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— Franks & Zalev - This Week in Family Law

Aaron Franks and Michael Zalev

Contents

One *Amicus*? Rarely; Two *Amici*? Never (Well, Almost Never)

Morwald-Benevides v. Benevides, 2019 CarswellOnt 20949 (Ont. C.A.) - Lauwers, van Rensberg, and Roberts JJ.A.

This is the latest (and hopefully last) chapter in a custody case that has been going on since 2012, and has involved at least 10 reported decisions (not including the actual decision on the merits from the actual ***23-day trial*** that took ***14 months*** to complete, which does not yet appear to have been reported) and multiple appeals. It has also already been discussed in this *Newsletter* several times (*volume* 2015-49 and *volume* 2019-27). It is the gift that keeps on giving.

The issue that the Ontario Court of Appeal had to grapple with in this instance was, as Justice Lauwers succinctly put it, "[w]hat are the principles governing the appointment of *amicus curiae* in private family law cases?"

The other issue this case raises is one that is not actually discussed in the decision: what can we do to stop this type of thing from happening again? Few can afford a 23-day trial, and there is no reason that this type of case should have been allowed to consume such a disproportionate share of our already scarce court resources. Consider how many hours the court could have devoted to Case Conference or Settlement Conferences instead.

Anyway . . .

The parties were married in 1999. They had three children together, born in 2003, 2004, and 2009, and the family lived in Bermuda during the marriage. In 2011, the parties and the children came to Ontario to visit the wife's family, and the father ultimately agreed that the wife and the children could remain in Canada while he would return to Bermuda. Shortly after he returned to Bermuda, the husband told the wife that the marriage was over.

Litigation ensued, and after numerous court attendances, the case was called to trial in the Ontario Court of Justice in April 2014. Although there were a number of issues that had to be addressed, the main issues were whether the husband should be allowed to have unsupervised access with the children, and whether the children should be able to visit the husband in Bermuda.

In his reasons for appointing *amicus*, the trial judge provided the following summary of the impossible situation with which he was confronted:

> 59 During the lengthy pre-trial stage, the mother on several occasions sought to adjourn motions and conferences. Before the trial even commenced, a pattern had developed by the mother of seeking to delay the proceedings. Before the trial commenced, it was apparent to me, the mother did not want the trial to proceed.

> 60 The trial opened with the mother self-represented. She was represented by counsel on the two pre-trial motions and appeal, but that was a limited retainer, not a retainer for trial. In the previous almost two years, the mother had dismissed five lawyers. The mother brought a motion at the commencement of trial for an adjournment on the basis of medical grounds. She tendered two medical letters from her family physician.
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> 61 In the first hour of the trial, it was apparent to me the mother's behaviour was bordering on hysterical. She was emotional and hyper and had a difficult time focusing. Fueling this, her mother was in the courtroom and was emotionally distraught.
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> 62 Later in the morning, the mother collapsed in the courtroom. The clerk called an ambulance and she was rushed to hospital. She did not re-attend court that day. Court was recessed to 2:00 p.m. In the afternoon, her brother attended court on her behalf.
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> . . .
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> 64 I was not prepared to adjourn the trial based on the two medical letters. I requested the attendance of the physician on the next day of the trial. The physician was extensively questioned. The physician recommended an adjournment of the trial based on alleged medical and mental/emotional reasons. I dismissed the motion to adjourn the trial. The medical evidence was vague. I questioned whether or not the mother's medical and emotional circumstances were any different than other litigants who come into the courtrooms. Further, the doctor was unable to give a timeline when the mother would be fit enough to go through a trial. The mother's position, if accepted, would have led to an indeterminate and lengthy adjournment of the trial.
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> 65 In this jurisdiction, if a trial is lost, a new trial date cannot be accommodated for at least six (6) months, longer if the trial requires multiple days such as this one. Had I granted the motion, since neither the doctor nor the mother knew when she might be fit enough for a trial, a new trial date could not have been set at that time. So the court would have to wait until the mother was medically ready for trial before a new trial date could be set. This would have pushed the timelines out for a year or more.

Faced with this difficult situation, the trial judge decided to appoint one of the five lawyers who had previously acted for the mother as *amicus* in order to "stabilize the proceeding"; to give the wife "a buffer" to assist her with her fear of the husband, who she claimed had been severely abusive towards her; and to help the Court deal with the complex legal issues. The trial judge also said that he was appointing *amicus* "to play an adversarial role to properly test the evidence, so I could make findings of facts and credibility - which would then allow me to effectively adjudicate on the best interest test."

And then things really started to go off the rails.

Although the parties had estimated that the trial was only going to take four days, it quickly became clear that this estimate had been woefully inadequate and, in the end, the trial ended up taking 23 days over a period of 14 months between April 2014 and June 2015. When it became clear that the trial was going to take significantly longer than the parties had originally estimated, the husband's lawyer brought a motion to be removed from the record because the husband could no longer afford her. In granting the motion, the trial judge explained that while it had been a close call and his first inclination had been to deny the motion, he had ultimately decided that he was not prepared to force the husband's lawyer, who was a senior member of the local Bar, to take on a case of this magnitude *pro bono*.

However, as *amicus* had already been appointed to essentially act as counsel for the wife, the trial judge found that it would be unfair to the husband to not also appoint *amicus* to essentially act as counsel for him. The trial judge also noted that he, "needed the adversarial system in order to properly test the evidence, not only from the perspective of the mother, but also from the perspective of the father."

Since the husband's lawyer who had just been let off the record was already familiar with the case, the trial judge decided to appoint her as *amicus* for the husband.

The Court ordered that both *amici* were to be funded by the Attorney General.

The Attorney General of Ontario appealed the trial judge's decision to the Superior Court of Justice, presumably because the government did not want to find itself forced to fund private counsel for family law litigants outside of the Legal Aid regime and the orders for state-funded counsel that are occasionally granted in child protection cases under s. 7 of the *Charter* (see e.g. *Catholic Children's Aid Society of Toronto v. C. (J.R.)* (2015), 73 R.F.L. (7th) 431 (Ont. C.J.)). The Attorney General argued that a trial judge does not have authority to appoint *amicus* to essentially act as counsel for a party.

The Attorney General's first appeal was dismissed in its entirety by Justice Koke, and the initial appeal has already been discussed in an earlier edition of this *Newsletter* (*volume* 2019-27).

The Attorney General appealed Justice Koke's decision to the Ontario Court of Appeal, and this time it was successful. The Court of Appeal started by setting out the following non-exhaustive list of principles and factors that apply when dealing with the appointment of *amicus* in family law cases (forgive the lengthy quote, but this is the crux of the decision):

> 27 First, the assistance of *amicus* must be essential to the adequate discharge of the judicial functions in the case: [*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 ("*CLA*")], at para. 47. The stakes must be high enough to warrant *amicus*. This is a circumstantial determination within the trial judge's discretion.
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> 28 Second, a party has the right to self-represent: *CLA*, at para. 51. However, the trial judge is responsible for ensuring that the trial progresses reasonably. There are situations in which the appointment of *amicus* might be warranted, such as when the self-represented party is ungovernable or contumelious, when the party refuses to participate or disrupts trial proceedings, or when the party is adamant about conducting the case personally but is hopelessly incompetent to do so, risking real injustice: see e.g. *R. v. Imona-Russel*, 2019 ONCA 252, 145 O.R. (3d) 197; *Zomparelli v. Conforti*, 2018 ONSC 610.
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> 29 Third, relatedly, while *amicus* may assist in the presentation of evidence, *amicus* cannot control a party's litigation strategy, and, because *amicus* does not represent a party, the party may not discharge *amicus*: *Imona-Russel*, at para. 67.
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> 30 Fourth, the authority to appoint *amicus* should be used sparingly and with caution, in response to specific and exceptional circumstances: *CLA*, at para. 47. And see *C.C.O. v. J.J.V.*, 2019 ABCA 292, 91 Alta. L.R. (6th) 237, at para. 50. This is in part a recognition of the financial exigencies, which is ultimately a political question under our separation of powers doctrine, as *CLA* noted at paras. 27-31, 83.
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> 31 A trial judge should consider whether a Legal Aid certificate would be available and whether the matter should be adjourned to permit a party to apply for it. A trial judge should also consider whether other resources could be gathered together to suffice. For example, where the interests of children are involved, the judge may request the participation of the Office of the Children's Lawyer under ss. 89(3.1) and 112 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. There are several modalities of participation available including, most recently, Voice of the Child reports. However, the consideration of any such services would need to be expedited to avoid delay, particularly in a case that involves children.
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> 32 Self-represented parties are increasingly routine in family law cases. The system recognizes this fact and does provide some resources. That one or both parties are self-represented is not a sufficient reason to appoint *amicus*, in itself, nor is it sufficient based on the idea that since one party is represented, *amicus* is necessary to level the playing field. As is sometimes noted in criminal cases, a party is entitled to a fair trial, not a perfect trial: *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, at para. 101; *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45.
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> 33 Fifth, the trial judge must consider whether he or she can personally provide sufficient guidance to an unrepresented party in the circumstances of the case to permit a fair and orderly trial without the assistance of *amicus*, even if the party's case would not be presented quite as effectively as it would be by counsel: *Imona-Russel*, at para. 69.

34 It is no longer sufficient for a judge to simply swear a party in and then leave it to the party to explain the case, letting the party flounder and then subside into unhelpful silence. As this court has noted, "it is well-accepted that trial judges have special duties to self-represented litigants, in terms of acquainting them with courtroom procedure and the rules of evidence": *Dujardin v. Dujardin*, 2018 ONCA 597, 423 D.L.R. (4th) 731, at para. 37, repeated in *Gionet v. Pingue*, 2018 ONCA 1040, 22 R.F.L. (8th) 55, at para. 30. The Court added, at para. 31 of *Gionet*: "In ensuring that a self-represented litigant has a fair trial, the trial judge must treat the litigant fairly and attempt to accommodate their unfamiliarity with the trial process, in order to permit them to present their case", citing *Davids v. Davids* (1999), 125 O.A.C. 375, at para. 36. See also *Manitoba (Director of Child and Family Services) v. J.A.*, 2006 MBCA 44, at paras. 19-20.

35 A trial judge requires the necessary evidence on which to base a sound decision and getting the evidence can be difficult when a party is unrepresented, is unfamiliar with the process and the venue, or is tongue-tied for other reasons. Recognizing this reality, a common practice has developed in which trial judges walk a self-represented party through the essential documents, giving the party every opportunity to explain under oath, line by line, his or her pleading, financial statement, and any pertinent documents, and doing the same with respect to the other party's pleading, financial statement, and pertinent documents, requesting the party's responding position and evidence. Once the evidence of a party has been received, then the other party may cross-examine.

36 This active approach on the trial judge's part can only work if the judge explains the purpose and nature of the exercise beforehand, and maintains a calm and impartial temperament throughout. The trial judge should not cross-examine a party. Doing so would cross the line into the adversarial representation of a party, which would give rise to possible bias allegations.

37 Importantly, it is only in rare cases that the assistance provided by the trial judge will be insufficient to ensure trial fairness. Only then might the appointment of *amicus* be considered.

38 Sixth, it will sometimes, though very rarely, be necessary for *amicus* to assume duties approaching the role of counsel to a party in a family case. While the general role of *amicus* is to assist the court, the specific duties of *amicus* may vary. This is a delicate circumstantial question. If such an appointment is to be made and the scope of *amicus*'s duties mirror the duties of traditional counsel, care must be taken to address the issue of privilege, as in *Imona-Russel*, at para. 89.

39 Finally, the order appointing *amicus* must be clear, detailed and precise in specifying the scope of *amicus*'s duties. The activities of *amicus* must be actively monitored by the trial judge to prevent mission creep, so that *amicus* stays well within the defined limits.

40 Ideally the need for *amicus* can be identified and considered at the pre-trial case management conference, but sometimes the need only becomes evident at trial. A case management judge or a trial judge faced with a trial that might require the appointment of *amicus* should prepare an order detailing the expected role and work of *amicus*. *Amicus* could, for example, be asked to lead some evidence, cross-examine a witness, or make submissions on specific issues. The goal should be to use the services of *amicus* only where and to the extent necessary. The order would be a work in progress and would be open to change as circumstances demand, with changes made formally on the record.

Justice Lauwers made a point of noting that he "would not be unduly critical of [the trial judge's] approach, because every trial takes on a life of its own, as this one did". However, he also concluded that if the case had not already been moot (because the trial was already completed with the participation of both *amici*), he would have allowed the appeal because:

1. The trial judge should not have appointed the wife's former lawyer as *amicus*, as, that immediately injected an adversarial element that was inconsistent with the impartial role of *amicus*."

2. The trial judge should not have appointed a second *amicus*, and noted that, "[i]f it would be rare in a family law case to appoint one *amicus*, the circumstances would virtually never justify the appointment of two." There had also been no

basis to also appoint the husband's former lawyer as a second *amicus* since, like the wife's former lawyer, he "could never be seen as neutral because he had previously acted as counsel for one of the parties."

3. The trial judge should not have appointed *amicus* for the husband to properly test the wife's evidence or to level the playing field between the parties, as these were not "legitimate considerations in most private family law cases" when considering whether to appoint *amicus*.

4. The trial judge should have given notice to the Attorney General before he appointed either lawyer as *amicus*.

5. The trial judge should have put a litigation plan in place "to guide and govern the activities of *amicus* throughout the case. the order was made. . . . Going forward, an *amicus* appointment order in a family law case should be as precise and detailed as possible in terms of setting out the parameters of the *amicus*'s role, and should not be as open-ended in its expression or in its operation as the orders in this case."

6. While the legal questions that the Court of Appeal dealt with about the role of *amicus* in family law cases are certainly interesting, in our view the more important question raised by this case is one that was not expressly discussed in any of the reported decisions:

What can we do to make sure this type of thing from happening again?

To start, parties must be forced to do some serious trial planning before they are allowed to schedule a trial date. They must also at least be encouraged to at least *consider* putting in as much of their evidence in chief through Affidavits that can then be subject to cross-examination at trial. Parties should also be forced (absent unforeseen circumstances) to keep to specific time limits for how many hours of court time they will need. For example, in *Fielding v. Fielding*, 2018 CarswellOnt 15895 (S.C.J.), which was a complicated support case:

- The parties were each given a maximum of 35 hours of court time for oral opening and closing statements, their evidence-in-chief, and their cross-examination of the other parties' witnesses (how they chose to use this time was up to them);

- Both parties adduced their evidence-in-chief by Affidavit, and were allowed to supplement their evidence-in-chief when they took the stand (although this time would then come out of his/her 35 hours of court time); and

- The time spent on any mid-trial motions would be deducted from the time of the losing party.

By putting these types of rules in place long before the trial started, the court in *Fielding* was able to ensure that the parties focused on the most important issues and did not call unnecessary or superfluous witnesses, and that they were generally as efficient as possible. Had these rules not been agreed upon in advance, the trial could have easily taken 20 or more days of court time instead of the less than 10 days that it ultimately took to complete.

We also recommend reviewing the Advocates' Society's paper entitled "Best Practices for Civil Trials", which was published in 2015, is available online [1] and has a number of important suggestions for how to ensure that you are conducting a trial as efficiently and effectively as possible.

Resisting a Divorce

Gill v. Gill, 2019 CarswellBC 3076 (B.C. S.C.) - Ball, J.

In this case, the husband brought a claim to sever the divorce from the corollary relief and have the divorce granted in advance of a trial. The wife argued that the divorce would prejudice her claims in India and should not be granted. The parties had been separated for either 6 or 13 years - depending on whose version of events was to be believed. There were no children. The wife had made claims in both India and British Columbia regarding the divorce.

The wife tried to rely on a letter from her lawyer in India purporting to attach a court decision, make statements about Indian law, and set out that the wife's claims to a return of the dowry and other relief would be prejudiced in India. The husband, on the other hand, had an expert on Indian law provide an Affidavit and an expert report to the effect that the wife's claims would not be prejudiced.

The Court set out that under either party's version of events, they had been separated for more than one year. The letter from the lawyer in India did not meet the requirements for an Expert Report, or even for affidavit evidence. It was not in the form of an affidavit, it was not sworn, and its paragraphs were not numbered. It was not for the Court to grant the wife an adjournment because *she* had failed to put forward the proper evidence. As there was no evidence before the Court that the wife would suffer any prejudice from the divorce, it was granted. Had the wife marshalled the necessary evidence, a court has jurisdiction to decline a divorce application where there is prejudice or risk of prejudice to the opposing spouse that is not outweighed by compelling or urgent reasons on the part of the applicant spouse: *Mann v. Mann*, 2013 CarswellBC 2834 (B.C. S.C.).

Health Care Premiums and Child Support

Neilly v. Neilly, 2019 CarswellAlta 2712 (Alta. C.A.) - Slatter, Bielby, and Schutz, JJ.A.

Technically speaking, this concurring opinion from Justice Slatter is *obiter* (the Husband did not cross-appeal) - but it does provide an important reminder about health care premiums in the context of self-employment and imputing income for support purposes.

The Husband was employed by his wholly-owned corporation. In calculating the Husband's income for support purposes, the chambers judge added back the amount the company paid for the Husband's Blue Cross health care premiums as an employee benefit.

In agreeing that the Wife's appeal should be dismissed, Justice Slatter took the time to comment on this specific add-back to the Husband's income.

The chambers judge reasoned that if an arm's length employer paid an employee's health care premiums, "the premiums would be a taxable benefit and included in his gross employment income on his T4." Justice Slatter noted that this was not accurate. Rather, he noted the proper tax situation is:

> (a) In an employer-employee relationship, if the employer pays health care benefits that is a non-taxable employment benefit: *Income Tax Act*, RSC, 1985, c.1, s.6(1)(a)(i);
>
> (b) If an arm's length employer pays health care premiums, that is generally a deductible business expense for corporate tax purposes.

Therefore, there was no adjustment required to the Husband's income on account of the health care premiums: they were a legitimate business expense and a non-taxable employment benefit. Had he been paying child support based on employment with an arm's length employer, these amounts would not be included in his Line 150 income - and there was no principled reason why a payor should pay more support simply because he or she is self-employed.

Recipients will often suggest that *any* personal benefit (automobile, meals, entertainment, insurance, etc.) from a wholly-owned corporation should be added back. Justice Slatter kindly reminds us that this is not always the case.

Footnotes

1 https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society-Best_Practices_for_Civil_Trials-June_2015.pdf

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