Appeal commented as follows:

> 10 The primary argument advanced for setting it aside is that the consent on which it is based was signed, not by the parties, but by counsel for the parties. This, it is argued, contravenes the requirements of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "FLA"). Amendments to the FLA in 2006 are such that when read with the *Arbitration Act*, 1991, S.O. 1991, c. 17, a "family arbitration agreement" must now be in writing, signed by the parties and witnessed, in order to be enforceable.
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> 11 We would not give effect to this argument. In *Geropoulos v. Geropoulos* (1982), 35 O.R. (2d) 763 (Ont. C.A.), this court considered a situation very similar to that of the present case. At the time that *Geropoulos* was decided, s. 54(1) of the *Family Law Reform Act*, R.S.O. 1980, c. 152, provided that a domestic contract was "void unless made in writing and signed by the persons to be bound". The settlement agreement in question had been executed by counsel for the parties, rather than the parties themselves.
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> . . .
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> 13 In our view, the reasoning in *Geropoulos* is equally applicable in the present case. No purpose would be served by interpreting the legislation in a way that would permit parties to withdraw at will from agreements properly entered into by their legal representatives during the course of litigation.
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> 14 Having said that, we understand that s. 59.6(1) of the FLA imposes additional requirements related to the enforceability of family arbitration awards and the agreements on which they are based. Under s. 59.6(1)(a), a family arbitration agreement on which an award is based must be made in writing and must comply with regulations made under the *Arbitration Act*, *supra*. O.Reg. 134/07, enacted under the *Arbitration Act*, *supra*, provides certain requirements for family arbitration agreements and mediation-arbitration agreements made on or after September 1, 2007. (It will be noted that the mediation-arbitration agreement and the Justice Taylor order were made prior to that date.) Nothing in these reasons is intended to

speak to whether the signatures of counsel alone are sufficient to render enforceable family arbitration agreements made after that date.

Lump Sum Spousal Support to End the Never-Ending Conflict

Wardlaw v. Wardlaw, 2019 CarswellOnt 19803 (Ont. S.C.J.) - Justice Le May

Lump sum spousal support orders in long term marriages - even those without children - are exceedingly rare. However, in *Wardlaw*, Justice Le May awarded a lump sum to achieve certainty and finality in circumstances where one of the parties would likely view a periodic award as an invitation to continue the fight through multiple Variation Applications in the future.

The parties were married for 17 years and did not have any children. The wife was self-represented at trial and, despite Justice Le May's efforts to get her to focus on the actual issues (i.e. property and support), the wife insisted on trying to deal with issues that were wholly irrelevant, such as whether there were problems with the Clearance Certificate, and the specific dates that various documents had been served. Critically, the wife also made it clear in her evidence that, from her perspective, the trial was not going to end the dispute, and that she was going to continue litigating with the husband and his family well into the future. This was a dangerous message to send to a well-meaning trial judge.

As a result of the wife's conduct, and although the wife was likely entitled to indefinite support, Justice Le May directed the parties to make submissions about whether the $540 a month in indefinite spousal support he had awarded the wife should be converted into a lump sum. The husband made submissions as to why lump sum support would be appropriate. The wife, on the other hand, took that opportunity to claim that the trial decision was "bogus" because it had the wrong date on the front cover, did not list where the case was heard, and did not include the husband's lawyer's Law Society number. She also indicated that she did not want a lump sum because of her unsubstantiated concern that someone had been surreptitiously accessing her bank accounts.

In *Davis v. Crawford* (2011), 95 R.F.L. (6th) 257 (Ont. C.A.), the Ontario Court of Appeal broke from their historical restraint regarding lump sum support in *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.), and held that lump sum support was no longer to only be awarded in "very unusual circumstances." Rather, lump sum support could be awarded in appropriate situations - one such situation being one where the case involves significant animosity between the parties. While considerations of "high animosity" are generally used to justify a lump sum award against the payor's wishes, in *Wardlaw* Justice Le May used the wife's clear animosity toward the husband as justification for awarding lump sum support against the recipient's wishes. It made good sense to do so rather than resign the husband to a future of never-ending litigation at the hands of the wife.

In this case, even though the SSAGs provided for indefinite support, His Honour concluded that a lump sum award would be appropriate because: (a) the wife would bring multiple variation applications against the husband; and (b) the parties' financial circumstances were unlikely to change in the future as the husband had already retired and the wife had already been out of the workforce for many years. The husband also had the ability to pay lump sum support.

As a result, Justice Le May ordered the husband to pay the wife a lump sum of $114,064 based on the low range of the SSAGs. While it is not clear from the decision what duration His Honour used to capitalize this amount, it would have taken more than 35 years of taxable/deductible monthly payments of $540 a month to equate to $114,000, which seems a tad long given that the husband was already 57 and the wife 51 at the time of trial. However, given the wife's conduct and the fact that the husband had a net worth of over $4,000,000, it is unlikely that the husband would complain about paying something in this range for the benefits of certainty and finality.

Justice Le May also ordered significant costs against the wife (more than $112,000) and, relying on the Divisional Court's decision in *Hindocha v. Patel*, 2009 CarswellOnt 2611 (Ont. Div. Ct.), allowed the husband to set off those costs against the lump sum support award (surely to avoid any possibility that the husband would pay the lump sum spousal support but the wife would refuse to pay the costs). This was also recently done in *Karges v. Karges*, 2018 CarswellOnt 21562 (Ont. S.C.J.), aff'd *Karges v. Karges*, 2019 CarswellOnt 17135 (Ont. C.A.) (although in *Karges*, the Court set off periodic support against costs ordered to be paid on a monthly basis).

As a result, the wife will ultimately receive the grand total of . . . $1,501.90. This was a very expensive lesson for the wife about the importance of behaving reasonably in litigation, and hopefully one that will cause the wife to rethink her prior threats to try to continue litigating with the husband and his family.

To paraphrase Justice Pazaratz in *S. (J.) v. M. (M.)* (2016), 80 R.F.L. (7th) 386 (Ont. S.C.J.): Nasty does not work. Nasty will not be tolerated.

Spousal Support Claimed 33 Years After Separation

T.G.R. v. K.M.R., 2019 CarswellMan 894 (Man. Q.B.) - Petersen, J.

In this case, the wife claimed spousal support, both retroactive and prospective, 33 (yes, 33) years after the parties separated following a 13-year cohabitation. The wife claimed that she was not able to proceed earlier, as she suffered from Post-Traumatic Stress Disorder arising from the husband's actions.

To explain her delay, the wife provided a report from a psychiatrist supporting her claim of PTSD. The doctor attributed the wife's symptoms to the sexual assault that she suffered as a child, and subsequently her daughter's sexual assault. The wife testified that it was the husband's molestation of the parties' daughter that, in part, caused the PTSD and caused the delay.

Justice Petersen properly noted that s. 15.2(5) of the *Divorce Act* confirms that the Court must not consider any alleged misconduct in determining spousal support. Notwithstanding that, the evidence was allowed - not for the purpose of considering entitlement to spousal support, but rather to assess the reason for the delay. This appears to be a straight application of *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.).

Justice Petersen addressed the husband's allegation that the parties had reached an agreement in which the wife received a more favourable property settlement in lieu of spousal support - an important factor.

In dismissing the claim, Justice Petersen noted the financial benefits the wife received following separation totaling $35,520 and the fact that had the wife not suffered two accidents, she likely would not have pursued spousal support at all. Both accidents were post-divorce, and had no connection to the marriage. Beyond that, the Respondent had been compensated by the Workers Compensation Board. Finally, her income post-2015 was higher than what it was prior to the accidents.

Justice Petersen also accepted the husband's evidence that he had structured his life and affairs on the basis that he had no spousal support obligation.

Her Honour also noted that the wife had been represented by senior counsel, and chose not to pursue her claim, despite having raised it in 1988. As stated by Justice Petersen:

> [101] Sitting on her claim for 17 years from the date of divorce and 26 years from the date of separation before providing the Petitioner with a notice that she intended to pursue spousal support is simply too long to continue to be a viable claim.

While delay is not a statutory bar to a claim for spousal support, at some point it does effectively become one. And, really, save but for the most unusual circumstances, it should be.