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Compensatory basis for spousal support – a review and analysis of post-pandemic case law

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Overview

To be successful in a claim for spousal support, a lawyer is required to have a clear understanding of the various legal principles for the basis for support and also to know how to apply them.

Sometimes, it can get confusing, especially due to the many principles of compensatory support and non-compensatory support along with the evidence required to prove these claims. Moreover, there is a difference between how courts address the issues at trial versus at a motion. There is also a distinction between original support claims and variations.

This article does not address many of the above differences and instead narrows the focus to only the compensatory basis for support with the goal of adding clarity and an increased understanding.

Introduction

Determining the compensatory basis for spousal support is a fundamental step of the modern support calculation process – even Covid-19 was not able to shake that tradition.

Courts have continued to first determine whether there are any compensatory factors in the relationship in question, and if so, to what extent. Only then are non-compensatory factors considered (i.e. needs and means) followed by the DivorceMate SSAG calculations.

But compensatory factors have been discussed ad nauseum for over 30 years since *Moge v. Moge* and if so, is there anything legally new under the sun, as King Solomon would have asked if he was a family lawyer?

This article attempts to answer that question by reviewing how cases in 2022 and 2023 continue to approach compensatory support on the whole.

In short, courts throughout Canada seem to follow a consistent and predictable path before performing *SSAG* calculations. That path, at least vis-à-vis compensatory support and with a few exceptions, is as follows:

1. Review the applicable sections in the *Divorce A*ct;
2. Review various sections in *Moge* and *Bracklow*;
3. Mention applicable paragraphs in a number of often cited cases including, *Miglin v. Miglin, Thompson v. Thompson, Chutter v. Chutter, Cassidy v. McNeil,* and *Zacharias v. Zacharias*, to name a few; and,
4. Refer to the *Spousal Support Advisory Guidelines Revised User's Guide (RUG)* that lists compensatory factors to consider.

The following is a deeper dive into the cases themselves.

Recent cases addressing compensatory support

Although the focus of this article is mainly cases in 2022, there were a few cases in 2023 that were interesting to summarize, namely, *Mullin v. Sherlock* (2023 ONSC 3744) and *R.L. v. M.F.* (2023 ONSC 2885).

Mullin v. Sherlock

In *Mullin v. Sherlock* (2023 ONSC 3744), the parties cohabited from the year 2000 until 2012, got married in September 2012 and finally separated in June 2013. They had no children.

The wife claimed support on both compensatory and non-compensatory basis.

Along with the major issue of unjust enrichment, *Mullin* provided a nice reminder to refer back to the *SSAGs* for the basis of compensatory support arguments.

With respect to compensatory factors vis-à-vis entitlement, Justice Bloom referred to pages 5-6 of the *SSAGs*: The Revised User's Guide (RUG) of April 2016:

> (a) The principles of entitlement
>
> • Compensatory claims are based either on the recipient's economic loss or disadvantage as a result of the roles adopted during the marriage or on the recipient's conferral of an economic benefit on the payor without adequate compensation.
>
> Common markers of compensatory claims include: being home with children full-time or part-time, being a "secondary earner", having primary care of children after separation, moving for the payor's career, supporting the payor's education or training; and working primarily in a family business. Some lawyers and judges erroneously think that any long marriage gives rise to compensatory support, but the Ontario Court of Appeal decision in *Fisher*,

> above, makes clear that this is incorrect. Compensatory support is to be distinguished from non-compensatory support …, which is based upon economic interdependency and loss of the marital standard of living.
>
> (*Mullin v. Sherlock*, 2023 ONSC 3744 at para. 61)

To support the finding of compensatory support, Justice Bloom indicated that the wife was paid for work at the husband's business while also giving up her career in architecture to assist in the parties' joint family venture.

However, the court outlined the fuller basis for compensatory support in the other part of the decision that established the basis for the wife's joint family venture claim. The relevant paragraphs are summarized as follows:

> 123 I find that the Applicant conferred on the Respondent a benefit. She worked constantly in the GS Medical business commencing in January of 2001 until the end of 2012. In 2012 she still did special projects for the business. She agreed with the Respondent to a salary reduction so that the business could hire more employees. From September 9, 2011 until December of 2011 she worked full time and received no salary.
>
> 124 Additionally, the Applicant ran the household of the parties so that the Respondent could devote himself to the business. She cooked; was responsible for the maintenance of their home; took care of their dogs; planned their many sailing-related trips; and prepared their sailboats for competition.
>
> 125 The Applicant suffered a deprivation corresponding to the benefit conferred on the Respondent. She gave up her architectural career once she commenced working full time at GS Medical. She provided underpaid and unpaid labour to GS Medical; and performed unpaid domestic services for the parties.
>
> 126 There was no juristic reason for the benefit conferred on the Respondent and the deprivation suffered by the Applicant.
>
> 127 Moreover, I find that the unjust enrichment of the Respondent by the Applicant took place in the context of a joint family venture. The parties acted in accordance with their agreement that they would dedicate their efforts to building the GS Medical business, which would finance their retirement by its sale or operation. The Applicant sacrificed her career in architecture and dedicated approximately a decade to realizing the goals she and the Respondent shared. (*Mullin v. Sherlock*, 2023 ONSC 3744 at paras. 123-127)

Mullin v. Sherlock also provided an example of a case where the basis for one legal issue, i.e., compensatory support, overlap with the basis for another issue, i.e. a joint family venture.

Ultimately, Justice Bloom ordered 10 years of support to be paid in a lump sum amount of $365,624, net of tax.

R.L. v. M.F.

In *R.L. v. M.F.* (2023 ONSC 2885), Justice Kurz dove into the spousal support universe and provided a very good summary of the basis for support, entitlement and compensatory factors.

Justice Kurz started with *Bracklow*, continued with *Thompson v. Thompson* and *Shaw v. Shaw*, and also sprinkled in *Caratun v. Caratun* (ONCA) and *Spurgeon v. Spurgeon* (Ont. Div. Ct.).

To top of the legal foundation, Kurz J. then quoted Professor Thompson's 2020 CFLQ article that listed examples of circumstances ("practical markers") that lead to an award of compensatory support:

- spouse stays home full-time or part-time to care for children
- secondary earner who takes a less demanding job to assume greater responsibility for childcare
- spouse relocates to further career or employment of the other spouse
- spouse earns income to support the other spouse who is completing education, training or other qualifications to improve income
- spouse primarily responsible for childcare after separation
- spouse works in family business, acquiring skills specific to the business and no broader credentials for employment elsewhere. (*R.L. v. M.F.* 2023 ONSC 2885 at para. 262)

For a thorough application of the law to the facts of that case, please refer to paragraphs 264 - 271.

Entitlement

When reviewing solely the 2022 cases on spousal support in Canada, it was interesting to see how compensatory spousal support cases stayed consistent over the years and how Canadian cases repeatedly view the compensatory factors on the whole.

From the 2022 case law review, there emerged a number of basic principles about entitlement in general that have continued to be repeated:

- When dealing with entitlement to compensatory and non-compensatory spousal support, the starting point is the *Divorce Act*, s. 15.2(4) (*C.K. v. S.F.*, 2022 NLSC 117 at para. 136). Alternatively, provincial legislation comes into play when the *Divorce Act* does not have jurisdiction.
- The leading authorities regarding spousal support are still *Moge v. Moge*, *Bracklow v. Bracklow* and *Miglin v. Miglin* (*C.K. v. S.F.*, 2022 NLSC 117 at para. 136).
- Entitlement for spousal support in *Moge* is based on compensatory ground and *Bracklow* stands for the principle that "need alone may not be enough" (*N. v. D.*, 2022 ABKB 860 at para. 115).
- Entitlement may exist as a result of one, or a combination, of the three grounds for entitlement, namely, compensatory, non-compensatory, and contractual (*Hooge v. Hooge*, 2022 ABKB 824 at para. 107).
- Compensatory spousal support should be awarded to address the economic disadvantage that a spouse suffers as a result of the role they adopted in the marriage. (*C.K. v. S.F.*, 2022 NLSC 117 at para. 138)
- It is only after the claimant proves entitlement that the issues of quantum and duration of spousal support arise (*Babijowski v. Wolanicki*, 2022 BCSC 2126 at para. 93).

The following are a number of cases that add more useful principles and concepts to the compensatory support analysis.

In *Goldman v. Goldman*, Justice Price reviewed the *Divorce Act* and outlined how it relates to the two types of support. Specifically, the spousal support objectives set out in s. 15.2(6) (a) and (b) of the *Divorce Act* primarily relate to compensatory support, while those set out in s.15.2(6) (c) and (d) primarily relate to non-compensatory support.

Justice Price referred to the often-cited decision of *Thompson v. Thompson* where Justice Chappel summarized the factors and objectives of spousal support as set out in the *Divorce Act* and where she also reviewed the models on which an entitlement to spousal support has been held to exist. (*Goldman v. Goldman*, 2022 ONSC 4585 at paras. 60, 61 & 77)

Justice Chozik in *Jasiobedzki v. Jasiobedzka* reminded us that it is critical for the court to determine all grounds for entitlement because the basis for entitlement may significantly impact quantum and duration of spousal support (*Jasiobedzki v. Jasiobedzka*, 2022 ONSC 1854 at para. 30).

Justice Caldwell in *Cartmell v. Cartmell* emphasized the requirement to consider all the factors when determining entitlement by referring to the 2015 Court of Appeal decision of *Zacharias v. Zacharias*. Justice Caldwell wrote as follows:

> The Court of Appeal in *Zacharias v. Zacharias*, 2015 BCCA 376 (B.C. C.A.) also made clear that where there is an entitlement to compensatory support, " . . . courts have not demanded a meticulous accounting of the detriment suffered by one spouse or the benefit received by the other" (at para. 51). Where the marriage was a long one, the marital standard of living is often a reasonable measure of appropriate compensation, but it will not always be determinative; all of the factors set out in s. 17(7) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) must be considered: paras. 51 — 55. (*Cartmell v. Cartmell*, 2022 BCSC 314 at para. 13)

With respect to the interplay between compensatory and non-compensatory factors, Justice MacDonald in *D.Z. v. M.Z.* narrowed the issue and wrote that many support claims involve aspects of both compensatory and non-compensatory principles. Also, a court does not need to decide on one basis for support to the exclusion of the other.

Rather, (quoting *Bracklow*), a court is to apply the relevant factors and strike the balance that best achieves justice in the particular case and to keep in mind the overarching principle of "the doctrine of equitable sharing of the economic consequences of the marriage." (*D.Z. v. M.Z.*, 2022 BCSC 706 at paras. 93 – 94)

In *Cartmell v. Cartmell*, Caldwell J. also held that where spousal support is ordered on a combination of compensatory and non-compensatory grounds, entitlement continues as long as either ground remains applicable. Justice Caldwell referred to the 2019 decision of *M.H.W. v. D.K.W.* to support his finding:

> When a spousal support order is made on the basis of both compensatory and non-compensatory considerations, it is an error to treat the two bases for entitlement "as if they were separate heads of damages"…
>
> . . . It must be recognized, however, that while there may be more than one basis for a spouse's entitlement to support, the award is a single and indivisible one. It is not, as the chambers judge implied, made up of a "compensatory" component and a separate "non-compensatory" component. Rather, the whole of the award is available to address both compensatory and non-compensatory goals. (*Cartmell v. Cartmell*, 2022 BCSC 314 at paras. 9 – 11)

A focus on the compensatory basis of support

With the above general overview in mind, now we can continue narrowing our focus to the compensatory basis of support and how cases in 2022 viewed the concept.

Chutter v. Chutter still remains an often-quoted case and was again referred to in *MFSJ862 v. FFSJ862* when defining compensatory support.

> …compensatory support provides redress for economic disadvantage arising from the marriage (such as diminished earning capacity and sacrificed career opportunities to take on child care responsibilities) or the conferral of an economic advantage upon the other spouse (such as contributions to enhanced career development). (*MFSJ862 v. FFSJ862*, 2022 BCSC 1259 at para. 208 referring to Justice Rowles in *Chutter v. Chutter*)

In *B.K.W. v. S.J.H*, Justice Morellato referred to the heavily cited 2015 British Columbia court of appeal decision of *Zacharias v. Zacharias*:

> Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. … Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage (see *Moge v. Moge*, [1992] 3 S.C.R. 813 at 858-66). (*B.K.W. v. S.J.H.,* 2022 BCSC 1445 at para. 45)

In addition to the traditional list of compensatory factors as listed above, courts continue to look for nuanced details of the relationship with respect to the compensatory assessment. This step is in line with the reality that relationships are unique and evolving. It should come as no surprise then that the basis of compensatory support also needs to be examined anew beyond the stereotypical "spouse stays at home to take care of the children" factors.

For example, in *Hooge v. Hooge*, Rothwell J. found that notwithstanding that the wife earned her PhD during the marriage and was largely supported by the husband, she established an entitlement to compensatory support due to being economically disadvantaged by the marriage. The reasons for this finding were that

- the wife was largely responsible for childcare from 2008 to 2015 while she was pursuing graduate studies and she likely would have completed her studies more quickly if she was not responsible for childcare during this period;

- the husband was gone from home working for extended periods of time during the 2008 to 2015 period and was able to focus on his career;
- the wife at times was the equivalent to a single parent when the husband was away for work; and
- the wife's entry into the paid workforce was delayed as a result of her childcare obligations.

In *Hooge*, the court distinguished the wife's disadvantage from a traditional stay-at-home parent who was absent from the workforce and re-enters with the same skill set as they possessed at the time the first child was born or perhaps with dated skills. (*Hooge v. Hooge*, 2022 ABKB 824 at paras. 108 – 101)

Similarly, in *A. v. A.,* the court described the wife having to face many barriers in finding decent employment due to her unique intersectional experience as a racialized, immigrant woman and the nature of her relationship with the husband. When the wife arrived in Canada, she learned that her degrees and designations would not be recognized and her previous work in the entertainment industry in India did not translate into regular, paid work in Canada. While she was accredited as a Hindi interpreter and worked in that capacity for a year or two in Brampton, there was less demand for such services in Edmonton. At the time of trial, the wife was 53 years old and was finishing the accreditation process for immigration consultancy.

In *A. v. A.,* Justice Mandhane found a strong compensatory claim based on the division of labour, barriers in finding employment and post-separation obligations with respect to the children. (*A. v. A.*, 2022 ONSC 1303 at paras. 155-157.)

In addition to assessing the compensatory factors on their own, there is also a further component of the analysis which entails comparing and contrasting the interplay between the factors themselves. For example, in *Davidson v. Jamieson*, Justice Engelking found that the wife was entitled to compensatory support and described the interplay between Ms. Jamieson's sacrifice and Mr. Davidson's benefit as follows:

> Mr. Davidson had already started his business at the time of the marriage. Although Ms. Jamieson had commenced university at Trent in Peterborough, she did not finish before giving birth to Adelaide. After Adelaide was born Ms. Jamieson stayed home to care for the children. Mr. Davidson was able to focus on building his business during those years. Ms. Davidson also testified that she did some bookkeeping for the business and volunteered at events in the community to get the name of Top Notch Heating out there. She, thus, helped Mr. Davidson promote the business. (*Davidson v. Jamieson*, 2022 ONSC 1736 at para. 32)

As a final example a compensatory focused case, *Osborne v. Shevalier* dealt with a spouse that assisted the other spouse in their business. Justice Sproat, quoted Justice Chappel in the 2013 decision of *Thompson v. Thompson* that provided a helpful list of contributions to a party's career:

> … a compensatory claim can also be founded on other forms of contribution to the other party's career, such as supporting the family while the other party obtained or upgraded their education, selling assets or a business for the benefit of the family unit, or assisting a party in establishing and operating a business that is the source of that party's income. (*Osborne v. Shevalier*, 2022 ONSC 73 at para. 69)

In *Osborne,* the court found that the wife did not have any right to support on a compensatory basis as the husband was a qualified electrician when they met, and she did not make any sacrifices and contributions that conferred a benefit to her husband.

Not taking entitlement for granted

In the review of the 2022 and 2023 cases, it was helpful to see examples of how courts dismissed claims for compensatory support.

These decisions included the reasoning for the dismissed claims and also highlighted what evidence was missing.

The following are the trial decisions where courts have found weak or no compensatory entitlement along with the specific reasonings in each:

- *Babijowski v. Wolanicki*, 2022 BCSC 2126 at paras. 94 – 101 (Justice Weatherill)
    - both parties carried on working in their respective careers, the wife as a housekeeper and the husband as a heavy-duty mechanic;
    - there was a lack of evidence regarding the economic contributions of each spouse to the relationship;
    - there was no evidence that the wife made sacrifices that lowered her earning potential or reduced her future financial prospects;
    - there was also no evidence that the husband enjoyed economic advantages as a result of the wife's efforts during the relationship;
    - the wife presented very limited evidence about whether she was economically disadvantaged during the parties' relationship;
    - there was no evidence that the wife delayed her career because of the relationship or of what went on at the home during their relationship;

- *Nagy v. Csuka*, 2022 BCSC 565 at paras. 108 - 112 (Taylor J.)
    - the evidence did not support the conclusion that either party incurred lasting economic disadvantages from making sacrifices that conferred economic advantages upon the other spouse;
    - the breakdown of the marriage did not materially impair Ms. Csuka's employment prospects, as she continued to work full-time in the same job up until 2015, when she experienced the health issues;
- *Kumar v. Nand*, 2022 BCSC 1145 at paras. 94 – 107 (Giaschi J.)
    - the evidence did not support the respondent's claim that she was entitled to support because she advanced the claimant's career to the detriment of her own career;
    - the claimant was employed with BC Liquor at the commencement of the relationship and remains employed with BC Liquor to this day;
    - the claimant's employment and position with BC Liquor had nothing to do with anything the respondent did or with any sacrifice made by the respondent during the marriage;
    - the claimant received a few promotions during the marriage, however, these were unconnected with anything the respondent did or with any sacrifices she made;
- *S.A.T. v. D.A.T.,* 2022 BCSC 1176 at paras. 254 - 264 (Morellato J.)
    - the parties did not have a traditional marriage where Ms. T stayed home with the children and sacrificed career opportunities;
    - Ms. T's career aspirations or income earning potential were not compromised by her roles and responsibilities while married to Mr. T;
    - Ms. T grew her nanny business during the marriage;
- *Cui v. Liwanpo*, 2022 ONSC 4549 at paras. 153 – 164 (Heeney J.)
    - far from causing an economic disadvantage, the wife's marriage to the respondent proved to be an economic windfall;
    - the evidence did not support the wife's claim that she made a significant contribution to the respondent's medical practice;
    - the respondent was 58 years of age at the time of the marriage, and had been practicing medicine for decades and had established a mature and profitable medical practice, which did not undergo any substantial changes throughout the marriage;
- *Goldman v. Goldman*, 2022 ONSC 4585 at paras. 78 - 166 (Price J.)
    - no evidence was provided to show that any failure on the wife's part to have achieve self-sufficiency resulted from her career pursuits or job dislocation for the family;

  - "any minimal disadvantage" suffered by Ms. Weiss Goldman — or the advantage gained by Dr. Goldman from the economic assistance Ms. Weiss Goldman rendered at the beginning of the parties' marriage — "cannot be compared to that of a long-term traditional spouse who made career sacrifices to the significant advantage of the other spouse."
- *Dosu v. Dosu*, 2022 ONSC 5053 at paras. 49, 61 - 66 (Lococo J.)
  - to the extent that the husband relied on the prospective disparity relating to the parties' opportunity to earn employment income and accumulate pension entitlement, that disparity was the result of his age and retirement status, rather than being related to the marriage or its breakdown;
- *C.C. v. S.P.R.*, 2022 BCSC 1817 at paras. 93 - 106 (Gibb-Carsley J.)
  - the respondent benefitted economically from his marriage to the claimant, rather than the marriage being a financial detriment to him;
  - there was no evidence to support the view that the respondent contributed in a sufficiently significant way to justify an award of spousal support on the basis that his contribution to the marriage endeavour was to his economic detriment;
- *C.Y.J. v. R.J.*, 2022 BCSC 1901 at paras. 74, 77 - 79 (Taylor J.)
  - the parties gave the other substantial freedom to pursue their own career and financial interests;
  - the wife chose not to pursue a career because this was not of interest to her either during the marriage or since the Separation Date;
- *S.E.H. v. S.D.H.*, 2022 BCSC 1937 at paras. 130 – 151 (Giaschi J.)
  - the claimant here never left the workforce – she merely took maternity leaves;
  - maternity leave alone does not give rise to an entitlement to spousal support;
  - the claimant received remuneration during her maternity leaves, including a top-up;
  - there was nothing to suggest that her career or earning potential suffered as a consequence of her taking maternity leave;
- *Sea v. He,* 2022 BCSC 2169 at paras. 320 - 343 (Adair J.)
  - Ms. He did not sacrifice a lucrative career, or career prospects, in China to come to Canada with Mr. Sea;
  - Ms. He made personal choices about how she wished to spend her time after the child started school;
  - Her absence from the paid workforce was not a financial consequence arising from care of the child, whose needs (once he began school) did

not require either that Ms. He remain unemployed or meant that she was unable to upgrade her skills to improve her employability;
    - Ms. He's actual earning capacity was largely untested;
- *Fawbert v. Fawbert*, 2022 BCSC 123 at paras. 13, 15 & 16 (Baird J.)
    - both parties worked consistently throughout the marriage years, with the exception of the two discrete periods when the claimant was away from work or on reduced hours before and after giving birth to their sons, and they divided child-rearing duties more or less equally;
    - the wife has not been much economically disadvantaged by her role in the marriage or materially prejudiced in the pursuit of her chosen career;
- *R.J.L. v. T.G.S.,* 2023 BCSC 3 at para. 176 (Norell J.)
    - there was no evidence that as a result of the relationship or the breakdown of the relationship, the respondent incurred an economic disadvantage or conversely that he conferred upon the claimant an economic advantage;
    - the parties' earning capacities were not significantly different;
- *Alexander v. Genseberger*, 2023 ONSC 904 at para. 149 (Kraft J.)
    - the husband had not put forward any evidence on the record about the roles played during the parties' marriage or the economic disadvantages he suffered as a result of the marriage or its breakdown;
    - there were no common markers of a compensatory claim in the facts of the case, such as the husband being home with the child full or part time; the husband being a secondary earner; or the husband moving for the wife's career;
- *D.B. v. I.B.,* 2023 ONSC 1053 at para. 77 (Jarvis J.)
    - there was no evidence that the mother contributed to the father's career or that the father received career or economic benefits as a result of contributions or sacrifices made by her;
    - excepting her parental leave after the child was born, the mother was always employed;
- *S. v. S.,* 2023 ONSC 882 at para. 74 (Pinto J.)
    - the respondent did not sacrifice his career to advance the applicant's, nor was his contribution to the parties' child related and domestic responsibilities greater than that of the applicant;
    - the respondent unilaterally decided to stop working to focus on those areas that he took a great interest in - the children's academic success and the family's finances;
- *Carinha v. Carinha*, 2023 BCSC 359 at para. 25 (Thomas J.)

  - there was a paucity of evidence relevant to the factors upon which the claimant's entitlement to compensatory support can be assessed;
  - the court did not have a sufficient factual matrix to assess the strength of the claim for compensatory spousal support in order to conduct a fair review of an appropriate quantum;
  - the court adjourned the review of the quantum of spousal support generally and directed the parties to set a new application;
- *R.L.D. v. J.R.J.M.*, 2023 BCSC 299 at paras. 62, 90-92 (Gibb-Carsley J.)
  - the respondent was not required to compensate the claimant for sacrifices she made during the marriage;
  - the claimant's benefit from the home's equity, in combination with her receiving spousal support for the past five and a half years, has adequately compensated her for any economic disadvantage arising from the marriage or its breakdown;
- *JS v. JD*, 2023 ABKB 155 at paras. 114-115 (Bercov J.)
  - there was never any agreement between the parties that the wife would stay home to look after the children;
  - the husband encouraged the wife to return to work;
  - while the parties did move around during the marriage, the reasons were not to further the husband's career;
  - during the marriage, the husband and his mother were actively involved in looking after the children when the wife was focused on looking after a child from a previous relationship
- *Wintrup v. Adams*, 2023 NSCA 19 at para. 44 (NSCA)
  - the wife was not dependent on the husband during their relationship and marriage and had remained self-sufficient subsequent to separation;
  - the wife remained capable of being employed in her field and had not demonstrated any economic (or otherwise) disadvantage as a result of the breakdown of her relationship and marriage;
- *Hill v. Kelly*, 2023 BCSC 630 at para. 110 (Walkem J.)
  - the claimant was on long-term disability when the parties met and remained so during the course of their marriage;
  - she does not appear to have given up opportunities or suffered further economic disadvantage as a result of the relationship;
- *Summers v. Hearn*, 2023 NLSC 63 at para. 220 (Coady J.)
  - the evidence did not prove that Ms. Summers passed up career opportunities or failed to advance in her career due to the role she took in her relationship with Mr. Hearn;

  - she did not prove that she made sacrifices which attract a compensatory spousal support award;
  - responsibilities relative to Ms. Summers' children were hers alone and they existed independent of Mr. Hearn;
  - the parties did not merge their finances until well into their relationship and then only partially when Ms. Summers was added to Mr. Hearn's bank account and later his Visa;
  - any financial dependency of Ms. Summers on Mr. Hearn did not arise from the role she took in her relationship with him;
- *D.J. v. K.J.,* 2023 PESC 17 at paras. 33 (Cann J.)
  - the mother did not put forward evidence capable of establishing lost opportunity, arising from the marriage, to attain a higher income than the one she has already;
  - no basis for comparison to what she could have earned, absent her departure from the work force, has been offered;
  - the departure from work was comparatively short lived, rendering an inference of lost opportunity problematic, especially when combined with the family's relocation from Ontario to Prince Edward Island;
- *F. v. F.,* 2023 ONSC 2682 at para. 177 (Kraft J.)
  - the husband sought spousal support from the wife, but when asked by the Court, the husband could not identify the basis of his spousal support entitlement;
- *Arcand v. Arcand*, 2023 BCSC 747 at paras. 113 - 116 (Lamb J.)
  - the court was not satisfied on the evidence that the wife's career was adversely affected by her family responsibilities;
  - both parties actively participated in child-rearing, although in different ways and with different strengths;
  - even if Ms. Arcand was the "primary caregiver" for the children, which the court was not satisfied had been proven, her family responsibilities did not impede her economic opportunities in the long term;
  - both parties worked at home, and Mr. Arcand actively encouraged and financially supported Ms. Arcand's career;
  - Ms. Arcand had not established that assuming childcare and household responsibilities resulted "in a lower earning potential and fewer future prospects of financial success";
  - Ms. Arcand benefitted from the economic advantage afforded by the parties' marriage by taking the opportunity to establish three businesses;
- *L. v. G.,* 2023 ONSC 2767 at paras. 50 - 51 (Tranquilli J.)

  - there was little evidence during the trial that demonstrated the parties lived together as a family, economic unit or in a joint venture before separation;
  - the evidence demonstrates the parties were no more than roommates throughout their 11-year relationship;
- *Mirzayeva v. Campbell*, 2023 BCSC 848 at para. 247 (Weatherill J.)
  - the evidence did not show the wife was economically disadvantaged by the relationship in any way'
  - if anything, it discloses that the relationship resulted in significant economic advantage to her;
  - the claimant had not provided evidence of particular need or hardship;
- *Huang v. Balchen*, 2023 BCSC 850 at paras. 119, 124 (Betton J.)
  - there was no evidence that the claimant gave up any pursuit of a career as a result of the marriage; in fact, she obtained her real estate license and pursued that as she chose to;
  - the wife was also able to pursue her financial and property investment objectives;
  - the respondent had his business but despite differing descriptions of their roles in and the nature of the relationship, the court did not find that the claimant's activities in the relationship enhanced the respondent's pursuit of his income-earning capacity;
- *Baswick v. Kahn*, 2023 ONSC 3120 at para. 113 (Sharma J.)
  - underlying this division of work was a desire by both parties to work full-time;
  - there were likely periods when the wife assumed more responsibility (during her maternity leave), and there were likely periods when the husband assumed more responsibility (during periods of unemployment);
  - however, the court could not conclude that the functions performed by the husband during cohabitation entitled him to compensatory support given the relatively equal functions performed by the wife;
  - the court could not conclude that the husband's decision to work as an in-house copywriter rather than with an agency was made as a sacrifice for his family or driven by a need to be more available to care for his children;
  - this may have been a consequence, but the court did not find it to be a cause for this change in his work;
  - given the shared parenting arrangement, the children's enrolment in after-school care, and the childcare supports available from the

husband's family, the court did not find that his childcare responsibilities had prevented him from working for an agency at a higher salary if such work became available to him;

- *Meffe v. Meffe*, 2023 ONSC 3195 at paras. 236, 241– 242 (Sharma J.)
    - the respondent did not adduce evidence to suggest that he suffered economically as a result of the marriage;
    - his own evidence was that in the parties' 35-year relationship, he earned double or triple the income of the applicant in 30 of those years;
    - both he and the applicant worked full-time;
    - none of the husband's evidence suggested that he made sacrifices as a result of the marriage that set his career back, or that he was otherwise financially disadvantaged as a result of the role he performed during the marriage;
    - the husband acknowledged in cross-examination that both spouses performed household chores, although his were focused on home renovations;
    - there was no evidence to support entitlement to compensatory support;

Conclusion

Overall, the post-pandemic cases throughout Canada that addressed issues of compensatory support were consistent in their approach and their analysis of the legal principles.

The legal principles and the approach of their application have been summarized in this article and a number of cases highlighted and discussed.

Additionally, the article provides a comprehensive list of the trial decisions in Canada in 2022 and 2023 to date that dismissed claims of compensatory support along with their specific reasonings.

This article has focused solely on the compensatory factors of support for a reason. And that was to deepen an understanding of their historic basis and also to better appreciate how courts have applied them in the recent past and continue to do so today.

You get an expert! You get an expert! EVERYONE GETS AN EXPERT! (Thank you Oprah)

David Tobin

Overview

Rule 20.3 of the *Family Law Rules* provides the court with the authority to appoint an expert "to inquire into and report on any question of fact or opinion relevant to an issue in a case". There is a surprisingly limited amount of case law dealing with this rule (which replaced the previous Rule 20.1(3) in September 2019). This is a useful rule to remember and utilize, and in the right context it can be a very effective tool to get necessary and expensive evidence before the court.

As Justice Jarvis pointed out in *Bahous v. Bahous* (2023 ONSC 1580), "…the time has come for the court to aggressively flex its power under *Family Law Rule* 20.3 to appoint an expert "on its own initiative" so as to implement the "culture shift" observed by Myers J. in *Manchanda*." Justice Myers in *Manchanda v. Thethi* (2016 ONSC 3776) noted as follows:

> Implementing a culture shift to enhance access to justice by promoting efficiency, affordability, and proportionality requires the court to re-draw the line between limiting drastic measures and applying the law robustly. In my respectful view, a little less judicial diffidence, a little less reluctance to hold accountable those who would deny justice to their former spouses, and a little more protection of abused parties from abusers, might be a better fulfillment of our critical responsibility…

Introduction

The full text of Rule 20.3 is reproduced below:

> Appointment of expert by court
>
> 20.3 (1) The court may, on motion or on its own initiative, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in a case. O. Reg. 250/19, s. 8.
>
> Requirements of order
>
> (2) An order under subrule (1) shall,

(a) name the expert being appointed, who shall be a person agreed on by the parties if possible;

(b) specify the instructions to the expert; and

(c) require the parties to pay the expert's fees and expenses and specify the proportions or amounts of the fees and expenses that each party is required to pay. O. Reg. 250/19, s. 8.

Serious financial hardship

(3) Despite clause (2) (c), the court may relieve a party from a requirement to pay any of the expert's fees or expenses if the court is satisfied that requiring the payment would cause serious financial hardship to the party. O. Reg. 250/19, s. 8.

Security

(4) If a motion is made under subrule (1) that is opposed, the court may, as a condition of the appointment, require the party making the motion to give such security for the expert's fees and expenses as is just. O. Reg. 250/19, s. 8.

Additional orders

(5) In making an order under subrule (1), the court may make any further order it considers necessary to enable the expert to carry out the specified instructions, including,

(a) an order for the inspection of property; or

(b) an order under section 105 of the *Courts of Justice Act* (physical or mental examination of a person), if the requirements of that section are met. O. Reg. 250/19, s. 8.

The origin of this rule was added to the *Family Law Rules* in 2011 and was based on the *Rules of Civil Procedure* (rules 52.03). At the time of its addition to the *Family Law Rules*, it was established law that under the *Rules of Civil Procedure* and by extension the *Family Law Rules*, court appointed experts were "solely reserved to assist the court in understanding the evidence the parties will or have presented at trial" (*Mowers v. Acland*, 2015 ONSC 1313).

It appears that in its current form, courts have been willing to take the application of this rule a little further.

It is clear from the current text of the rule that:

1. Even though most of the case law relates to requests for financial experts, this rule is not limited to financial experts. This rule can be used for any expert that is necessary or relevant to a live issue. Subrule 20.3(5) specifically references defense medical examinations under section 105 of the *Court of Justice Act*. Justice Kraft, in *Mohajeri and Stroedel*, (2020 ONSC 6554) confirmed that under Rule 20.3, she could order an assessment in the same terms as those found in section 30 of the Children's Law Reform Act.

2. Despite case law interpreting otherwise, both parties are to contribute some portion of the expert's fees unless payment would cause "serious financial hardship" to a party. The case law interprets the proportioning provision of the rule as a mechanism to make a 'bad actor' pay all or almost all of the fees.

When will a court make an order under Rule 20.3 on a motion?

Rule 20.3 has been used to address the common injustice of a party refusing to fulfil their obligation to retain an expert. Where the other party does not have the resources or the inclination to obtain an expert in light of the other's refusal, they can bring a motion pursuant to Rule 20.3.

If a non-obligated party is unable to or unwilling to (in certain circumstances) fund an expert's involvement in the case and an expert is needed to report on a question of fact or an opinion, the non-obligated party can seek the appointment of a court appointed expert.

In asking for that expert, the party can also obtain an order apportioning the "lion's share of the fees" to the other and presumably better funded party (*Smith v Smith*, 2021 ONSC 7167 at para 15).

Orders for experts can be brought when a party has an obligation to retain an expert to value their business interests or property, or determine their income for support purposes but refuses to furnish such evidence. In these circumstances a court may appoint an expert to produce a report and order the obstinate party to pay for the expert.

Di Sabatino v. Di Sabatino

In *Di Sabatino v. Di Sabatino* (2021 ONSC 4901), Justice Jarvis gave a party 30 days to retain an expert to value his business and determine his income failing which the "court would consider appointing wife's expert at his expense."

What is interesting about Justice Jarvis' statement is that it seems to side-step the requirement that the court appointed expert shall be 'independent.' An expert retained by a party prior to being converted to a court appointed expert does not appear independent.

At the motion, the wife sought disclosure from the husband related to his twenty-two companies worth roughly $20 million to $30 million. The wife retained an expert (Martin Pont) to determine the value of the husband's business interests and to determine his income. The husband thought it necessary neither to retain his own expert for this purpose, nor to provide the wife's expert with disclosure. The husband also sold a business notwithstanding a preservation order.

Unsurprisingly, Justice Jarvis was unimpressed with the husband's behaviour and made a sweeping disclosure order requiring the husband to provide disclosure sufficient for the wife's expert to complete his mandate. He also ordered that the funds from the sale of the husband's business remain in his lawyer's trust account.

Justice Jarvis stated that:

> …given the husband's abdication of his valuation/income analysis duty, [the wife's expert's] expert opinions may be the only expert evidence that this Court will permit be tendered in evidence. There is no indication that the husband is inclined to retain an expert. **Wait and See is not a very smart strategy**. (emphasis added)

Justice Jarvis then ordered that

a. The husband would have until August 16, 2021 to retain an expert to undertake a valuation of his business interests and an analysis of his income.
b. He shall provide to Court by that time an affidavit (separate from his disclosure affidavit) that meets the requirements of Rule 20.3 but with terms.
c. The proposed expert must undertake to complete his engagement by October 31, 2021.
d. The husband should be aware that before this matter can proceed to a settlement conference the experts will be required to comply with Rule 1(7.2)(k) which provides as follows:

> For the purposes of promoting the primary objective of these rules as required under subrules 2(4) and, particularly, (5), the court may make orders giving such directions or imposing such conditions respecting procedural matters as are just, including an order, (k) that any expert witnesses for the parties meet to discuss the issues, and prepare a joint statement setting out the issues on which they agree and the issues that are in dispute.

Finally, Justice Jarvis ordered that if the husband did not retain an expert, the court would consider appointing the wife's expert pursuant to Rule 20.3, the expense for which shall be paid by the husband from the funds held in his lawyer's trust account.

It is unclear from the reasons whether the wife would experience serious financial hardship if she had to pay, but Justice Jarvis used the proportioning provision in the rule as a motivating tool to encourage the husband to fulfil his obligation.

So here we have the court considering using Rule 20.3 where a party is attempting to frustrate the litigation by making their financial circumstances opaque and abdicating their valuation/income analysis duty.

When will a court act on its own initiative?

As stated above, a court can act on its own initiative to appoint an expert. It need not wait for a party to bring a motion for such an order.

But when will the court do this?

Rule 20.3 should be read in the context of the primary objectives of the *Rules* as stated in Rule 2, which is to "enable the court to deal with cases justly" including "saving expense and time" and "dealing with the case in ways that are appropriate to its importance and complexity."

In *Van Delst v. Hronowsky* (2021 ONSC 2353), Justice Engelking utilized Rule 20.3 on her own initiative at what she called a "tragically unnecessary hearing".

This particular hearing was a three day event and was the result of the husband's narrow appeal of a trial decision which resulted in difference of an equalization payment of roughly $1,000.00. At paragraph 7 of her reasons, Her Honour wrote:

> Rather than minimize "further cost and delay", as suggested by the Court of Appeal, the parties ultimately conducted a three day hearing on the issue, where their respective experts each provided opinions on the FLV of Ms. Van

> Delst's pension at a normal retirement of age 60 which were less than one thousand pre-tax dollars apart.

It is in this context that, on the issue of a pension rollover and the required tax gross up, she appointed an expert to opine. At paragraph 50, Justice Engelking wrote:

> Based primarily on Rule 2(3), in particular "(b) saving time and expense" and "(c) dealing with the case in ways that are appropriate to its importance and complexity", I agreed to hear from Mr. Martel on this issue. The last thing that is required in this case is a further hearing on the even narrower question of Ms. Van Delst's potential tax rate on the amount owing.

The Court appointed an expert who had already been retained by one of the parties on another (albeit related) issue (again independence is questionable). It did so on its own initiative to save time and expense and deal with the case justly.

It seems that it will be a rare case that two funded parties with access to their own expert will benefit from Rule 20.3 as one would think it would be the parties' responsibility to marshal the expert evidence. However, Justice Engelking appreciated that the husband would continue to litigate this matter if she did not immediately address the issue. We can take from this that in the context of a serial litigator, a court may be more inclined to make such an order on its own initiative.

In *Grande v. Sciacca* (2021 ONSC 1625), Justice Jarvis used the spectre of the court's power to appoint its own expert under section 20.3 to cajole the parties agreement to a joint expert when he endorsed "If the parties are unable to agree on the choice of valuator and the scope and nature of the valuator's engagement in the near future, consideration may need to be given to *Family Law Rule* 20.3 dealing with the court's ability, on its own initiative, to appoint expert."

In the previous iteration of the rule, Justice O'Connell in *W.D.N. v. O.A*. (2019 ONCJ 926) appointed an expert on US immigration law four days into a trial where the court was told conflicting information on a party's immigration status in the United States, and she felt that:

> Expert evidence on the issue of the mother's immigration status in the United States was needed in order to properly adjudicate the issues in this hearing. No expert evidence had been provided by the parties. Neither of the parent's counsel have expertise in U.S. immigration law, nor does the mother's immigration lawyer in Canada.

Without the information from an expert on the issue of the mother's immigration status the court could not discharge its duty to fairly adjudicate the matter.

Conclusion

As stated at the outset, Rule 20.3 is an overlooked rule that since 2019 has, at least notionally, has been expanded in application.

The Rule is a powerful and compelling tool for a less resourced party to use when the other party is not fulfilling their obligation to retain their own expert.

This may also be a more effective tool than an order for interim fees to retain an expert because not only does Rule 20.3 leave it open of the non-complying party to pay for the expert, but also the expert will be 'court' appointed and thus maybe looked upon more favourably than an expert retained by one of the parties.

Back to (Rosen) Basics – the threshold for urgency

Christina Hinds

Overview

"When problem solving takes precedence over family law litigation, the potential for a reasonable and affordable outcome multiplies exponentially. Conversely, when the first step in the litigation is a race to the Courthouse on reactive and incomplete information, the potential for a reasonable and affordable outcome plummets." (Justice McGee)

Introduction

The threshold for urgency was set out by Justice Wildman in *Rosen v. Rosen* (2005 CanLII 480) nearly 20 years ago. It is also well-established that an urgent motion within a court proceeding contemplates issues such as abduction, threats of harm, or dire financial circumstances.

Rosen provides that prior to bringing an urgent motion:

1. The first step should be an inquiry as to when case conference dates are available to deal with the matter. If there is a particularly pressing issue, the trial coordinator should be made aware of this, as there may be times that could be made available for cases of urgency to avoid a motion. (para. 7)

2. The next step prior to bringing a motion should be to engage in settlement discussions to try to obtain a resolution of the pressing matters until the case conference date. The focus is on achieving a short-term agreement to get the parties through to the case conference date without a motion, rather than necessarily achieving a final resolution on all issues in the case. (para. 9)

Justice Wildman stated that, absent canvassing case conference dates and showing attempts to resolve matters until the available case conference date, "it is difficult to understand how urgency can be established." (para. 12)

On the spirit of *Rosen*, *Kaur v. Singh* (2023 ONSC 2116) is a cost decision by Justice McGee following an urgent motion that serves as a reminder for lawyers to carefully assess whether an urgent motion is warranted and meets the *Rosen* threshold for urgency.

In *Kaur, t*he father brought an urgent motion on March 20, 2023 seeking, among other relief, that the parties' three-year-old child be returned to Brampton and that the mother be prohibited from relocating with the child outside of Brampton without his consent.

After reviewing the father's urgent motion materials, Justice McGee provided a timeline for the mother to respond and scheduled the matter to be returned before her on March 24, 2023.

The contrast to the father's "alarming" motion materials

The father stated that the mother relocated from Brampton, Peel Region to Scarborough with the child without informing him. He swore in his affidavit that he was not aware "in any way or form" that the mother removed and relocated with the child to another city. He stated that when he went to the daycare to pick up the child, he was told that the child had not been at daycare all week. He then contacted his lawyer and learned that the mother had moved to Scarborough with the child a week prior.

Justice McGee referred to the facts as set out in the father's motion materials as "alarming". However, the mother's materials painted a very different picture.

The mother explained that she had been living in a shelter with the child since separation and had been trying to secure subsidized housing. She had already turned down two prior subsidized housing options because of the distance from Peel Region and the wait list for subsidized housing in Peel Region was 10 to 12 years.

When she was offered housing in Scarborough, she accepted. She informed her lawyer who sent an email to the father's lawyer on February 27, 2023 advising that the mother had accepted subsidized housing in Scarborough and proposed a gradual adjustment to the father's parenting time as the child adjusted to the move.

Upon learning of the father's concerns with respect to the move and change in the parenting schedule, the mother's counsel proposed an early case conference. The father did not respond to this proposal and instead filed urgent motion materials.

Dismissal of the father's "urgent" motion

After reviewing the mother's responding materials, Justice McGee dismissed the father's motion. Her Honour reviewed Rule 14(4.2) of the *Family Law Rules* and the test for urgency set out by Justice Wildman in *Rosen v. Rosen*.

Justice McGee accepted that the mother had no other option but to accept subsidized housing in Scarborough. She also accepted that the father was not aware that the mother had moved until he went to the daycare on March 10, 2023 to pick up his son and that this would have been shocking. However, once the father contacted his lawyer, he made no attempt to "problem solve the impasse" and instead interpreted the mother's move "as proof that his son was being deliberately removed from his life".

This was a fear that Justice McGee determined was "not objectively valid" given the circumstances of the move, the fact that the mother had not suspended the father's parenting time but rather made a proposal with respect to parenting time in light of the move, and that she proposed attendance at an early case conference.

While the mother was not following the interim parenting agreement, an urgent motion was not warranted.

A caution to family lawyers and parties

Justice McGee stated that the threshold for urgency in family law matters remains high and for good reason:

> When problem solving takes precedence over family law litigation, the potential for a reasonable and affordable outcome multiplies exponentially. Conversely, when the first step in the litigation is a race to the Courthouse on reactive and incomplete information, the potential for a reasonable and affordable outcome plummets.

Her Honour acknowledged that family law matters, especially those dealing with parenting issues, are "painful and complicated", "emotions run high" and "events are easily misconstrued in the fog of the war".

In *Rosen,* Justice Wildman also made note of the "nasty affidavit war" that accompanies the filing of a motion.

Justice McGee reiterated that bringing a motion before a case conference that does not meet the urgency threshold is "unreasonable litigation conduct". Further, it will attract an enhanced award of costs in order to discourage and sanction inappropriate behaviour by litigants – one of the four purposes of costs awards as set out by the Ontario Court of Appeal in *Mattina v. Mattina* (2018 ONCA 867) and to ensure that cases are dealt with justly as required under subrule 2 (2) of the *Family Law Rules*.

Thus, *Kaur v. Singh* is a caution and a reminder that bringing urgent motions is only warranted when a child's circumstances meet the *Rosen* threshold.

Lawyers should therefore advise clients to engage in a reasonable and child-focused approach to resolving parenting issues and be careful not to equate a client's discontent or panic with urgency.

Practical Tips learned from Rosen and Kaur v. Singh

1. Prior to bringing an urgent motion, first inquire as to the available case conference date(s). In Toronto, there is also the option of scheduling a To Be Spoken to Date to obtain an urgent case conference date.

2. Do not "assume" that there are no case conference dates available.

3. Promptly notify your client of any communication from other parties.

4. Remember that the focus of parenting issues is the child. Guide your client to make decisions and act in a manner that is in the child(ren)'s best interests.

Should a litigant provide the court with relevant information, even if it is not helpful for their case?

Amruta Ponkshe

Overview

Rolfe v. Boneo (2023 ONSC 2269) is a tale about a litigant who went to court and failed to disclose an important part of their own story. Which part? Well, an event that he tried to hide from not only his ex-spouse, but also the court.

The missing piece of information was in fact an *ex parte* motion that he brought earlier and that was dismissed. For reasons we can guess, the father never subsequently served the motion material or the endorsement onto the other party. What made matters worse was that Justice Pazaratz only discovered this fact upon his own review of the court file prior to the hearing of the mother's subsequent motion.

Introduction

In *Rolfe v. Boneo* (2023 ONSC 2269), the parties never married and separated in January 2019. At that time, their child was about four months old, and the parties consented to a final order which included sole custody to the mother and liberal and generous access to the father.

Nothing eventful happened for approximately four years until December 2022 when the mother delivered the now four-year-old child to the father for an overnight visit. The father refused to return the child and refused to allow the mother any contact for about three and half months.

On March 29, 2023, the mother served the father with an urgent motion which included a request that the child be returned to her care immediately, with a police enforcement clause if the father failed to comply.

The mother was granted authorization to proceed with an emergency motion, with the ultimate issue of "pre-Case Conference urgency" to be determined by the presiding judge.

Motion before Justice Pazaratz

The mother's urgent motion was placed on Justice Pazaratz's motion list for April 12th, 2023. The father did not file any materials in response to the mother's March 29th, 2023 motion.

However, while reviewing the electronic court file in preparation of the upcoming motion, His Honour noticed that the then self-represented litigant had previously brought his own *ex parte* motion which was heard – and dismissed – by Justice Lafrenière.

Neither the father's Notice of Motion and Affidavit, dated January 5, 2023 nor Justice Lafrenière's endorsement dated January 11, 2023 had ever been served on the mother.

On the April 12th return date of the mother's motion, the father attended with counsel who had served a Reply affidavit on the mother's counsel.

In the father's Reply affidavit, he did not mention his earlier failed *ex parte* motion.

At the outset, His Honour addressed the elephant in the room relating to his discovery of the earlier litigation brought by the father.

Not unexpectedly, the mother, her lawyer, and the father's lawyer were each taken by surprise. They indicated that they were unaware of the earlier materials, or the fact that the father had previously made an unsuccessful attempt to obtain an *ex parte* order.

Credibility Issues

In comparing what the father said in his January 5th affidavit to what he said in his April 6th affidavit, it became clear to Justice Pazaratz that there were significant credibility issues in relation to the father even predating the current motion.

- The father outrightly deceived Justice Lafrenière back in January by advising that there were no existing orders dealing with parenting issues and there were no written agreements between the parties. This was not true since the mother had sole custody pursuant to a final order that the father had consented to four years earlier.
- Justice Lafrenière found that the father had provided no evidence which would justify proceeding without notice to the mother.

- In his April 6th affidavit, the father stated that since the final order was made in 2019 he has had the child in his care "50-80% of the time". But in his January 5th affidavit, he claimed that the parties had "shared time on an equal basis".
- In his January 2023 affidavit the father alleged that the mother hadn't had a stable residence since the child's birth in September 2018. Justice Pazaratz questioned why the father waited until December 31, 2022 to suddenly withhold the child based on vague and undated allegations and consented to an order granting the mother sole custody in January 2019 if the father truly had this concern.

Costs

Despite the father withholding such an important part of the ligation history, the mother's lawyer sought costs of only $500.

In response, and yet another surprise, the father opposed agreeing to the costs.

The father's opposition appeared to be consistent with his earlier litigation tactics. (As an aside, it would also be interesting to know what his lawyer advised him to do and what were his instructions.)

Nonetheless, Justice Pazaratz noted that the hearing of the mother's motion had become much more protracted as a result of the last-minute discovery of the father's motion.

Justice Pazaratz went on to discuss Rule 24 and the jurisprudence that guides courts in determining costs in family law proceedings. He found that knowingly misleading the court to obtain an *ex parte* order constituted bad faith on the father's part.

Justice Pazaratz also noted that awarding costs on a full recovery basis to sanction a party's bad faith actions is necessary and appropriate to discourage abuse of the court process. Further, there was no possibility that a nominal request for $500 was anywhere near "full recovery."

Still, the court's hands seemed to be tied and the order was limited to the $500 that the mother sought. Pazaratz J. took into account that costs had to be determined based on the mother's successful April 2023 motion, and not the father's unsuccessful January 2023 *ex parte* motion.

Justice Pazaratz's Tale of Caution

Despite the relatively small cost award, Justice Pazaratz warned that a litigant cannot exercise self-help and then sit back, while a new status quo evolves in their favour.

Instead, if a parent unilaterally changes the status quo based on alleged safety concerns, they must seek the court's approval at the earliest opportunity.

The father had no justification in his attempt to dramatically change the child's placement without notice to the mother and without affording the court the opportunity to hear both sides.

Moreover, there could be no justification for the father trying to obtain a parenting order based on misstatements and one very big lie.

In the context of *ex parte* motions, it is especially important for lawyers to ensure that every piece of relevant information is placed before the court. Lawyers (and their clients) should remember that cherry picking facts to suit their case is a non-starter.

As noted by Justice Pazaratz, the contents of motion materials, especially affidavits – and indeed the mere fact that an urgent or *ex parte* motion was attempted – may be highly relevant in assessing credibility, motivation, reasonableness, consistency and parental judgment.

To reduce conflict and tension in family law cases, don't ask for irrelevant disclosure

Samantha Rich

Overview

In *Baswick v Kahn* (2023 ONSC 3120), the court declined to impute certain business expenses to the wife's income and emphasized that time and resources should not be expended where the process to value these kinds of benefits is disproportionate to the result. The court did not look favourably on the husband's repetitive and irrelevant disclosure requests that had no bearing on calculating the wife's income in order to determine support.

The court affirmed that income is the primary indicator of child support obligations and disclosure requests need to be limited to relevancy.

The court also held that the objective of child support awards is not income equalization, and that child support awards must not enter into the realm of a functional wealth transfer.

Background

In *Baswick*, the husband claimed child support pursuant to s. 9 of the *Federal Child Support Guidelines*, ("*Guidelines*") up to the full table support payable. He also sought a determination of the wife's income, as this would impact the child support payments he received and the proportionate sharing of extraordinary expenses under s. 7 of the *Guidelines*. The parties had two children and both were gainfully employed.

Business Expenses Imputed as Income

The husband wanted certain business expenses to be imputed to the wife as income. However, the court declined to impute these expenses. The court found that the wife's 2022 income for support purposes was $162,810. This amount reflected her base salary of $150,000 and other additional benefits she received. (para. 33)

The court assessed whether the expenses categorized as business expenses could be imputed as income due to any personal benefits enjoyed by the wife, such as taking

left-over food home from a work event or accumulating points on a personal credit card for charges that were employment related.

The court found that it is not out of the ordinary for employees to incur business expenses on behalf of their employer. Generally, there are processes and procedures in place in a business to review and approve business expenses incurred by the employee for the employer and to reimburse employees accordingly. Clearly, reimbursement payments are not part of an employee's compensation or benefits package. They are, "intended to make the employee whole for expenses incurred for the business." (para. 35)

Therefore, purely business expenses related to reimbursement payments cannot be imputed as income to employees.

The court held that:

> For the court and parents with support obligation to go through the minutiae of trying to value these types of personal benefits is inconsistent with section 1(b) of the *Guidelines*, which states that **an objective is "to reduce conflict and tension between spouses** by making the calculation of child support orders more objective. (emphasis add) (para. 37)

The court reasoned that by their nature, these kinds of benefits are difficult to value, and the effort expended to try and value these benefits is not worth the outcome. Furthermore, the time and resources utilized to value these kinds of business is inconsistent with the objectives of the *Family Law Rules*.

If valuation of these kinds of benefits were required, "it would increase, not reduce, conflict and tension between parents." This would be entirely inconsistent with the objectives of the *Family Law Rules*. (para. 38)

Relevancy of Disclosure Requests

The husband argued that the wife had provided insufficient disclosure and that a negative inference should therefore be drawn.

The court did not agree with the husband's position. The court also did not look favourably on the husband's repetitive and irrelevant disclosure requests that had no bearing on calculating the wife's income.

The court affirmed that income is the primary indicator when determining child support obligations. That being said, under section 9 of the *Guidelines*, consideration

of a spouse's condition and means is required, which may support disclosure of information beyond income. (para. 44)

However, such a disclosure request was not applicable in this case.

The husband requested disclosure of the wife's bank and credit card statements. In terms of this particular disclosure request, the court held that:

> Bank and credit card statements can be useful in identifying deposits and expenses for parties who are self-employed and to fully appreciate the legitimacy of business expenses. It is less relevant for T4 employees who only have one job and one source of income. (para. 47)

Furthermore, the court held that:

> It would be disproportionate, **would overly complicate the determination of the parties' child support obligations, and be inconsistent with the objectives of the Guidelines to demand that the parties produce bank and credit card information in a case such as this**. The *Guidelines'* objectives include reducing conflict and tension between spouses and improving the efficiency of legal process when fixing the levels of child support. (emphasis added) (para. 49)

Determining Child Support Obligations

The table amount of child support for the wife, with an income of $162,810 for two children was $2,230.72 per month.

The husband's 2022 income of $114,390 (annual salary plus benefits) was not in dispute. The table amount of child support for the husband is $1,647.84.

Thus, the set-off amount of child support was $582.88, payable by the wife. (para. 57)

The children resided with both parents equally. The wife's children's budget identified total family expenses of $13,380.36, and that 41.4% of those expenses, or $5,536.26, were expenses for the children. (para. 58)

The husband's children's budget identified total family expenses of $10,959.21, and that 46.8% of those expenses, or $5,128.35, were expenses for the children. (para. 59)

The parties' budgets were not unreasonable and were in fact very similar. While there were high costs identified by the wife, with the set-off of $582, the court held that the husband should be in a position to spend an equal amount on the children.

Contino Analysis

The court then proceeded to do a *Contino* analysis noting that the starting point of a s. 9 analysis is table child support based on the parties' income. However, the analysis does not end there. The court must look at the financial and personal circumstances of the parties as a whole, including their spending habits regarding expenses related to the children as well as a comparative analysis of each party's standard of living (i.e., the condition, means, needs, and other circumstances of each spouse). (*Contino v. Leonelli-Contino* [2005] 3 S.C.R. 217)

The court held that the ratio of income between the wife and husband was 59:41. The total child related expenses in both households was $10,664. If the wife was responsible for 59% of this cost, this meant her share was $6,291. The wife was already paying $5,536 in childcare costs, resulting in a difference of $755. Set-off was calculated at $582 per month. This suggested the wife should pay slightly more than the set-off amount in child support, and up to $173 more per month. (para. 66)

The court held that this approach appears to have household equalization as an objective. As stated in *A.E. v. A.E.* (2021 ONSC 8189) at para. 240:

> The objective of the child support provisions of the *Divorce Act* and the *Guidelines* is to ensure the reasonable support of children rather than household equalization or spousal support. One of the purposes of section 4 is to ensure that child support does not enter into the realm of a functional wealth transfer or de facto spousal support to the recipient parent. Table amounts that so far exceed a child's reasonable needs that they become a transfer of wealth between the parents or spousal support under the guise of child support will be inappropriate… (para. 67)

The court further reasoned that the authority suggests that the objective of child support under s. 9 of the *Guidelines* is not household equalization. The objection of s. 9 of the *Guidelines* is, "so that children do not suffer a noticeable decline in their standard of living as between their two homes". (para. 68)

The court held that the wife should pay an amount that slightly exceeded the set-off and fixed the amount at $100. The court made this finding primarily due to the concern that the children's standard of living in their two parents' homes would be noticeably different and thus the court had to ameliorate that difference. (para. 78)

The court held that the objective of child support is not income equalization. Therefore, a significant payment above the set-off would be inappropriate in the circumstances as the parties spend relatively equal amounts on the children. (para. 80)

Conclusion

The court declined to draw any negative inference or impute income to the wife for any reimbursement she received relating to business expenses made on behalf of her employer. The court was not persuaded that either the wife or the husband took on a greater share of the childcare or household responsibilities. Based on each party's testimony, the court found that they shared these responsibilities equally. The court held that the wife was to pay a set-off of child support in the amount of $582 per month plus a further $100 per month pursuant to s. 9 of the Guidelines. The court held that the parties shall share s. 7 expenses proportionally based on their respective incomes.

Baswick reminds us that it is important when making disclosure requests, to ensure you get all relevant documentation to paint a clear picture of the compensation package if there is one. Standard and easily quantifiable non-taxable benefits should be included when calculating income.

However, time and resources should not be expended more than necessary on quantifying the kinds of benefits discussed above, as this would be contrary to the spirit and objectives of the *Guidelines*.

Once again, we see the court trying to steer litigants away from overcomplicated disclosure requests when determining income, particularly in circumstances such as this where the wife's compensation package as an employee is relatively straightforward.

Rightfully so, this case is another example of the courts attempting to reduce conflict and tension between spouses during family law proceedings. One way of doing so is not to make disclosure requests that are irrelevant and simply unnecessary.