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

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Family Law News: Ottawa businessman tells incredulous judge he burned $1M cash to keep it from ex-wife.

As reported in the Ottawa Citizen on February 4, 2020:

Some people really, really (really) do not want to have to divide property or pay child or spousal support.

A 55-year-old Ottawa businessman, Bruce McConville, withdrew in excess of $1 million and claims that he burnt the cash in two bonfires, saying that he would rather burn his own money than give it to his ex-wife. At the same time, McConville has long defied a court order requiring him to provide disclosure. And he has further defied an Order to pay $300,000 into Court as security.

The "Defence of Conflagration" arose during a contempt motion in February before Justice Phillips.

McConville told Justice Phillips he withdrew a total of $1,050,000 through as many as 25 withdrawals from six bank accounts - and although he had the receipts to prove the withdrawals - he no longer had the cash. He allegedly burnt it. All of it. Out of frustration with the divorce proceedings. However, Mr. McConville had not recorded himself burning the money and he had no independent evidence to prove what he claimed he had done.

Not surprisingly, Justice Phillips did not believe Mr. McConville, and found that it was "crystal clear" that Mr. McConville "has very clearly and deliberately set out to thwart the court and the proper administration of justice."

Justice Phillips has allowed Mr. McConville 30 days in a burnt orange jumpsuit to consider his next move.

As Mr. McConville was escorted from the court in silver bracelets, Justice Phillips added, "You are making a mockery of this court, and its process, something I will not allow . . . You are conducting yourself with intent to deliberately and wilfully frustrate the proper administration of justice. More particularly, I find what you have done to be morally reprehensible because what you claim to have done wilfully and directly undermines the interests of your children."

His Honour also imposed a fine of **$2,000 per day** to be paid directly to Mr. McConville's ex-wife until he told the Court what he did with the money.

As we have said, and as we will undoubtedly say again: You can't make this stuff up.

Recognizing a Foreign Divorce - From Russia (Without Love or Notice)

Novikova v. Lyzo (2019), 31 R.F.L. (8th) 140 (Ont. C.A.) - Lauwers, van Rensburg, and Roberts JJ.A.

In this case, the Ontario Court of Appeal considered the validity of a foreign divorce. Foreign recognition issues continue to arise in some provinces on account of the "*Rothgeisser* Rule" as it is known in Ontario [*Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.)].

In *Rothgeisser* the Ontario Court of Appeal held that, a court in Canada can only award Corollary Relief that is, in fact, *corollary* to a Canadian divorce, and that absent a Canadian divorce, there can be no order for Corollary Relief under the *Divorce Act*. This is because of the division of powers in the Constitution. Under the Constitution, the Federal Government may legislate over "marriage and divorce" [s. 91(26)] and the provinces can legislate over "property and civil rights in the province" [s. 92(13)]. In *Papp v. Papp*, 1969 CarswellOnt 963 (Ont. C.A.) the Ontario Court of Appeal held that the Federal government was only competent to legislate in the area of support and custody (what otherwise seem to be property and civil rights in the province" if such laws were corollary to the granting of a divorce. It is a constitutional imperative. Then, in *Rothgeisser*, the Ontario Court of Appeal clarified that it must be corollary to a *Canadian* divorce.

Other provinces are similarly situated. In B.C., it might be called the "*Virani* Rule" [*V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 59 (B.C. C.A.)]. In New Brunswick: the "Rule in *Leonard v. Booker*" [*Leonard v. Booker* (2007), 44 R.F.L. (6th) 237 (N.B. C.A.)]. Or the "*Harman* Rule" in Alberta [*Harman v. Harman* (2009), 75 R.F.L. (6th) 50 (Alta. C.A.)]. You get the idea. [Interestingly, the courts in La Belle Province did not feel bound by the same constitutional imperative: *M. (G.) c. F. (M.A.)*, 2003 CarswellQue 1969 (C.A. Que.)].

The problem has been particularly acute in Ontario because, in Ontario, a "former spouse" (i.e. after divorce) is not a "spouse" for the purpose of claiming spousal support under the Ontario *Family Law Act*. This was historically a problem in B.C., but the new B.C. *Family Law Act*, SBC 2011, c. 25 (well, not so new anymore) applies to "former spouses." In Nova Scotia (and in B.C. with respect to claiming Corollary Relief under the *Divorce Act*), the courts have determined that where a recognized foreign divorce is silent or defers jurisdiction on a matter of corollary relief, a former spouse ordinarily resident in the province can apply to a Superior court for, or to vary, a Corollary Relief judgment. And, until a foreign divorce is final, a court in the province has jurisdiction to make an interim order under the *Divorce Act*. [See *Quigley v. Willmore*, 2008 CarswellNS 808 (N.S. S.C.) and *S. (R.N.) v. S. (K.)* (2013), 42 R.F.L. (7th) 35 (B.C. C.A.)].

Therefore, spouses that are subject to a foreign divorce cannot claim support in Ontario under the *Divorce Act* or under the *Family Law Act* - a terribly unfair situation and the reason some spouses run to foreign jurisdictions to get divorced. This really must change. In any case, that is our (longer than anticipated - forgive the indulgence) explanation as to why the issue of recognition of foreign divorce matters.

Although the federal government could have taken a stab at fixing this issue in the upcoming changes to the *Divorce Act*, they are of the view that, on account of the Constitutional issue, the "fix" must come from the provinces in allowing "former spouses" to claim spousal support. They may be right.

In *Novikova v. Lyzo*, the parties were Russian citizens, but had moved to Canada in 2013 and had become permanent residents. The parties separated in 2016, and the husband returned to Russia in February of 2016 where he commenced divorce proceedings. The wife remained in Canada and was not told about the Russian divorce proceedings. Furthermore, the divorce application had been sent to her official address in Russia, that of her parents. The wife had become aware of the divorce prior to the order being granted by the Russian court, but she did not have the chance to review the documents and did not know that she would be unable to obtain spousal support in Canada once the divorce in Russia had been granted.

On June 8, 2016, the divorce was granted in Russia, but the wife did not receive a copy of the divorce order until the appeal period had passed.

The wife commenced a claim in the Ontario Superior Court of Justice in October of 2016, claiming a divorce, equalization of property, and spousal support. The husband brought a motion for summary judgment, seeking to have the Russian divorce recognized and to have the wife's claim for spousal support dismissed (this is the gamesmanship encouraged by *Rothgeisser*), but his motion was dismissed by Justice Van Melle. Her Honour found in favour of the wife and determined that the Russian divorce was invalid due to the lack of notice to the wife.

The husband appealed, arguing that the motion judge had erred in law by failing to consider whether the parties had a "real and substantial connection" to Russia. The husband argued that *if* such a connection existed, *and* the Russian divorce was obtained in accordance with Russian law, then Ontario had no choice but to recognize the divorce (and to end the wife's claim for spousal support). The motion judge, argued the husband, had not considered the real and substantial connection to Russia, as she ended her analysis once she determined that there had been no notice.

The Court of Appeal upheld Justice Van Melle's decision.

Section 22 of the *Divorce Act* sets out the law governing the recognition of foreign divorces:

> **22 (1)** A divorce granted, on or after the coming into force of this Act, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so shall be recognized for all purposes of determining the marital status in Canada of any person, if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce.
>
> **Idem**
>
> **(2)** A divorce granted, after July 1, 1968, pursuant to a law of a country or subdivision of a country other than Canada by a tribunal or other authority having jurisdiction to do so, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for all purposes of determining the marital status in Canada of any person.
>
> **Other recognition rules preserved**
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> **(3)** Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act.

The Court of Appeal determined that section 22(3) of the *Divorce Act* expressly recognizes the following common law principles:

> Canadian courts will recognize a foreign divorce:
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> 1. Where jurisdiction was assumed on the basis of the domicile of the spouses;
>
> 2. Where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties;
>
> 3. Where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings;
>
> 4. Where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada;
>
> 5. Where the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted; or

> 6. Where the foreign divorce is recognized in another jurisdiction with which the petitioner or respondent has a real and substantial connection.

However, in addition to these common law principles, a court may *refuse* to recognize a foreign divorce that would otherwise be valid, on the grounds of fraud, denial of natural justice (including lack of notice), or public policy.

In the case at bar, the motion judge did not need to deal with the issue of whether or not the parties had a real and substantial connection to Russia or whether the Russian divorce was valid in Russia and in compliance with Russia law. The motion judge appropriately focused on the "lack of notice" to the wife, which was a denial of natural justice. This was the reason for the refusal to recognize the Russian divorce. Once this was established by the motion judge, there was no need for her to go any further.

Careful Drafting - There But for the Grace of God . . .

Lotimer v. Johnston, 2019 CarswellBC 3591 (B.C. S.C.) - Gomery J.

Lotimer v. Johnston provides another example of a Family Court rejecting an overly technical interpretation of a Separation Agreement to give effect to the parties' intentions, and to avoid an inequitable result.

During the marriage, the wife received an inheritance from her mother that she shared with the husband. Therefore, when the parties separated in 2007, they agreed it would be fair that the wife receive 25 percent of the inheritance that the husband expected that he would eventually receive from his mother. The parties' Separation Agreement included the following terms:

> 40. Ronald, in consideration of Holley having shared an inheritance she received from her mother with Ronald, agrees that he will share the inheritance that he receives from his mother with Holley.
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> 41. Ronald agrees that he will forthwith upon receipt of any estate documents setting out his entitlement to an inheritance, provide Holley with a copy of the same.
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> 42. Ronald agrees that he will forthwith upon receipt of any inheritance provide Holley with Twenty-Five (25%) of the amount received.

The wife likely believed that she would receive a relatively significant amount of money when the husband's mother died, because the husband's mother had a net worth of about $1 million, she lived modestly, and she was on good terms with all three of her children.

The problem, however, was that the Separation Agreement did not address what would happen if the husband's mother wrote the husband out of her will, but still gave him what he would have otherwise received as an inheritance as an *inter vivos* gift. Of course, that is exactly what happened.

When the husband's mother learned about the Separation Agreement, she changed her will to provide that instead of sharing the residue of her estate equally with his two siblings, the husband would only receive $10,000.

The husband's mother had every right to change her will. However, the evidence also clearly showed that she did not actually disinherit the husband, because after she changed her will she started making significant gifts to him. In fact, by the time the husband's mother died, she had given him a total of $330,000.

The husband relied on the dictionary definition of "inheritance" to argue that an inheritance could only be something that was received on death, and that "an inheritance stands in contradistinction to an '*inter vivos gift*' made while the giver is alive and not in expectation of death[.]"

Justice Gomery was having none of this. Based on the evidence, it was clear that the husband was trying to avoid paying the wife money the parties had clearly intended he would pay her, and the Court was not prepared to accept an overly strict interpretation of the term "inheritance" that would allow the husband to avoid his obligations:

> [40] In my view, "inheritance" a word that encompasses a range of meanings. I accept that, in ordinary usage, "inheritance" connotes a gift received by a person in his or her capacity as an heir, but I do not think that the concept of an inheritance requires that the giver has died. Such gifts are often received on death, but it would not be strange or unusual for a giver and the recipient to view a transfer in the giver's lifetime that is intended as a substitute for a gift effective on death as an "inheritance". Such gifts are not uncommon. They may be made to minimize anticipated taxes, avoid the expense of probating a will, or for other reasons. Often they are part of an exercise in estate planning in which the will is only one means by which assets are conveyed from the giver to recipients on or in anticipation of death.
>
> . . .
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> [43] By strictly limiting an "inheritance" under ss. 40 to 42 to gifts effective on death, Mr. Johnston's argument would defeat the plain purpose of these provisions, by permitting Mr. Johnston to avoid sharing with Ms. Lotimer any gifts that were intended by May Johnston to serve as his inheritance, in place of a testamentary bequest.
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> . . .
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> [45] A broader understanding of "inheritance" as encompassing gifts made by May Johnston in her lifetime that she intended to substitute for a gift effective on death is consistent with the language used by the parties in light of the surrounding circumstances. It gives effect to the purpose of these provisions. Accordingly, construing ss. 40 to 42 objectively, in light of the surrounding circumstances, and having regard to their purpose, I find that Mr. Johnston's obligation to pay Ms. Lotimer is not only triggered by gifts effective upon May Johnston's death, which is to say, gifts under her will. In principle, the obligation is triggered by gifts made by May Johnston to Mr. Johnston during her lifetime, if those gifts were intended by May Johnston to stand in the place of a testamentary bequest to her son.

Based on the evidence before the court, Justice Gomery's interpretation of the Separation Agreement was wholly consistent with the Supreme Court of Canada's decision in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.), where it noted at paragraph 47 that:

> • " . . . the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine 'the intent of the parties and the scope of their understanding'[.]"
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> • " . . . a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."

Justice Gomery then went on to determine that, in addition to the $10,000 that the husband had received from his mother's estate under her will, $300,000 of the $330,000 that the husband had received during his mother's lifetime qualified as an "inheritance" within the meaning of the Separation Agreement. As a result, his Honour determined that the husband owed the wife $77,500 for her 25 percent share of his inheritance.

This was a very fortunate result for the wife. While a court can imply obvious terms where it is necessary to give efficacy to an agreement and to prevent one party from undermining the very rationale for the agreement, it generally will not rewrite a contract to reflect changed circumstances or to effect more equitable results: *Murray v. Murray* (2005), 17 R.F.L. (6th) 248 (Ont. C.A.); *Adamson v. Steed*, 2008 CarswellOnt 2641 (Ont. C.A.); *Olympic Industries Inc. v. McNeill*, 1993 CarswellBC 361 (B.C. C.A.). That is, Justice Gomery could have just as easily concluded that the agreement said what it said.

The lesson here is that parties must be careful to say what they mean, and mean what they say. With the benefit of hindsight, it is clear that the Separation Agreement in Lotimer should have provided that when the husband's mother died, the wife would receive a payment from the husband of 25 percent of all gifts and inheritances that the husband received from his mother and her estate after the Separation Agreement was signed.

Or, even better, instead of having the agreement provide that the wife would receive 25 percent of an unknown amount and at an unknown date in the future:

- The agreement could have provided that the wife would receive a specific amount of money when the husband's mother died.

- The agreement could have provided that when the husband's mother died, the wife would receive the greater of: (a) $X; or (b) 25 percent of all gifts and inheritances that the husband received from his mother and her estate after the Separation Agreement was signed, but only up to a maximum of $Y.

These types of provisions would have given both parties additional certainty and finality by: (a) reducing the risk for the husband that wife would receive a windfall if his mother's estate turned out to be materially larger than he thought it was going to be when the Separation Agreement was signed; and (b) reducing the risk to the wife by guaranteeing that she would receive at least some specified amount of money no matter what happened in the future.

Ultimately, however, this is just another example of how careful we must be when drafting agreements. There but for the grace of god, go I.

Unsuccessful Claim to Set Aside Global Settlement for Lack of Disclosure and Unilateral Mistake

Boechler v. Boechler, 2019 CarswellSask 594 (Sask. C.A.) - Richards C.J.S., and Caldwell and Tholl JJ.A.

In *Boechler*, the wife wanted to set aside a separation agreement that the parties had negotiated on the eve of trial. The issue came down to the treatment and representation of a shareholder loan from one of the husband's companies to the other. The husband had produced all of the relevant disclosure regarding this issue, but the different corporate year-ends and a change in how the loan was shown from one year to the next led to confusion on the wife's part. The day after the matter was settled, the wife claimed that the husband had materially misrepresented his financial circumstances to the extent of $310,000 and that the Separation Agreement should be set aside.

Unlike, say, British Columbia and Ontario, the Saskatchewan *Family Property Act*,[1] basis of a lack of disclosure (nor for that matter, does the Manitoba *Family Property Act*). However, the Court did determine that a court in Saskatchewan has the authority to set aside an "inter-spousal contract" (as they are called in Saskatchewan) if it is unconscionable or grossly unfair. Such a situation might arise from a failure to adequately disclose relevant information.

The Court of Appeal considered the duty to disclose when negotiating family law property settlements. Each party has a duty to provide full and honest disclosure of all relevant information to the other party. The purpose of disclosure is to ensure that the family property is distributed in a manner that is free from informational asymmetry and psychological exploitation.

The Court of Appeal set out that the husband had a duty to provide financial disclosure that was full and forthright so that the wife could genuinely decide for herself whether the bargain was fair. A contract that is negotiated with full and fair disclosure and without exploitative tactics will likely survive judicial scrutiny.

The Court found that while there may have been a failure on the wife's part to understand the disclosure regarding the husband's companies (and especially the shareholder loans), this did not equate to a failure to disclose. The husband provided the information and, in fact, the wife's expert had flagged the issue during the negotiations and the wife specifically told him to not follow up with it. Not only did the wife have all of the appropriate information, but she used the documents that had been disclosed to her to argue that she had been misled. She simply realized the difference after the separation agreement had been signed.

The husband did not have a duty to point out to the wife that she may have undervalued an asset or to provide advice on how to value an asset. The husband had a duty to provide full and frank disclosure. And he did. If the wife was confused, the onus was on *her* to clarify her understanding.

The wife's case to set aside the agreement was even more difficult because the agreement was a "global settlement" wherein the precise value of the company or the associated loans were not specific factors.

The wife also argued that the contract should be set aside on the basis of unilateral mistake. Unilateral mistake occurs when one party *knows* the other has made a mistake but does not correct it so as to take advantage of the mistaken party. Again, the Court rejected this argument once more because the agreement was a global settlement. In the end, the parties did not agree on the value of the corporate assets (or a number of other assets), but agreed to a compromise total payment that they were each willing to accept. Under the circumstances, the Court did not think it just to set aside the contract.

An agreement usually involves compromise. One party cannot later try to isolate specific terms that s/he believes, in retrospect, to be a problem: *Sawiak v. Wybrew* (2011), 4 R.F.L. (7th) 382 (Ont. S.C.J.). Furthermore, when a court reviews an agreement, especially in the context of a global settlement, it must review the *entire* agreement and not only some isolated part of it; a court cannot make adjustments to a single number. The Agreement either stands or it does not: *Zavarella v. Zavarella* (2013), 40 R.F.L. (7th) 352 (Ont. C.A.); *Giffin v. Giffin* (2018), 12 R.F.L. (8th) 360 (Ont. S.C.J.); and *Grimes v. Grimes* (2012), 25 R.F.L. (7th) 295 (N.L. C.A.).

How to Adduce New Evidence While Decision Is Under Reserve - (Very Carefully)

Rana v. Rana, 2019 CarswellOnt 19949 (Ont. S.C.J.) - Le May J.

This high conflict parenting case considers when a court can receive new evidence after a motion has been argued, but before the decision has been released.

About a week after the parties argued a highly contested interim access motion, and while the decision was still under reserve, the wife's lawyer wrote directly to Justice Le May (without the husband's lawyer's consent) to advise that she wanted to file further evidence.

The bar for introducing new evidence while a decision is under reserve is *extremely* high and, as discussed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 CarswellOnt 3357 (S.C.C.), requires the moving party to show that: (a) the evidence would have affected the outcome of the hearing; and (b) the evidence could not have been discovered prior to the hearing.

While noting the high threshold, Justice Le May also considered that, when dealing with an interim motion that is subject to later possible variation, "it is often more efficient to simply consider additional information rather than deciding to release a decision and make a party adduce the additional information at either a new hearing or at the trial of the matter." While this is certainly a worthy consideration, courts must be careful to not allow that criterion to swamp the general near-prohibition against continuing the motion after it has already been argued. If parties are allowed to continuously adduce further evidence (to try to make up for evidentiary deficiencies at the time of argument), motions will never end.

In the end, Justice Le May allowed the wife to file notes from the professionals who were supervising the husband's access about events that took place after the motion was argued, because the information was important enough to potentially affect the outcome of the motion and could not have been produced earlier (as it did not even exist when the motion was argued). In other words, the evidence met the test. His Honour clearly also wanted to avoid the possibility that one of the parties would have moved to vary his decision after it was released based on the new evidence.

We also want to briefly comment on the wife's lawyer's decision to write to Justice Le May without the consent of the husband's lawyer. This was a major "no-no", and the wife's lawyer is very lucky there were no consequences.

Although his Honour did not specifically mention this issue in his decision, counsel should always remember that, as Justice Matheson noted in *Ward v. Ward* (2009), 85 R.F.L. (6th) 308 (Ont. S.C.J.), "[t]he cases are quite clear that counsel should not be in communication with a judge who has not rendered his or her decision, without the express consent of the other parties."

The consequences of contacting a judge without the other side's consent can be quite severe. In *Ward*, for example, the husband's lawyer's decision to write to the judge without consent while the decision was under reserve almost caused a mistrial and ultimately resulted in the husband having to pay the wife $15,000 in costs: *Ward v. Ward* (2010), 85 R.F.L. (6th) 315 (Ont. S.C.J.). See also *Timleck v. Beltrano*, 2014 CarswellOnt 19239 (C.A.).

This issue is specifically addressed in Rule 1.09 of the Ontario *Rules of Civil Procedure*, which provides as follows:

> When a proceeding is pending before the court, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge, master or case management master out of court, directly or indirectly, unless,
>
> (a) all the parties consent, in advance, to the out-of-court communication; or
>
> (b) the court directs otherwise.

In a situation where you believe that it is necessary to contact the judge while a decision is under reserve, you must first ask the other side to consent. If consent is not forthcoming, the best course of action is to bring a formal motion to deal with the matter instead of unilaterally writing to the court.

Footnotes

1 SS. 1997, c. F-6.3.